NOTICE

PUBLIC MEETING

COUNCIL ON COURT PROCEDURES

Saturday, May 11, 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 4-13-02 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. Report of Jury Innovation Committee (Judge Harris)

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

3d. Proposal to substitute declarations for affidavits throughout the ORCP (see Attachment B*) (Prof. Holland)

3e. Proposed amendment to ORCP 43 (see Attachment C*) (Mr. Sugerman)

3f. Technical amendment: Proposed amendment to ORCP 62 F (see Attachment D) (Prof. Holland)

***By separate mailing or distribution at meeting.**

4. Old business (Mr. Spooner):

4a. Proposal to amend ORCP 44 regarding conditions of court-ordered physical or mental examinations (Ms. Clarke)

4b. Report regarding possible need to amend ORCP 70 A(2)(a)(ii) (Judge Carp)

5. New business (Mr. Spooner)

6. Adjournment

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Note

The following ORCP amendments have been approved to date for voting on "tentative adoption" and publication for comment at the Council's Sept. 14, 2002 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 paragraph: ", 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 April 13, 2002
5200 Southwest Meadows Road
Oregon State Bar Center
Lake Oswego, Oregon

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

Also present were: Susan Evans Grabe, Public Affairs Attorney with the Oregon State Bar; 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 9:35 a.m.

Agenda Item 2: Approval of minutes. The minutes of the March 9, 2002 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 4-13-02 agenda) (Mr. Brothers). Mr. Brothers explained that the problem with the present subsection 34 B(2) is that it gives less protection to a claimant against a deceased defendant than do the pertinent statutes, ORS 115.003 and 115.315, which could not have been intended by the drafters of this subsection. Specifically, he further explained, subsection 34 B(2) provides that an action commenced against a living defendant may be continued against such defendant's personal representative or successor in interest provided the latter is substituted for the named defendant within four months of publication of the notice of the personal representative's appointment required by ORS 115.003, following which the claim "may be barred,"[1] whereas ORS 115.315 provides that an action pending against a decedent on the date of his or her death "may be continued as provided in ORCP 34 B(2) without presentation of a claim against the estate of the decedent."

One member commented that ORS 115.030 and 115.315 appear to be concerned with a matter of probate law, namely, whether and when claims against an estate must be presented to a personal representative, whereas ORCP 34 B(2) deals with the purely procedural matter of substitution of defendants. Mr. Brothers concluded discussion of this item by saying that he would prepare a revised draft of this proposed amendment for consideration at the Council's May 11 meeting.

3b. Proposal to substitute declarations for affidavits throughout the ORCP (see Attachment B to agenda of this meeting) (Mr. Spooner). Mr. Spooner noted that Prof. Holland had completed his initial research into what provisions of the ORCP presently call for affidavits, and also into the question of whether either substituting declarations for affidavits, or making declarations an optional alternative to use of affidavits, might create inconsistencies with a variety of ORS provisions requiring affidavits. He added that all members appeared to be agreed that if use of declarations is to be introduced into practice under the ORCP there must be absolute assurance that knowingly false statements of material fact contained in declarations would be subject to prosecution for perjury to the same extent as is true of affidavits. He further added that there might be some members who were somewhat wary about omitting the greater formality associated with affidavits, particularly the administration of an oath or affirmation.

Prof. Holland stated that his examination of the perjury statutes in chapter 162 of the ORS had convinced him that in order for knowingly false statements of material fact contained in

[1]ORS 115.003(3)(d).

a declaration to be subject to perjury prosecution on the same basis as such statements contained in an affidavit, certain statutory amendments would be needed since the present perjury statutes, in particular ORS 162.065(1), require that a false statement be "sworn," which he was quite certain means that the statement must have been given under oath or affirmation. However, Ms. Clarke queried why a knowingly false statement of material fact contained in a signed declaration would not be subject to prosecution as an "unsworn falsification" under ORS 162.085, which, if so, would obviate any need for statutory amendments.

Mr. Libmann reported that the OSB Practice & Procedure Committee ("P&PC"), of which he is a member, had reacted very positively to the suggestion that use of declarations as alternatives to affidavits be authorized. Ms. Russell noted that declarations were being used in lieu of affidavits in the U.S. District Court without any apparent problems, and that practitioners in that court appeared to be finding declarations more convenient and saving of time than affidavits.

Judge Carp asked Ms. Grabe how much time remained for the P&PC to consider and draft any statutory amendments authorizing use of declarations in the ORCP might require. Ms. Grabe responded that the P&PC was operating under a May 1 deadline for any statutory amendments to be forwarded to the OSB Board of Governors for its approval for OSB sponsorship in the 2003 Legislative Assembly. Judge Carp observed that, in view of the shortness of available time, this project might have to be deferred to the 2003-05 biennium. Mr. Spooner commented that, in addition to amendments to the perjury statutes, there needed to be amendments to ORS chapter 45 to authorize declarations subject to the penalty for perjury as a permissible form of testimony.

