MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 12, 2008, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd
Tigard, OR 97224

ATTENDANCE

Members Present:

Eugene H. Buckle
Brian S. Campf
Brooks F. Cooper
Kristen S. David
Dr. John A. Enbom*
Martin E. Hansen*
Hon. Robert D. Herndon
Hon. Jerry B. Hodson*
Hon. Rodger J. Isaacson
Alexander D. Libmann*
Hon. Eve L. Miller
Leslie W. O'Leary
Shelley D. Russell
Hon. David Schuman*
John L. Svoboda*
Mark R. Weaver*
Hon. Locke A. Williams

Members Absent:

Don Corson
Hon. Daniel L. Harris
Hon. Lauren S. Holland
Hon. Mary Mertens James
Hon. Rives Kistler
David F. Rees

Guests:

David Nebel, Oregon State Bar

Council Staff:

Mark A. Peterson, Executive Director
Shari C. Nilsson, Administrative Assistant

*Appeared by teleconference

ORCP Discussed this Meeting	ORCP Discussed & Not Acted Upon this Biennium		ORCP Amendments Moved to Publication Docket this Biennium
ORCP 1	ORCP 7	ORCP 47C	ORCP 7D(3)(b)
ORCP 7D(3)(b)	ORCP 7D(4)(a)	ORCP 51	ORCP 54E
ORCP 18A	ORCP 7F(2)(a)	ORCP 54	ORCP 59B
ORCP 27	ORCP 9	ORCP 55H	
ORCP 44A	ORCP 9F	ORCP 57D(2)-(4)	
ORCP 54A	ORCP 18B	ORCP 58	
ORCP 54E	ORCP 19B	ORCP 58B(5)	
ORCP 57	ORCP 21A	ORCP 59H	
ORCP 59B	ORCP 25	ORCP 61	
ORCP 68	ORCP 27	ORCP 67C	
ORCP 69A(1)	ORCP 38B	ORCP 69A(1)	
	ORCP 38C		
	ORCP 43B		
	ORCP 44B		

I. Call to order (Mr. Buckle)

Mr. Buckle called the meeting to order at 9:33 a.m.

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of March 8, 2008, Minutes

Mr. Buckle called for a motion to approve the March 8, 2008, minutes which had been previously circulated to the members. The motion was made and seconded and the minutes were approved by the membership with no amendments or corrections.

IV. Administrative Matters

A. Update: Performance Measures (Prof. Peterson)

Prof. Peterson reported on the meeting that he and Mr. Nebel had at the Legislative Fiscal Office (LFO) on March 28, 2008. They met with John Borden and Dawn Farr regarding Key Performance Measures (KPO) for the Council. It was noted during the meeting that the Council is a state agency but that, for budgeting purposes, it is a line item under the Office of the Legislative Counsel. The Council is therefore not required to have KPOs; however, such measures are a means of providing important information to the Ways and Means Committee. KPOs also help an agency to gauge how well it is doing its job. Prof. Peterson stated that the Council has the means to do this simply and inexpensively, largely by doing what it has done in the past, but in a more formal manner.

KPOs could include: keeping track of how many rules were considered and acted upon; how many rules were considered and not acted upon; promulgated rules acted upon by the legislature; ORCP amended independently by the legislature; and appellate decisions that involve the clarity of the ORCP. Another KPO could involve sending a survey to circuit court judges as well as a segment of Oregon attorneys. The Oregon State Bar can make Survey Monkey software available to the Council for the purpose of obtaining survey results. Prof. Peterson previously circulated a draft survey to the Council's officers. He suggested creating a small administrative committee in charge of crafting surveys to measure how well the Council is doing in fulfilling its mission to have rules of civil procedure which advance the just, speedy, and inexpensive determination of civil actions.

Prof. Peterson also stated that he is in the process of drafting a Memorandum of Understanding between the Council and the LFO. He hopes to have it completed by May's meeting and, once it is accepted, the Council can start disbursing funds to reimburse members for travel expenses.

Mr. Buckle stated that, even if performance measures are not required, they are a good idea to help keep the Council in touch with the LFO.

B. Report: Website/Inquiries (Ms. Nilsson)

Ms. Nilsson briefly reviewed the information contained in the Website/Inquiries Update (attached as Appendix A), which shows that the website continues to receive a steady stream of visitors from throughout the state. She discussed the new materials which have been posted on the website, including all Council promulgations by biennium since the Council's inception, and legislative histories of promulgations for specific rules. Mr. Buckle stated that it is important to continue to publicize the website to let the public know of the helpful features which are being added.

V. Old Business

A. Committee Reports

1. ORCP 18A: Allow Optional Form Pleadings for Personal Injury (and Other) Complaints (Mr. Libmann)

Mr. Libmann stated that he and Ms. O'Leary had sent inquiries to the Oregon Association of Defense Counsel (OADC) and Oregon Trial Lawyers Association (OTLA) listserves regarding the issue of form pleadings. Responses from attorneys with both organizations were overwhelmingly negative and did not support this change. He stated that the entire committee will meet and will provide a written report for the May meeting.

2. ORCP 27 and 68: Probate Court Matters (Mr. Cooper)

Mr. Cooper stated that the committee will not be proposing any change to ORCP 27, as the contemplated changes appeared to create more problems than they solve.

