MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 8, 2014, 9:30 a.m.
University of Oregon School of Law
1515 Agate St, Lewis Lounge (4th Floor)
Eugene, OR 97403

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart
John R. Bachofner*
Arwen Bird
Michael Brian
Hon. R. Curtis Conover
Kristen S. David
Travis Eiva
Jennifer L. Gates*
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Robert M. Keating
Hon. Jack L. Landau
Maureen Leonard
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver
Hon. Charles M. Zennaché

Members Absent:

Jay W. Beattie
Hon. Paula M. Bechtold
Brian S. Campf
Hon. Roger J. DeHoog
Deanna L. Wray

Guests:

Ben Harris, 3rd Year Student, University of Oregon School of Law
Nicole Commissiong, Assistant Dean, University of Oregon School of Law

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 1 • ORCP 7 • ORCP 9 • ORCP 10 • ORCP 44 • ORCP 46 • ORCP 54 A • ORCP 55 • ORCP 67 • ORCP 69 • ORCP 73	• ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:36 a.m. There were two guests present, so brief introductions were held. Prof. Peterson gave a short overview of the mission of the Council and the timing of its biennial sessions.

II. Approval of February 1, 2014, Minutes (Ms. David)

Ms. David called for a motion to approve the February 1, 2014, minutes (Appendix A). A motion was made and seconded, and the minutes were approved unanimously.

III. Administrative Matters (Ms. David)

Ms. Nilsson reminded Council members that on the previous day she had sent an e-mail to the listserv with suggested language for an update to legislators, and asked that everyone send updates to their assigned legislators. Ms. David emphasized the importance of keeping the Legislature informed of the Council's work.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David reported that the committee has heard of no significant issues with the prior biennium's changes to Rule 43, but that it is still continuing to monitor the situation in case any problems arise.

2. ORCP 1 and Legislative Counsel Suggestions (Ms. David)

Prof. Peterson reminded the Council that the Oregon Law Commission had recommended that the Legislature enact the Uniform Foreign Declarations Act into the Oregon Revised Statutes and that the Legislature had amended Rule 1 E to include a reference to the new law. He noted that the Act uses different language for declarations made outside of the United States, and that the committee had reworked and reordered Rule 1 E so that it makes sense, including the precise language for declarations made both inside and outside of the U.S. He noted that the amendment is now complete, as Legislative Counsel has codified the statutory citation and it is now included in the draft amendment to the Rule. Ms. David reported that the Rule 1 committee was also dealing with other suggestions from Legislative Counsel's "pink sheets" for which there were no existing committees, and accordingly had drafted amendments to rules 67 and 73 (Appendix B). Prof. Peterson noted that these changes were to the lead lines of the rules, and that the ones suggested by Legislative Counsel are better and more descriptive than the

ones in the existing rules.

Mr. Brian asked for clarification about Legislative Counsel's "pink sheets." Prof. Peterson explained that Legislative Counsel has various people assigned to look at different parts of the Oregon legislative scheme and, over the years, the people assigned to the ORCP have assembled what they see as issues with the Rules and recorded them in "pink sheets." He stated that this is the first time that Legislative Counsel has shared these items with the Council, and it has been a helpful exercise to consider these suggestions. Justice Landau asked whether lead lines and headings are actually part of the rules that the Council approves. He noted that, in the case of statutes, Legislative Counsel inserts the lead lines and they are not part of the statute – in fact there is a statute which states that they are not. Prof. Peterson stated that no lead line goes into the ORCP that the Council does not approve. He observed that, if a lead line became important, an ORCP lead line might have more heft than a statutory lead line.

Ms. David called for a motion as to whether to put the proposed amendment to Rule 1 on the September agenda for voting on publication. The motion was made and seconded, and passed unanimously.

Ms. David called for a motion as to whether to put the proposed amendment to Rule 67 on the September agenda for voting on publication. The motion was made and seconded, and passed unanimously.

Ms. David called for a motion as to whether to put the proposed amendment to Rule 73 on the September agenda for voting on publication. The motion was made and seconded, and passed unanimously.

3. ORCP 7/9/10 Regarding Service (Mr. Bachofner)

Prof. Peterson reported that the committee has had a number of long meetings and suggested a number of changes which include minor stylistic, punctuation, and grammar changes to rules 7, 9, and 10 (Appendix C). He stated that the most interesting change relates to service by mail which is available under ORCP 7 2(d)(2). Typically, an attorney for a party is not allowed to serve a summons; however, an attorney is authorized in section E to serve the summons by first class mail along with a certified, registered, or express return receipt requested. He stated that the committee had a lively debate about service by mail, but the consensus was that only attorneys should be allowed to serve, since they have adequate training and are governed by ethics rules. The bottom line is that attorneys have malpractice insurance should the need arise. Prof. Peterson stated that, at the committee's last meeting, there was some discussion about serving corporations because this change would require the services of an attorney to serve a corporation by mail. He stated that a person could be sent to the office of

the corporation to serve by personal or office service but, particularly for out of state corporations that do not have a registered agent in Oregon, it may result in additional expense. Again, however, the committee agreed that, since laypersons may not even know what a summons and complaint are, it is safer to restrict mail service to attorneys. He stated that his own sense is that, if a party receives an envelope from a soon-to-be former spouse or an estranged business partner, that party may not care to open it but, if the envelope comes from a law office, it may receive more attention. For all of the reasons Prof. Peterson outlined, the committee decided to add the word "only" to section E.

Judge Miller stated that the mail service issue came to the Council from Holly Rudolph at the Oregon Judicial Department (OJD), who is involved with creating forms for self represented parties. Ms. Rudolph wanted self-represented litigants to be able to serve by mail to avoid expense. Judge Miller stated that another person who took an interest in this area was Aaron Crowe of Nationwide Process Service, Inc. She stated that both Ms. Rudolph and Mr. Crowe presented well-reasoned arguments. She noted that the forms that the courts give to self-represented litigants are either ambiguous or specifically state that these litigants can serve by mail, and her office has found that litigants often are either confused or not honest about service. Prof. Peterson stated that Mr. Crowe, who is not a lawyer but has likely done more service than the entire Council, wanted certified mail to also require restricted delivery. Judge Miller related that Mr. Crowe had posited that, if mail is sent by regular delivery as well as by certified mail, return receipt requested, and the certified mail is rejected, the post office will also return the regular mail. Prof. Peterson pointed out that the committee had challenged him on that point, and did not believe it to be true.

Judge Zennaché stated that he had not been able to participate in most of the committee meetings. He recalled that the original request that came to the Council was to modify Rule 7 E to allow mail service to be made by a party, but stated that the committee's proposal has now moved the rule backwards, stating that not only can an individual not serve by mail but, with the proposed amendment, a process server cannot do so either. Judge Zennaché expressed concern that this would be unduly punitive to self-represented litigants, and that it serves no justifiable purpose. He stated that he understands the argument that lawyers are officers of the court and have malpractice insurance, but that he does not see allowing others to serve by mail as that big of a problem because many plaintiffs are serving individuals, and service by mail on individuals under Rule 7 D 3(a)(i) is only effective when the person signs for the piece of mail, so he does not see a great potential for abuse. Judge Zennaché also noted that the committee had recommended a change to require that the person certify that they have served both the summons and the complaint, but stated that this problem has been addressed elsewhere.

Prof. Peterson stated that the change to which Judge Zennaché referred is in ORCP 7 F(2)(i) where the certificate of service, when not served by a sheriff or sheriff's deputy, must certify the specific documents served. Judge Miller observed that, as practical matter, a judge receives a certificate of service from a self-represented litigant and anything could have been served – at least most of the sheriffs are appending photocopies of the cover page of what they served. Judge Armstrong stated that there was a recent Court of Appeals case where a sheriff performed service in Texas, but did not include the complaint or summons, so the court entered a default. He stated that it is a problem, and it is useful to make sure that people have the ability to know what has been served. He noted that it is difficult to capture what it is to be a process server in the rule, because anyone can serve process, so it may not be possible to distinguish between people who serve documents as a business versus anyone else when allowing someone other than lawyers to serve by mail.

Judge Miller stated that the committee had talked to Mr. Crowe about the idea of getting some type of licensing or certification and insurance or bonding for process servers to have some assurance that they were doing it right, so that there would be recourse in the event something went wrong. She stated that he was receptive to this idea, but there is no such mechanism in place right now. Prof. Peterson stated that, in Multnomah county, the sheriff indicates what documents were served in the certificate of service, but he is not certain what other counties do. He wondered if perhaps sheriffs, along with everyone else, should also be required to state what was served. Ms. David agreed that the committee might want to think about removing the exception for sheriffs so that it is the rule for everyone. Judge Zennaché wondered whether anyone has seen a case in Oregon where sheriff has not listed the documents served in the certificate of service. Mr. Weaver stated that it is his experience that not all sheriffs do. Judge Armstrong noted that it is the right practice in any case, and saying that because you're a sheriff you do not have to follow the right practice because we know that you will is a bit foolish. Judge Zennaché wondered whether there are any statutes that address service by the sheriff that already require them to identify what was served in a certificate, and he asked that the committee research this.

