NOTICE

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES

Saturday, April 13, 2002

9:30 a.m.

Oregon State Bar Center

5200 Southwest Meadows Road

Lake Oswego, Oregon

AGENDA

1. Call to order (Mr. Spooner)

2. Approval of 3-9-02 minutes (attached)

3. Progress reports and discussion regarding current ORCP amendment projects (Mr. Spooner)

   3a. Proposal to amend ORCP 34 B(2) (see Attachment A) (Mr. Brothers)

   3b. Proposal to substitute declarations for affidavits throughout the ORCP (see Attachment B*) (Mr. Spooner)

   3c. Report of Jury Innovation Committee (Judge Harris)

   3d. Report of Medical Records Committee (Mr. Merrick)

4. Old business (Mr. Spooner)

   4a. Possible amendments to ORCP 44 A regarding conditions pertaining to court-ordered physical and mental exams (Ms. Clarke)

   4b. Possible amendments to ORCP 36-46 to prescribe duty to supplement certain discovery responses (Mr. Sugerman)

*To follow by separate mailing.

4c. Possible technical amendment of ORCP 27 B (see Attachment C) (Judge Rasmussen)

5. New business (Mr. Spooner)

6. Adjournment

Note

The following amendments have been approved for voting on tentative adoption and publication for comment at the Council's September 14, 2000 meeting:

1. To amend ORCP 47 C by substituting "at least 60 days before the date set for trial" for "at least 45 days before the date set for trial." (See minutes of 2-9-02 meeting at pp. 2-3.)

2. To amend ORCP 68 C(4)(c)(i) by adding at the end of that subsection:

", including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements." (See minutes of 3-9-02 meeting at pp. 3-4.)

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of March 9, 2002
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

Present:	Lisa A. Amato	Nicolette D. Johnston
	Benjamin M. Bloom	Alexander D. Libmann
	Eugene H. Buckle	Connie Elkins McKelvey
	Ted Carp	Jeffrey S. Merrick
	Kathryn H. Clarke	Shelley D. Russell
	Allan H. Coon	David Schuman
	Robert D. Durham	Ralph C. Spooner
	Daniel L. Harris	David F. Sugerman
	Rodger J. Isaacson	John L. Svoboda
	Nely L. Johnson	
Excused:	Richard L. Barron	
	Bruce J. Brothers	
	Don A. Dickey	
	Karsten Hans Rasmussen	

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Spooner, called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of minutes. The minutes of the 2/9/02 Council meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

Agenda Item 3: Progress reports and discussion regarding current ORCP amendment projects (Mr. Spooner).

3a. Proposal to amend ORCP 34 B(2) (see Attachment "A" to 3-9-02 agenda) (Mr. Brothers). It was decided to defer further consideration of this item until a meeting when Mr. Brothers could be present.

3b. Proposal to substitute declarations under penalty of perjury for affidavits throughout the ORCP (Mr. Spooner). Mr. Spooner reported that he had been in contact with Mr. Jeff Johnson, who is Chair of the OSB Committee on Practice & Procedure ("CPP"), and further reported that Mr. Johnson and Mr. John Coletti would coordinate with the Council any activities regarding this item on the part of the CPP. Mr. Spooner added that it was by no means certain whether the CPP would have the time or inclination during this biennium to develop the proposed statutory amendments that would almost certainly be required should the Council decide that substituting declarations for affidavits, at some or all places in the ORCP where the latter are called for, would be desirable.

Judge Harris stated that since he was the member who brought this proposal to the Council's attention, he would volunteer to serve on a committee to work on it, including liaison with the CPP. Mr. Spooner responded that he did not think a committee was needed at this point, that liaison with the CPP could continue to be handled by Mr. Libmann and himself, and Prof. Holland could continue to do the necessary statutory research. Justice Durham commented that, if this project were to move forward, very thorough research would have to be undertaken so that all ramifications of either substituting declarations for affidavits, or providing that declarations might be used optionally in lieu of affidavits, could be very carefully considered.

Prof. Holland was asked to continue his research on the question of whether substitution of declarations for affidavits, or, alternatively, providing for declarations as alternatives to affidavits at all or some places throughout the ORCP where only affidavits are now permitted, would be consistent with current ORS provisions regarding affidavits, sworn testimony, and liability to prosecution for perjury or false statement. Prof. Holland stated that he would complete as much of this work as possible in time to distribute a memo prior to the April 13 Council meeting. Ms. Russell noted that declarations are now used in lieu of affidavits in federal court, including in connection with summary judgment motions, and that there appear to have been no objections or difficulties about this.