Discussion of this item then concluded with a motion by Judge Carp, duly seconded and unanimously adopted, whereby Prof. Holland was authorized and directed to get some proposed statutory amendments to Ms. Grabe as soon as possible for her to place in the hands of the P&PC. Judge Carp stated that he would try to get in touch with one or more criminal lawyers in the Office of the Attorney General to get their thoughts about any needed amendments to the perjury statutes. Ms. Grabe pointed out that any statutory amendments proposed by the P&PC and approved by the Board of Governors would be subject to revision, if necessary, when they reach the Office of Legislative Counsel, which would provide an opportunity to repair any drafting defects that might exist in proposals forwarded by the OSB.

3c. Report of Jury Innovation Committee. In the absence of Judge Harris Mr. Bloom reported that members of this committee had been provided with copies of *Jury Trial Innovations*, a recent publication of the National Center for State Courts. Mr. Spooner asked Mr. Bloom to inform Judge Harris that the June Council meeting was the target date by which all prospective ORCP amendments should be presented to the Council for discussion, debate, and

tentative approval, and that it would be most helpful if the Committee could have some material ready for distribution as early as the May meeting.

Mr. Libmann noted that there was some coordination occurring between the P&PC and Judge Harris, adding that there had been some discussion in the P&PC about three jury innovation issues, namely, mandatory written jury instructions, alternate juror choice, and jury debriefing. Ms. Grabe noted that while the P&PC had some discussion of these issues, the committee did not plan to forward any proposed statutory amendments concerning jury innovation this biennium.

3d. Report of Medical Records Committee. In Mr. Merrick's absence Ms. McKelvey reported on behalf of this committee. She stated that the general topic of medical records in light of the HIPAA regulations had been divided into three subtopics, namely, whether the distinction should or must, in light of HIPAA, be maintained between hospital and medical records; whether Rule 55, in particular sections 55 H and I, should be rewritten and, if so, how; and preparation of a model qualified protective order and records custodian's affidavit. Ms. McKelvey reported that she is a member of the subcommittee concentrating its efforts on drafting the order and affidavit, adding that she had sent Prof. Holland an e-mail message summarizing the subcommittee's thinking and noting the difference of opinion which then existed. (A copy of this message is filed with the original of these minutes.) She added that the committee seemed inclined toward a single process for obtaining any form of health information, and toward continuing the present 14-day advance notice requirement and opportunity for objection to the scope of requests. She added that the full committee did not believe it to be within its scope to draft any provisions changing the amount or kind of health care information that is discoverable, and therefore has limited itself to amendments dealing solely with the procedures by which discoverable information is obtained, with the clear understanding that any such procedures must be fully compliant with HIPAA.

Ms. Clarke observed that a problem encountered with last biennium's proposals was that they provided too many opportunities to object to discovery requests for health care records, and thus unduly prolonged the process.

Discussion of this item concluded with Mr. Spooner's strongly encouraging this committee not to get too bogged down with discoverability and evidentiary issues about which the plaintiffs and defense bars have contended for years, but to be sure to prepare whatever ORCP amendments might be required in order to assure compliance of the ORCP discovery and subpoena rules with HIPAA.

Agenda Item 4: Old business (Mr. Spooner)

4a. Possible amendments to ORCP 44 A regarding conditions pertaining to court-ordered physical and mental examinations (Ms. Clarke). Mr. Spooner stated that Ms. Clarke and he had agreed to defer further consideration of this item to the May 11 Council meeting, by which time Ms. Clarke will have consulted with some lawyers reportedly having a particular interest in this matter and will report to the Council the result of those consultations.

4b. Possible amendments to ORCP 36-46 to prescribe duty to supplement certain discovery responses (see Attachment D to agenda of this meeting) (Mr. Sugerman). Mr. Sugerman noted that, in contrast to the earlier draft, this draft amendment would impose a supplementation duty only on Rule 43 requests for production, and not on Rule 44 requests for admissions. Judge Barron asked Mr. Sugerman why he had dropped requests for admissions as subject to a supplementation duty, to which Mr. Sugerman responded that he and some other Council members were concerned that imposing a duty to supplement responses to admissions requests might have the effect of discouraging counsel from conceding or stipulating issues just before or during trial.

