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

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

NOTE: Bruce J. Brothers appeared by speaker telephone.

Excused: Jeff Merrick

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 9:33 a.m.

Agenda Item 2: Approval of minutes (attached). On motion of Ms. Clarke, seconded by Judge Barron, the minutes of the 9-14-02 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: Votes on final adoption of proposed amendments to Oregon Rules of Civil Procedure as published in Issue 22 of the Oregon Appellate Court Advance Sheets (attached) (Mr. Spooner):

Subitem 3a: Rule 21. Action concerning this rule was deferred until later in this meeting.

Subitem 3b: Rule 34. Following brief discussion it was decided that further discussion of the tentatively adopted amendment to this rule was not needed. On motion of Mr. Brothers, duly seconded, it was unanimously voted to adopt this amendment as shown in the aforesaid attachment.

Subitem 3c: Rule 43. On motion of Judge Barron, duly seconded, it was unanimously voted to adopt the tentatively adopted amendments to this rule as shown in the aforesaid attachment.

Subitem 3d: Rule 47. On motion duly made and seconded, it was unanimously voted to adopt the tentatively adopted amendment to this rule as shown in the aforesaid attachment.

Subitem 3e: Rule 44. On motion of Ms. Clarke, duly seconded, it was unanimously voted to adopt the tentatively adopted amendment to this rule as shown in the aforesaid attachment.

Subitem 3f: Rule 55. On motion of Ms. Clarke, duly seconded, it was unanimously voted to adopt the tentatively adopted amendments to this rule as shown in the aforesaid attachment.

Brief discussion followed concerning some of the amendments adopted as shown above. Prof. Holland stated that he had received a letter from Mr. Lloyd Helikson suggesting that the change in Rule 47 from 45 to 60 days be held off pending a comprehensive review of this rule. The consensus of the meeting was that there was no reason to hold off on this amendment. Ms. Clarke reported that she had received a communication from Doug Shaller expressing concern that the amendments adopted to Rules 44 and 55 might have the effect of broadening the scope of discovery, and that she had assured Mr. Shaller that no such broadening was either intended or provided for by those amendments. Mr. Spooner noted that he had received a communication from Mr. Robert Neuberger expressing the same concern and had responded to it.

Subitem 3g: Rule 59. Judge Harris reported that he had received a great deal of useful feedback concerning this tentatively adopted amendment, which he distributed at the recent meeting of the Judicial Conference where there had been a one-hour presentation focusing on it. He further noted that, in light of the state's current fiscal situation, some might worry that an amendment encouraging the use of written instructions provided to juries might impose some additional costs which the courts are not now well able to absorb, but emphasized that this amendment would not mandate any change in current practice since it explicitly preserves the court's discretion to dispense with written instructions on a case-by-case basis when it is not deemed feasible.

Judge Johnson commented that she thought the amendment was at least ambiguous as to whether written instructions must be provided to the jury whenever the parties so request, with which comment Mr. Buckle expressed agreement. Mr. Brothers noted some concern as to whether the phrase "not feasible" might generate some appeals on that question. He added that he thought the question of whether written instructions are provided to juries should be left to the courts' discretion without introducing any issue about feasibility. Mr. Sugerman commented that he did not read the amendment in the manner suggested by Judge Johnson and Mr. Brothers and thought it would have the useful effect of encouraging written instructions being provided to juries. Judge Carp expressed agreement with this comment. Ms. Johnston stated that, in her experience serving as a juror, much time had been wasted going back to the judge for repetition of instructions, and she thought providing jurors with written instructions is a very good idea.

Immediately following this discussion, on motion of Judge Dickey duly made and seconded, this amendment as shown in the aforesaid attachment was finally adopted by a vote of 19 in favor, 2 opposed, and no abstentions.

Subitem 3h: Rule 62. On motion duly made and seconded, this tentatively adopted amendment as shown in the aforesaid attachment was finally adopted by unanimous vote.

Subitem 3i: Rule 68. On motion duly made and seconded, this tentatively adopted amendment as shown in the aforesaid attachment was finally adopted by unanimous vote.

Subitem 3a: Rule 21 (out of order). Prof. Holland recalled that this amendment had been tentatively adopted at the 9-14-03 meeting, with many reservations being expressed on that occasion, primarily so that it could be seriously considered whether to finally adopt it at this meeting. He further recalled that this amendment had been prompted by an opinion of the Court of Appeals holding that enforcement of a forum selection clause could properly be obtained only by defendant's motion for summary judgment. He added that the Supreme Court subsequently granted review in this case.

Justice Durham commented that this case does not involve the exercise of jurisdiction pursuant to ORCP 4 or 5, but the proper procedural treatment of contract clauses which purport to vest exclusive jurisdiction in a forum other than an Oregon court. Without implying any view on how the Supreme Court might decide this case, Justice Durham stated that he thought a vote finally adopting this proposed amendment would be premature at this point. Judge Rasmussen said that he was not prepared to vote in favor of this amendment at this time, but added that he thought it generally unwise to require resort to summary judgment when a proper Rule 21 motion would be more expeditious.

Judge Carp then offered a motion, duly seconded, that this matter be put over to the 2003-05 biennium, by which time the Council would have the benefit of a Supreme Court

opinion in this case. This motion carried by unanimous vote.