. 3c. Proposal to amend ORCP 31 (see Attachment "B" to 3-9-02 agenda) (Mr. Svoboda). Mr. Svoboda reported that he thought this item raised an issue within the purview of the OSB Ethics Committee rather than the Council. Prof. Holland reported that he had contacted Mr. Roger Harris to ask him whether he could suggest any way his suggestions

might be accomplished by means of a Council-promulgated amendment to ORCP 31 in light of attorney fee-shifting being outside the scope of the Council's statutory powers, but had received no response. On a unanimous voice vote it was decided to table this item indefinitely.

3d. Report of Jury Innovation Committee (Judge Harris). Judge Harris reported that this committee had narrowed down the jury innovation amendments it was considering this biennium to the following three: i. the alternate juror rule (i.e., ORCP 57 F), ii. jury instructions (i.e., ORCP 59), and iii. an amendment that would allow post-trial debriefing of willing jurors in the presence of counsel. In response to a question by Mr. Buckle, Judge Harris said that one change under consideration was that alternate jurors would not be informed of that status until the conclusion of trial and just before the jury was sent out to deliberate. Judge Harris added that the time did not seem ripe for a possible change requiring jurors to be provided with written copies of instructions in light of the current budgetary situation.

3e. Report of Medical Records Committee (Mr. Merrick). Mr. Merrick distributed copies of a memorandum he had addressed to all members of this committee (a copy of which is filed with these minutes). Mr. Libmann stated that the CPP, of which he is a member, has a subcommittee chaired by Mr. John Coletti working on the various impacts of the imminently effective federal HIPAA privacy regulations on the ORS, the ORCP, and the UTCR, and added that the CPP was looking to the Council to take the lead and provide guidance respecting the impact on the ORCP. Mr. Spooner commented that the current ORCP provisions regarding health care records are likely to be inconsistent with the HIPAA regulations in various respects.

Mr. Merrick reported that this committee had met, its work was well underway, and that, as shown in the memo he had distributed, drafting assignments had been made to committee members to prepare proposed amending language regarding a new subpoena rule, a new form of qualified protective order, and a new form of affidavit by custodians of medical records. Prof. Holland suggested that one thing this committee should look into is the apparent contradiction between ORCP 44 C and OEC Rules 504-1 and 511. He explained that ORCP 44 C is a discovery rule that is unique in calling for production of material that is entirely privileged and thus not discoverable under ORCP 36 B(1). There thus seems to be a contradiction between Subsection 36 B(1) and Section 44 C.

Mr. Merrick also stated that one complicating factor is that the HIPAA regulations give patients the right to have their medical records amended, which would seem to create the potential for litigation between patients and health care professionals. Ms. McKelvey commented that this particular provision of the HIPAA regulations will require an amendment to ORS Chapter 192.

Prof. Holland asked whether committee members thought it would be helpful if he were to undertake some research into what, if anything, other states might be doing by way of adjusting their medical records discovery rules to the HIPAA regulations. Ms. McKelvey responded that Oregon's law respecting medical records is so different from that of other states that she did not think learning what other states might be doing would be especially helpful or worthwhile.

Mr. Buckle and other members stated that any proposed amendments should try to solve, or at least mitigate, the problem of different parties winding up with different records in the same case. Other members mentioned the long expressed wish on the part of health care records custodians to be relieved of the burden of having to furnish multiple copies of the same records in the same case.

Mr. Spooner remarked that he strongly believed that, in amending Rules 44 and 55, the ability to subpoena health care records directly from health care providers should be preserved. Judge Harris observed that different records custodians sometimes have different ideas about what records should be provided in response to subpoenas. Discussion of this item concluded with general agreement that, at a minimum, Rules 44 and 55 would have to be amended to comply with HIPAA, and, beyond that, improved to whatever extent is possible.

Agenda Item 4: (Old business) (Mr. Spooner)

4a. Possible amendment to, or comment on, ORCP 68 (Justice Durham). Justice Durham referred members to a proposed amendment he had drafted to ORCP 68, as requested at the February 9 Council meeting, the purpose of which was to alert lawyers to the fact that rulings on attorney fee requests and objections are governed by ORS 20.075. (A copy of this draft amendment is filed with the original of these minutes.) He noted that his proposal would accomplish this purpose by tacking on a clause to Subparagraph 68 C(4)(c)(i), but stated that he would welcome suggestions of other ways of accomplishing it which might be better.