He stated that the draft revision to ORCP 68 is almost completed and that it will be available, along with the committee's report, for the May meeting.

3. ORCP 54A: Voluntary Dismissals (Mr. Campf)

Mr. Campf stated that the committee remains open and welcomes input.

4. ORCP 54E: Offers of Settlement (Mr. Buckle)

Mr. Buckle stated that Mr. Rees had drafted a new proposal for changes to ORCP 54E which incorporates the language and suggestions from the March Council meeting (Appendix B). Judge Miller stated that the revisions were effective. She moved to put the change on the publication docket for a formal vote in September. The motion was seconded and passed.

5. ORCP 57, 59: Jury Improvement (Judge Harris)

Judge Harris was absent, but stated previously that he will bring to the May meeting any feedback from judges on the committee's proposed changes.

6. E-Filing (Mr. Cooper)

Mr. Cooper stated that he proposed minor changes to the rules to make them amenable to UTCR-level changes regarding e-filing. He has spoken with the e-filing task force and reported to the Council that these are ministerial changes which make it clear that the UTCR can establish electronic filings and those filings are consistent with the ORCP. The task force has not contacted the Council for any other assistance at this time. Mr. Cooper will provide his proposed changes to ORCP 1 for the May meeting.

7. ORCP 44: Prohibit *Ex Parte* Conversation with Treating Physicians (Ms. O'Leary)

Ms. O'Leary discussed the feedback received from the Oregon Medical Association, OADC, and OTLA regarding this issue. That feedback is attached as Appendices C, D, and E. The committee's impression of this feedback is that it highlights the ambiguity that exists in the rule. She noted that the OADC and OTLA have diametrically opposing views.

Ms. O'Leary stated that the committee feels that, although the Council has the authority to entertain changes to the rule, because it may involve substantive issues it is a better change for the legislature to address. She stated that there is ambiguity with how the rule relates to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and that the issue is somewhat controversial. The committee feels that, even if the Council changes the rule, the Supreme Court eventually will end up resolving the issue, which it has not yet done with the current rule.

Mr. Buckle asked how the issue is being resolved in courts currently. Ms. O'Leary stated that it is unpredictable and almost always contentious.

Judge Herndon stated that if the Council were to entertain changing the rule, a "supercommittee" would be necessary, as well as hearings and testimony from interested parties. He stated that there is probably a reason that the issue has not yet reached the Supreme Court – that, as a discovery matter, it already gets resolved in trial courts on an individual basis and that it is, therefore, not worthy of Supreme Court review. Ms. David noted that the issue of *ex parte* contact becomes more minor as attorneys get closer to trial and that it is usually not worth the time or money required to bring up the issue on appeal.

Ms. O'Leary stated that this issue does affect the outcome of trials and that the stakes are high on both sides. It is her feeling that it will take a higher court to finally resolve it. Mr. Cooper stated that this problem is one that is most susceptible to change by rule because it is a discovery dispute. He stated that the only way he could envision this matter going to the Supreme Court is on mandamus, which is a rare procedure and not likely to happen.

Prof. Peterson stated that he sees the issue as strictly procedural, not substantive. He believes that the fact that it determines the outcome of the case does not mean it is not procedural. He noted the OMA's position of asking their doctors not to have *ex parte* contact and wondered whether the doctors are following that direction. Prof. Peterson and Mr. Cooper both agreed that a rule stating explicitly that either "*ex parte* contact is not allowed" or "*ex parte* contact is allowed" would solve the problem of ambiguity, but not the controversy.

Judge Isaacson asked whether there have been complaints to the Bar regarding unethical conduct with regard to *ex parte* physician contact. Ms. David stated that she knows of at least three instances that were investigated and dismissed without action. Judge Miller questioned Ms. O'Leary's assertion that, because this is such a divisive and difficult issue, it may be better left to the legislature to resolve. She then asked whether the Council has taken this position in the past. Judge Herndon stated that it is probably too late in this biennium to attempt to make a change but that, in past Council discussions, the consensus seemed to be that the issue was substantive.

Judge Miller stated that the fact that Prof. Peterson firmly believes the issue is procedural tells her that it is something the Council needs to discuss even if they do not ultimately agree. Ms. O'Leary restated that she believes that, if something is outcome-determinative, it is substantive. Judge Miller suggested that the Council attempt to resolve whether it is a

substantive or procedural issue this biennium. If it is determined to be procedural, the Council could then attempt a change next biennium. If it is determined to be substantive, the Council could send the issue to the legislature. Ms. David observed that the two completely different positions from the OADC and OTLA make her believe that the issue is more substantive. Judge Miller again suggested that the Council vote on the substantive vs. procedural issue alone.

Judge Herndon moved that the Council not consider making a change because the issue is substantive and needs to be addressed by the legislature. The motion was seconded by Judge Miller. Mr. Buckle asked for discussion on the matter. Judge Isaacson stated that he feels the Council should not vote on the matter before further discussion. He noted that, if the issue were sent to the legislature and it was to determine the issue to be procedural, the Council could be faced with criticism. He recalled an instance in the Council's past where something similar had occurred.

