

**\*\*\*NOTICE\*\*\***  
**PUBLIC MEETING**  
**COUNCIL ON COURT PROCEDURES**

Saturday, June 8, 2002  
Oregon State Bar Center  
5200 Southwest Meadows Road  
Lake Oswego, Oregon

**AGENDA**

1. Call to order (Mr. Spooner)
2. Approval of 5-11-02 minutes (attached)
3. Progress reports, discussion, and recommendations regarding current ORCP amendment projects (Mr. Spooner):
  - 3a. From the Medical Records Committee (Mr. Merrick)
  - 3b. From the Jury Innovation Committee (Judge Harris)
  - 3c. Possible amendment of ORCP 43 to impose continuing duty to supplement responses to requests for production of documents, etc. (Mr. Sugerman)
4. Old business (Mr. Spooner):
  - 4a. Possible need to amend ORCP 70 A(2)(a)(ii) (Judge Carp)
  - 4b. Technical amendment of ORCP 27 B (see Attachment 4b) (Judge Rasmussen)
  - 4c. Proposal to amend ORCP 34 B(2) (see Attachment 4c) (Mr. Brothers)
  - 4d. Proposed ORS and ORCP amendments re use of declarations (see Attachment 4d) (Prof. Holland) (for information only)
5. New business (Mr. Spooner):
  - 5a. Proposal to amend ORS 1.735 (see Attachment 5a)

*Agenda of June 8, 2002 Meeting, cont'd.*

- 5b. Agreement regarding scheduled July 13 and August 10 meeting dates (Mr. Spooner)
- 6. Adjournment (Mr. Spooner)

**Note**

The following ORCP amendments have been approved to date for tentative adoption for publication and comment at the Council's 9-14-02 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 subparagraph:  
  
", 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.)
3. Technical amendment to ORCP 62 F changing statutory reference from "ORS 19.125" to "ORS 19.415(3)." (See minutes of 5-11-02 meeting at p. 3.)



**COUNCIL ON COURT PROCEDURES**

Minutes of Meeting of May 11, 2002

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present: Benjamin M. Bloom Nely L. Johnson  
Eugene H. Buckle Nicolette D. Johnston  
Kathryn H. Clarke Alexander D. Libmann  
Allan H. Coon Connie Elkins McKelvey  
Don A. Dickey Jeffrey S. Merrick  
Robert D. Durham Ralph C. Spooner  
Daniel L. Harris David F. Sugerman  
Rodger J. Isaacson John L. Svoboda

Excused: Lisa A. Amato  
Richard L. Barron  
Bruce J. Brothers  
Ted Carp  
Karsten Hans Rasmussen  
Shelley D. Russell  
David Schuman

Also present were: Bob Oleson, Public Affairs Director, Oregon State Bar; Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

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**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 April 13, 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).\***

\*Sub-items under Agenda Item 3 were, without objection, taken up out of the order shown in the agenda of this meeting.

**3d. Proposal to authorize use of declarations as alternatives to affidavits throughout the ORCP (see Attachment B to agenda of this meeting) (Prof. Holland).** Prof. Holland reported that he had attended the May 3 meeting of the Oregon State Bar Practice & Procedure Committee (P&PC) to request that it consider and approve the proposed ORS and ORCP amendments shown in Attachment B for forwarding to the Board of Governors for its approval as a legislative package for pre-session filing and sponsorship by the Oregon State Bar (OSB) in the 2003 Legislative Assembly. He explained that he had acted in this unusual manner because May 3 was the date of the last meeting of the P&PC and of the Board of Governors before the May 15 deadline by which legislative proposals for pre-session filing by the OSB must reach the Office of Legislative Counsel. He also noted that it had seemed important to him that both the ORS and the ORCP amendments be contained in the same bill to avoid any possibility of one, but not the other, becoming law.