Judge Harris asked Justice Durham why his proposed amendment did not take the form of a separately numbered paragraph or subparagraph that would replicate the factors included in ORS 20.075. Justice Durham responded that proceeding in that way might improve the amendment, but noted that it would have the disadvantage of requiring an amendment to ORCP 68 C(4) every time ORS 20.075 might be amended.

Judge Johnson asked whether the fact that the amendment would be added to ORCP 68 C(4)(c), which deals with hearings on objections, might encourage an assumption that ORS 20.075 applies only when objections are filed. Justice Durham responded such an assumption would, in fact, be correct in the sense that, if no objections are filed, there is nothing to adjudicate. Judge Harris commented that attorney fees are sometimes requested in default cases.

Mr. Merrick asked whether the proposed amending language should be "any other statute, rule, or authority" instead of "any other statute or rule." Justice Durham replied that he had considered the formulation suggested by Mr. Merrick, but finally rejected it on the basis that all the cases dealing with attorney fees come down to interpretations of ORS 20.075 or ORAP 13.10.

Judge Schuman suggested that "ORS 20.075 and any other statute or rule" be changed to "ORS 20.075 or any other statute or rule." Judge Isaacson expressed agreement with this suggestion because, he explained, the use of "and" would suggest that some other statute or rule, apart from ORS 20.075, is always applicable. General agreement was then expressed with Judge Schuman's suggestion.

Mr. Spooner then called for a straw vote approving or disapproving the amendment as proposed by Justice Durham as changed in accordance with Judge Schuman's suggestion. The straw vote was 19 in favor, 0 opposed to table the amendment until the September Council meeting when a vote would be taken on its tentative adoption for publication and comment.

4b. Possible amendment of ORCP 44 A regarding conditions under which court-ordered physical or mental examinations are conducted (see Attachment C to 3-9-02 agenda) (Ms. Clarke). Mr. Spooner stated that he had agreed to Ms. Clarke's suggestion that the possibility of revisiting various issues surrounding court-ordered physical or mental examinations during this biennium not be foreclosed, and hence that this item should be continued on the Council's current biennial agenda. Ms. Clarke asked that further consideration of this item be deferred until the April or other future Council meeting. She added that there was considerable interest in this matter on the part of OTLA, and that she would soon be in contact with OADC to inquire whether that organization also has an interest in addressing the issues that surfaced during the 1999-2001 biennium or possibly other related ones. There was general agreement that this item be continued on the Council's agenda.

4c. Possible amendment of one or more discovery rules to make clear duty to update responses to discovery (see Attachment E to 3-9-02 agenda) (Mr. Sugerman). Mr. Sugerman said that an issue that comes up occasionally in Oregon courts, which is not answered by the current discovery rules (ORCP 36 through 46), is whether a party who has responded to discovery is under any duty subsequently to supplement or update those responses in light of later-acquired information showing that the initial responses were erroneous or incomplete. He noted that the Federal Rules of Civil Procedure ("FRCP") include a provision specifically dealing with this question, FRCP 26(e)(2). Mr. Sugerman added that he had shown this draft proposal to Ms. Amato, who agreed with him that any duty of supplementation should not extend to deposition answers as it was thought that would be unduly burdensome for counsel. Thus, he explained, the draft proposal would impose the duty of supplementation only

on Rule 43 requests for production and Rule 45 requests for admissions. He further explained that while the current ORCP 36-46 leave the question unanswered, he personally has always assumed there is an implied duty of supplementation and believed that many lawyers and trial judges operate under the same assumption.

Judge Johnson asked whether, if a supplementation duty were prescribed, it might be preferable to require that supplemental responses be furnished by a date certain prior to trial, thus avoiding the uncertainty of the meaning of the word "seasonably." Justice Durham said he would prefer that language such as "within a reasonable time," or "as soon as possible," or "as soon as reasonably possible" be substituted for "seasonably," and also suggested inclusion of the following language immediately following "(b)"*: "the party has not disclosed the after-acquired information to the requesting party" in lieu of "the after-acquired information has not otherwise been made known to the requesting party ..." Mr. Sugerman suggested that the following might be better: "(b) the party has not otherwise disclosed the after-acquired information to the requesting party in writing," with which suggestion there seemed to be general agreement.