Mr. Sugerman then asked for comment as to whether this draft amendment would be improved by any greater specificity about the time by which supplementation must or could occur, in particular whether the phrase "within a reasonable time" is specific enough. Ms. Clarke commented that this amendment might more appropriately relate to Rule 43 rather than Rule 36 since it only applies to requests for production, with which comment there was general agreement that, if promulgated, this amendment should become a new section 43 E.

Mr. Brothers said that he opposed the entire concept of mandatory subsequent disclosures and expressed support for leaving the burden of requesting supplemental responses where it now rests, on the party wishing to obtain supplemental information. Several members suggested that the phrase "within a reasonable time" should be moved to follow the phrase "after the response," with which suggestion there was general agreement. It was also noted that Rule 46 presently provides for no sanction for any failure to comply with a supplementation obligation.

Judge Barron stated that he believed the present language of the discovery rules deals adequately with the question of a continuing duty to supplement responses, and therefore was not inclined to support an amendment directed to this issue. Mr. Bloom commented that an expressly stated supplementation obligation is needed to deal with those lawyers who habitually and deliberately sit on important discoverable information and documents which first become available following an initial response to a discovery request. Judge Johnson stated that any provision for sanctions for violation of a supplementation obligation should make clear what the appropriate standard for imposing sanctions would be, whether, for example, a careless or negligent failure to comply, as opposed to deliberate withholding, would be sanctionable.

Mr. Brothers noted that there is an unintended lack of parallelism between the language in sections 43 A and 43 B which he said could easily be eliminated. He explained that the inconsistency to which he referred was the language in section 43 A about production and permitting inspection and copying, whereas the language of section 43 B speaks only about production and permitting inspection, while saying nothing about copying. No motion was offered in response to this observation.

Discussion of this item concluded with an observation that the "(a)" in the current draft should be changed to "(i)" and the "(b)" to "(ii)," and with a direction to Prof. Holland to work together with Mr. Sugerman in an effort to deal with the issues raised during this discussion, but that they need not concern themselves with a sanction provision.

4c. Possible technical amendment of ORCP 27 B (see Attachment C to agenda of this meeting) (Judge Rasmussen). In Judge Rasmussen's absence it was agreed that this item be deferred to the May 11 Council meeting.

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

5a. Possible amendment of ORCP 7 F (Judge Barron). Judge Barron stated that a member of the Civil Law Advisory Committee had raised a question as to whether the word "promptly" as it appears in subsection 7 F(1) might usefully be modified to read "reasonably promptly." There was general agreement that no such amendment is needed.

5b. Possible amendment of ORCP 70 A(2)(a)(ii) (Judge Carp). Judge Carp commented that he had some concern about the paragraph 70 A(2)(a)(ii) requirement that a judgment debtor's Social Security number be shown along with his or her name and other identifying information on judgment forms. He added that in this era of "identity theft" the linking of names with Social Security numbers might pose some risk to judgment debtors. It was agreed that Judge Carp and Ms. Amato would consider this question and, if they concluded that an amendment to this provision would be appropriate, present it at a future Council meeting.

5c. Future Council meetings (Mr. Spooner). Mr. Spooner emphasized the importance of having the fullest possible attendance at both the May 11 and the June 8 Council meetings to ensure that the latter target date is met for getting all proposed amendments in reasonably close to finished form. The importance of the May and June meetings was all the greater, he added, because of the recurring difficulty in having full attendance at the July and August meetings, when many members are either on vacation or need to attend professional meetings.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner adjourned the meeting at 11:45 a.m.

Respectfully submitted,

Maury Holland
Executive Director

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 5-11-02
Agenda

NOTE: THIS DOCUMENT RELATES TO ITEM 3C OF 5-11-02 AGENDA

LIBMANN, ALEXANDER

From: Connie McKelvey [CEM@hhw.com]
Sent: Friday, May 03, 2002 10:23 AM
To: kathrynhc@aol.com; Jcoletti@bctiallaw.com; Sconklin@cooneycrew.com; jeffmerrick@jeffmerrick.com; Mholland@law.uorgeon.edu; Markgriffin@markgriffin.com; Gdayton@oahhs.org; Sgrabe@osbar.org; bsime@pbswlaw.com; Alexli@safeco.com; khagan@schwabe.com
Subject: HIPAA and Oregon Rules regarding Subpoenas for Protected Records

Rule 44 &55 (as amended).doc

Dear COCP Subcommittee & Other Interested Parties:

This week the COCP Subcommittee meet and reached consensus on a number of changes to ORCP 55 to make the process for subpoenaing protected health information consistent with the HIPAA standards. To this end, we agreed to have just one process to obtain all such records eliminating the two processes currently set forth for hospital records and other medical records, include HIPAA definitions (substituting the term individually identifiable health information for the term protected health information). and clarify that we are not intending to broaden the scope of discovery allowed under ORCP 36.