Judge Zennaché observed that the proposed language in ORCP 7 D(2)(d)(i) is in part related to the "only" language proposed in section E, so he believes that a decision cannot be made on this language until one is made on the “only” language. Prof. Peterson agreed that they are related and, standing by itself, this would simply be internal cross-referencing, which the Council has been resisting. Judge Hodson asked whether people believe that, by the way the rule is currently written, it was intended to only allow attorneys and this amendment is intended as a clarification. Judge Zennaché stated that this is not his belief. Prof. Peterson noted that Holly Rudolph observed that the current language in ORCP 7 E sounds like only attorneys are allowed to serve by mail, and she wanted the language

clarified to state that parties should also be allowed to serve the summons by mail. Judge Zennaché stated that the committee was moving in the direction of only allowing attorneys to serve by mail; the rule would not let anyone else serve by mail any longer. Judge Hodson asked whether the rule currently only allows attorneys that exception. Judge Zennaché stated that Rule 7 E only allows attorneys an exception from a general prohibition that an attorney or a party cannot serve the summons. He stated that, if he was self-represented, under the current rule he could hire a process server or have his cousin put the summons in the mail – he just could not do it himself. Judge Hodson agreed that the proposed amendment would not just be clarification but, rather, a move in the opposite direction, by saying only lawyers can serve by mail.

Mr. Bachofner reiterated that the majority of committee felt strongly that it wanted only attorneys to be able to serve by mail because of concerns about protections such as malpractice insurance, and the vetting process involved with being admitted to the bar, that are not present with self-represented litigants. He noted that many judges have experienced situations where these litigants do not do what needs to be done for proper service, and letting people know about lawsuits against them is an important process. He stated that it is not an onerous obligation to have a process server do that. Judge Armstrong stated that he understood that part of the effort is to make clear that, contrary to the general prohibition about attorneys serving the summons, it is confirming that attorneys can serve by mail. Judge Zennaché stated that he feels the rule clearly allows that now. Prof. Peterson stated that the current rule does not have the cross-referencing so, if an attorney does not read section E, he or she might think they need to have someone else do the service by mail.

Judge Miller observed that Rule 7 seems to be a bit out of control in terms of organization. She stated that, in the future, the Council may want to look at other states' service rules and see whether improvements could be made. Ms. David noted that Legislative Counsel had also asked the Council to do an overhaul on Rule 4, but that the problem with doing that is that the lettering and structure would change, making future legal research more difficult. Prof. Peterson pointed out that, during his time on the Council, two revisions have been made to Rule 7 to make it more organized. Ms. David stated she would like to see a better checklist for self-represented litigants on how to serve accurately.

Judge Zennaché stated that he does not think that sending the current committee members back to discuss this issue will be fruitful because the consensus is already that mail service should be limited to lawyers. He suggested letting the full Council think about it and come back and vote next time. Prof. Peterson asked that Council members look at all of the changes to make sure they do not create any inadvertent problems.

Prof. Peterson asked for direction on another matter: Legislative Counsel suggested that the Council use the term "electronic mail" rather than "e-mail" in Rule 9 but, with the addition of electronic service, there might be confusion. Ms. David stated that she would prefer to stick to "e-mail" to avoid confusion. Judge Zennaché and Mr. Eiva agreed. The rest of the Council concurred. Mr. Eiva observed that electronic service has nothing to do with e-mail.

Judge Zennaché noted that, in the proposed change to Rule 9 E, the document is required to include the register number of the action, if one has been assigned, and wondered exactly what that number is. He expressed concern that the number may not be known until the case is filed. He pointed out that the last sentence of section H, which states that service by electronic service is prohibited unless the person being served agrees to it, is somewhat inconsistent with Uniform Trial Court Rules (UTCR) 21.070(2) and 21.100 one of which gives the court the authority to order a party to accept service by electronic process and the other of which prohibits a party from withdrawing from electronic service without a court order. Prof. Peterson noted that the language was taken verbatim from the E-court Task Force; however, the committee will look at it and make sure it does not conflict with the UTCR. Judge Zennaché asked why, in Rule 10, the extra three days are needed for e-mail service. He stated that it makes sense with mail, because it is presumed that it takes a while to get there, but e-mail is delivered to the receiver immediately. Judge Armstrong observed that, even if the e-mail comes right away, the receiver is not necessarily there to receive it. Judge Miller noted that the extra three days is also allowed for faxes. Ms. David pointed out that this may change with an eventual change to seven day increments as well.

Mr. Brian suggested putting off further discussion of rules 7, 9, and 10 until the next meeting, as there are other issues that need to be dealt with. Since there are only three weeks until the April meeting, Ms. David asked Ms. Nilsson to send an e-mail to Council members in a week and a half to remind them to re-read the draft amendments to Rules 7, 9, and 10 and be ready to discuss them at the next meeting. Prof. Peterson stated that the committee will send any new versions of amendments to the full Council as soon as they are ready.

4. ORCP 13 (Judge Zennaché)

Judge Zennaché stated that he is trying to set up a new committee meeting and that the committee is still in the process of discussing how Rule 13 should be modified, if at all, to make certain documents that are filed in family law cases pleadings. He noted that the committee did come to a consensus on Prof. Peterson's proposed change to Rule 69 (Appendix D), and that this can be discussed during the Rule 69 committee report.

5. ORCP 15 (Mr. Beattie)

Mr. Beattie was not present at the meeting. Prof. Peterson reminded the Council that we are waiting for the committee's final report.

6. ORCP 27 (Mr. Weaver)

Mr. Weaver stated that the committee met after the last Council meeting and discussed the proposed amendment and hashed out some other issues, and before the next Council meeting is forming a work group which includes former Council members who were on the ORCP 27 committee last biennium. He stated that, hopefully by the next meeting, the committee might have an amendment we can vote on. Ms. David reminded the committee, and the entire Council, that there are only three meetings left before the September publication meeting.

7. ORCP 44 (Mr. Keating)

Mr. Keating reminded the Council that the issue at hand is whether ORCP 44 C should be amended by clarifying the phrase "relating to injuries for which recovery is sought." Those on the committee who think it should be clarified believe it should incorporate ORCP 36 B because that is the language used in ORCP 44 E. Mr. Keating noted that, at the last meeting, Judge Zennaché had asked for a report from both sides. Those reports are attached as Appendix E. He stated that there is no recommendation to the full Council from the committee because it could not come to an agreement as to the wisdom of such a change; however, it is good to get the committee's work into the record so that it is available in the Council's history.

Mr. Keating stated that, although the ability to get an affirmative vote in September to publish an amendment that would bring about a change is slim, he wanted to make a few practical pitches. He noted that there are three ways that a defendant in personal injury litigation can get access to health care information: an ORCP 44 C request for production of medical records relating to the claim; a subpoena to health care providers that defendant's counsel learns about; and the deposition of the plaintiff. He stated that his position is that the scope of discovery available in ORCP 44 C and E is congruent, and that both are governed by ORCP 36 B, but there have been trial court decisions that narrow the production of documents to records relating to the "same body part." Mr. Keating stated that this is why the defense bar would like to change it. He stated that he has spent his life defending health care providers and, when they get sued, it is a traumatic experience. He noted that his bias is pretty obvious and, for his clients' benefit, he wants to be able to tell them that he is able to get everything relevant to the claim against them. Right now they cannot have that assurance.

Mr. Keating stated that he feels that Oregon has the most restrictive discovery in the country, but stated that Mr. Eiva disagrees. However, Mr. Keating has had conversations with lawyers from other jurisdictions that reinforce the reality that Oregon is quite restrictive. He observed that the primary concern of the plaintiffs' bar is that a patient that has personal medical history with no bearing on the litigation should not be put in a position where that information has to be disclosed. Mr. Keating stated that such cases exist, but that there is a mechanism whereby that information can be protected – the plaintiff can simply object to a request for production, articulate the specifics, and the records will not be produced absent a protective order if they are determined to be producible. He noted that this process gives the defense an opportunity to go to the court and move to compel production of the documents, which allows the court to decide if the defense is allowed access to the material and, if so, whether the material is subject to a protective order. Barring this, the decision about access to records is made by the plaintiff's attorney and it is basically not reviewable.

Mr. Eiva noted that his clients also experience stress when dealing with trials and opposing counsel because they have been injured severely in some way and their lives have been disrupted or destroyed. He noted that he encounters privilege problems as well, such as the statutory peer review privilege, where he is not allowed to access any discussion health care providers have had regarding the error they have committed that harmed his client, as well as the expert witness doctrine, where a provider will not tell him what safety rules apply to the procedure that harmed his client. He stated that privilege is a substantive policy decision to be made by the Legislature, not by the Council. Our Legislature has made that decision with regard to the physician/patient privilege. He stated that he thinks the Council is in agreement that it cannot abrogate a privilege. If another jurisdiction has a persuasive way of addressing privilege, that is something for the Legislature to look at, not the Council.

Mr. Eiva wondered whether the change Mr. Keating proposes is really a clarifying amendment, or whether it would change the nature of the physician/patient privilege. He noted that, under the standard rule of interpretation of law, since the text of ORCP 44 C is very different from ORCP 36 B(1), we must presume it means something different. It is clear from the legislative history of ORCP 44 C that the Legislature was talking about reports, and "reports" is a term of art with regard to litigation, meaning "what happens after an examination to determine the nature of the injury caused by the incident." Mr. Eiva stated that this is all the Legislature ever authorized, but that the Council later expanded the rule to include not just reports but also existing notations, acknowledging at the time of the amendment that it expanded the incursion into what documents were required to be produced. Mr. Eiva stated that those who propose a current amendment look to the Council's change from "reports" to "existing notations" as authority for their proposed amendment but, in reality, the Council did not have the authority to

make that change in the first place.