Mr. Buckle inquired whether the area of privilege (as established by the rules of evidence) is considered substantive or procedural. Mr. Cooper stated that Mr. Buckle's question could be sidestepped because privilege is outside the scope of the Council and is not a rule of civil procedure. Judge Herndon stated that the issue is interwoven with federal legislation and that it appears to be a procedural issue interwoven with substantive issues.

Mr. Cooper asked whether the issue could be summarized as the plaintiffs' bar wanting to limit the ruling in *Grimm v. Ashmanskas* to what they would like it to be, and the defendant's bar wanting to limit the ruling to what they want it to be. He stated that *Grimm* was based upon an evaluation of privilege in the evidentiary rules and stated that this may mean that it is necessary to either take the right case to the Supreme Court or change the rules of evidence to state that waiver of physician privilege occurs but here is the limit of the waiver, etc. In either case, he feels that this is not what the Council was established to do.

Mr. Buckle stated that the issue might well be beyond the scope of the Council, but stated that, as a matter of process, he feels that it is best to go forward and do a thoughtful analysis before taking a vote. Judge Miller asked whether other rulemaking bodies look at what the Council does and take it into consideration. She wondered if the Council's process would be helpful to them. Mr. Buckle stated that someone from the Council should contact the other rulemaking bodies and inquire about this. Ms. David stated that the committee did discuss this issue and came to the conclusion

that it is unclear what the Council could do to be helpful. Mr. Nebel stated his feeling that, if the legislature were confronted with this issue, it would have hearings and take testimony and form a work group because it is not equipped to handle the issue. He stated that he believed the legislature would face the same problems as the Council in dealing with this issue. Judge Miller agreed.

Ms. O'Leary stated that, in other states where the issue has been resolved, it has been resolved by supreme courts. Mr. Buckle asked the judges on the Council whether judges ever discuss this type of issue to try to reach consensus. Judge Herndon stated that they do, but that it has been impossible to reach consensus.

Ms. David stated that she had spoken to attorney and past Council chair, Connie McKelvey, who suggested first making a minor change to ORCP 44E to clarify that the issue can be brought before the courts by motion. Ms. David stated that she agrees with Judge Herndon that there is already a process in place to do that. Judge Miller stated that she sees no benefit to such a change.

Mr. Cooper stated that for the judges it seems to be a purely legal question, and that the facts of any individual case would not seem to affect the judicial decision. He stated that after each judge rules on two or three cases, the attorneys can see that a track record is established and determine that this is the way this particular judge will rule on any case. Judge Miller stated that in Clackamas County cases are not assigned, so this could result in judge shopping, which is a dangerous proposition when there is no consensus among judges. Mr. Cooper stated that, if the facts of any individual case do not have a particular bearing on the outcome of the motion, and the decision is based on a judge's personal prejudices, it is better to have a community decision expressed through the Council, as an agency of the legislature, as to what the policy should be.

Mr. Buckle stated that the issue is too big to resolve during this meeting. He suggested leaving the issue with the committee to consider the Council's discussion. Judge Herndon withdrew his motion to vote on whether the issue is substantive or procedural. Mr. Buckle suggested tabling the issue for this biennium but keeping the committee formed and available. Judge Miller withdrew her second but stated that the Council does need to decide whether it is an issue for the Council to deal with. Ms. O'Leary stated that tabling it and raising it in the next biennium will not result in any new feedback. Ms. O'Leary stated that the committee will provide a written, detailed report for May's meeting for the Council's

consideration and decision.

B. Non-Committee Matters

1. ORCP 54A: Confidentiality Agreement at Settlement (Ms. O'Leary)

Ms. O'Leary stated that she and Mr. Campf have been looking into how other jurisdictions handle this situation. She stated that he had not yet gathered enough information to make a report to the Council. She stated that it is probably too late in the biennium to act on this matter. Mr. Buckle stated that a formal committee may be formed next biennium. Prof. Peterson asked that Ms. O'Leary and Mr. Campf provide a written report addressing the concern and their preliminary research. They agreed to do so for the next meeting.

VI. New Business

A. ORCP 69A(1) (Prof. Peterson)

Prof. Peterson stated that Mr. Buckle had received an e-mail regarding ORCP 69A(1). The hypothetical situation was of an attorney receiving a notice of intent to take default and then making an ORCP 54E offer of judgment. The question was whether an attorney can be sure that the other side will not take the default judgment while he or she is waiting on the offer. Judge Miller stated that no judge would fail to set aside a default taken in a situation like this, and that no rule change is necessary. The Council agreed.

B. Timely Notification of ORCP Changes (Mr. Buckle)

Mr. Buckle stated that most lawyers rely on the Oregon Rules of Court book in their possession until they receive the new one. This presents a problem since the new publication of Oregon Rules of Court is usually not available until March and the new ORCP are effective January 1.

Prof. Peterson stated that he has contacted Thomson West Publishing regarding the possibility of publishing and sending out an insert for the back of the Oregon Rules of Court book which could be sent to subscribers before January 1. Thomson West is looking into it. He also stated that it would be a good idea to have the OSB do an e-mail to its members prior to January 1 which reminds them of the upcoming changes.