In making these changes I realized we would also need to revise ORCP 44 to preserve the current ability to subpoena medical records from physicians.

Enclosed is the revised draft of these rules. Please share your comments with the entire interested group.

Connie McKelvey
503 222 4499

RULE 44

E. Access to {*Hospital}* **Individually Identifiable Health Information**. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of {*all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person }* **idividaully identifiable health information as defined in Rule 55 H.** within the scope of discovery under Rule 36 B. {*Hospital records*} **Individually identifiable health information** shall be obtained by subpoena in accordance with Rule 55 H.

RULE 55

H Individually Identifiable Health Information {*Hospital records.*}

{H(1) Hospital. As used in this rule, unless the context requires otherwise, "hospital" means a hospital, as defined in ORS 442.015(19), or a long term care facility or an ambulatory surgical center, as those terms are defined in ORS 442.015, that is licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695}

H(1) ***Definitions.*** **As used in this rule, the terms "individually identifiable health information" "qualified protective order" and "satisfactory assurance" are defined as follows:**

(a) "Individually identifiable health information" means information that is a subset of health information, including demographic information collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse which relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual which identifies the individual or could be used to identify the individual.

(b) "Qualified protective order" means an order of the court or a stipulation by the parties to the litigation that prohibits the parties from using or disclosing individually identified health information for any purpose other than the litigation for which such information was requested and which requires the return to the original custodian of such information or destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

(c) "Satisfactory assurance" means a written statement and accompanying documentation from a party issuing a subpoena for individually identifiable health information demonstrating that

H(1)(c)(i). The party has made a good faith attempt to provide written notice to the individual or the individual's attorney at least 14 days prior to issuing the subpoena informing the individual or the individual's attorney that the individual or attorney had 14 days from the date of the notice to object;

H(1)(c)(ii). The notice included sufficient information about the litigation in which the individually identifiable health information is requested to permit the individual to raise an objection to the court;

H(1)(c)(iii). The individual did not object within the 14 days, or if objections were made they were resolved by the court and the information being sought is consistent with such resolution the parties to the litigation; or

H(1)(c)(iv). The parties have agreed to a qualified protective order.

Nothing in these definitions or in this Rule is intended to expand the scope of discovery beyound that provided in Rule 36 or 44 with respect to individually identifiable health information.

H(2) **Mode of compliance.** {*Hospital records*}**Individually identifiable health information** may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless

the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.

H(2)(a) Prior to or commensurate with serving a subpoena requesting production of individually identifiable health information, the attorney for the party issuing the subpoena must provide the custodian or other keeper of such information with an affidavit providing satisfactory assurance, that production is permitted. Supporting documentation, including any referenced written notice or court order must be attached to the affidavit.

H(2){*a*}(**b**) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of {*hospital records*} **individually identifiable health information** in an action in which the {*hospital*} **entity or person** is not a party, and the subpoena requires the production of all or part of the records of the {hospital}**entity or person** relating to the care or treatment of {*a patient*} **an individual** {*at the hospital*}, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H(2)(*b*)(**c**) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(*b*)(**c**)(iv), then a copy of the subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the {*hospital*} **entity or person**.

H(2)(d) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)(*d*)(**e**) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of section D(3) of this rule.

H(3) Affidavit of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the {*hospital*} records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the{ *hospital, staff physicians, or*} **entity or person**{*s* }acting under the control of either, in the ordinary course of {*hospital*} **entity or person's** business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the { *hospital* }**entity or person** has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H(4) **Personal attendance of custodian of records may be required.**
H(4)(a) The personal attendance of a custodian of {*hospital}* records and the production of original {*hospital*} records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of {*hospital}* records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) If more than one subpoena duces tecum is served on a custodian of *{hospital}* records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

{I Medical records.
I(1) ***Service on patient or health care recipient required****. Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.*

I(2) ***Manner of service****. If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient not less than 14 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient not less than 14 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.*

I(3) ***Affidavit of attorney****. If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.*

I(4) ***Application****. The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.}[*CCP 12/2/78; §§A, C, H amended by 1979 c.284 §§33, 34, 35; §§D(1), F(2) amended by CCP 12/13/80; §D amended by CCP 12/4/82; §D amended by 1983 c.751 §5; §H(2) amended by CCP 12/13/86; H(2) amended by CCP 12/10/88 and 1/6/89; §E amended by 1989 c.980 §3; amended by CCP 12/15/90; §H amended by 1993 c.18 §3; §D amended by CCP 12/10/94 and 1995 c.79 §404; §§F, H amended by CCP 12/10/94; §I enacted by 1995 c.694 §1; §I amended by CCP 12/14/96; §D amended by 1997 c.249 §10; §C amended by 1999 c.59 §5; §I amended by CCP 12/12/98; §H amended by 2001 c.104 §3]