Prof. Holland further explained that he had made clear to the P&PC that, although it was generally favorable to authorizing optional use of declarations in lieu of affidavits, the Council had not yet approved the specific language of the ORS and ORCP amendments contained in Attachment B, and also informed the P&PC that, if the Council subsequently decided to disapprove or change any of those amendments, he would immediately so notify Ms. Susan Evans Grabe so that they could be recalled or modified accordingly. On that understanding the P&PC endorsed the proposed amendments, which were subsequently approved by the Board of Governors.\*\*

Judge Johnson suggested that the following language be added at the end of proposed ORS 45.025: "A declaration may be submitted in place of, or instead of, an affidavit whenever the use of an affidavit is permitted or required." However, several members questioned whether an amendment of that sort, which would appear to authorize use of declarations in a wide variety of contexts remote from the ORCP, such as in search warrant applications or attestations of wills, would be advisable. There followed a lengthy discussion of whether any ORS amendments authorizing use of declarations should be limited to the context of the ORCP as opposed to being more general and open-ended.

No motion to amend was offered, but there was general agreement that any statutory amendments should be limited to the specific purpose within the Council's charge; that is, limited to authorizing use of declarations in lieu of affidavits at all places in the ORCP where the latter are now called for. The reason expressed for thus limiting the scope of proposed ORS

\*\*The final version of these ORS and ORCP amendments as forwarded to the Legislative Counsel is as shown in Attachment B to this meeting agenda modified as shown in the document entitled "May 14, 2002. By FAX to Susan Evans Grabe from Maury Holland," filed with the original of these minutes.

amendments was that the Council's function has to do with the ORCP, not general law reform, and is not in a position to undertake the broad inquiries and consultations that would be appropriate in connection with statutory changes of a more encompassing character. A minority of members, however, expressed a preference for not limiting any statutory amendment to use of declarations in the context of the ORCP.

Discussion followed as to whether use of declarations under penalty of perjury might open up some problems not presented by affidavits. Mr. Sugerman observed that notaries are required to confirm the identity of affiants. Judge Harris commented that he had never known an affidavit to be challenged on the basis of doubts about the actual identity of the affiant. Justice Durham stated that he favored changing the language of proposed ORS 45.025 to the active voice in order to make clear who is exercising the authority it would confer.

Discussion of this item concluded with general agreement that Prof. Holland would undertake to revise the proposed ORS amendments to reflect the comments and suggestions raised in the course of it, and get any such revisions to Ms. Grabe not later than May 14. No revisions of the proposed ORCP amendments set forth in Attachment B were suggested.

**3a. Proposal to amend ORCP 34 B(2) (see Attachment A to agenda of this meeting) (Mr. Brothers).** Without objection the Council decided to postpone further consideration of this sub-item until a meeting when Mr. Brothers could be present.

**3b. Report of Jury Innovation Committee (Judge Harris).** Judge Harris reported that this committee had considered the following three possible changes to the alternate juror rule, ORCP 57 F: i. an amendment adopting something like the method used in federal court whereby additional regular jurors are seated in cases where that is deemed appropriate and there are no alternate jurors; ii. an amendment adopting the method used in a few states such as Michigan and Arizona whereby 14 jurors are selected at the outset of the case, the names of all placed in a container, and there is a blind selection of two jurors to be excused as alternates before the jury is sent out to begin deliberations; and iii. retain the present section 57 F except that alternates would not be informed that they are such until the jury is sent out to deliberate, but counsel would know of their identities from the outset of trial. He stated that the committee had early concluded that an amendment along the lines of i. was out of the question given the characteristics of Oregon civil juries, and that there was little or no support for an amendment along the lines of ii.

Judge Harris indicated that the committee would prepare some specific amending language to be added to section 57 F for the Council's consideration at its 6-8-02 meeting. Judge Dickey stated that he was not inclined to favor any amendment to section 57 F because, whatever the findings of the "Williamsburg Study" by the Council on State Courts might have been, he had not

observed any problem about jurors aware from the outset that they were alternates not paying close attention to the evidence. Judge Coon commented that his experience had been the same as Judge Dickey's. Justice Durham suggested dealing with any possible disappointment on the part of alternates at being excluded from deliberations by counsel stipulating that alternates could participate in them. Judge Harris stated that, in light of members' comments, he had become inclined to think that perhaps no amendment regarding alternate jurors was warranted at this time.

Judge Harris further reported that this committee had considered the advisability of amending ORCP 59 B to require that written instructions be prepared and copies provided to jurors in all cases. He added that all committee members agreed in believing that written instructions are highly desirable, and that his inquiries of jurors in his court indicated that they like to have written instructions with them during deliberations. Justice Durham commented that his observation of jury behavior when a trial lawyer was that juries sometimes had great difficulty following complicated instructions.