Mr. Buckle stated that, in his opinion, an insert to the Rules of Court book would be ideal. Judge Miller asked whether Thomson West would charge an additional

fee or whether the cost would be included in the cost of the book. She expressed concern that there would be complaints from attorneys if the cost of the book were raised as a result. She also expressed concern about saving paper. Judge Williams also asked whether West would pass the cost of the insert on to the consumer. Mr. Cooper stated that Washington and other states include inserts in the cost of the book, but did not know whether the cost of these books was comparatively higher than Oregon's.

Mr. Buckle suggested that Prof. Peterson and Ms. Nilsson put the issue on the calendar (to draft a summary of the highlights of the changes and to send the summary to the Bar to have it notify its members two months prior to the effective date of the changes as well as on January 1). He noted that it is important to have the Bar include the information in a paper mailing for those attorneys who do not use e-mail.

Judge Miller stated that the Council should try to encourage attorneys to find the rule changes online as a way to save paper. Ms. Nilsson pointed out that the legislature does not publish the new ORCP online until late February or early March. Judge Miller stated that attorneys can be referred to the Council's website, which has the most up-to-date information.

Prof. Peterson agreed to check with Thomson West about whether an insert would cost extra or would raise the price of the Oregon Rules of Court book.

C. ORCP 7D(3)(b) (Prof. Peterson)

Prof. Peterson stated that he received an e-mail from Mr. Weaver that an attorney in his office pointed out that ORCP 7D(3) does not mention limited liability companies (LLCs). Prof. Peterson will draft a rule change to add LLCs to corporations and limited partnerships in ORCP 7D(3)(b). He will provide the draft for May's meeting.

D. May Meeting in Bend (Prof. Peterson)

Mr. Hansen stated that he has reserved the conference room at the Phoenix Inn for the Council's May 3, 2008, meeting. Depending on how many Council members will attend, Mr. Hansen may choose to use a conference room at his office. Ms. Nilsson will send an e-mail to the listserve asking how many Council members plan to attend the Bend meeting in person.

VII. Adjournment

The meeting was adjourned at 10:54 a.m.

VIII. Additional Appendices to Minutes (informational materials provided at the meeting, but not formally discussed)

Respectfully submitted,

Mark A. Peterson
Executive Director

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 2/25/08 - 3/25/08

I. Website Statistics

A. Visitors

From February 25 to March 25, the site received a total of 94 visits from 65 unique visitors. 51% of the total visits were from new visitors. 32% of the visits were direct, 38% came from referring sites, and 30% came from search engines.

B. Geographical Information

Most visitors to the website came from various cities in Oregon:

- Albany
- Aurora
- Beaverton
- Eugene
- Fairview
- Grants Pass
- Halsey
- Keizer
- Gladstone
- Grants Pass
- Portland
- Tangent

The site also had visitors from Idaho, California, and Washington.

C. Referring Sites

Visitors arrived at the web page by clicking links from the following websites, among others:

- Clackamas County Bar Association
- Jackson County Bar Association
- Lane County Bar Association
- Oregon State Bar

D. Keywords from Search Engines

Some of the keywords that visitors entered in search engines that found the Council's website included:

- council on court procedures
- Oregon council on court procedures
- court procedure
- "council on court procedures" minutes
- minutes procedures
- orcp council on court procedures

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II. Updates

Work is proceeding on the site's search engine. We are experiencing some difficulty in getting Google to "see" all of the pages on the site and are working with Lewis & Clark as well as searching the Google technical site to make sure that visitors will soon be able to search the site in its entirety.

III. New Additions

New materials added to the website include:

- **Complete council rule promulgations from 1982 to present**
  (http://www.lclark.edu/~ccp/orcps.htm)
- **Agendas and minutes from the 2003-2005 and 2001-2003 biennia**
  (http://www.lclark.edu/~ccp/minutes.htm)
- **A history of Council amendments of ORCP 1, ORCP 4, ORCP 7, ORCP 8, and ORCP 10, from 1982 to present**
  (http://www.lclark.edu/~ccp/LegislativeHistoryofRules.htm)
  The eventual goal is to include a history of each rule that the Council has amended. This is a time-consuming project but one that should prove extremely useful in terms of research of legislative history.
- **A page for libraries to order materials from the Council**
  (http://www.lclark.edu/~ccp/order.htm)

IV. E-mail and telephone inquiries

The Council received one follow-up e-mail regarding a previous inquiry on ORCP 9. Prof. Peterson responded by stating that the Council had discussed the issue and that the Council felt that the previous biennium's amendment to ORCP 9 was complete. The caller was referred to the minutes for January, 2008, and February, 2008, as well as to the minutes of the last biennium where ORCP 9 was discussed. All of those minutes are located on the Council's website.

The Council also received three telephone inquiries. The first caller wanted to know where to find the current ORCP. The caller was directed to the Council's website. The second caller asked where to find the minutes of the Council's 1979 deliberations. The caller was directed to the Multnomah County Law Library. The third caller requested comments to last biennium's ORCP 43B amendments. The caller was advised that no comments were available but that the minutes (legislative history) are available on the Council's website.