Attachment B to Agenda of 5-11-02 Meeting

Introductory Note. The following proposed ORS and ORCP amendments are intended to authorize use of "declarations" as alternatives to affidavits at all places in the ORCP where the latter are now called for.* My recommendation is that the Practice & Procedure Committee ("P&PC") consider and approve (or disapprove if that is its decision) both the ORS and the ORCP amendments in tandem for inclusion in a single bill for sponsorship by the OSB in the 2003 Legislative Assembly. That would ensure that both the ORS and the ORCP amendments either get enacted or defeated in combination and, if enacted, become effective on the same date. Were the P&PC to approve only the ORS amendments for forwarding to the Board of Governors, while leaving it to the Council on Court Procedures to promulgate the ORCP amendments at its December 14, 2002 meeting, that would create the possibility of the ORCP amendments becoming effective January 1, 2004 even if the ORS amendments were not enacted. The "fix" that mess would require would involve either the OSB or the Council itself lobbying the Legislature to disapprove the promulgated ORCP amendments by statute, something everyone would like to avoid.

I should strongly emphasize that the ORCP amendments which appear following the ORS amendments have not yet been approved by the Council, and that I have no authority to act on behalf of, or commit, the Council in this matter. However, the Council will meet on May 11, and will then have an opportunity to either approve or disapprove the ORCP amendments. Should the Council decide not to approve these ORCP amendments, or to approve some but not all of them, I shall immediately so notify Susan Grabe, who will likely be at the Council meeting in any event, so that if the P&PC has approved and forwarded both the ORS and ORCP amendments the entire legislative package could be recalled if that seems the sensible thing to do. Another alternative, of course, would be to let the ORS amendments move forward with the ORCP amendments removed from the package if the Council decides not to approve the latter. Should the P&PC not approve the ORS amendments that would, of course, preclude the Council's promulgating the ORCP amendments.

Naturally, I cannot predict whether the Council will approve these ORCP amendments, but would estimate the chances of approval as reasonably favorable. That is because the reaction to the proposal concerning declarations by Council members has been, on the whole, positive. Some members appear to prefer the continued use of affidavits, despite the delay and inconvenience they sometimes entail, because they believe the ritual of placing affiants under oath or affirmation serves a salutary admonitory purpose. That is the reason the ORCP amendments do not abolish use of affidavits, but simply make declarations an optional alternative.

A major concern on the part of Council members, as I expect it is for the P&PC members, is that any knowingly false statements of material fact included in a declaration should

*The ORS amendments, if approved by the P&PC and the Board of Governors, and enacted by the Legislature, would of course make possible a similar change to other sets of rules, such as the UTCR and the ORAP, should those responsible for them choose to do so.

be subject to perjury prosecution to the same degree as with affidavits. The amendments I suggest to ORS Chapter 162 are intended to ensure that this is accomplished, but it is for the P&PC to judge whether they achieve that purpose.

Maury Holland
Executive Director, Council on Court Procedures

Note: Matter to be added **BOLDED IN ALL CAPS AND UNDERLINED**; matter to be deleted [~~in strikethough enclosed in square brackets~~]

Proposed ORS Amendments

45.010 Testimony taken by [~~five~~] SIX modes.

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(6) DECLARATION AS DEFINED BY ORS 45.025

45.025 DECLARATION DEFINED. A DECLARATION IS A STATEMENT INTENDED FOR POSSIBLE USE AS EVIDENCE IN COURT, WRITTEN OR ADOPTED AND SUBSCRIBED BY THE DECLARANT, WHEREIN APPEARS IN PROMINENT TYPE IMMEDIATELY BELOW THE SIGNATURE LINE THE FOLLOWING: "THE ABOVE-SIGNED DECLARANT HEREBY DECLARES THAT THE ABOVE STATEMENT IS TRUE AND ACCURATE TO THE BEST OF HIS/HER KNOWLEDGE AND BELIEF, [1]ACKNOWLEDGES UNDERSTANDING THAT IT IS GIVEN FOR POSSIBLE USE AS EVIDENCE IN COURT,[1] AND IS THEREFORE MADE SUBJECT TO THE PENALTY PROVIDED FOR THE CRIME OF PERJURY."

1---1This language is included to prevent declarations from being misused for purposes having nothing to do with evidence or litigation, such as employers placing the prescribed legend below the signature line of employment applications and then seeking an applicant's prosecution for perjury if any statement in the application turns out to have been false. That might be fraud, but should not be treated as perjury.