Mr. Eiva suggested that the amendment would be healing a defendant problem in a way that hurts plaintiffs, and that this is not the Council's role. He noted that Mr. Keating cites ORCP 44 E as authority for the proposed change, but stated that ORCP 44 E is a very different rule than ORCP 44 C. Mr. Eiva pointed out that the Legislature authorized hospital records only in the statutory precursor to ORCP 44 E, but the Council later amended the rule to state "individually identifiable health information." He again suggested that the Council did not have the authority to make that change because it was a bigger incursion into the physician/patient privilege, which is a substantive issue that should be decided by the Legislature. He posited that it is an exercise in wagging the dog to cite the broad scope of the Council's changes to ORCP 44 E as authority to change 44 C, because it is using an unauthorized amendment as authority for a new amendment.

Mr. Eiva stated that the cases cited by Mr. Keating in his report – *Baker v. English* [134 Or App 43, 46-47,894 P2d 505 (1995), *rev'd on other grounds*, 324 Or 585 (1997)] and *Doran v. Culver* [88 Or App 452, 454-55, 745 P2d 817 (1987), *rev den*, 305 Or 102 (1988)] – only discussed whether a document was relevant, but that there was no discussion about the nature of medical privilege. In *Baker*, the express language of the court does not dispute whether or not the document was privileged. Mr. Eiva wondered why this proposed change is being brought forth in this way. He stated that, if the defense bar feels strongly about it, they can use mandamus, as that would allow the matter to get to the Supreme Court, whose job it is to interpret laws. This would allow the seven justices, with full access to all of the legislative history, law clerks to do research, and the opportunity to receive amicus briefings, to discuss and decide the matter.

Mr. Eiva also observed that the Council has been discussing the concurring opinion in *State v. Vanornum* [SC S060715, December 27, 2013 [reversing and remanding 250 Or App 693, 282 P3d 908 (2012)]]. He noted that there are good reasons to believe that, when the Supreme Court has the opportunity to take on the issue directly, there are some very strong arguments why the Council's authority to change the ORCP as authorized in ORCP 1.735 is correct and that the rules will stand in their current form. However, if the Supreme Court agrees with the concurrence, all of his arguments regarding the amendment of ORCP 44 become even stronger. He stated that the amendment is wrong under the plain language of ORS 1.735 with regard to substantive changes or interfering with the rules of evidence, in addition to the fact that ORCP 44 C and 44 E were clearly creatures of legislative passage and based on substantive policy decisions about the scope of privilege, and the Council is not allowed to make such decisions. Mr. Eiva noted that the Council could resolve the problem by amending Rule 44 C and Rule 44 E back to the original language created by the Legislature, which identifies a good policy choice by the Legislature where there is ample legislative history about not

waiving the physician/patient privilege in drafting that language.

Mr. Eiva pointed out that what the defense gets now is not nothing – it is quite a lot, including hospital records which will identify all acute and serious injuries of the plaintiff, as well as written examination reports of the physician with relation to the injury under ORCP 44 C. If those reports do not exist, the defense is even entitled to require them to be made under ORCP 44 D.

Justice Landau stated that he has concerns about the extent to which what is being proposed amounts to a change to the substantive rules of privilege, and he would be curious to know Mr. Keating's response to that. He asked whether the change Mr. Keating is proposing is in effect an alteration of the rules of privilege and, if that is true, how does the Council go about doing that. Mr. Keating stated that he does not believe the change he proposes would alter the current law. The language relating to the injuries for which damages are sought existed well before the Council. The issue arises with judicial decisions narrowing what had always been believed to be the scope of that language, so his proposal is that the Council go back to what he believes was originally intended. ORCP 44 C, as originally passed by the Legislature, was and still is recognized as a limited waiver of the physician/patient privilege, and the question is what scope the Council intended when amending ORCP 44 E in 2002, adding the language that he is proposing for ORCP 44 C as a clarification. He does not believe it is changing the law of privilege as, when a plaintiff files a lawsuit, that plaintiff is obligated to respond to a request under ORCP 44 C for medical records that relate to the injury for which damages are claimed – that has always been the rule. Rather, the question is, "What is the scope of the rule?" Mr. Keating stated that a classic example is a permanent injury – he wondered why the fact that the patient had a heart condition, even though the injury is not circulatory in nature, would not be relevant.

Justice Landau stated that he takes it that everyone agrees as a general proposition that this Council does not have the authority to alter the rules of evidence or particular rules of privilege, and that the Legislature did that for the Council when it adopted the amendments to ORCP 44 C. He understands that Mr. Keating's response to his question is that he is not proposing an amendment to expand but, rather, to clarify what the Legislature intended when it adopted those, in effect, statutory changes to Rule 504 of the Oregon Evidence Code. Mr. Keating affirmed this. Justice Landau stated that he does wonder how it is that the Council can amend what the Legislature passed as, in effect, a statute, but stated that this is an entirely different problem. Mr. Eiva reiterated that the Legislature used the term "examination written reports" when it passed the legislation - it did not use the term "health information."

Judge Hodson stated that this is one of the few rules where he likes the tension and ambiguity because he feels that he can do the right thing in each case, and

each case is different. He stated that he has listened to the arguments on each side and actually agrees with both of them. He suggested to Mr. Keating when the committee was formed that it needed to discern the Legislature's original intent because he was worried the Council might exceed its authority. Judge Hodson stated that he comes out on the side of leaving Rule 44 as it is, because what the amendment is trying to fix is some judges who apply this "same body part" rule, which is not a rule but something that someone came up with as an easy measure to follow when deciding these cases. He stated that he does not apply the same body part rule, but does think about it in some cases because someone advocates it. He realizes that leaving the rule as it is potentially creates more motion practice in this area, and that improving economy and efficiency is often why the Council tries to pass amendments to the rules but, in this particular case, he feels the rule should be left as it is.

Ms. Leonard stated that she is of the same mind as Judge Hodson. In her practice, this rule is litigated and is the subject of motion practice. The defense argues about this rule a lot – sometimes they win getting evidence beyond the same body part. She observed that it is about privilege, and it is also subject to interpretation by trial judges – they do this by hearing both sides' arguments. We cannot have a uniform rule, because it needs to be litigated case by case. She stated that she is concerned about the Council involving itself in substantive issues, and that this is one of those issues that is wrapped up in the larger question of what the Council can do and the effect of its rules if we were to make such a change without legislative ratification.

Mr. Weaver stated that he can speak anecdotally, as he received three responses to requests for production of medical records last week, and each response was "objection, privilege." Each plaintiff stated that they would provide records related to the same or similar body part limited to three or five years – that was their definition of how the privilege applies. He stated that defense counsel is just trying to get all the facts out there to litigate. The month before, he spent thousands of dollars in court litigating whether he could see podiatrist records which were not related to the same body part in a case where a person claimed that a shoulder surgery had left them unable to walk or move around. In the end, after in camera review, there were notations that the person was training for a marathon, and that resolved that part of the non-economic damages when the judge decided that those records were something that should have been produced and were relevant to the case. He stated that the question of how broad is the privilege is one question, and the other is how do we get pertinent information disclosed without a lot of court expense and a lot of practitioner/party expense. He stated that, when the facts come out, the cases do tend to resolve themselves. As its stands now, it is extremely difficult to get access to these records without filing a motion. This means that his hands are tied because he knows how much judges hate these motions, and the other side knows he does not want to churn

out motions to compel. Mr. Weaver opined that we do need clarification of this rule, and some way to help practitioners know what should be disclosed so we can get these cases over with.

Judge Gerking stated that he admires the eloquence with which both sides' presentations were made. He stated that he agrees with Judge Hodson that trial courts should have some latitude in making these determinations but, probably because of his past practice of representing defendants in litigation, is inclined to agree more with Mr. Keating because of the need for clarity in connection with this rule. He stated that it would help resolve cases.

Judge Conover stated that he personally agrees with Judge Hodson's position, and that he is unclear as to whether it is the Council or the Legislature which needs to take this kind of action.

Prof. Peterson stated that he is frustrated that there are lawyers who are spending their clients' money and taking up judges' time, and the results depend on which judge you are before and which county you are in. He observed that this type of discord is precisely what the Council is supposed to minimize. He asked if it would be helpful to have each side propose language so that there could be a vote on two competing amendments. He suspects that neither side would get enough votes to publish or promulgate, but someday someone in the Legislature might want to tinker with this issue and it might be good for them to see our work product.

Ms. David stated that discovery is the opportunity to get the matters on the table and to exchange information. It is up to court to be gatekeeper and take a look at privilege. She does not see the change Mr. Keating is proposing as a change to privilege or a substantive issue but, rather, as procedural steps to help attorneys who do not understand what they are supposed to be getting and how to do it right. She stated that she has been blessed to be in a law firm where she was mentored but, unfortunately, there are new lawyers hanging out their shingles, and it would be helpful for them to have clarity on this issue. Judge Armstrong stated that it could help the judges too. Ms. David stated that she feels there is great need for a rule change which would help in the exchange of discovery, because in one out of every five cases there is pertinent information that does impact the injury in question but, until the two parties can actively exchange information, the two sides are not on same playing field. She feels that there should be a complete procedural mechanism that could occur. She observed that she does not know that anyone has yet proposed some pure procedural mechanism, but she does feel that they could be blended in. She stated that she thinks there is a need for some kind of change, and that the number of these motions being filed and argued shows that practitioners need more guidance and help.

