*** NOTICE ***
PUBLIC MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 14, 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 9-14-02 minutes (enclosed)**

3. **Proposed amendments to Oregon Rules of Civil Procedure (as published in Issue 22 of Oregon Appellate Courts Advance Sheets) (Mr. Spooner):**

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

    b) RULE 34 SUBSTITUTION OF PARTIES

    c) RULE 43 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

    d) RULE 47 SUMMARY JUDGMENT

    e) RULE 44 PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

    f) RULE 55 SUBPOENA

    g) RULE 59 INSTRUCTIONS TO JURY AND DELIBERATION

    h) RULE 62 FINDINGS OF FACT

    i) RULE 68 ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS

(agenda, continued)

4. **Suggestions regarding Staff Comments (mailing to follow)**

5. **Election of year 2003 officers**

6. **Election of Legislative Advisory Committee (LAC) for the 2003 Legislative Assembly**

7. **Old business: Proposed amendment to ORS 1.735(2) (enclosed) (for discussion)**

8. **New business**

9. **Adjournment**

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COUNCIL ON COURT PROCEDURES
Minutes of Meeting of September 14, 2002
5200 Southwest Meadows Road
Oregon State Bar
Lake Oswego, Oregon

Present:

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

NOTE: Nely L. Johnson appeared by speaker telephone.

Excused:

Lisa Amato
Gene Buckle
David Schuman

Susan Evans Grabe was a guest in attendance at the meeting. A guest, Attorney Bruce Hamlin, appeared by speaker telephone. Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Spooner, called the meeting to order at 9:35 a.m.

Agenda Item 2: Approval of minutes (attached). The minutes of the June 8, 2002 meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

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

On motion made and seconded, the amendments previously approved to ORCP 47 C, 62 F, and 68 C(4)(c)(i) were unanimously tentatively adopted for publication and comment.

Agenda Sub-item 5a: Proposed amendment to ORCP 21 A (see Attachment 5a to agenda of this meeting)* Mr. Spooner asked Mr. Hamlin to explain the purpose of this proposed amendment. Mr. Hamlin responded that this amendment was proposed in response to the prevailing opinion in *Black v. Arizala,* 182 Or App 16, 48 P3d 843 (2002), which held that the only permissible procedural method by which a defendant could seek dismissal of an action on the basis of a forum-selection clause was by motion for summary judgment. He stated that his contention was not that *Black* was wrongly decided under existing law, but that resorting to summary judgment in order to obtain enforcement of valid forum-selection clauses is unsound as a matter of policy.

Mr. Hamlin further stated that, by requiring a defendant to resort to summary judgment in order to get the benefit of a forum selection clause, the very purpose of such clauses--avoidance of litigation in other than the forum-selected by the parties--would be largely defeated. This would be particularly true, he added, in any case where the validity and enforceability of a forum-selection clause depends upon contested issues of fact, as it sometimes does when a plaintiff contends that it should not be enforced for such reasons as unconscionability or fraud. He pointed out that if forum-selection clauses can be invoked only by means of summary judgment, that would mean that, whenever their enforceability might turn upon contested facts, a defendant could not get the benefit of it except following discovery and trial, which would defeat their purpose.

Mr. Hamlin concluded by recommending that this problem be resolved by amending ORCP 21 A to add a new defense or objection that could be raised by pre-answer motion worded as follows: "(10) that retaining jurisdiction would contravene an enforceable forum-selection clause." He added that this amendment, in addition to facilitating the raising of a forum-selection clause defense at the earliest possible point in the litigation, would also make clear that, when contested issues of fact must be decided, they will be decided by the judge pursuant to the fifth sentence of section 21 A.

*Without objection, this item was taken up out of order to accommodate Judge Johnson and Mr. Hamlin, both of whom participated in the meeting by speaker telephone.

Mr. Spooner noted that this proposal came very late in the current biennium and asked for a discussion as to whether the Council should tentatively adopt it on the understanding that it would be subject to a final vote on promulgation at the December meeting. Judge Johnson noted that, prior to *Black*, forum-selection clauses had been raised by motions to dismiss, with supporting and sometimes opposing affidavits, similarly to the way in which arbitration clauses are dealt. Justice Durham stated that he had not had an opportunity to consider this proposal carefully, but noted that it lacked any definition of a forum-selection clause. Mr. Hamlin responded to the latter point that his intention was that the proposed amendment deal with contractual forum-selection clauses, which he said are increasingly found in commercial agreements. Justice Durham remarked that he was not fully convinced that advancing the stage at which forum-selection clauses are ruled on from summary judgment to a motion to dismiss was in any way advantageous.