Agenda Item 7: Proposed amendment to "exact language" requirement of ORS 1.735(2) (out of order). Mr. Spooner asked Judge Harris to bring the Council up to date on this proposed statutory amendment which failed of enactment in the 2001 legislature because it was not heard by committee of the Senate. Judge Harris responded that a bill to modify the exact language requirement would be pre-session-filed by the Oregon State Bar, for which he said that thanks were largely due to Ms. Susan Grabe. He added that Ms. Grabe had asked that one or more individuals authorized by the Council to testify on behalf of this bill be available to appear before the relevant committees on what is typically very short notice. Prof. Holland suggested that Ms. Grabe might notify him whenever testimony is needed, and that he would assume the task of finding one or more Council members whose schedules would permit them to offer that testimony.

Agenda Item 6: Election of 2003 session Legislative Advisory Committee (LAC) pursuant to ORS 1.760 (out of order). A motion was duly offered and seconded, which carried unanimously, to elect the following members to comprise the 2003 session LAC: Ms. Clarke, Judge Dickey, Judge Harris, Ms. Johnston, and Mr. Spooner.

Agenda Item 4: Suggestions regarding Staff Comments to amendments finally adopted for promulgation at this meeting (copy attached) (out of order). Prof. Holland stated since the demise of the rules publication by Butterworth, Staff Comments have not been published anywhere, including with the official version of the ORCP in the Oregon Revised Statutes. He said that, although no longer published, Staff Comments had been included with finally adopted amendments and kept in the Council's archives, where they are occasionally copied and supplied to attorneys who request them. He added that in the 1999-2001 biennium the Council voted that no Staff Comments be prepared. He further added that, in the past, Staff Comments had been prepared by him and were not officially voted on by the Council, although they were shared with the Council to ensure that they accurately stated the "legislative intent" of promulgated amendments.

Justice Durham remarked that he thought Staff Comments are highly useful, and suggested that in the near future the Council might give some consideration to how it could better be directly involved in their preparation. Some members suggested that there might be a phone conference meeting in June of 2003 devoted to discussion of this issue. Mr. Brothers observed that he thought that Staff Comments pose an opportunity to do mischief and that the minutes of meetings adequately record the thoughts and intentions of members in the course of considering and debating amendments. This discussion concluded without any specific decision other than to consider the matter further in the future.

Agenda Item 5: Appointment and reappointment of members (out of order). Prof. Holland announced the names of members whose first or second terms would expire on 8-31-03 according to the information in the appointments files, and asked for correction of this information if anyone thought it was erroneous. He noted that appointment or reappointment of judicial members of the Council was a matter for the Court of Appeals in the case of Judge Schuman, and for the Executive Committee of the Circuit Judges Association in the case of circuit court judges.

Prof. Holland further stated that he had learned at the end of the 1999-2001 biennium that the Board of Governors were inclined to reappoint practitioner members of the Council whose first terms were expiring, provided the Board was informed that such members were willing to accept reappointment. He therefore requested that members whose first terms would expire 8-31-03 let him know whether they were willing to accept reappointments to second terms so that he could get word to the Board prior to its August 2003 meeting when appointments and reappointments would be made.

Prof. Holland then called attention to what he thought was a certain awkwardness about election of Council officers. He said that the problem, to the extent there is one, is that the Council operates on a biennial basis, whereas ORS 1.730(2)(b) provides that its chair shall be elected "annually." Ralph Spooner was relected Chair at the December 2002 meeting, but decided not to be considered for reappointment with the result that our Vice Chair, Ms. Clarke, will become Acting Chair effective 9-1-03 and until the election of new officers at the December 2003 meeting. In the 1999-01 biennium Mick Alexander's second and final term as a member expired 8-31-01 in the middle of his second year as Chair, whereupon Ralph Spooner became Acting Chair.

The past practice of the Council has invariably been to elect the incumbent Vice Chair to be the next Chair to serve "annually" for one year and then invariably to be elected to a second year. The same has been true of the other officers. Perhaps the obvious thing to do would be to comply with our Rules of Procedure, which provide that "officers shall be elected for a period of one year at the first meeting of the Council following October 1 of each year. Rule II A. That would be the sensible thing to do except perhaps for the fact that, at the October meeting of a new biennium, there are always new members who would presumably have no basis on which to cast their vote. Maybe that really wouldn't matter very much. While this is obviously not a problem of the first magnitude, perhaps one or more members will have a suggestion of how it might be better handled in the future. But, perhaps not.

Agenda Item 8: Adjournment. Without objection Mr. Spooner declared the meeting adjourned at 11:12 a.m.

Respectfully submitted,

Maury Holland, Executive Director

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 (8), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment pursuant to subsection B(3) of Rule 54.

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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.

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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**.

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

RULE 43

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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

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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 those 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

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[*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

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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.

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FINDINGS OF FACT
RULE 62

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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

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C(4)(c) **Hearing on objections.**

C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits 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.

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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:

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

ORCP 21:

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

ORCP 34:

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

ORCP 43:

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

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

ORCP 44:

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

ORCP 47:

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

ORCP 55:

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

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

ORCP 59:

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

ORCP 62:

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

ORCP 68:

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