Judge Zennaché stated that he does not necessarily agree that a change would either be substantive or a change in the rules of privilege. He stated that it seems that the language in Rule 44 C is relatively broad, and that he likes the discretion that it gives trial courts to hammer out these issues. He stated that he does not support changing the rule to address a problem that exists in one part of the state, with some judges interpreting the "same body part" rule – he feels that Mr. Eiva is correct that mandamus is the way to address this problem. He suggested leaving the rule as it is to allow the tension to exist and to allow trial judges to exercise their gatekeeper function in this role.

Judge Miller stated that she agrees with Judge Hodson and Ms. Leonard. She stated that she practiced in this area a long time ago, and can remember representing a 17 year-old in an automobile accident case and the defense attorney asking her client about the abortion she had just had. She noted that there are certain things that go way beyond the issue for which recovery is being sought that are very personal in nature. While there are always plaintiffs' attorneys that are on the obstructionist side and defense attorneys looking for embarrassing information, most attorneys are in the middle, being cooperative. She stated that, in her time on the Council, the Council has not changed a rule because of the practice of a few judges. Judge Miller stated that Mr. Weaver's example gives a good example of the way the rule works, even though it cost his client money. She feels pretty strongly about the idea that we have judges to make these hard decisions on a case-by-case basis.

Mr. Brian stated that he is a plaintiffs' lawyer and does not feel there needs to be a change, but that he wrestled with what we should do. With regard to ORCP 44 E, he noted that it is limited by privilege – the rule says that you can get records available in discovery under ORCP 36 B, and ORCP 36 B has within it a privilege limitation if we are just talking about privilege as it relates to the subpoena of documents. Therefore, a defendant could not obtain any medical records at all pursuant to a subpoena because of privilege and, because the only waiver of the privilege is found in ORCP 44 C, which is limited to information relating to the injury for which recovery is sought, he does not believe that *any* information could be received under section E. Judge Hodson noted that a brief part of the legislative history was left out of the committee's reports – the part that changed "hospital records" to "individually identifiable health information" in ORCP 44 E. He noted that broadening that language was not intended to broaden the scope of what was being requested but, rather, it was merely a language change to match the language of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Ms. Bird stated that she tends to identify more with the plaintiffs' side on this issue and feels that it does not seem like there is a change that needs to be made. She appreciates the healthy tension this rule creates, which is borne out in the

discussion today. She stated that today's discussion speaks to the fact that any changes would be substantive in nature and seems like it would be something the Legislature should wrestle with.

Judge Armstrong stated that he is of many minds regarding this rule. He believes that clarity is always worthwhile, and understanding is provisional and never achieved. He stated that tension is all right, but removing tension and deciding what the real principal should be reflects a viewpoint he has – that there is an answer to every legal question, not just arguments for every position – it should be the same answer every time. Deciding what that answer is may not be simple, but there should be an answer. This answer would not undo a judge's continuing obligation to sort these issues out, but it might help everybody understand the ultimate principle that should be applied, particularly judges without civil litigation backgrounds. Judge Armstrong stated that he actually did the legislative work and wrote the Court of Appeals opinion in *A.G. v. Guitron* [351 Or 465, 268 P3d 589 (2011)]. He stated that, from his research, he thinks that the Legislature may have been intending something narrower than some recent interpretations. Judge Armstrong observed that he does not have a great concern regarding *Varnorum* as to the Council's authority, but the Council's substantive limit as to privilege is why he is of many minds – he has not settled on any answer. He stated that achieving clarity is the ultimate goal, and the rule in its current form is not clear, but he feels that this Council will probably not settle on anything. He stated that it may be a question for the Legislature.

Ms. Payne stated that she believes this is an issue for the Legislature, as she believes it would be a substantive change to privilege. She noted that, even though the Legislature stated that it was not intending to make a change when it changed "hospital records" to "individually identifiable health information," in some sense practitioners have viewed it as a change. She observed that, as Mr. Brian pointed out, ORCP 36 B contains a privilege limitation on discovery – ORCP 44 E really gets you nothing unless it is limited to hospital records. Ms. Payne observed that, If the Council were to do anything regarding Rule 44, it should be to clarify section E.

Judge Bachart stated that she had little civil litigation experience. While she would normally advocate for clarity and guidance, she has a number of cases with motions to compel, and her feeling is that the rule as written sets up the guideposts, and the analysis that she is engaged in as a trial judge is limited by the nature of the claim. She stated that if the provider is limiting production of records to two or three years, the plaintiff needs to tell her why it needs to be expanded – these questions need to be answered in a hearing. She has never viewed these hearings as a waste of time, and she is comfortable with her decisions because she has more information, the information is privilege-sensitive, and she feels there should be some discretion with the trial court. She feels that

this is a good use of the court's time. The exercise of discretion, while it may lead to different results in different jurisdictions before different judges, is appropriate.

Justice Landau asked whether it would be helpful to have a concrete proposed amendment from both sides as Prof. Peterson suggested. Mr. Eiva clarified that he proposes making no change but, to the extent that the Council would like to see clarification, he would suggest that the original language of ORCP 44 C and ORCP 44 E provides greater clarification. Judge Zennaché asked the purpose of having proposals. Judge Armstrong stated that, if it were possible to achieve the clarity to which he referred in words, so that it is concrete rather than abstract, it might be helpful. Judge Miller noted that the Legislature is not made up of lawyers and, without the help of a lawyer, it will not understand the nuances involved – it will be an either/or question. Ms. David asked whether the Council would like to see proposed amendments. The consensus was no.

An informal vote was held to see how many Council members would like to see a change made versus how many would like to see no change made. Nine voted for no change, and 7 voted for a change to clarify the rule. Ms. David stated that her sense is that there will be no further activity now, but she is certain that it will be resurrected next biennium. She noted that not all Council members were present at the meeting and, if anyone has additional comments or concerns, they should submit them in writing to the committee.

8. ORCP 45 (Ms. Wray)

Ms. Wray was not present at the meeting. Prof. Peterson reported that the committee did not meet, but that it was going to take up Mr Bachofner's new matter. Prof. Peterson will remind Mr. Bachofner to send language to the committee that would allow unlimited requests for admission as to the authenticity of documents.

9. ORCP 46 and 55 (Judge Gerking)

Judge Gerking stated that the committee had been discussing ORCP 55 H and whether a change is needed to ORCP 55 H(2)(d) to clarify whether notice to the party whose records are being sought is required prior to subpoenaing records directly to court. The committee's report is attached as Appendix F. He stated that he did research on ORCP 55 H with respect to notice, as well as ORCP 44 E and ORCP 55 I. He asked Mr. Eiva to do research on HIPAA. At the committee meeting, there was a healthy tension with respect to whether that notice is required or not. Mr. Keating and Mr. Bachofner advocated that no notice is required when subpoenaing sealed records to be delivered to the court from a health care provider. They thought that it is not practical or reasonable to require notice and that it not consistent with historical practice. Mr. Eiva and Ms. Payne had a very

simple argument: in 2002, HIPAA was promulgated and that legislation states very clearly that a notice is required in every instance when records are subpoenaed; in 2002, ORCP 55 H was revamped to comply with HIPAA. Judge Gerking stated that he is not sure where to go from here. He guessed that there must be some case law regarding whether HIPAA would require pre-subpoena notice when requiring that a custodian of health information records is to appear in person. He has never seen that happen. He stated that he is not optimistic that the issue can be resolved. He noted that, when he did a historical perspective on ORCP 44 E, 55 H and 55 I, which no longer exists, it was even more unclear as to whether notice was required before 2002.

Judge Zennaché asked how one gets around the language in ORCP 55 H(2) that says "individually identifiable health information may be obtained by subpoena only as provided in this section" which then incorporates the requirement in ORCP 55 A(2)(a) that says one has to give notice. He wondered what the argument is that a party does not have to give notice if that party is subpoenaing records directly to court. Mr. Keating stated that, when the committee was discussing this, they found that there is other language in ORCP 55 that suggests that it is not necessary. Judge Gerking stated that there is a 14 day notice requirement when subpoenaing records for delivery to an individual party's attorney, but no similar notice requirement when subpoenaing records to court. Mr. Keating stated that a concern he has is that everyone who has tried a personal injury case has run into cases where a patient sees someone the week before trial; if a party has to give 14 days' notice before subpoenaing, it creates a "mother-may-I" circumstance that has no relationship whatsoever to justice in the case. He stated that his guess is that the rule was constructed so that, if the records are being subpoenaed to the court, a party does not need to give notice in advance of the subpoena because everyone will be there and the court can determine what is admissible and what is not.

Ms. Payne affirmed that the tension has arisen about whether ORCP 55 H(2)(a) applies to all subpoenas. She stated that she and Mr. Eiva believe it does, but that there is language in ORCP H(2)(d) that only specifies that notice shall be served not less than 14 days prior to the service of the subpoena if the subpoena directs delivery of the records to the attorney or party issuing the subpoena – it does not specifically refer to giving notice when the records are to be delivered to trial. She stated that she and Mr. Eiva nonetheless feel that ORCP H(2)(a) would still apply and good faith notice and the opportunity to object would still need to be given before the subpoena is served. She noted that, pursuant to ORCP H(2)(a)(i), the health care provider is entitled to notice that any objections were made and were resolved before the subpoena was sent, and that cannot happen if the records have already been sent to the court. Ms. Payne observed that the language in ORCP 55 H(2)(a) is taken directly from the HIPAA regulation, and that the practice of not giving notice is not in compliance with ORCP 55 H(2)(a) or HIPAA. Judge

Gerking noted that he is at a loss to explain Mr. Keating's observation that lawyers he deals with throughout the country relate to him different subpoena practices, given that HIPAA is a federal law. Judge Hodson related that he believes there is something in either the legislative history or the regulations that says something to the effect that it was not intended to disturb existing discovery procedures in court. Ms. Payne responded that the regulation specifically recites "standard disclosures for judicial and administrative proceedings," and that the provision that ORCP 55 H(2)(a) was modeled after specifically discusses disclosures in judicial procedures, so it is hard to argue that it does not apply. Judge Hodson wondered whether there is legislative history for what Congress intended that is different.