The prescribed legend sounds quite menacing, but it might well be necessary for courts to be willing to convict declarants for perjury unless declarations provide an admonitory influence on declarants roughly equivalent to that provided to affiants by administration of the traditional oath or affirmation.

45.130 Production of affiant OR DECLARANT for cross-examination. Whenever a provisional remedy has been allowed upon affidavit [~~,~~] **OR DECLARATION,** the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring that the affidant **OR DECLARANT** 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 **OR DECLARATION** 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 affidant **OR DECLARANT** 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 **OR DECLARANT** may be examined by either party, but a party is not obligated to make this production of 2[~~a witness~~] **AN AFFIANT OR DECLARANT**2 except within the county where the provision remedy was allowed.

2---2This change is certainly not essential, but isn't it a slight improvement?

162.055 Definitions for certain provisons 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 party 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" in a given factual situation in a question of law.~~] **A "DECLARATION" IS A "STATEMENT" AS DEFINED IN SUBSECTION (4) OF THIS SECTION WHICH ALSO COMPLIES WITH THE DEFINITION OF A "DECLARATION" IN ORS 45.025.**

[~~(2)~~] **(3)** "Material" means that which could have affected the course or outcome of any proceeding or transaction. Whether a false statement is "material" in a given factual situation [3]is a question of law.[3]

[3]--[3]Just a little query in passing: I haven't looked at the cases, but isn't this likely to be held unconstitutional unless a perjury defendant has waived trial by jury? Isn't the materiality of a knowingly false statement a factual element of the offense of perjury? Even if so, I don't suppose this is the time or place to try to fix the problem, assuming there is one, although it seems to me this might be of interest to the P&PC next biennium.

[~~3~~] **(4)** "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

[~~(4)~~] **(5)** "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 **OR A FALSE STATEMENT IN A DECLARATION** in regard to a material issue, knowing it to be false.

Proposed ORCP Amendments

RULE 1. SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION; **DECLARATION**

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F. DEFINITION OF DECLARATION. AS USED THROUGHOUT THESE RULES, "DECLARATION" MEANS A STATEMENT CONFORMING TO ALL REQUIREMENTS OF ORS 45.125.

RULE 7. SUMMONS

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D. Manner of Service.

D(6) *Court Order for Service; Service by Publication.*

D(6)(a) Court Order for Service by Other Method. On motion upon a showing by affidavit **OR DECLARATION** that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

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D(6)(c) *Where Published.* An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit **OR DECLARATION** required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

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F. Return; Proof of Service.

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F(2) *Proof of Service*. Proof of service of summons or mailing may be made as follows:

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F(2)(b) Publication. Service by publication shall be proved by an affidavit **OR A DECLARATION** in substantially the following form:

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G. Disregard of Error; Actual Notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, or who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit, **DECLARATION** or certificate of service of summons. The court shall disregard any error in the content of summons that does not materially prejudice the substantive rights of the party against whom

summons was issued. If service is made in any manner complying with subsection D(1) of this section, the court shall also disregard any error in the service of summons that does not violate the due process rights of the party against whom summons was issued.

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RULE 9. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

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C. Filing; Proof of Service. Except as provided by section D of this rule, all papers required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit **OR DECLARATION** of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers. Where service is made by telephonic facsimile communication device, proof of service shall be made by affidavit **OR DECLARATION** of the person making service, or by certificate of an attorney. Attached to such affidavit**, DECLARATION** or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine.

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RULE 17. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

A. Signing by Party or Attorney; Certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion or other paper

and state the address of the party. Pleadings need not be verified or accompanied by affidavit **OR DECLARATION**.

* * * * *

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits**, DECLARATIONS** and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present [~~evidence,~~] **AFFIDAVITS,**

DECLARATIONS, [~~and affidavits~~] **AND OTHER EVIDENCE,** and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment pursuant to subsection B(3) of Rule 54.

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RULE 47. SUMMARY JUDGMENT

A. For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits **OR DECLARATIONS**, for a summary judgment in that party's favor upon all or any part thereof.

B. For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits **OR DECLARATIONS**, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and Proceedings Thereon. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits **OR DECLARATIONS** and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall enter judgment for the moving party if the pleadings, depositions, affidavits **OR DECLARATIONS** and admissions on file show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit **OR DECLARATION** under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of Affidavits OR DECLARATIONS; Defense Required. Except as provided by section E of this rule, supporting and opposing affidavits **OR DECLARATIONS** shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant **OR DECLARANT** is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit **OR DECLARATION** shall be attached thereto or served therewith. The court may permit affidavits **OR DECLARATIONS** to be supplemented or opposed by depositions or further affidavits **OR DECLARATIONS**. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits**, DECLARATIONS** or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. Affidavit OR DECLARATION of Attorney When Expert Opinion

Required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit **OR DECLARATION** of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit **OR DECLARATION** shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit **OR DECLARATION**, would be a sufficient basis for denying the motion for summary judgment.