Mr. Brothers asked whether, if contested facts relating to unconscionability had to be resolved, that would be done by the judge or by the jury. Mr. Hamlin responded that he thought such facts would be decided by the judge, but that would not be so respecting facts relevant to other issues possibly bearing on enforceability of a forum-selection clause, such as fraudulent inducement. Prof. Holland commented that Judge Armstrong's concurring opinion in *Black* pointed out that no other American jurisdiction requires forum-selection clauses to be raised by a motion for summary judgment, but allow them to be raised by some form of motion to dismiss. He added that the most appropriate dismissal motion would be a motion to dismiss for improper venue, but no such addition is possible in connection with ORCP 21 A because it would upset too much well-settled law.

Judge Rasmussen observed that Rule 21 motions often require resolution of contested facts, and that this is routinely done by judges in accordance with that rule. He added that it seemed to him this matter is better handled under Rule 21 rather than Rule 47. Judge Rasmussen then moved, seconded by Judge Harris, that this proposed amendment be amended by adding the word "contractual" before "forum-selection clause," which motion was unanimously agreed to. Judge Dickey's motion, duly seconded, to tentatively adopt the proposed amendment as thus amended was then agreed to by a vote of 13 in favor, 7 opposed, and no abstentions.

Agenda Item 3 (resumed):

Sub-item 3a: Amendments to ORCP 44 and 55 recommended by the Medical Records Committee (see Attachment 3a to agenda of this meeting) (Ms. Clarke and Mr. Merrick). Mr. Merrick reported that two small changes had been agreed on by the committee

since the last Council meeting. These changes, he said, were in line 8, p. 3a-4, to substitute "object" for "raise an objection to the court; ..." and in lines 7-9, p. 3a-8, to revise the language following "H(6) *Scope of Discovery*" as follows: "Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44, including the limitation expressed in Rule 44 C." Ms. McKelvey stated that she was opposed to adding the specific reference to section 44 C. Mr. Sugerman expressed the view that there might be some ambiguity as to whether chart notations within the meaning of section 44 C are included in the definition of "individually identifiable health information," and urged that any such ambiguity should be removed from the language of the amendment rather than being dealt with in a comment.

Mr. Brothers suggested that, in line 26, p. 3a-6, the word "the" was needed before "entity's or person's business, ..." with which suggestion there was general agreement. Justice Durham stated that he was opposed to the addition, in line 9, p. 3a-8, of the words "including the limitation expressed in Rule 44 C" following "beyond that provided in Rule 36 or Rule 44, ... [.]"

Mr. Merrick, seconded by Ms. Clarke, then offered a motion that the text of subsection H(6) read as follows: "Notwithstanding any other provision, this rule is not intended to expand the scope of discovery beyond that provided in Rule 36 or Rule 44," and that, with that change, these amendments be tentatively adopted for publication and comment. This motion was unanimously agreed to.

Sub-item 3b: Amendment to ORCP 59 B recommended by the Jury Innovation Committee (see Attachment 3b to agenda of this meeting and the document entitled "Proposals to replace the third sentence of ORCP 59 B," copies of which were distributed at this meeting and a copy attached to the original of these minutes) (Judge Harris). Judge Harris explained that the four alternatives set forth in Attachment 3b would replace what is now the third sentence of section 59 B. He further explained that all of the alternatives would accomplish essentially the same thing, but in somewhat different forms of words. He added that the committee preferred either Alternative A or B over Alternatives C and D. Judge Coon asked what the difference was between Alternatives A and B. Judge Harris responded that the only difference was that Alternative A would give the court the option of requiring a party requesting written instructions to prepare such instructions. He added that both Alternatives A and B would move back the time by which written instructions must be requested from the commencement of trial to anytime before the jury is charged. Ms. Russell noted that in federal court attorneys are required to submit requested instructions on disks. Judge Harris said he would bring up this possibility at the Judicial Conference in October, but that he had some concerns about the adequacy of staff and technology in this connection.

The discussion then shifted focus from Alternatives A through D as shown in Attachment 3b to the First, Second, Third, and Fourth Alternatives as shown in the document entitled "Proposals to replace the third sentence of ORCP 59 B." Judge Johnson stated that she thought it important that written instructions be provided at the beginning of trial rather than as late as immediately before the jury is charged. She added that she did not know of any situation where the instructions are not recorded either electronically or stenographically.