Prof. Peterson observed that Mr. Eiva's memo on HIPAA states that notice is required, but it does not say how much notice. He wondered if it would be meaningfully helpful to the defense to make the required notice seven days instead of 14. Mr. Eiva responded that a party can do a lot with judicial order. The permitted disclosures in that regulation include: (i) in response to an order; and (ii) in response to a subpoena so, with a trial court order, if the defendant anticipates a need for records close to trial, the defense can file a motion with the court. Mr. Keating wondered how the defense can anticipate a need for a subpoena if the defense cannot get the medical records. Judge Miller asked if 24 hours' notice is not enough to get a judge to open an envelope and hear objections. Mr. Eiva stated that the HIPAA rule seems to indicate there should be an opportunity to resolve objections. Judge Gerking posed the question of whether it would be a violation of HIPAA if defense counsel serves a subpoena on a health care provider requiring the provider to comply with 55 H and seal the records and send them to court, including in the subpoena that the records would not be opened without an order of the court in the presence of all parties. He stated that he believes that it would violate HIPAA because it is not a pre-subpoena order; however, it seems like it would be a workable solution because everybody would be there in court to resolve the issue.

Judge Zennaché asked whether the committee can take the issue back and discuss a shorter time frame than 14 days for notice and an opportunity to resolve the disputes. Mr. Keating reiterated a comment he made to the committee – it is not so much that he does not want to tell the plaintiff that he is doing it, but he feels that he is being put into a time box because a lot happens right before trial. He stated that he has had plaintiffs have their client examined in the middle of his case, and asked why there is a need to put administrative barriers in front of the opportunity to have a fair hearing. He observed that his concern is not so much with a case in which he knows about the health care provider and is going to subpoena the doctor but, rather, cases in which the plaintiff sees a doctor in the middle of his case. He wondered why he cannot subpoena those records in the middle of his case when he has just learned of them. Judge Zennaché stated that what he hears Mr. Keating saying is that he does not want to have any change to

the rule but, rather, to let it be the way it is and, if there are HIPAA implications or if judges decide the rule should be interpreted in a certain way, he will live with that. Mr. Keating agreed.

Ms. Payne stated that the committee is asking for guidance, because this may be a practice education issue, since some members of the committee feel that it is being practiced incorrectly under the rule. Ms. David stated that the committee can put forth a memorandum that says the committee has actively looked at this, some believe it is an education issue, while some think there is no need for a change. The Council can then share a copy of that memorandum with the Oregon State Bar and CLE directors and suggest that this would be a good issue for education of the bench and bar.

Mr. Keating reported that there were suggested staff edits to ORCP 44 and ORCP 55 on which everyone on the committee agreed. Judge Gerking noted that Mr. Bachofner had not had the opportunity to weigh in on those proposed changes. Ms. David asked whether any Council members had any questions or concerns about these proposed changes. Hearing none, she called for motions to put those changes on the agenda for the September publication meeting.

A motion was made to put the proposed amendment to Rule 46 A on the September agenda for voting on publication. The motion was made and seconded, and passed unanimously.

A motion was made to put the proposed amendment to Rule 55 on the September agenda for voting on publication. The motion was made and seconded, and passed unanimously.

Mr. Weaver asked what the committee report should say. Ms. David stated that the report can say that there seems to be some disagreement amongst lawyers and that this would be a great issue for the Bar to pull a panel together to figure out the law and educate everyone. She noted that there are people who have spent a lot of time and effort on HIPAA, and that it is not a procedural issue for the Council. Since there was disagreement among the committee on what the substantive law is, we should let someone else figure it out. Judge Miller noted that judges would probably appreciate a presentation about the issue at their judicial conference.

10. ORCP 54 A (Ms. Leonard)

Ms. Leonard stated that the committee was charged with looking into whether Rule 54 A, which allows a plaintiff to dismiss a case without court approval up to five days before trial, should be changed. She pointed to the results of the survey that the committee put together and the Bar conducted (Appendix G) and observed that the survey seems to indicate no burning desire to change the rule. Therefore, the committee recommends no change. Ms. Leonard will write a brief report summarizing the committee's work and recommendation.

Ms. David noted that the survey was a good example for committees wishing to conduct surveys next biennium.

11. ORCP 54 E (Ms. Gates)

Ms. Gates was not present at this portion of the meeting. Ms. Nilsson noted that the committee was to write a final report, but that there was a Legislative Counsel "pink sheet" recommendation for a change to ORCP 54 D that she had sent to Ms. Gates for the committee to review.

12. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee would be sending a survey to judges regarding ORCP 68 (Appendix H) and that the committee should have results by the next meeting.

13. ORCP 69 (Mr. Campf)

Mr. Campf was not present at the meeting. Ms. David stated that the committee is working through some issues and will have a presentation at the next meeting. Prof. Peterson put together a proposal for both ORCP 13 and ORCP 69 regarding family law motions to show cause. He stated that last biennium people spent a lot of time talking about "counterclaims" to a motion to show cause, which is a disconnect and is simply wrong. He stated that his proposal was to perhaps include motions to show cause in the default rule, but that he accidentally included "responses" instead of "cross-motions to show cause" in his proposal. He stated that he may have confused the Rule 13 committee by doing so.

Judge Zennaché stated that the Rule 13 committee is still discussing the counterclaim vs. cross-claim issue, but that they did evaluate Prof. Peterson's proposed draft and opposed it, partly because of some of the language in the proposal, but partly because of the way show cause orders to modify are handled in different courts. There are some courts that set such motions on a show cause docket for a personal appearance, rather than giving 30 days to file a written

response and then setting a hearing. He stated that the packets from the OJD track those two different processes and, if we require courts to default parties pursuant to Rule 69, we would require all courts to process these motions in the same manner. He noted that this does not address concerns or requirements there may be under the Service Members Civil Relief Act (SMCRA); those concerns would still apply. To obtain a supplemental judgment, a party still has to prove that the requirements of the SMCRA have been met. Prof. Peterson stated that this was his intent in including motions to show cause and cross-motions in Rule 69 so the SMCRA would be addressed.

14. ORCP 79-85, Various Consumer Law Issues (Prof. Peterson)

Prof. Peterson reported that he will meet with the two judges from Lane County who are on the committee and arrange a meeting of the committee.

15. Council's Authority to Amend ORCP Enacted by the Legislature (Prof. Peterson)

Prof. Peterson stated that he has not yet gotten a summary of the telephone conference to the committee members so that the discussion can be brought before the entire Council.

V. New Business (Ms. David)

A. HB 4143 - Amending ORCP 32 & Fluid Recovery

Prof. Peterson stated that the Oregon State Bar had contacted Council staff asking for a letter that the Council had written in 2005 in response to a letter from Sen. Ginny Burdick regarding whether the Council could enact cy pres or fluid recovery in class action cases. Ms. Nilsson provided that letter, which stated that the Council felt that it was clearly a substantive issue. The reason for the request for the letter was House Bill 4143 (Appendix I), which proposed to amend ORCP 32 regarding class actions. Prof. Peterson stated that the bill came up abruptly and that the Council received no notice of it prior to the request for the letter.

He stated that it is clear that both the Council and the Legislature have made amendments to the rule in the past. For all rules that the Council promulgates, the Legislature has the right to pass on them, amend them, or reject them, and the Legislature has shown repeatedly that it is not hesitant to amend the rules without informing the Council. He noted that there was discussion in the Legislature that the issue should be sent to the Council because it falls under the Rules of Civil Procedure which is clearly the purview of the Council. Prof. Peterson stated that it appeared to perhaps be a tool for slowing down the legislation rather than a legitimate concern about the appropriate body to make changes to the ORCP, since the Council had previously and

clearly stated it would not enact any kind of cy pres or fluid recovery.

Prof. Peterson stated that he was lobbied by a party on one side of the bill to provide a statement to the Legislature, and respectfully declined to do so. He could not imagine that there was anything he could have said that would not have been seen as somehow taking a position, and that would not be appropriate in his role as Executive Director without Council input. He noted that, now that the Legislature is holding a short session in even numbered years, the Council may want to change its rules to have a legislative advisory committee active on a year-round basis. Ms. David asked Mr. Peterson to propose amended language to the Council's rules of procedure to make this change.

B. Meeting Packets

Judge Zennaché asked whether the information for meetings could be disseminated to Council members more in advance of the meeting date, even on a piecemeal basis if necessary, so that there is not so much reading to be done in a short amount of time. Ms. Nilsson and Prof. Peterson agreed that this is a problem and stated that they would make an effort to get materials to the members sooner. Ms. David asked committees to get materials to Ms. Nilsson by March 27, 2014, in order to give enough time for members to read them before the April 5, 2014, meeting. Ms. Nilsson will send a reminder approximately a week before that date.