ORCP 54

Dismissal of actions; *[compromise]* offer to allow judgment

* * * * *

E *[Compromise*] Offer to allow judgment; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. **The offer shall not be filed with the court clerk or provided to any assigned judge, except as set forth in subsections E(2) and E(3) below.**

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence [*on the*] **at** trial **and may be filed with the court only after the case has been adjudicated on the merits**[;] and **only** if the party asserting the claim fails to obtain a **judgment** more favorable **than the offer to allow** judgment[*,*]**. In such a case,** the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

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Council on Court Procedures
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Appendix B

From: Teresa Higgens [mailto:thiggens@cooneyllc.com]=20
Sent: Friday, February 29, 2008 3:02 PM
To: Leslie O'Leary
Cc: 'Paul R. Frisch'; 'Jo Bryson'; klaus@oregon.com; 'Teresa Higgens'
Subject: Council on Court Procedures - OMA Written Comment

Dear Ms. O'Leary:

The OMA advises its members who are or who have been treating physicians not to participate in ex parte contacts with defense attorneys but to have both the plaintiff attorney and defense attorney present either at an interview or deposition. This is to protect the physician from claims of breach of fiduciary duty relationship (notwithstanding any waiver of privilege or court order to which the doctor was not a party) or a HIPAA violation.

Thomas E. Cooney

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OADC Oregon Association of Defense Counsel

Council on Court Procedures
310 SW Fourth Avenue
Portland, OR 97204-2387

March 10, 2008

Re: Informal Interviews with Treating Physicians

Dear Council on Court Procedures:

Thank you for inviting the Oregon Association of Defense Counsel (OADC) to submit a statement regarding "*ex parte* conversations with treating physicians." This is a very important issue to the defense bar.

First, OADC takes exception to the use of the term "*ex parte*" in the context of witness interviews. The term "*ex parte*" generally refers to a lawyer communicating with a judge on the merits of a case without notice or opportunity for the opposing party to be heard. That is and always has been inappropriate. In contrast, there is nothing improper about a lawyer speaking to a fact witness without the opposing party being present.

Informal interviews of fact witnesses, outside of the presence of the other party, are invaluable to both the plaintiff and defendant. Informal interviews allow attorneys to conduct discovery without the interference of opposing counsel. More importantly, informal interviews of witnesses permit attorneys to investigate and prepare possible theories of the case without revealing to opposing counsel information that is entitled to work product protection. This is particularly true with respect to informal interviews of the plaintiff's treating physicians in a medical malpractice case. Informal interviews can reduce the cost of formal discovery, and they can provide the attorneys with a more candid assessment of the plaintiff's medical condition and the elements of the medical case, including breach of the standard of care, causation and damages.

Under current Oregon law, if a party making a claim for compensation or damages has waived the physician-patient privilege, then any party against whom such a claim is made may communicate with and conduct an informal interview of the physician without the claimant being present.

The issue under consideration by the Council on Court Procedures is a procedural question: how can defense counsel interview the plaintiff's treating physician, after the plaintiff has waived the physician-patient privilege, if the plaintiff objects to the interview or seeks to impose unacceptable conditions for the interview?

This procedural question has generated extensive motion practice. As noted below, minor changes to ORCP 44E and ORCP 36A may clarify the issue and greatly limit current motion practice without changing substantive law.

STATE LAW AND HISTORICAL PRACTICE

1. **Waiver of Physician-Patient Privilege**.

"It has long been recognized that once a patient has taken the testimony of one doctor, either on trial or by deposition, the privilege is then terminated for all purposes related to the injury or illness which was the subject of the testimony of that doctor." *State ex rel Grimm v. Ashmanskas*, 298 Or 206, 213-214, 690 P2d 1063.

2. **Historical Oregon Practice**.

Informal interviews with a plaintiff's treating providers have been allowed by most courts in Oregon since *Ashmanskas*. Copies of the trial court orders can be provided upon request. After the issuance of numerous orders allowing informal interviews following waiver of the physician-patient privilege, the Multnomah County Circuit Court Motion Panel ruled that it was appropriate to allow informal interviews with a plaintiff's subsequent treating physicians without a court order once the privilege had been waived in a medical malpractice case.

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

("HIPAA")

1. **Purpose**.

The HIPAA privacy rule sets forth comprehensive federal protection for the privacy of health information. HIPAA complex regulatory scheme is designed to protect against the misuse and disclosure of protected health information. The Preamble to the HIPAA Privacy Rules expressly states that the rules are "*not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.*"

2. **The Privacy Rule Allows for Disclosure of Protected Health Information Pursuant to Court Order**.

The Privacy Rule specifically permits the disclosure of Protected Health Information by a physician, without the consent or authorization of the individual, if that disclosure is in response to a court order. 45 CFR §164.512(e)(1)(i). The Rule does not specify how such an order might issue. Instead the litigants have looked to state law for that authority.

In Oregon, litigants have primarily relied upon the court's authority to control discovery under ORCP 36. ORCP 36(b)(1) allows a party to conduct discovery "into any matter not

privileged which is relevant to the claim or defense of the party seeking discovery." (Emphasis added.)