Mr. Merrick asked whether the committee had any specific recommendation, to which Judge Harris replied that the First Alternative had the most support within the committee. Judge Rasmussen commented that all four alternatives eliminated the right of a party to require written instructions, adding that, if this is done, it should be made clear. Ms. Clarke pointed out that none of the alternatives explicitly provided that the court will read written instructions to the jury. Mr. Brothers commented that he did not understand how any of the alternatives would really change practice under the existing rule. Judge Dickey conceded this point, but stated that the alternatives were intended to move courts in the direction of written instructions.

Mr. Spooner then suggested taking a short break during which a single version might be prepared on which further discussion might focus. One or more members asked about having parallel transcripts, meaning that each juror would have a copy of the written instructions to follow as the judge reads them. After further discussion, on motion offered by Ms. Clarke and duly seconded, the Council voted unanimously to tentatively adopt for publication and comment the following language to be substituted for the present third sentence of section 59 B:

> **The court shall reduce, or require a party to reduce, the charge to writing. However, if the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.**

Judge Dickey stated that, in light of the above amendment, UTCR 6.070 would need to be changed. Judge Harris said that he had already contacted the UTCR Advisory Committee in this regard.

Sub-item 3c: Recommended amendment to ORCP 34 B(2) (see Attachment 3c to agenda of this meeting) (Mr. Brothers). Mr. Brothers briefly recapitulated the purpose of this amendment, which he explained was to avoid any possibility that a motion to continue an action against a deceased's personal representative or successor in interest could be time-barred by the expiration of one year from the date of death even if the personal representative or successor in interest failed to give the claimant or claimant's attorney the notice required by ORS 115.003(3). By general agreement rather than formal motion it was agreed that this amendment

be revised by deleting the comma between "claimant's attorney" and "if the claimant" in line 10, p. 3c, and that "successors" be substituted for "successor" in line 12 of the same page. A motion was then offered, and duly seconded, that this amendment as thus revised be tentatively adopted for publication and comment. This motion was unanimously agreed to.

Sub-item 3d: Recommended amendment to ORCP 43 B (see Attachment 3d to agenda of this meeting) (Mr. Sugerman). Justice Durham stated that he found section 43 B to be generally poorly drafted and proposed that the section be redrafted to read as follows:

> **B. Procedure.** A party may serve the request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall set out the items that the requesting party desires to inspect either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts. A request shall not require a defendant to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party that receives service of a request shall comply with the request unless that party objects to the request, with a statement of reasons for each objection, before the time specified in the request for allowing the inspection and performing the related acts. An objection to part of an item or category of a requested item shall specify the objectionable part. The duty to comply with the request is a continuing duty during the pendency of the action. Notwithstanding any other response or objection, a party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item. The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

In response to a question by Mr. Brothers Justice Durham explained that a continuing duty to either produce subsequently discovered items identified in an original request or object to such production was needed so that the requesting party would become aware of their existence and could serve a motion to compel their production if the ground for objecting were deemed to be without merit. Mr. Merrick offered a motion, duly seconded, to delete the entire sentence of the above proposed amendment beginning: "Notwithstanding any other response or objection, .

. ." This motion was defeated by a vote of 8 in favor, 10 opposed, and no abstentions.

A motion, duly seconded, to tentatively adopt for publication and comment the amendment as set forth above was then unanimously agreed to.

Agenda Item 4: Old business (Mr. Spooner). Prof. Holland explained the background and reasons for this proposed amendment to ORS 1.735(2) that would dispense with, or at least mitigate, its provision that no ORCP amendment may validly be promulgated unless its "exact language" is published for comment at least 30 days before the date of the Council's vote on final promulgation. He further explained that the practical effect of this exact language requirement is to make the solicitation of comments on tentatively adopted amendments from the bench, bar, and public nearly useless. He added that, during the 1999-2001 biennium, Justice Durham prepared a statutory amendment that would eliminate the exact language requirement while providing safeguards against the Council's publishing a given amendment and then promulgating one having a substantially different meaning. He concluded by saying that this proposed amendment was unanimously approved by the Council, was approved by the House following a committee hearing at which no opposition was expressed, but failed to get a hearing before a Senate committee and therefore failed of enactment.

Justice Durham stated that, for him, getting this or a similar amendment through the legislative process remained an item of urgent business because he regards the present exact language requirement as having some potential for adversely affecting the quality of the Council's work product. Mr. Merrick suggested that the Oregon State Bar be asked to include this amendment in its package of legislative proposals for the 2003 session. In response to this suggestion Ms. Grabe stated that the deadline for inclusion of items in the OSB's legislative package had unfortunately passed, but that she would do her best to see whether it might nonetheless be pre-session filed.**

Judge Harris said that he has had some experience with the legislative process, and would be willing to serve on a committee to shepherd the bill through the 2003 session. He added that he would solicit other members to join this committee and would call upon Judge Rasmussen, as a former senator, for advice. Prof. Holland said that a copy of this proposed amendment would be included with the agenda of the 12-14-02 Council meeting.