Judge Coon observed that not all cases involve complicated, difficult-to-follow instructions on the law, and therefore thought any amendment should preserve trial court discretion regarding this matter. Ms. Johnston stated that she had once been a juror in a medical malpractice case where written instructions would have been most helpful. Judge Dickey stated that he thought it important that trial court discretion be preserved, since there are some cases where requiring written instructions would be foolish, adding that there are some districts lacking staff support to get instructions in written form in time. He further stated that, if either party so requests, instructions could be electronically recorded. Mr. Svoboda suggested that, if written instructions are to be required, the amendment should provide that written copies be provided to jurors before the judge gives oral instructions so that a dual learning process would occur.

Discussion of this sub-item concluded by Judge Harris's observing that there remained some hurdles to overcome, and that in consultation with the committee he would work on some amending language for the Council to consider at the 6-8-02 meeting unless his consultation led him to conclude that no amendment is called for. He also observed that it might be useful if a Staff Comment emphasized the value of written instructions in cases where oral instructions alone might leave the jury confused.

**3c. Report of Medical Records Committee (Mr. Merrick).** Mr. Merrick reported that he believed the committee was then within one more meeting, and a bit more tweaking of amending language, of producing amendments that would conform our rules with HIPAA regulations for the Council's consideration at the 6-8-02 meeting. Ms. Clarke commented that, beyond achieving its most urgent goal of achieving conformity with HIPAA, this committee had developed some other ideas by which other health care records discovery problems that have long divided the plaintiffs and defense bars might be fairly compromised and resolved.

**3e. Proposed amendment to ORCP 43 (see Attachment C to agenda of this meeting) (Mr. Sugerman).** Mr. Sugerman stated that these proposed amendments had been drafted by Prof. Holland, and added that he agreed with the need for a sanction to deal with violations of a new supplementation duty. Several members commented that they found the draft language awkward and unsatisfactory, and suggested it should be simplified. Mr. Merrick suggested wording along the lines of "a party has a continuing duty to respond to a request for production within a reasonable time after . . ." Ms. Clarke suggested: "A party has a continuing duty to respond to a request . . ." and leaving out the language about "having complied."

Mr. Sugerman said that, in light of these comments, he would rework the language of this amendment and have it in form for consideration by the Council at the 6-8-02 meeting.

**3f. Technical amendment: Proposed amendment to ORCP 62 F (see Attachment D) (Prof. Holland).** Prof. Holland said that the need for this amendment had been called to his attention by Mr. Bloom in order to change the statutory reference from ORS 19.125 to ORS 19.415(3). Without objection this amendment was approved for inclusion on the agenda of the 9-14-02 meeting for tentative adoption for publication and comment.

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

**4a. Proposal to amend ORCP 44 regarding conditions of court-ordered physical or mental examinations (Ms. Clarke).** Ms. Clarke suggested that this item be tabled for the present time, with which suggestion no disagreement was expressed.

**4b. Report regarding possible need to amend ORCP 70 A(2)(a)(ii) (Judge Carp).** In Judge Carp's absence it was without objection agreed to defer further consideration of this item to the 6-8-02 Council meeting.

**Agenda Item 5: New business (Mr. Spooner).** No item of new business was raised. Prof. Holland distributed copies of ORS 12.220 as proposed to be amended by the Oregon Law Commission for the information of members.

**Agenda Item 6: Adjournment.** Without objection Mr. Spooner declared the meeting adjourned at 11:40 a.m.

Respectfully submitted,

Maury Holland  
Executive Director

Attachment 3a to 6-8-02 Meeting Agenda {Matter to be added in **bold underlined**; matter to be deleted in ~~[strikeout enclosed in square brackets]~~}

RULE 44

\* \* \* \* \*

**E Access to ~~[Hospital Records,]~~ 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]~~ individually 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]~~ may be obtained by written patient authorization or by subpoena in accordance with Rule 55 H.

RULE 55

\* \* \* \* \*

**H. ~~[Hospital Records]~~ Individually Identifiable Health Information.**

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.]~~

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

H(1)(a) "Individually identifiable health information" means information which identifies an individual or which<sup>1</sup> could be used to identify an individual and which has

<sup>1</sup>Suggested to be added by MH.