There has been some debate over whether ORCP 36 allows the court to issue an order allowing informal interviews. Some plaintiff attorneys argue that the court cannot issue an order allowing an informal interview because the ORCP does not expressly allow the court to issue such an order. The defense bar contends that ORCP 36 allows the courts to fashion a protective order controlling the method of discovery, and that such authority, particularly ORCP 36C(5), permits the court to issue an order to allow an informal interview.

3. **The Privacy Rule Allows for Disclosure of Protected Health Information in Response to a "Lawful Process" or Discovery**.

The Privacy Rule also permits the disclosure of Protected Health Information by a physician in response to a discovery request, subpoena, or "other lawful process." 45 CFR §164.512(e)(1)(ii).

If the disclosure is in response to a court order under §164.512(e)(1)(i), the disclosure is limited by the terms of the court order itself and no other protections are required.

However, if the disclosure is pursuant to a discovery request, subpoena or other lawful process under §164.512(e)(1)(ii), then additional protections are necessary. Specifically, the physician must receive satisfactory assurance from the party seeking the information that reasonable efforts have been made to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request or that reasonable efforts have been made by the party to secure a qualified protective order. 45 CFR §164.512(e)(1)(iii). In turn, the protective order requirement is satisfied by an order that (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested, and (2) requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation proceeding. 45 CFR §164.512(e)(1)(iv).

The practice of many Oregon courts to allow informal interviews after the physician-patient privilege has been waived falls squarely within §164.512(e)(1)(ii), as a lawful process through which disclosure may be obtained.

4. **Post HIPAA Many Courts in Other Jurisdictions Have Allowed Informal Interviews Through Either a Qualified Protective Order or Order Compelling Authorization from Plaintiff's Counsel**.

The Superior Court of New Jersey was the first to address the narrow issue presented here: Whether HIPAA preempts the informal discovery techniques previously authorized by state practice following waiver of the physician-patient privilege: *In re: PPA Litigation* 2003 WL 22203734 (NJ Super.L. September 23, 2003) as the court said at page 10: "The answer is plainly

no." HIPAA allows a covered entity to disclose protected health information without written authorization of the patient following waiver of the physician-patient privilege by court order. *Id.* at p.11.

In *Smith v. American Home Products Corp.*, 372 NJ Super. 105, 855 A2d 608 (2003), the court recognized a strong dichotomy of judicial reasoning between those states that permit informal discovery and those states prohibiting such techniques. The court concluded, however, that debating and/or modifying that state's prior law providing for informal discovery was not the role of the court. Rather, the court's task was to decide the narrow issue of whether HIPAA preempted informal discovery techniques. Again, "The answer is plainly no." 855 A2d at 621.

As the *Smith* court explained, at 622:

> "Nowhere in HIPAA does the issue of ex parte interviews with treating physicians, as an informal device, come into view. The court is aware of no intent by Congress to displace any specific state rule, statute or case law (e.g., Stempler) on ex parte interviews. As for this state's informal discovery practices, Congressional intent seems not to intrude on New Jersey's general authority over its judicial and administrative proceedings. HIPAA allows a covered entity to disclose protected health information without written authorization of the patient or an opportunity for the patient to agree or object to the disclosure during judicial proceedings under certain circumstances such as a court order."

In *United States ex rel. Mary Stewart v. The Louisiana Clinic*, 2002 US Dist LEXIS 24062 (ED La 2002), plaintiff sought the disclosure of non-party medical records from the defendant. The defendant objected, arguing that the disclosure of non-party medical records was prohibited by HIPAA. The court disagreed, holding that the requirements of HIPAA were satisfied by the process of seeking an order form the court and the entry of a protective order regarding how the medical information could be used. Significantly, the court found that neither the patient's consent nor a contradictory hearing was required. (In Louisiana, a contradictory hearing affords the patient an opportunity to contest the disclosure.) This case supports the conclusion that, in the context of a lawsuit, medical information may be disclosed without the patient's consent or an opportunity to be present, so long as an appropriate court order is obtained.

The following cases hold that the plaintiff in a medical malpractice case can be compelled to execute HIPAA compliant authorizations to allow informal defense interviews of physicians. *Steel v. Clifton Springs Hospital & Clinic*, 788 NWS 2d 587 (2005); *O'Brien v. Varnovitsky*, 46 Ad 3rd 1295 (2007); *Arons v. Jutkowitz*, 880 NE 2d 831 (2007); *Doe v. Eli Lilly & Co., Inc.*, 99 FRD 126, 128-29 (1983). As the court in *Doe* explained:

> "No party to litigation has anything resembling a proprietary right to any witness' evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness however impartial or important to him, by insisting upon some notion of allegiance."

POTENTIAL ORCP CHANGES

We suggest a minor change to ORCP 44E as follows:

> "Any party against whom a civil action is filed for compensation or damages for injuries may obtain ~~copies of~~ individually identifiable health information as defined in Rule 55H within the scope of discovery under Rule 36B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55H."

A change to the Rule to delete the words "copies of" would clarify that discovery is allowed not just as to medical records in document form, but also as to all forms of individually identifiable health information, which would include statements by a health care provider after the privilege has been waived.

We also suggest a minor change to ORCP 36 A to clarify what we all know in practice; that is, discovery is broader than the formal processes currently mentioned in ORCP 36 and extends to informal interviews.