VI. Adjournment

Ms. David adjourned the meeting at approximately 12:45 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 1, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Michael Brian
Hon. R. Curtis Conover
Kristen S. David
Hon. Roger J. DeHoog
Travis Eiva
Hon. Timothy C. Gerking*
Hon. Jerry B. Hodson
Robert M. Keating
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

Hon. Sheryl Bachart
Hon. Paula M. Bechtold
Arwen Bird
Brian S. Campf
Jennifer L. Gates
Hon. Jack L. Landau
Maureen Leonard

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 9 • ORCP 10 • ORCP 27 • ORCP 44 • ORCP 46 • ORCP 55 • ORCP 69	• ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:37 a.m.

II. Approval of January 4, 2014, Minutes (Ms. David)

Ms. David called for a motion to approve the January 4, 2014, minutes (Appendix A). A motion was made and seconded, and the minutes were approved unanimously.

III. Administrative Matters (Ms. David)

A. Council Meeting Schedule

Ms. David reminded the Council that the next meeting date had been changed to March 8, 2014, in order to accommodate the University of Oregon Law School's availability. She stated that it will be a good meeting for law students to attend, since several committees will have proposals to vote to put on the agenda for September. Ms. David asked that committee chairs get items to Ms. Nilsson in plenty of time so that she can create a meeting packet which can be distributed to law students ahead of time.

Council members discussed the possibility of holding meetings in either Bend or Newport, since it is an aspirational goal for the Council to hold meetings in various congressional districts throughout the biennium. Since it is getting late in the biennium and attendance at upcoming meetings is crucial, it was decided to keep all remaining meetings after March at the Oregon State Bar.

B. Contacting Legislators

Ms. David stated that Prof. Peterson will be drafting an update e-mail for Council members to edit and send to their assigned legislators. At this point in the biennium it is very important to keep the Legislature informed of our work. Judge Miller mentioned that Rep. Chris Garrett has been appointed to the Court of Appeals and that Ann Lininger will be taking his place in the House. Ms. Nilsson will check to see which Council member was contacting Rep. Garrett and give him or her Rep. Lininger's contact information.

C. Smart Phone/Tablet App for ORCP/ORCP in More Readable Format on Council Website (Ms. Nilsson)

Ms. Nilsson stated that Laura Orr, librarian at the Washington County Law Library, has been in touch and let her know that every Oregon State Bar member has access to Fastcase products through their Bar membership. Fastcase makes “e-books” for various products, and Ms. Orr has spoken to a Fastcase representative who may be willing to create an ORCP e-book as part of the Bar’s contract with Fastcase. The Fastcase representative will be speaking to Ms. Orr and to the Bar about the possibility. Ms.

Nilsson stated that the nice thing about an E-Book is that, unlike an app, it can be used on any smart phone or tablet with an e-book reader.

Mr. Bachofner stated that Fastcase does have an app for smart phones and tablets, but he cautioned that his experience has shown that there are some inaccuracies in Fastcase itself in terms of its search functions and content. He often finds more information when searching Westlaw than when searching Fastcase.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David reported that the committee is still monitoring whether there are any problems with the recently amended Rule 43 and has not heard anything significant.

2. ORCP 1 and Legislative Counsel Suggestions (Ms. David)

Prof. Peterson reported that the committee has met and discussed several issues. The draft that was previously submitted to the Council is ready except for adding the citation to the foreign declarations statute when Legislative Counsel finalizes it. By the March Council meeting, the draft should be ready for members to vote on whether to add it to the September publication docket.

3. ORCP 7/9/10 Regarding Service (Mr. Bachofner)

Mr. Bachofner stated that the committee had met again on January 31 regarding changes that Prof. Peterson had drafted to ORCP 7, 9, and 10 and issued a summary of its meeting (Appendix B). He stated that the committee had concluded that mail service should only be done by attorneys and, regardless of the prevailing opinion on whether that is what ORCP 7E says currently, the committee is proposing that it be changed to permit only attorneys to serve by mail as provided in Rule 7 D(2)(d) (as opposed to follow-up service by mail).

Judge Miller mentioned that there is some dispute over whether forms that are provided to self-represented parties in administrative child support proceedings and other matters state that these parties are allowed to mail the summons. Prof. Peterson reminded the Council that Holly Rudolph from the Judicial Department has been following the Council's work and that she is involved in creating the forms that are given to self-represented parties. He observed that she will likely not appreciate the committee's change to Rule 7 but that she recognizes that, if the Council promulgates such a change, the Judicial Department will need to

change the forms. Mr. Bachofner noted that Ms. Rudolph was the original proponent that self-represented litigants as well as attorneys be allowed to serve by mail. He stated that the committee felt that, generally speaking, self-represented litigants should be held to the same rules as attorneys, but the majority felt that original service was important enough that initial mail service should be restricted to attorneys because there has been a vetting process to be licensed to practice law, as well as ethics rules and malpractice insurance in case something goes wrong.

Mr. Beattie noted that ORCP 7 D(2)(d)(i) lays out the general mechanics for service by mail when so permitted, while ORCP 7 E states who can make service by mail. He observed that the new language in the draft states that, pursuant to ORCP 7 D(2)(d)(i), service may only be made by an attorney for a party, and wondered how someone not represented by counsel could serve and why they do not get the benefit of the first sentence of ORCP 7 E. Mr. Bachofner replied that other service methods could be used, such as having a friend over 18 years of age serve. Mr. Beattie stated that this is confusing because the language says that service may only be made by an attorney for any party, but this is not true because it can be made by any party who falls into the description in sentence 1. Prof. Peterson explained that the way the rule previously read was that attorneys are generally not allowed to serve the summons but, if the only method of service is by mail in a form that requires a signature, attorneys are allowed to do that kind of service. The proposed amendment clarifies that *only* an attorney is allowed to do it. Mr. Beattie asked if only an attorney can serve an out of state corporation that is permissibly served via mail. Prof. Peterson replied that, if mail service is the only method of service, yes. However, he pointed out that mail service is not the preferred method of corporate service, and stated that a process server that performs office service or substituted service can do the follow-up mailing that completes the service. Mr. Beattie wondered why a competent process server could not do initial mail service and why it is limited to attorneys. Judge Miller stated that the committee's thinking was that not all process servers are certified and that, since there is not a licensing process such as for private investigators, there is no guarantee that a process server would have enough education, training, or qualifications to ensure that they would get it right.

Mr. Beattie observed that mail service requires a return receipt. Judge Zennaché stated that this is the case only for individuals. Prof. Peterson noted that for motor vehicle cases it does not but, otherwise, the summons and complaint must be sent by certified mail; therefore, a return receipt is required on all others . With corporations and business entities, the Council has now incorporated the Rule 7 D(2)(d) procedure, but the committee is still working on that. Judge Zennaché stated that he believes that the rule allows for service by mail under very limited circumstances where the rule specifically provides, and that service by mail is only effective if the individual signs a return receipt and it is deemed effective on the

return of the signed receipt. He thinks a change is unnecessary but, if anything, would suggest changing the rules that allow service on a corporation without a return receipt. Prof. Peterson stated that, if the only service that attaches personal jurisdiction is an envelope from a soon-to-be former spouse, a party might not open it but, if it is from a law firm, a party might be more inclined to open it. He pointed out that the Council has heard a number of anecdotal stories of self-represented litigants who did not know what to serve so they served the summons only or the complaint only. Prof. Peterson told the Council that the committee has also included language to state that, if service is not accomplished by the sheriff, the server needs to indicate the specific documents that were served. This is an additional check to make sure that all necessary documents are served but, if the person serving does not know what a summons or complaint is, we may not get very good service anyway. Prof. Peterson stated that the Council has also heard concerns from the family law bench that it adds cost to litigation if an attorney has to serve by mail but, if a party cannot afford an attorney, that party can have his or her brother serve the defendant personally or, if the party cannot find the defendant, that party can do substituted service and complete it by mail. The committee thought that, if the only way someone was going to be served was by mail, it would be good if the mail was from a law firm and it required a signature.

Judge Zennaché wondered, if it is acceptable for someone's brother to hand a defendant some pieces of paper that he does not understand and certify that he served the defendant, why it is more problematic for that same person to serve by mail. Prof. Peterson replied that part of the reason is that an envelope received in the mail may be thrown away, whereas a document handed personally to a defendant may be more likely to be read. Ms. David noted that many process servers now hand documents to a defendant in an envelope and obtain a signature. Judge Zennaché stated that the reality is that a lot of that service is being performed by family members or friends, because a lot of people do not have $36 to pay the sheriff. Mr. Beattie stated that there are a lot of out of state corporations and some people are not sophisticated enough to obtain service in the state of the business, whereas they could send the corporate defendant a letter and there is a high likelihood the corporation will get the mailing because it has an address that receives regular mail. Prof. Peterson observed that corporations are different from individuals in that there is a higher likelihood corporations will open their mail and process it. Ms. Payne asked whether the concern is more that we should not have self-represented parties serving individuals. She wondered whether, if that is the case, individual service should be limited but that self-represented litigants could be allowed to serve corporations. Mr. Bachofner stated that, with corporations that do not have a registered agent, officer, or director within the county in which the action is filed, there are many alternatives set forth under D(3)(b)(ii) that include mailing, but not as the primary method. He stated that the concern about changing corporate service to allow

mailing is that it would probably result in service by mail being the only way corporations would be served. Prof. Peterson recalled that, when the Council amended Rule 7 regarding corporate entities last biennium, it retained the primary service method and confirmed that method should be attempted first; mailing should not be done first.