**Subsequent to this meeting Ms. Grabe informed Prof. Holland that this amendment would be pre-session filed, which will facilitate its being called for hearing before committees of both chambers.

Agenda Item 5: New business. See Sub-item 5a at pp. 1-2 above.

Agenda Item 6: Adjournment. Without objection Mr. Spooner declared this meeting adjourned at 12:10 p.m.

Respectfully submitted,

Maury Holland
Executive Director

PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface (with underlining) denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent to:

Maurice J. Holland
Executive Director
Council on Court Procedures
1221 University of Oregon School of Law
Eugene, OR 97403-1221

and/or

Ralph C. Spooner
Chair, Council on Court Procedures
Spooner, Much & Amman, P. C.
530 Center Street Northeast, Suite 722
Salem, OR 97301-3740

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and place:

December 14, 2002 Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

The Council will take final action on the proposed amendments at the December 14, 2002, meeting.

Proposed Amendments to Oregon Rules of Civil Procedure

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

RULE 21

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**, and (10) that retaining jurisdiction would contravene an enforceable contractual forum-selection clause**. 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) **or (10)**, the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, 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.

* * * * *

C **Preliminary hearings.** The defenses specifically denominated (1) through [*(9)*] **(10)** in section A of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * * * *

G **Waiver or preservation of certain defenses.**

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, [*or*] insufficiency of service of summons or process, **or that retaining jurisdiction would contravene an enforceable contractual forum-selection clause**, is waived under either of the following circumstances: (a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

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SUBSTITUTION OF PARTIES
RULE 34

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B **Death of a party; continued proceedings.** In case of the death of a party, the court shall, on motion, allow the action to be continued:

B(1) By such party's personal representative or successors in interest at any time within one year after such party's death; or

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 successors in interest mail or deliver notice including the information required by ORS 115.003(3) to the claimant or to the claimant's attorney if the claimant is known to be represented, and the claimant or his attorney fails to move the court to substitute the personal representative or successors in interest within 30 days of mailing or delivery.**

* * * * *

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

RULE 43

* * * * *

B Procedure. [*The request*] **A party** may [*be served upon*] **serve the request on** the plaintiff after commencement of the action and [*upon*] **on** any other party with or after service of the summons [*upon*] **on** that party. The request shall set [*forth*] **out** the items [*to be inspected*] **that the requesting party desires to inspect** either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner [*of*] **for** making the inspection and performing the related acts. A [*defendant*] **request** shall not [*be required*] **require a defendant** to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party [*upon whom*] **that receives service of** a request [*has been served*] shall comply with the request[*,*] unless [*the request is objected to*] **that party objects to the request,** with a statement of reasons for each objection**,** before the time specified in the request for **allowing the** inspection and performing the related acts. [*If*] **An** objection [*is made*] to part of an item or category[*, the part shall be specified*] **of a requested item shall specify**

the objectionable part. The duty to comply with the request is a continuing duty during the pendency of the action. Notwithstanding any other response or objection, a party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item. The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

SUMMARY JUDGMENT
RULE 47

* * * * *

C Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least [*45*] 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits 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 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 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.

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PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATION RULE 44

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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, by an order of the court, or by subpoena in accordance with Rule 55 H.

SUBPOENA

RULE 55

* * * * *

[*H 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 Individually identifiable health information.

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

H(1)(a) "Individually identifiable health information" means information which identifies an

individual or which could be used to identify an individual; which has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and 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.

H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually identifiable 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.

*[H(2) **Mode of compliance.** Hospital records 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) *Mode of Compliance.* 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 requesting party has complied with the applicable law.

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of such information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that: (i) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to object; (iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with such resolution. The party issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

[*H(2)(a)*] **H(2)(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)*] **H(2)(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)(iv)*] **H(2)(c)(iv)**, then a copy of the **proposed** 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. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.**

[*H(2)(c)*] **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)] **H(2)(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*] **subsection (3) of section D**.

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*] **entity** or person[*s*] acting under the control of either, in the ordinary course of [*hospital*] **the entity's 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 **a** 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*] **used**.

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.