> **A. Discovery Methods**. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; [and] requests for admission **and informal interviews**.

If the Council is considering a codification of existing practice, then we suggest the following new section be added to ORCP 44:

> **F. Informal Interview of a Health Care Provider.**
>
> "If a party files a civil action against a health care provider on the party's behalf or in a representative capacity for injuries to person or death arising from any medical, surgical or dental treatment, omission or operation, and the party asserting the claim in that action waives any privilege as to any information or opinion in the possession of a health care provider who has examined or treated the party or the person whose health or medical condition has been placed in controversy in the action, then any party to the action, and their attorneys or authorized representatives, may conduct an

informal interview of the health care provider and discuss the information or opinion of the health care provider outside of the presence of the other parties and their attorneys or authorized representatives, if the provider consents to such an informal interview. An informal interview of a health care provider may be obtained by written patient authorization or by an order of the court. A health care provider may refuse to consent to an informal interview, but in that event the party seeking the information or opinion may take the deposition of the health care provider with respect to that information or opinion, without obtaining a prior court order."

We would appreciate the opportunity to respond to the statement of the Oregon Trial Lawyer's Association, or to respond to any questions that you may have. We are happy to send an OADC representative to any work sessions or meetings relating to this important issue.

Very truly yours,

Billy M. Sime
President, OADC

From: Kathryn Clarke [mailto:kathrynhclarke@mac.com]=20
Sent: Friday, March 07, 2008 7:49 PM
To: Leslie O'Leary
Subject: COCP: Ex parte interviews with treating physicians

Dear Leslie:

You asked the Oregon Trial Lawyers Association to provide a response to a Council suggestion that a rule could address the issue of ex parte interviews between a plaintiff's physician and defense counsel. Apparently no specific proposal has been drafted, and therefore OTLA cannot offer specific comment. Conceptually, however, OTLA could accept a rule prohibiting such interview, but would oppose any rule that would authorize an adversary to meet alone with a plaintiff's treating physician,
Indeed, OTLA believes that any rule which would authorize such interviews would impact the patient's substantive rights. ORS 1.735 provides in part:

The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure * * * 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.

As a threshold matter, enactment of any rule authorizing ex parte physician contact will have an impact on the substantive rights of both patient and physician. For instance, ex parte communication between physician and the patient's adversary may violate HIPAA In addition, it would have an impact, and potentially change, Oregon's Rules of Evidence, particularly OEC 504-1 (Physician-Patient Privilege) and OEC 511 (Privilege Waiver).

What follows is a brief discussion of some of the reasons why ex parte interviews with treating physicians should not be authorized by rule .

1. This issue arises only in the context of professional negligence litigation. In non-medical liability cases, defense attorneys do not intrude into the physician-patient relationship. The argument for ex parte contact only arises after a discovery deposition of a medical defendant occurs. Only after a discovery deposition is taken does defense counsel argue that the ordinary privilege protecting communications between an injured person's physicians and their patient's adversary is waived. See State v Ashmanskas, 298 Or 206, 212,

690 P2d 1063 (1984)(discussing procedure and a medical defendant's right to depose treating physicians once the defendant physician's discovery deposition is taken). In all other liability cases, no attempt is ever made by defense counsel to meet alone with the plaintiff's physicians. Yet no one complains that therefore the system functions unfairly or that the defense is handicapped in the full preparation of its case.

2. Medical providers and treating physicians are no ordinary fact witnesses. The physician-patient relationship exists on a foundation of trust and candid, even painful, disclosure. A physician's knowledge in any case is a complicated, mixed bag of factual information provided by a patient, or obtained though a review of other medical records generated specifically to provide medical care to the patient, and opinion. The physician's opinion is derived from specialized training and knowledge, but it also includes a subjective element that may be difficult to isolate or prove. A skillful and persuasive examiner, posing questions without a patient's advocate present, may elicit opinions that reflect a physician's fears and beliefs regarding the nature of medical liability cases, the current national medical-legal debate, or local medical liability hysteria rather than an objective assessment of a patient's medical condition.

3. In a medical liability action, "winning or losing" is often dependent on whether or not the current treating doctor is willing to express any opinion at all. Physicians' today are economically dependent on patient referrals and subject to extreme peer pressure. Because a treating physician speaks from a particularly impressive vantage point, and has a particularly persuasive impact on jurors, he has the ability to foreclose a patient's ability to prevail on a claim simply by declining to express an opinion or denying any conclusion can be drawn from the medical evidence. This is particularly true in contests over causation.

4. Physician medical insurance is dominated in Oregon by two insurance carriers. Those insurance carriers regularly retain the same defense firms. The same firms routinely defend entire medical centers including medical facilities such as Kaiser and OHSU. For each treating physician in Oregon, it is likely that she, her present partner, her former partner or an associate within her group has been or is being represented by the same defense firm that seeks an ex parte interview regarding a plaintiff-patient. When such an ex parte communication occurs chances are very good that the physician is approached in the style of a "lawyer-client" conference, complete with advice regarding how to avoid controversies, and how to say away from awkward positions, or how to avoid criticism of a fellow physician.