F. When Affidavits OR DECLARATIONS Are Unavailable. Should it appear from the affidavits **OR DECLARATIONS** of a party opposing the motion that such party cannot, for reasons stated, present by affidavit **OR DECLARATION** facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits **OR DECLARATIONS** to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

G. Affidavits OR DECLARATIONS Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits **O R DECLARATIONS** presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits **OR DECLARATIONS** caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may

be subject to sanctions for contempt.

RULE 52. POSTPONEMENT OF CASES

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B. Absence of Evidence. If a motion is made for postponement on the grounds of absence of evidence, the court may require the moving party to submit an affidavit **OR DECLARATION** stating the evidence which the moving party expects to obtain. If the adverse party admits that such evidence would be given and that it be considered as actually given at trial, or offered and overruled as improper, the trial shall not be postponed. However, the court may postpone the trial if, after the adverse party makes the admission described in this section, the moving party can show that such affidavit **OR DECLARATION** does not constitute an adequate substitute for the absent evidence. The court, when it allows the motion, may impose such conditions or terms upon the moving party as may be just.

RULE 55. SUBPOENA

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H. Hospital Records.

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H(2)(a) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by [~~the~~] **AN** affidavit **OR**

DECLARATION AS described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

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H(3) Affidavit OR DECLARATION of Custodian of Records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit **OR DECLARATION** of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant **OR DECLARANT** is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant **OR DECLARANT** shall so state in the affidavit **OR DECLARATION**, and shall send only those records of which the affiant **OR DECLARANT** has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit **OR DECLARATION**, more than one affidavit **OR DECLARATION** may be made.

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I. Medical Records.

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I(3) *Affidavit* **OR DECLARATION** *of Attorney.* If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or

other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit **OR DECLARATION** of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

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RULE 64. NEW TRIALS

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D. Specification of Grounds of Motion; When Motion Must Be on Affidavits OR DECLARATIONS. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) through (4) of section B of this rule, it shall be upon affidavit [~~,~~] **OR DECLARATION** setting forth the facts upon which the motion is based. If the cause is newly discovered evidence, the affidavits **OR DECLARATIONS** of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.

E. When Counteraffidavits OR COUNTERDECLARATIONS Are Allowed; Former Proceedings Considered. If the motion is supported by affidavits **OR DECLARATIONS**, counteraffidavits **OR COUNTERDECLARATIONS** may be offered by the adverse party. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case prior to the verdict or other decision sought to be set aside.

F. Time of Motion; Counteraffidavits OR COUNTERDECLARATIONS; Hearing and Determination. A motion to set aside a judgment and for a new trial, with the affidavits **OR DECLARATIONS**, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits **OR COUNTERDECLARATIONS**, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

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RULE 68. ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS

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C. Award of and Entry of Judgment for Attorney Fees and Costs and Disbursements.

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C(4) *Procedure for Seeking Attorney Fees or Costs and Disbursements.* The procedure for seeking attorney fees or costs and disbursements shall be as follows:

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C(4)(c) Hearing on Objections.

C(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, **DECLARATIONS, AND OTHER EVIDENCE** relevant to any factual issue.

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RULE 69. DEFAULT ORDERS AND JUDGMENTS

A. Entry of Order of Default.

A(1) *In General.* When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit, **DECLARATION** or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

A(2) *Certain Motor Vehicle Cases.* Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an affidavit **OR DECLARATION** showing:

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B. Entry of Default Judgment.

B(1) *By the Court or the Clerk.* The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

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B(1)(d) The party seeking judgment submits an affidavit **OR DECLARATION** stating that, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005;

B(1)(e) The party seeking judgment submits an affidavit **OR DECLARATION** of the amount due;

B(1)(f) An affidavit **OR DECLARATION** pursuant to subsection B(3) of this rule has been submitted; and

* * * * *

B(2) *By the Court.* In cases other than those cases described in subsection (1) of this section, the party seeking judgment must apply to the court for judgment by default. The party seeking judgment must submit the affidavit **O R DECLARATION** required by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking judgment, the party against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005 or a respondent as defined in ORS 125.005. If the party seeking judgment cannot submit an affidavit **OR DECLARATION** under this subsection, a default judgment may be entered against the other party only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits **OR DECLARATIONS**.

B(3) *Amount of Judgment.* The judgment entered shall be for the amount due as sown by the affidavit **OR DECLARATION**, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B(4) *Non-military Affidavit* **OR DECLARATION** *Required.* No judgment by default shall be entered until the filing of an affidavit **OR DECLARATION** on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

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RULE 70. FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing plainly titled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, **DECLARATIONS,** certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof.