Ms. Payne asked how much it generally costs to serve out of state with a process server. Ms. David estimated $60 to $70. Ms. Payne remarked that we are basically forcing self-represented parties to pay this to serve out-of-state corporations. Mr. Bachofner stated that self-represented parties can have anyone over 18 serve the Secretary of State's office in Oregon. Mr. Beattie pointed out that the Secretary of State is not authorized to accept service for a foreign corporation, and that there are many corporations that have virtually no presence in Oregon except that their products are sold here. In the case of a self-represented party injured by an out of state corporation with no presence in Oregon, that party will have to pay a process server, because the party cannot serve by mail. Ms. Payne stated that this raises some concerns – the party is self-represented in the first place because they cannot afford an attorney. Judge Miller stated that the committee came down on the side of the competing interest of making sure the defendant is served. If a plaintiff obtains a default judgment, it is hugely inconvenient and expensive, and the court has to resolve whether the person was served properly. She noted that, the longer Rule 7 gets, the more complicated it gets and the more ways there are for people to get it wrong.

Ms. David stated that we can all agree that ORCP 7 is long, voluminous, and confusing and her sense is that, over the next two to four years with the advent of e-court, a complete re-write with a flowchart style may be necessary to make the rule easier for people to decipher. Ms. Payne stated that perhaps the goal should be to make mail service better, rather than to create barriers to bringing an action. Mr. Bachofner stated that the committee has concerns about mail service in any case; although there is a presumption in the evidence code that mail will be received, mail often gets lost. He stated that he gets concerned when it comes to establishment of personal jurisdiction, because it should not be too easy, but he agrees we need to try to make it clear. He stated that the committee will look at additional changes to Rule 7, but the majority of the committee believes that, in balancing the abilities and interests of self-represented parties and attorneys, it was worth having a stronger limitation in service by mail. Mr. Beattie observed that this is a perfectly valid policy reason for limiting Rule 7 D(2)(d) service, but noted that a lot of important material, from jury summonses to violation notices, comes in the mail and, if you do not respond, you are subject to at least monetary penalties. Judge Conover pointed out that these items do not require a return receipt.

Ms. David related an incident where a process server served the security guard in her building as the "person in charge," and stated that the Council can only do so much to fix every wrong that can happen when someone reads Rule 7. Prof. Peterson stated that he also added the words "if any" with regard to the return receipt for the Council's consideration. He noted that, in motor vehicle cases or service by court order, the receipt may never be returned and wondered, in that case, whether personal jurisdiction is established. He noted that, if a piece of certified mail is not signed for, normally the sender would get the envelope back stamped “refused” or “unclaimed,” but sometimes nothing is returned. He stated that the committee will probably take the suggested “if any” out because, if the sender does not get a return of service and gets the envelope back in a motor vehicle case, the sender probably does not have personal jurisdiction yet. Mr. Bachofner asked that Council members review the committee's draft changes for any unintended consequences and report any to the committee.

With regard to ORCP 9, Mr. Bachofner stated that the committee wanted to address the concern that facsimiles could be received in ways other than telephonic faxes, such as e-mail services. He noted that the committee will make a further change by taking out the word "technology" and defining facsimile communication in another section. This will make the rule less wordy. Some other changes were to use the word "documents" in place of "papers" and, pursuant to a request from Legislative Counsel, to use the words "electronic mail" instead of "e-mail." The committee also made clear that, no matter what kind of technology is used, service is subject to the three additional days of ORCP 10 C. Mr. Bachofner stated that the committee made other small changes as well, and asked that the Council review the draft for unintended consequences.

With regard to ORCP 10, the committee added language to make clear that the 3 additional days apply whether service is by mail, electronic mail, or facsimile.

Judge DeHoog asked why the committee changed "e-mail" to "electronic mail." Prof. Peterson stated that Legislative Counsel prefers this more formal term and asked the Council to make the change. Judge DeHoog noted that, with the advent of e-court, the use of the terms "electronic service" and "electronic mail" could cause confusion. Prof. Peterson replied that he could contact Legislative Counsel to determine how strongly it feels about this change.

Prof. Peterson asked whether Oregon continues to have terms of court and, if not, whether section B of Rule 10 could be removed. Mr. Bachofner expressed concern that there could be unintended problems if section B were removed. Judge Armstrong stated that the term has no application in any sense now. Mr. Bachofner wondered whether there could be any statutory provisions about a term of court, perhaps if the legislature were to create a court with a limited term for a specific purpose. Prof. Peterson stated that it would probably not be a circuit

court, to which the ORCP apply. Judge Armstrong stated that he believes it is an archaic term. Mr. Bachofner suggested doing a search in the statutes to see if there is a reference to a term of court that remains.

Mr. Bachofner stated that the committee will also be taking into consideration issues raised by Lisa Norris-Lampe and Aaron Crowe.

4. ORCP 13 (Judge Zennaché)

Judge Zennaché stated that the committee did not meet due to scheduling conflicts, but would be meeting the following week. Ms. David noted that the committee is trying to include non-Council members in its work group, which makes scheduling more difficult.

5. ORCP 15 (Mr. Beattie)

Mr. Beattie stated that he will write a report summarizing the committee's decision to take no action.

6. ORCP 27 (Mr. Weaver)

Mr. Weaver reported that the committee had drafted an amendment to ORCP 27 (Appendix C) which it is submitting to the Council for discussion. The committee also plans to meet with last biennium's committee that drafted the amendment that was published, but not promulgated, including Brooks Cooper. Prof. Peterson noted that the committee provided a draft that included changes as well as a "clean copy" of how the potential new rule would read for ease of reading.

Prof. Peterson reminded the Council that there was concern about front loading the decision on notice, as well as concerns about the statute of limitations, and stated that the change would allow the plaintiff to file a claim and then have a period in which to determine whether notice was necessary to protect the person for whom the guardian ad litem (GAL) was sought and, if so, to whom the notice should be given. This would give the court enough opportunity to determine whether there is anything of concern or anything that indicates an abuse of the process. The change is intended to allow a plaintiff or petitioner to get their papers filed as well as allow the court the opportunity to look at it before too much mischief can occur. Prof. Peterson stated that another concern from last biennium was that the phrase “guardian ad litem” was being used elsewhere in the statutes, and it is clear that certain proceedings, such as termination of parental rights, are separate statutory procedures that the Council’s promulgations should not be impacting. He stated that attorney Erin Olson attended the Council’s promulgation meeting last biennium and expressed concern about potential conflict between last biennium's draft amendment and termination of parental

rights proceedings, as well as a potential conflict with the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EDAPA) statute. Prof. Peterson stated that the committee will invite Ms. Olson to a work group to help determine what language to use in terms of excluding particular statutory procedures from this rule.

Mr. Bachofner asked for an example of where you would not want to give notice to the party for whom a guardian ad litem is being appointed. Prof. Peterson gave the example of a very young child who has been injured with a parent appointed as GAL. Mr. Bachofner asked why a six-year-old child should not be aware that there is litigation and that someone has been appointed who they can contact if they have a problem. He stated that perhaps the person for whom a GAL is being appointed should always get notice. Mr. Eiva noted that this language tracks the conservator rules, which say that notice should be given if a minor is age 14 or older. He remarked that the GAL process is meant to be looser than a conservatorship. Mr. Bachofner stated that, if a GAL is being appointed because a six-year-old may be being abused, we may want to err on the side of that child being notified so that the child knows that there is someone he or she can contact. Mr. Eiva replied that this situation is covered under the ORS 417A statutes, and that the GAL process is more for civil litigation.

Judge Zennaché stated that he does not see language anywhere that states that service on the GAL who is initially appointed and then is either replaced or discharged amounts to effective service. The committee might want to include that. He stated that he has concern with the language in section E(3) that states that a person can call the clerk's office to be able to register an objection, because he does not see how that will be practical for the courts. He stated that he also has an overall concern that the list of people who need to receive notice seems onerous. Prof. Peterson noted that the list includes people who arguably should be entitled to notice, and it is up to the practitioner to let the court know that some on the list may not apply. The court may then modify the list. Judge Zennaché pointed out that the language of the rule states that these people “shall” receive notice.

Prof. Peterson stated that telephonic notice is currently included in the conservatorship statutes, and the Council has received feedback from Multnomah and Lane counties that telephone calls are received and the court is able to handle them. Judge Zennaché noted that there are far fewer actions for conservatorships filed than actions to appoint a GAL. Prof. Peterson stated that the committee will talk about the judge’s comments about service and objections.

Mr. Eiva stated that he has some general concerns, although he likes the idea of a simpler process. He gave the example of a homeless child with no parents connected to him, and stated that obtaining all of the information about who to

serve would be quite a burden. He noted that section D states that the notice must be provided no later than seven days after the filing. He stated that Multnomah County has a good process in place now for appointment of GALs: you go in ex parte and obtain a GAL before the case is even filed, then take the pleading in the name of the GAL and file it. Mr. Eiva suggested that a better way to deal with notice would be to have a longer process, perhaps 30 days after the order appointing the GAL, to meet the notice requirements. He stated that the notice requirements should be removed if, within 30 days, the party files for a conservatorship. Mr. Eiva stated that use of the word “entirely” in section G almost suggests that the court may only waive notice "entirely" and not partially. He suggested changing this language to "entirely or partially." Prof. Peterson noted that the seven days was just a placeholder, and that this time period could be changed. Judge Miller asked whether seven day increments should be used. She stated that there will not be a default judgment issued unless 30 days has passed.