Mr. Buckle queried whether this new supplementation duty would trigger a sanction if, for example, a defense counsel filed an amended answer admitting liability a week before trial. Judge Johnson noted that a supplementation duty as applied to requests for admissions might discourage counsel from agreeing at trial that certain issues need not be tried because not seriously contested. Prof. Holland queried whether it would be sensible to impose a supplementation duty on Rule 45 admissions, since the purpose of requests for admissions is less to obtain more or later information than it is to lock things in place.

Discussion of this item concluded with general agreement that it would be continued on the Council's agenda and with a suggestion to Mr. Sugerman that he further refine his draft proposal in light of the discussion at this meeting.

4d. Tentative adoption of amended Barron amendment to ORCP 47 C. There was agreement without objection that this amendment had been approved at the Council's 2-9-02 meeting, and that it should therefore be tabled until the Council's September 2002 meeting when it would be called up for voting on its tentative adoption for publication and comment.

*There was general agreement that the "a" and "b" in this draft should be enclosed in parentheses as "(a)" and "(b)."

Agenda Item 5: New business (Mr. Spooner):

5a. Possible technical amendment to ORCP 27 B (see Attachment D to agenda of this meeting). Without objection it was agreed that this item would be continued on the Council's agenda for consideration at a meeting when Judge Rasmussen is present.

5b. Possible need to amend ORCP 19 B (Mr. Bloom). Mr. Bloom raised the question whether it might be useful to amend ORCP 19 B to eliminate any among the specified affirmative defenses that are no longer valid as a matter of substantive law, such as, for example, contributory negligence. Mr. Spooner responded that Mr. Bloom was certainly welcome to take a stab at amending Section 19 B. Ms. Clarke commented that, despite major changes in substantive tort law, there might nonetheless be good reason to retain the affirmative defense of contributory negligence as there might still be cases where it is applicable.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner declared the meeting adjourned at 11:53 a.m.

Respectfully submitted,

Maury Holland
Executive Director

MEMORANDUM

To: Medical Records Committee of Council on Court Procedures
Connie Elkins McKelvey, Kathryn Clarke, Alex Libmann, Gene Buckle, Ralph Spooner, Gwen Dayton (Or. Hosp. Assn.), Rich Rogers (OTLA), Bill Sime (OADC)

From: Jeff Merrick

Summary

On March 7, 2002, the committee met. There was consensus on the following:

- The old distinction between Hospital Records and Medical Records is obsolete.
- We need to rewrite the subpoena rules for Protected Health Information
- We ought to prepare forms for Qualified Protective Orders and for Affidavits of Records Custodians.

There was no consensus on how to reduce the burden caused by multiple requests to providers. The idea of making – as a precondition to a subpoena of providers - an ORCP 43 request that plaintiff seek the records via authorization did not gain consensus. Also, there was no consensus to skip requests and merely subpoena the records.

We also discussed ORCP 44 and whether it should be clarified. There was no consensus on this topic, though we seem to agree that ORCP 44E, pertaining to Hospital Records, is obsolete.

Drafting assignments are as follows:

1. New subpoena rule:
   Connie Elkins McKelvey
   Mark Griffin
   Gwen Dayton

2. Form Qualified Protective Order
   Kathryn Clarke
   Bill Sime

3, Form Affidavit of Custodian of Records
   Gwen Dayton
   Rich Rogers

The above committees are to submit their drafts to me on or before April 11, 2002.

Next meeting?

Please indicate your preference for the next meeting date:

Tuesday April 23 at 3:30
Thursday April 25 at 3:30
Tuesday April 30 at 3:30

Please indicate your availability by indicating "P" for possible, "I" for impossible, or "B" for best.

Thank you.

c: Thomas E. Cooney
Kelly Hagan
John Coletti
Susan Grabe

ORCP 68C (4)(c)(i)

If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue, including any factors that ORS 20.075 ~~and~~ or any other statute or rule require or permit the court to consider in awarding or denying attorney fees or costs and disbursments.

During the 1999-2001 biennium the following amendment to ORCP 34 B(2) was proposed by Mr. Brothers, but the Council deferred action on the proposal because of lack of time to consider it. [Matter to be added in bold underlined; matter to be deleted *italicized* and enclosed in square brackets [ ]:

"B(2) Against such party's personal representative or successors in interest [*at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death*] unless the personal representative or successor in interest serves notice of the death of the party on the claimant and the claimant fails to substitute the personal representative or successor in interest within four months of service of such notice."