1 been collected from an individual and created or received by a  
2 health care provider, health plan, employer, or health care  
3 clearinghouse which relates to the past, present or  
4 future physical or mental health or condition of an individual;  
5 the provision of health care to an individual; or the past,  
6 present, or future payment for the provision of health care to an  
7 individual.

8 H(1)(b) "Qualified protective order" means an order of the  
9 court, by stipulation of the parties to the litigation or  
10 otherwise, that prohibits the parties from using or disclosing  
11 individually identifiable health information for any purpose other  
12 than the litigation for which such information was requested and  
13 which requires the return to the original custodian of such  
14 information or destruction of the individually identifiable health  
15 information (including all copies made) at the end of the  
16 litigation.

17 H(1)(c) "Satisfactory assurance" means an affidavit or  
18 declaration and supporting documentation from a party issuing a  
19 subpoena for individually identifiable health information  
20 demonstrating that:

21 H(1)(c)(i) The party has made a good faith attempt to  
22 provide written notice to the individual or the individual's  
23 attorney that the individual or the<sup>2</sup> attorney had 14 days from the  
24 date of the notice to object; and

25 H(1)(c)(i)(a)<sup>3</sup> The notice included the proposed subpoena and  
26 sufficient information about the litigation in which the  
27 individually identifiable health information was being requested  
28 to permit the individual<sup>4</sup> or the individual's attorney<sup>4</sup> to raise an  
29 objection to the court; and

30 H(1)(c)(i)(b)<sup>5</sup> The individual did not object within the 14  
31 days or, if objections were made, they were resolved by the court  
32 and the information being sought is consistent with such

1 resolution; or

2<sup>2</sup>Suggest this be added. MH.

3<sup>3</sup>Suggest this be corrected to "H(1)(c)(ii)." See ORCP 1 E.  
MH.

4<sup>4</sup>---<sup>4</sup>Suggest this be added. MH.

5<sup>5</sup>Suggest this be corrected to "H(1)(c)(iii)." See ORCP 1 E.  
MH.

1 H(1)(c)(ii)<sup>6</sup> The production is allowed pursuant to a qualified  
2 protective order.

3 Nothing in these definitions or in this rule is intended to  
4 expand the scope of discovery beyond that provided in Rule 36 or  
5 44 with respect to individually identifiable health information.

6 H(2) *Mode of Compliance.* [~~Hospital records~~] Individually  
7 identifiable health information may be obtained by subpoena only  
8 as provided in this section. However, if disclosure of any  
9 requested records is restricted or otherwise limited by state or  
10 federal law, then the protected records shall not be disclosed in  
11 response to the subpoena unless the requirements of the pertinent  
12 law have been complied with [~~and such compliance is evidenced~~  
13 ~~through an appropriate court order or through execution of an~~  
14 ~~appropriate consent. Absent such consent or court order,~~  
15 ~~production of the requested records not so protected shall be~~  
16 ~~considered production of the records responsive to the subpoena.~~  
17 ~~If an appropriate consent or court order does accompany the~~  
18 ~~subpoena, then production of all records requested shall be~~  
19 ~~considered production of the records responsive to the subpoena].~~

20 H(2)(a) [~~Except as provided in subsection (4) of this~~  
21 ~~section, when a subpoena is served upon a custodian of hospital~~  
22 ~~records in an action in which the hospital is not a party, and the~~  
23 ~~subpoena requires the production of all or part of the records of~~  
24 ~~the hospital relating to the care or treatment of a patient at the~~

1 ~~hospital, it is sufficient compliance therewith if a custodian~~  
2 ~~delivers by mail or otherwise a true and correct copy of all the~~  
3 ~~records responsive to the subpoena within five days after receipt~~  
4 ~~thereof. Delivery shall be accompanied by the affidavit described~~  
5 ~~in subsection (3) of this section. The copy may be photographic~~  
6 ~~or microphotographic reproduction.] The attorney for the party~~  
7 issuing a subpoena requesting production of individually  
8 identifiable health information must serve the custodian or other  
9 keeper of

<sup>6</sup>If suggested corrections <sup>3</sup> and <sup>5</sup> above are accepted, this would become "H(1)(c)(iv)."