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RULE 79. TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

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B. Temporary Restraining Order.

B(1) *Notice.* A temporary restraining order may be granted without written or oral notice to the adverse party or to such party's attorney only if:

B(1)(a) It clearly appears from specific facts shown by affidavit, **DECLARATION** or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the

adverse party's attorney can be heard in opposition, and

B(1)(b) The applicant or applicant's attorney submits an affidavit **OR DECLARATION** setting forth the efforts, if any, which have been made to notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit **OR DECLARATION** required in this paragraph shall not be required for orders granted by authority of ORS 107.095(1)(c), (d), (e), (f) or (g).

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RULE 82. SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF SURETIES

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E. Affidavits OR DECLARATIONS of Sureties.

E(1) *Individuals.* The bond or undertaking must contain an affidavit **OR DECLARATION** of each surety which shall state that such surety possesses the qualifications prescribed by section D of this rule.

E(2) *Corporations.* The bond or undertaking of a corporate surety must contain affidavits **OR DECLARATIONS** showing the authority of the agent to act for the corporation and stating that the corporation is qualified to issue surety insurance as defined in ORS 731.186.

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RULE 83. PROVISIONAL PROCESS

A. Requirements for Issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits **OR DECLARATIONS** requesting specific provisional process and

showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

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C. Evidence Admissible; Choice of Remedies Available to Court.

C(1) The court shall consider the affidavit**, DECLARATION** or petition filed under section A of this rule and may consider other evidence including, but not limited to, an affidavit, **DECLARATION,** deposition, exhibit, or oral testimony.

C(2) If from the affidavit**, DECLARATION** or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of provisional process, as provided in section D or E of this rule, or a restraining order, as provided in section F of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

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G. Appearance; Hearing; Service of Show Cause Order; Content; Effect of Service on Person in Possession of Property.

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G(3) The order shall:

G(3)(a) State that the defendant may file affidavits **OR DECLARATIONS** with the court and may present testimony at the hearing; and

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ATTACHMENT C TO 5-11-02 MEETING AGENDA

The following amendment to Rule 43, which would add a new section 43 E, is proposed:

E. Duty to Supplement Response. A party having complied[1] with a request under this rule is under a continuing duty seasonably[2] to supplement without further request such response by producing for inspection and copying [3]documents or other tangible things[3] designated in the request which come into the possession, custody, or control of the party subsequently to such response.

[1]"[C]omply with the request" is the language used in section 43 B.

[2]"Weasel words" are indispenable tools in drafting rules or statutes, and "seasonably" is among the most elegant in that select company. It cannot be improved upon, neatly conveying in a single word the same thought for which "within a reasonable time" requires four. It means: "leave it to the good sense of the judges on a case-by-case basis because anything more precise or confining would be counterproductive." An illustration, Fed. R. Civ. Pro. 26(e)(2), reads: "A party is under a duty seasonably to amend a prior response to . . . a request for production, ..."

[3]---[3]Substituted for "information" and "after-acquired information" in the previous draft because Rule 43 authorizes requests for "documents or other tangible things," not "information" as such unless embodied in a pre-existing document, etc. *See Union Pacific Railroad Co. v. Crookham,* 295 Or 66, 68, 663 P2d 763 (1983). This also eliminates the need for "and ~~b~~ (ii) the party has not otherwise disclosed the after-acquired information to the requesting party in writing."

At the April 13 meeting the Council seemed more or less agreed it doesn't matter that, unsurprisingly, nowhere in the ORCP, including in particular Rule 46, is there any sanction expressly provided for violating the duty new section 43 E would impose. Should the Council change its mind about this, and sensibly conclude that no provision of the ORCP discovery rules should impose a duty for violation of which no sanction is authorized, the following amendment to Rule 46 would quite easily supply this lack:

{Matter to be added in **bold underlined**}

[46] **D. Failure of Party to Attend at Own Deposition or to Respond to Request for Inspection or to Inform of Question Regarding the Existence of Coverage of Liability Insurance Policy.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C(6) or 40 A to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among other it may take any action authorized under subsection B(2)(a), (b), and (c) of this rule. **Failure to comply with the duty imposed by section E of Rule 43 which the court finds has substantially[3] prejudiced the party requesting production shall be treated as failure to comply with such request.** In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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[3]Another indispensable weasel word.

Attachment D to Agenda of May 11, 2002 Meeting: Proposed Technical Amendment

The statutory reference in ORCP 62 F should be changed from ORS 19.125 to ORS 19.415(3) to reflect the renumbering of sections of ORS chapter 19 in 1997.