Attachment "A" to
4-13-02 Agenda

ATTACHMENT B TO AGENDA OF 4-13-02 COUNCIL MEETING {MJH}

ORS Provisions re "Perjury and Related Offenses"

162.055 Definitions for certain provisions of ORS 162.055 to 162.425. As used in ORS 162.055 to 162.425 and 162.465, unless the context otherwise requires:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Material" means that which could have affected the course or outcome of any proceeding **or** transaction. Whether a false statement is "material" is a question of law.

(3) "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly related to state of mind apart from or in addition to any facts which are the subject of the representation.

(4) "Sworn statement" means any statement knowingly given under any form of oath or affirmation attesting to the truth of what is stated.

162.065 Perjury. (1) A person commits the crime of perjury if the person makes a false sworn statement in regard to a material fact, knowing it to be false.

(2) Perjury is a Class C felony.

162.075 False swearing. (1) A person commits the crime of false swearing if the person makes a false sworn statement, knowing it to be false.

(2) False swearing is a Class A misdemeanor.

162.085 Unsworn falsification. (1) A person commits the crime of unsworn falsification if the person knowingly makes any false written statement to a public servant* in connection with any benefit.

(2) Unsworn falsification is a Class B misdemeanor.

162.095 Defenses to perjury and false swearing limited. It is no defense to a prosecution for perjury or false swearing that: (1) Statement was inadmissible under the rules of evidence; or (2) The oath or affirmation was taken or administered in an irregular manner; or (3) The defendant mistakenly believed the false statement to be immaterial.

*ORS 162.005(2) defines a "public servant" as: "(a) [a] public officer or employee of the state or of any political subdivision thereof or of any government instrumentality within the state; (b) [a] person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state; (c) [a] person nominated, elected or appointed to become a public servant, although not yet occupying the position; and (d) [j]urors." A notary public might or might not come within the definition of "a public officer . . . of the state," but even if so, that would afford no help in this context given that the whole point of this exercise is to dispense with the need for a notary.

Other ORS Provisions Possibly Relevant to Declarations as Opposed to Affidavits

45.010 Testimony taken in five modes. The testimony of a witness is taken by five modes:

(1) Affidavit.
(2) Deposition.

(3) Oral examination.

(4) Telephone examination under ORS 45.400.

(5) Examination before a grand jury by means of simultaneous television transmission under ORS 132.320.

45.020 Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party.

45.130 Production of affiant for cross-examination. Whenever a provisional remedy has been allowed upon affidavit, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant to be produced for cross-examination before a named officer authorized to administer oaths. Thereupon the party to whom the remedy was allowed shall lose the benefit of the affidavit and all proceedings founded thereon, unless within eight days, or such other time as the court or judge may direct, upon a previous notice to the adversary of at least three days, the party produces the affiant for examination before the officer mentioned in the notice, or some other of like authority, provided for in the order of the court or judge. Upon production, the affiant may be examined by either party; but a party is not obliged to make this production of a witness except within the county where the provisional remedy was allowed.

194.505 Definitions for ORS 194.505 to 194.595 [Uniform Law on Notarial Acts]. As used in ORS194.005 to 194.200 and 194.505 to 194.595, unless the context requires otherwise:

* * * * *

(3) A "notarial act" or "notarization" is any act that a notary public of this state is authorized to perform, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy and noting a protest of a negotiable instrument.

(4) "Notarial officer" means a notary public or any other officer authorized to perform notarial acts.

(5) "Oath" and "affirmation" mean a notarial act or part thereof in which a notary certifies that a person made a vow in the presence of the notary on penalty of perjury.

(6) A "verification upon oath or affirmation" is a statement by a person who asserts it to be true and makes the assertion upon oath or affirmation.

194.515 Notarial acts. (1) . . . . .

(2) In taking a verification upon oath or affirmation, the notarial officer must determine, either from personal knowledge or satisfactory evidence, that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified.

194.525 Who may perform notarial acts; acts performed under federal authority. (1) A notarial act may be performed within this state by the following persons: (a) A notary public of this state; or (b) A judge, clerk or deputy clerk of any court of this state.