1 such information with an affidavit or declaration providing  
2 satisfactory assurance,<sup>7</sup> that production is permitted. Supporting  
3 documentation, including any referenced written notice or court  
4 order,<sup>8</sup> must be attached to the affidavit or declaration.

5 H(2)(b) [~~The copy of the records shall be separately~~  
6 ~~enclosed in a sealed envelope or wrapper on which the title and~~  
7 ~~number of the action, name of the witness, and date of the~~  
8 ~~subpoena are clearly inscribed. The sealed envelope or wrapper~~  
9 ~~shall be enclosed in an outer envelope or wrapper and sealed. The~~  
10 ~~outer envelope or wrapper shall be addressed as follows: (i) if~~  
11 ~~the subpoena directs attendance at court, to the clerk of the~~  
12 ~~court, or to the judge thereof if there is no clerk; (ii) if the~~  
13 ~~subpoena directs attendance at a deposition or other hearing, to~~  
14 ~~the officer administering the oath for the deposition, at the~~  
15 ~~place designated in the subpoena for the taking of the deposition~~  
16 ~~or at the officer's place of business; (iii) in other cases~~  
17 ~~involving a hearing, the officer or body conducting the hearing at~~  
18 ~~the official place of business; (iv) if no hearing is scheduled,~~  
19 ~~to the attorney or party issuing the subpoena. If the subpoena~~  
20 ~~directs delivery of the records in accordance with subparagraph~~  
21 ~~H(2)(b)(iv), then a copy of the subpoena shall be served on the~~

1 ~~person whose records are sought and on all other parties to the~~  
2 ~~litigation, not less than 14 days prior to service of the subpoena~~  
3 ~~on the hospital.]~~ Except as provided in subsection (4) of this  
4 section, when a subpoena is served upon a custodian of  
5 individually identifiable health information in an action in which  
6 the entity or person is not a party, and the subpoena requires the  
7 production of all or part of the records of the entity or person  
8 relating to the care or treatment of an individual, it is  
9 sufficient compliance therewith if a custodian delivers by mail or  
10 otherwise a true and correct copy of all the records responsive to  
11 the subpoena within five days after receipt thereof. Delivery  
12 shall be accompanied by the affidavit described in subsection (3)  
13 of this section.

14 H(2)(c) [~~After filing and after giving reasonable notice in~~  
15 ~~writing to all parties who have appeared of the time and place of~~  
16 ~~inspection, the copy of the records may be inspected by any~~

<sup>7</sup>Suggest this comma be deleted. MH.

<sup>8</sup>Suggest this comma be added. MH.

1 ~~party or the attorney of record of a party in the presence of the~~  
2 ~~custodian of the court files, but otherwise shall remain sealed~~  
3 ~~and shall be opened only at the time of trial, deposition, or~~  
4 ~~other hearing, at the direction of the judge, officer, or body~~  
5 ~~conducting the proceeding. The records shall be opened in the~~  
6 ~~presence of all parties who have appeared in person or by counsel~~  
7 ~~at the trial, deposition, or hearing. Records which are not~~  
8 ~~introduced in evidence or required as part of the record shall be~~  
9 ~~returned to the custodian of hospital records who submitted them.]~~  
10 The copy of the records shall be separately enclosed in a sealed  
11 envelope or wrapper on which the title and number of the action,  
12 name of the witness, and date of the subpoena are clearly  
13 inscribed. The sealed envelope or wrapper shall be enclosed in an  
14 outer envelope or wrapper and sealed. The outer envelope or  
15 wrapper shall be addressed as follows: (i) if the subpoena

1 directs attendance at court, to the clerk of the court, or to the  
2 judge thereof if there is no clerk; (ii) if the subpoena directs  
3 attendance at a deposition or other hearing, to the officer  
4 administering the oath for the deposition, at the place designated  
5 in the subpoena for the taking of the deposition or at the  
6 officer's place of business; (iii) in other cases involving a  
7 hearing, the officer or body conducting the hearing at the  
8 official place of business; (iv) if no hearing is scheduled, to  
9 the attorney or party issuing the subpoena. If the subpoena  
10 directs delivery of the records in accordance with subparagraph  
11 H(2)(b)(c)(iv),<sup>9</sup> then a copy of the subpoena shall be served on the  
12 person whose records are sought and on all other parties to the  
13 litigation, not less than 14 days prior to service of the subpoena  
14 on the hospital.