H(6) *Scope of discovery.* Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

[*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.*]

INSTRUCTIONS TO JURY AND DELIBERATION

RULE 59

* * * * *

B Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. [*If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or if in the opinion of the court it is desirable, the charge*

shall either be reduced to writing, and then read to the jury by the court or recorded electronically during the charging of the jury.] **The court shall reduce, or require a party to reduce, the charge to writing. However, if the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury.** The jury shall take such written instructions or recording with it while deliberating upon the verdict and then return the written instructions or recording to the clerk immediately upon conclusion of its deliberations. The clerk shall file the written instructions or recording in the court file of the case.

* * * * *

FINDINGS OF FACT
RULE 62

* * * * *

F Effect of findings of fact. In an action tried without a jury, except as provided in ORS [*19.415*] **19.415(3)**, the findings of the court upon the facts shall have the same force and effect, and be equally conclusive, as the verdict of a jury.

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

* * * * *

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 relevant to any factual issue**, 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.

C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements.

* * * * *

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.

12-14-02 Draft of Staff Comments to ORCP Amendments Promulgated Dec. 14, 2002

ORCP 1:

1 Section K is added to define "declaration" as used throughout these rules.

ORCP 21:

2 Subsection A(10) is added to provide that an objection that retaining jurisdiction of an
3 action would contravene an enforceable contractual forum-selection clause may be raised by pre-
4 answer motion. Section C is amended to clarify that, as with defenses or objections (1) through
5 (9), on motion of any party this objection shall be determined at a preliminary hearing unless the
6 court orders that its determinatin be deferred until trial. Subsection G(1) is amended to provide
7 that this objection is waived under the same circumstances as apply to defenses or objections
8 stated in subsections A(2), (3), and (5).

ORCP 34:

9 Subsection B(2) is amended to provide that in the event of the death of a party opposing
10 a claim the court shall, on motion to substitute the party's personal representative or successors
11 in interest, allow the action to be continued against such representative or successors provided
12 the motion is served not more than 30 days following mailing or delivery of notice in accordance
13 with ORS 115.003(3) to the claimant or claimant's attorney. The former requirement, that a
14 motion to substitute must be made within one year of the death of a party against whom a claim
15 is asserted even if no statutory notice is afforded to the claimant or the claimant's attorney, is
16 abolished as posing some risk of a claim being unfairly barred.

ORCP 43:

17 Section B is amended for stylistic improvement and also to impose a continuing duty
18 throughout pendency of an action to supplement initial responses to requests for production by

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Fax #	Fax # 541-346-1564

19 producing, or objecting to producing, any documents or things described in a request discovered
20 subsequently to an initial response to such request within a reasonable time after their discovery.
21 [[1]Failure to comply with this supplementation duty may, in appropriate circumstances, be
22 treated as failure to respond completely to a request for production under this rule.[1]]

ORCP 44:

23 Section E is amended for consistency with section H of Rule 55 as also amended, and to
24 achieve compliance of both sections with federal privacy regulations issued pursuant to the
25 Health Insurance Portability/Accountability Act (HIPAA) of 1996. [*Here insert citation to the*
26 *regs.*] References in this section to "hospital records," "hospital," and "hospitalization" are
27 replaced by references to "individually identifiable health information" as the linkage term used in
28 the pertinent HIPAA regulations.

ORCP 47:

29 Section C is amended to increase from 45 to 60 the number of days before the date set for
30 trial by which a motion for summary judgment, with all supporting documents, must be served
31 and filed.

ORCP 55:

32 Section H is amended, and former section I deleted, to achieve compliance with federal
33 privacy regulations issued pursuant to the Health Insurance Portability/Accountability Act
34 (HIPAA) of 1996. [*Here insert citation to the regs.*] Since those regulations afford the identical
35 protection to "individually identifiable health information" whether contained in hospital or
36 medical records, the differences in their treatment under former sections H and I are eliminated.
37 The amendments to this rule are not intended to affect the scope of discovery heretofore
38 applicable to hospital or medical records pursuant to Rules 36 and 44.

[1]---[1]Double check this sentence. Is it accurate, necessary, or helpful?

<u>ORCP 59:</u>

39 Section B is amended to provide that jury instructions must be reduced to writing unless
40 the court determines it to be unfeasible, and that the court may require a party to prepare written
41 instructions.

<u>ORCP 62:</u>

42 Section F is amended to correct the statutory reference to ORS 19.415(3).

<u>ORCP 68:</u>

43 Subparagraph C(4)(c)(i) is amended to clarify that the factors which courts are required or
44 permitted to consider in ruling on requests for award of attorney fees are not set forth in the
45 ORCP, but in such statutes as ORS 20.075 or other applicable rules.