5. Ironically, often plaintiff's counsel cannot speak with a treating physician before a case is filed without the treating physician contacting the defense firms who demand to be present when meeting with plaintiff's counsel pre-trial. The same defense firm that attended plaintiff's counsel pre-trial meeting will often represent the defendant physician when a civil action is filed. Ex parte interviews thus permits the defendant to meet alone with a treating physician when the injured patient's own advocate is unable to discuss medical care and treatment in private.

6. In candid speeches to lawyer education groups, claims managers have disclosed that they will not even evaluate a medical liability claim for settlement until an attempt has been made to persuade treating physicians either to decline to testify at trial or to agree to advocate for the defense as expert witnesses.

7. The most insidious aspect of permitting ex parte contact is the violation of trust between a treating physician and her patient. An injured patient may have seen a physician for years. The physician may have observed a patient in the worst of times, perhaps assisting the patient back from the brink of disaster created by the error of another physician. The injured patient considers the current treating physician a friend and confidante. The plaintiff's previous physician, now named as a defendant in a medical liability action, is an adversary. Permitting an ex parte communication, without the patient's representative present, means that the plaintiff can not trust the current treating physician who has consulted with her adversary behind closed doors. The patient is left wondering whether what she says to her doctor will be used against her, whether her current physician is advocating on her behalf or assisting his colleague to defeat her claim, and why her own representative was prevented from being present when her own physician discussed her care.

Ex parte communications impair legitimate discovery. They allow improper disclosure of protected health information, and force treating physicians to be lawyers as well as doctors when they try to distinguish protected information from that which is discoverable. They create the danger of unauthorized and improper defense inquires into collateral issues and unrelated treatment. All legitimate medical information, including plaintiff's condition, history, and prognosis can be obtained through informal joint meetings where plaintiff's representative can monitor the conversation or through depositions with the opportunity to object to improper inquiries. The only benefit to the ex parte meeting, as compared to joint meetings or depositions, is the opportunity to enlist the doctor to work against his or her own patient's interests.

It should be noted that Washington State, and many other jurisdictions, prohibit defense counsel's ex parte contact with plaintiff's treating physicians. The parties cooperate to arrange joint meetings, no one complains that the system is unworkable or unfair, and there is no complaint of unfair advantage.
I hope this is helpful. Please let us know if you need any further information.

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Council on Court Procedures
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March 25, 2008

Douglas M. Bray, Chair
Judicial Administration Committee
Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, OR 97204

Re: Judicial Administration Committee's Requested Review of ORCP 7D(4)(a)

Dear Mr. Bray:

Michael Bloom raised a concern from the Judicial Administration Committee as to whether ORCP 7D(4)(a)'s requirement that a plaintiff mail a true copy of the summons and complaint to "...any other address of that defendant known to the plaintiff at the time of making the mailings...." might be an unduly burdensome requirement which would thwart service.

There were instances prior to the 1997 amendments to ORCP 7D(4)(a) where the lack of an adequate due diligence search tripped up a plainitiff. *See, Mitchem v. Rice*, 142 Or App 214, 219, *aff'd on recon*, 143 Or App 546, 550 (1996).

A review of more recent appellate cases indicates no continuing problems finding service to be inadequate based on a failure to serve the defendant at additional addresses of which the Plaintiff may have, with due diligence, become aware. An inquiry was made of the Professional Liability Fund regarding any claims made due to an alleged defect in service under ORCP 7D(4)(a). The PLF's response is that the identified part of Rule 7 is not an issue for the PLF.

Therefore, the Council on Court Procedures determined at its March 8, 2008, meeting to remove ORCP 7D(4)(a) from its agenda for amendments this biennium. However, if you or the

Judicial Administration Committee have further concerns that ORCP 7D(4)(a) is not working to facilitate the just, speedy, and inexpensive determination of civil disputes, please contact me and I will put the provision back on the Council's agenda.

Sincerely,

MARK A. PETERSON
Executive Director

MAP:scn

c: Don Corson
Eugene Buckle

Council on Court Procedures

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March 25, 2008

Danny Lang
Attorney at Law
140 State Street
Sutherland, OR 97479

Re: Proposal to Amend UTCR 4.050

Dear Mr. Lang:

Thank you for your letter of March 4, 2008, regarding a proposed amendment to UTCR 4.050 relating to oral argument on motions in criminal cases. Your proposal would make oral argument by telecommunication the normal practice rather than a procedure that may be requested as provided in UTCR 4.050(2)(a).

As you no doubt know, UTCR 5.050(2) has a parallel procedure for requesting oral argument by telecommunication in civil cases.

I presented your proposal to the Council on Court Procedures at the March 8, 2008, meeting. The Council declined to take action on your proposal. First, the Council only proposes amendments to the Oregon Rules of Civil Procedure and, therefore, the matters within UTCR 4.050 are outside of the Council's mandate. Secondly, with regard to UTCR 5.050, the Council believes that such a modification is best left to the judgment of the UTCR Committee.

Thank you for your interest in improving the practice of law in Oregon.

Sincerely,

MARK A. PETERSON
Executive Director

MAP:scn

c: Bruce Miller, UTCR Reporter
Don Corson
Eugene Buckle