15 H(2)(d) [~~For purposes of this section, the subpoena duces~~  
16 ~~tecum to the custodian of the records may be served by first class~~  
17 ~~mail. Service of subpoena by mail under this section shall not be~~  
18 ~~subject to the requirements of subsection (3) of section D of this~~  
19 ~~rule.] After filing and after giving reasonable notice in  
20 writing to all parties who have appeared of the time and place of  
21 inspection, the copy of the records may be inspected by any party  
22 or the attorney of record of a party in the presence of the  
23 custodian of the court files, but otherwise shall~~

<sup>9</sup>This should be corrected to "H(2)(c)(iv)." MH.

1 remain sealed and shall be opened only at the time of trial,  
2 deposition, or other hearing, at the direction of the judge,  
3 officer, or body conducting the proceeding. The records shall be  
4 opened in the presence of all parties who have appeared in person  
5 or by counsel at the trial, deposition, or hearing. Records which  
6 are not introduced in evidence or required as part of the record  
7 shall be returned to the custodian of hospital records who  
8 submitted them.

1           H(2)(d)(e)<sup>10</sup> For purposes of this section, the subpoena duces  
2 tecum to the custodian of the records may be served by first class  
3 mail. Service of subpoena by mail under this section shall not be  
4 subject to the requirements of subsection (3) of section D of this  
5 rule.

11 H(3) Affidavit or Declaration of Custodian of Records.

12           H(3)(a) The records described in subsection (2) of this  
13 section shall be accompanied by the affidavit or declaration of a  
14 custodian of the [~~hospital~~] records, stating in substance each of  
15 the following: (i) that the affiant or declarant is a duly  
16 authorized custodian of the records and has authority to certify  
17 records; (ii) that the copy is a true copy of all the records  
18 responsive to the subpoena; (iii) that the records were prepared  
19 by the personnel of the [~~hospital, staff physicians, or~~] entity or  
20 <sup>11</sup>person[s] acting under the control of either, in the ordinary  
21 course of [~~hospital~~] entity or person's business,<sup>11</sup> at or near the  
22 time of the act, condition, or event described or referred to  
23 therein.

24           H(3)(b) If the [~~hospital~~] entity or person has none of the  
25 records described in the subpoena, or only a part thereof, the  
26 affiant <sup>12</sup>or declarant<sup>12</sup> shall so state in the affidavit or  
27 declaration and shall send only those records of which the affiant  
28 <sup>12</sup>or declarant<sup>12</sup> has custody.

<sup>10</sup>Should be corrected to "H(2)(e)."

<sup>11</sup>---<sup>11</sup>I think this might need some rewording. MH.

<sup>12</sup>---<sup>12</sup>Added by MH.

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

3 H(4) *Personal Attendance of Custodian of Records May Be Required.*

4 H(4)(a) The personal attendance of a custodian of [~~hospital~~]  
5 records and the production of original [~~hospital~~] records is  
6 required if the subpoena duces tecum contains the following  
7 statement:

8 The personal attendance of a custodian of [~~hospital~~] records  
9 and the production of original records is required by this  
10 subpoena. The procedure authorized pursuant to Oregon Rules of  
11 Civil Procedure 55 H(2) shall not be deemed sufficient compliance  
12 with this subpoena.

13 H(4)(b) If more than one subpoena duces tecum is served on a  
14 custodian of [~~hospital~~] records and personal attendance is  
15 required of each pursuant to paragraph (a) of this subsection, the  
16 custodian shall be deemed to be the witness of the party serving  
17 the first such subpoena.

18 \* \* \* \* \*

19 **1. Medical Records.**

20 \* \* \* \* \*

21 <sup>13</sup>I(4) *Application.* The requirements of this section apply  
22 only to subpoenas duces tecum for patient care and health care  
23 records kept by a licensed, registered or certified health  
24 practitioner as described in ORS 18.550, a health care service  
25 contractor as defined in ORS 750.005, a home health agency  
26 licensed under ORS chapter 443 or a hospice program licensed,  
27 certified or accredited under ORS chapter 443.<sup>13</sup>

13---13The version of the above amendments I received by e-mail  
is unclear about whether or not the Committee intends to delete  
this entire subsection.