* * * * *

{Commentary by MJH: Without having read the cases construing the statutes shown above I cannot be sure, but simply on the basis of their language it appears to me that a materially false statement in a declaration purportedly under the penalty of perjury would not support a prosecution for perjury, false swearing, or unsworn falsification. (I'll be glad to study the cases and have a report concerning them to distribute prior to the May 11 Council meeting if at the April 13 meeting the Council concludes that would be worthwhile.) Both perjury and false swearing require that a false statement be "sworn," which must mean given under oath or affirmation. Administering an oath or affirmation is

obviously a "notarial act." While not expressly so stating, the obvious meaning of ORS 194.525 must be that *only* notaries public, judges, clerks and deputy clerks may perform notarial acts in Oregon. Unsworn falsification under ORS 162.085 might do the trick except that the unsworn false statement must be "to a public servant," within the definition of which in ORS 162.005(2)(a) a notary might possibly come. But since the whole point of this exercise is to obviate the need to find notaries, this would not be helpful, in addition to which it is hard to see how the requirement of "in connection with any benefit" could be satisfied.

It seems to me the question comes down to the following question: For purposes of liability under the above criminal statutes, is it possible to make a "sworn" statement without an oath or affirmation having been administered? Put another way, if someone signs a statement declaring it is made under the penalty of perjury or the like, does that dispense with the need for any oath or affirmation? I don't think it is necessary to look at the cases to see that under ORS 162.055(4)'s definition of a "sworn statement," the answer is no. So the conclusion I'm inclined toward is that if the affidavit provisions of the ORCP were to be amended to permit declarations in lieu of, or as an alternative to, affidavits, it would require that ORS 162.055(4), and perhaps other statutory amendments, be sponsored by the OSB at the behest of the CPP and, of course, subsequently enacted.

I do have one suggestion, however. Several members have mentioned that declarations are being used in federal court in lieu of affidavits with no evident problems. As promptly as I can manage to do so, I'll check into this and see how this is being done. For example, since the Fed. R. Civ. P. still call for affidavits in support of motions for summary judgment and in many other contexts, on what authority are declarations being substituted for them? Also, do the U.S. statutes concerning perjury or false statement differ from those of Oregon so that prosecutions can be sustained for materially false declarations filed in federal court?

I assume that all, or at least most, Oregon lawyers are also notaries--the firm with which I practiced in Boston about the time of the Salem witch trials required all of its attorneys to be. But I also assume the reason lawyers cannot themselves notarize affidavits for use in cases where they are either an attorney or counsel is because of DR 5-102. There are probably other reasons as well.

Apart from a serious doubt about the prosecutability under Oregon law of false statements or representations contained in declarations, I do not find any other reason why, with one exception, the provisions of the ORCP which currently require affidavits could not be changed to permit the use of declarations or either affidavits or declarations at the option of the user. The one exception arises from ORS 45.130, which expressly contemplates the use of affidavits in obtaining provisional remedies, as ORCP 79 B also requires in connection with tro's. All the other ORS provisions requiring or permitting affidavits address matters quite different from those addressed by the ORCP's affidavit provisions.}

The following technical amendment of ORCP 27 B has been forwarded by Judge Rasmussen (matter to be added in bold, to be deleted italicized and enclosed in square brackets):

Rule 27 Minor or Incapacitated Parties

* * *

B. APPEARANCE OF INCAPACITATED PERSON BY CONSERVATOR OR GUARDIAN

When a person who is incapacitated or financially incapable, as defined in [*section 1 of this 1995 Act [c. 664, § 1],*] **ORS 125.005(5), [1]or who has otherwise been committed to a mental institution[1] / [2]or who is subject to the jurisdiction of the Mental Health Division,[2]** who has a conservator of such person's estate or a guardian, is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. If the person does not have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

* * *

[1]---[1]Alternative A

[2]---[2]Alternative B

{Note by MJH: If "ORS 125.005(5)" is substituted for "section 1 of this 1995 Act [c. 664, § 1]" in Section 27 B, the same change should presumably also be made in Subsection 27 B(1).}

ORCP 36 General Provisions Governing Discovery

Proposed new section—

36D. Duty to Supplement Response

A party who has responded to a request for production is under a duty, within a reasonable time, to supplement or correct the response to include information acquired after the response. For purposes of this subsection, supplemental disclosures are required if: (a) the after-acquired information is material; and (b) the party has not otherwise disclosed the after-acquired information to the requesting party in writing.

Comments:

- Revision of prior draft replaces "seasonably" with "within a reasonable time."
- Removes requests for admissions from the prior draft
- Cleans up the requirements that trigger supplemental disclosure.

Question:

Does the timing need further elaboration either in the text or in separate commentary, or can we rely on common sense, professionalism and—if necessary—trial bench interpretation based on the specific facts of any dispute?