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):

1 **Rule 27 Minor or Incapacitated Parties**

2 \* \* \*

3 **B. APPEARANCE OF INCAPACITATED PERSON BY CONSERVATOR OR GUARDIAN**

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

13 \* \* \*

1--1Alternative A

2--2Alternative 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).}

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 3c to 6-8-02 Council Meeting Agenda (Matter to be added in bold underlined)

The following two alternative versions of proposed amendments to ORCP 43 B have been prepared by Mr. Sugerman:

ALTERNATIVE A

RULE 43

1 \* \* \* \* \*

2 **B Procedure.** The request may be served upon the plaintiff after  
3 commencement of the action and upon any other party with or after  
4 service of the summons upon that party. The request shall set  
5 forth the items to be inspected either by individual item or by  
6 category and describe each item and category with reasonable  
7 particularity. The request shall specify a reasonable time,  
8 place, and manner of making the inspection and performing the  
9 related acts. A defendant shall not be required to produce or  
10 allow inspection or other related acts before the expiration of 45  
11 days after service of summons, unless the court specifies a  
12 shorter time. The party upon whom a request has been served shall  
13 comply with the request, unless the request is objected to with a  
14 statement of reasons for each objection before the time specified  
15 in the request for inspection and performing the related acts. If  
16 objection is made to part of an item or category, the part shall  
17 be specified. The party upon whom a request has been served has a  
18 continuing duty to respond to the request by supplementing  
19 production of responsive documents or things within a reasonable  
20 time. The party submitting the request may move for an order  
21 under Rule 46 A with respect to any objection to or other failure  
22 to respond to the request or any part thereof, any failure to  
23 supplement a response to a request, or any failure to permit  
24 inspection as requested.

25 \* \* \* \* \*

3c

ALTERNATIVE B

RULE 43

1 \* \* \* \* \*

2 **B Procedure.** The request may be served upon the plaintiff after  
3 commencement of the action and upon any other party with or after  
4 service of the summons upon that party. The request shall set  
5 forth the items to be inspected either by individual item or by  
6 category and describe each item and category with reasonable  
7 particularity. The request shall specify a reasonable time,  
8 place, and manner of making the inspection and performing the  
9 related acts. A defendant shall not be required to produce or  
10 allow inspection or other related acts before the expiration of 45  
11 days after service of summons, unless the court specifies a  
12 shorter time. The party upon whom a request has been served shall  
13 comply with the request, unless the request is objected to with a  
14 statement of reasons for each objection before the time specified  
15 in the request for inspection and performing the related acts. If  
16 objection is made to part of an item or category, the part shall  
17 be specified. Requests made under this rule shall be treated as  
18 continuing requests. Responding parties shall supplement the  
19 production of documents or things covered by the request by  
20 providing responsive documents or things within a reasonable time.  
21 The party submitting the request may move for an order under Rule  
22 46 A with respect to any objection to or other failure to respond  
23 to the request or any part thereof, any failure to supplement a  
24 response to a request, or any failure to permit inspection as  
25 requested.

26 \* \* \* \* \*

May 14, 2002. By FAX to Susan Evans Grabe from Maury Holland.

{Note: The purpose of the proposed ORS and ORCP amendments shown below is to authorize use of declarations under penalty of perjury as an optional alternative to use of affidavits at each point in the ORCP which presently call for use only of affidavits.

THE ONLY PROPOSED AMENDMENTS SHOWN BELOW ARE THOSE WHICH DIFFER FROM THOSE SHOWN IN "ATTACHMENT B TO AGENDA OF 5-11-02 MEETING." IN OTHER WORDS, APART FROM THE AMENDMENTS SHOWN BELOW, THE AMENDMENTS PROPOSED TO THE ORS AND THE ORCP REMAIN THE SAME AS CONTAINED IN "ATTACHMENT B TO AGENDA OF 5-11-02 MEETING.\*}

Matter to be added in **bold underlined**; to be deleted in [~~strikeover enclosed in square brackets~~]:

**Proposed ORS Amendments**

1. **45.010 Testimony taken by [~~five~~] six modes.**  
\* \* \* \* \*  
**(6) Declaration under penalty of perjury as defined by ORS 45.025.**
  
2. **45.025 Declaration under penalty of perjury defined. A "declaration under penalty of perjury" is a statement, written or adopted and subscribed by the declarant, made for use as permitted by the Oregon Rules of Civil Procedure, wherein the following words appear prominently in typed letters immediately above the declarant's signature: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and therefore made subject to the penalty for perjury."**
  
3. **45.130 Production of affiant or declarant for cross-examination.** Whenever a provisional remedy has been allowed upon affidavit[~~;~~] **or declaration under**

\*Susan, please ignore the third correction shown on "Corrections to ATTACHMENT B to May 11, 2002 Meeting Agenda (for Distribution at the Meeting)," a copy of which I gave to Bob Oleson at the meeting to pass on to you. The Council can and presumably will promulgate the amendment to ORCP 47 C referred to in the usual fashion.

penalty of perjury, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant 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 under penalty of perjury and all proceedings founded thereon, unless within eight days, or such 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 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 [~~a witness~~] an affiant or declarant except within the county where the provisional remedy was allowed.

4. **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 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 is a question of law.~~] **A "declaration" means a statement as defined by subsection (4) of this section which complies with the definition of a declaration under penalty of perjury by 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 is a question of law.

[~~(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.

5. {Susan, please don't forget the amendment to ORS 162.065 shown at the bottom of p. 4 of "Attachment B, etc."}

**[Proposed ORCP amendments begin on next page]**

**Proposed ORCP Amendments**

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

\* \* \* \* \*

**F Definition of declaration. As used throughout these rules "declaration" means a declaration under penalty of perjury as defined by ORS 45.025.**

2. RULE 7. SUMMONS.

\* \* \* \* \* {Susan, please don't overlook the amendment to 7 D(6)(a) shown on p. 5 of Attachment B to the Agenda of the 5-11-02 Meeting.}

**F Return; proof of service.**

\* \* \* \* \*

F(2)(b) **Publication.** Service by publication shall be proved [~~by an affidavit~~]  
**by declaration or by affidavit** in substantially the following form:

\* \* \* \* \*

F(2)(d) **Form of certificate, declaration or affidavit.** A certificate, **declaration** or affidavit containing proof of service may be made upon the summons or as a separate document attached to the summons.

\* \* \* \* \*

{Note: Susan, from this point on all proposed ORCP amendments are as shown on pp. 6-20 of Attachment B to the Agenda of the 5-11-02 meeting. As usual, many thanks to you and Bob for all your help and support without which we would certainly founder beneath the tempestuous waves of lawmaking in Oregon.}

c: Jeff Johnson

4d

PROPOSAL TO AMEND ORS 1.735

The Council on Court Procedures supports enactment of a bill amending ORS 1.735(2) in the following manner and invites public comment relating to it:

**1.735 Rules of procedure; limitation on scope and substance; submission of rules to members of bar and Legislative Assembly.**

(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant. The rules authorized by this section do not include rules of evidence and rules of appellate procedure. The rules thus adopted and any amendments which may be adopted from time to time, together with a list of statutory sections superseded thereby, shall be submitted to the Legislative Assembly at the beginning of each regular session and shall go into effect on January 1 following the close of that session unless the Legislative Assembly shall provide an earlier effective date. The Legislative Assembly may, by statute, amend, repeal or supplement any of the rules.

(2) A promulgation, amendment or repeal of a rule by the council is invalid and does not become effective unless the *[exact language of the proposed promulgation, modification or repeal is published or distributed to all members of the bar at least 30 days before the meeting at which final action is taken on the*

promulgation, modification or repeal] Council does the following:

(a) The council shall publish or distribute the exact language of the proposed promulgation, modification or repeal to all members of the bar at least 30 days before the meeting at which the council plans to take final action on the promulgation, modification or repeal, and

(b) If the council modifies a proposed promulgation, modification, or repeal of a rule at the meeting described in subsection 2(a) of this section, the council shall publish or distribute a notification of the modification to all members of the bar within 60 days after the meeting and to the Legislative Assembly when the council submits the proposed promulgation, amendment or repeal of a rule to the Legislative Assembly pursuant to subsection (1) of this section.