Prof. Peterson observed that EDAPA cases are temporary orders for emergency relief and the committee would seek input as to whether the proposed amendment would cause adverse consequences in those cases.

Prof. Peterson stated that the committee will create one more draft before including the work group in its next meeting.

7. ORCP 44 (Mr. Keating)

Mr. Keating referred the Council to the committee’s meeting summary from its January 30, 2014, meeting (Appendix D). He stated that, since the last Council meeting, Ms. Nilsson had provided him and Mr. Eiva with Council history on ORCP 44 E, which mirrors ORCP 44 C. He had a member of his office staff prepare a legislative history of ORCP 44 E for the committee. As the Council is aware, the issue at hand is the scope of the phrase "relating to injuries for which recovery is sought." There is a very distinct difference with clearly articulated interests between the plaintiffs’ bar and defense bar about what that phrase needs to mean in order to get a fair result in litigation. The defense wants to make sure it gets all information that allows it to adequately defend the case. For about 30 years, the plaintiffs’ bar has been articulating concerns about patient privacy. Mr. Keating stated that the Council's discussion regarding ORCP 44 E is very informative about this. ORCP 44 E was last addressed by the legislature in 1979. At that time it related to hospital records, and it provided that any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment of the injured person within the scope of discovery under Rule 36 B, which is admissible or likely to lead to the discovery of admissible evidence. During the 1981-83 Council biennium, it was debated whether to amend ORCP 44 E to limit the scope from ORCP 36 B to what

basically amounts to a statement of the "same body part" rule. A motion to amend the rule was offered to limit access to hospital records to “those records arising out of the accident, injury, or occurrence for which the civil action had been brought.” That proposed language was recommended to the Council by the committee, and the Council declined to make the change.

In 2002, the Council further amended ORCP 44 E to its present form, which reads, "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 55 H within the scope of discovery under 36 B." Mr. Keating stated that individually identifiable health information as defined under Rule 55 H is broader than hospital records. The current state of ORCP 44 E is that you can get any medical record of the person making a claim for damages pursuant to a subpoena within the limitations of ORCP 36 B. His proposal is to simply take the existing language in ORCP 44 E which references ORCP 36 B and put it in ORCP 44 C. He stated that this would mean that the plaintiff, upon request of a defendant, is obligated under ORCP 44 C to produce the same medical records as if requested by subpoena. He observed that there previously were notice provisions in 44 E but, when the Council adopted the Rule 55 H definition, that included the 14 day notice provisions from Rule 55 H.

Mr. Keating reported that the committee was not able to find consensus, as there is a strong division between the plaintiffs’ and the defense bar. He stated that there were concerns from Judge Hodson about whether the reference to ORCP 55 H really meant ORCP 44 E is no longer limited to hospital records. Mr. Keating stated that the committee concluded that it would come back to the full Council to see if the Council can provide any guidance. He stated that his practice of many years has shown him that ORCP 44 is important; while some lawyers advise just subpoenaing everybody since records are obtainable under ORCP 44 E, the person who knows the most about the plaintiff's medical situation is the plaintiff. The person who gets unlimited access to the medical records is the plaintiff. When an ORCP 44 C request comes in, a plaintiff's lawyer can go through the records and determine whether there is anything on which they wish to invoke privilege – at that time the lawyer can withhold documents and the defense lawyer can go before the court and ask for an in camera inspection. The plaintiff can then file a motion for a protective order. He thinks that the legitimate interests of both parties are met through this process.

Mr. Beattie wondered, after the decision in *State v. Vanornum,* SC S060715, December 27, 2013 [Reversing and Remanding 250 Or App 693, 282 P3d 908 (2012)], to what degree the Council can modify the ORCP 44 C waiver of privilege which was created by statute. Mr. Keating responded that the language of ORCP 44 C predated the Council. He stated that ORCP 44 E was promulgated by the Council in 1978, and the Legislature addressed it in 1979 and adopted an

amendment. Mr. Eiva noted that the Council has amended ORCP 44 C to include reports. Mr. Keating observed that, at the last Council meeting, members expressed concern about Justice Landau's concurring opinion possibly being a time bomb. He stated that the Council needs to decide whether it believes that, in light of the concurring opinion, the Council should change its procedures, or whether it believes the way the Council has been working since 1978 is appropriate. He noted that what we cannot do is to accept some segments of the rules where the Council has adjusted prior legislative work and then reject other segments. Mr. Eiva stated that he believes that, once it is addressed, the concurring opinion will not affect the Council's current procedure. He stated that, regardless of that opinion, the Council's authority does not allow us to make any modification on substantive rights – a privilege is a substantive right – or incursions into the rules of evidence – a privilege is a rule of evidence. He stated that he believes that the Council cannot modify the physician/patient privilege in any case because of the limitations in the Council's authorizing statute.

Mr. Keating stated that, even before there was a Council, the statutory precursor to ORCP 44 C stated that the filing of a complaint for personal injury does not waive the physician/patient privilege but, when a claim is made, records protected by the physician/patient privilege must be produced. In ORCP 44 E, records must be produced pursuant to subpoena that would have been protected by the privilege had the lawsuit never been filed. He stated that both rules do incorporate a limited waiver of a recognized privilege. Mr. Keating observed that there are two sections of the same rule, both statutorily based, one of which defines the scope of the waiver, and the other of which is silent. He feels that it is appropriate for the Council to address this incongruity and that it is not tampering with the privilege to send amendments to the Legislature suggesting that the two sections become congruent. Mr. Keating noted that, if there is an objection, it can be made clear and resolved. He explained that he is not talking about eroding the physician/patient privilege but, rather, giving direction as to its scope with the language in ORCP 44 C.

Mr. Brian asked whether we might consider making the language in section E congruent with section C, because doing the opposite would seem to be a modification of the physician/patient privilege. Mr. Eiva agreed and stated that the only reason we know something is not privileged in a medical record is to the extent that 44 C creates an incursion into the privilege or because the privilege was waived due to the deposition of a physician or other event during the litigation. He noted that ORCP 36 B(1) is completely informed by ORCP 44 C, to the extent that there is an incursion into the privilege, that means the records are not privileged under ORCP 36 B(1). Mr. Eiva stated that ORCP 36 B(1) carries with it not just "reasonably calculated to lead to admissible evidence" but, also, that you will not receive the material if it is privileged. Mr. Keating countered that there is a spectrum for which the Legislature has determined there is no privilege, and that

is therefore discoverable, and that is defined in section E but is not defined in section C. He asked why, in the practical real world, it is a good idea to tell the defense bar they need to serve subpoenas. Mr. Eiva stated that the language in section E was interpreted by the Supreme Court in *State ex rel. Calley v. Olsen* [532 P.2d 230 (1975)], and the court held that the rule does not mean prior medical information is allowed, but only the documents related to the accident for which a claim is made. He stated that the statutory precursor for ORCP 44 E was a statute that allowed medical records from a hospital that were related to the accident. He stated that the statutory precursor to ORCP 44 E used language similar to 44 C to describe a form of discovery in which a party could only get documents directly related to the claimed injury. He stated that the history is far more convoluted than what the language in the current 44 E might lead one to believe. Mr. Keating noted that the Legislature responded to the *Calley* case in 1979. Mr. Eiva stated that he did not believe the Legislature's change was substantive. Mr. Beattie stated that, as a practical matter, the change was substantive because, years ago, before the *Calley* case, attorneys would send out ORCP 55 subpoenas and receive all hospital records. He observed that it was not until the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and amendments the Council made to ORCP 55 that this practice was contracted.

Judge Zennaché stated that it sounds like both sides have firm positions, and it would be helpful to have the committee draft a report for Council members stating those positions so there is a good basis for informed discussion at the next meeting. Judge Miller asked Mr. Keating to provide the Council with the summary that his associate created. Mr. Keating noted that Mr. Eiva has also created a memorandum and asked him to circulate that to the Council as well. Ms. David asked that the committee meet again by telephone and consolidate the material into a concise report which includes the pros and cons of both sides. She noted that the Council may ultimately decide it is at an impasse.

Judge Zennaché stated that it would also be helpful to know exactly how the problem arose. Mr. Beattie replied that the genesis of the problem would seem to be different ORCP 44 C rulings in different counties. Judge Hodson noted that there is no such thing as a "body part rule" but, rather, there was a consensus statement from the Multnomah County motion panel a long time ago. He stated that no judge is bound by this consensus statement, and that he routinely grants the relief the defense is asking for, but he sometimes gives the relief plaintiffs are asking for. He believes that the rule gives him the latitude he needs and does not feel constrained by any implied "body part rule." He stated that, most of the time, the parties work it out themselves and the cases when they do not are not so frequent. He opined that this controversy began because certain people had issues with certain judges who routinely rule one way because of the way they interpret Rule 44, and he feels that it is more of an education issue for the bench. He understands, however, why the defense bar would want the change. Mr.

Bachofner stated the he does not want to create a rule that makes people file a motion to compel but, rather, wants a rule that plaintiffs can look at and know "this is the scope." He stated that everyone knows that motions to compel are discouraged, because judges tell attorneys that. They are also expensive for clients. Mr. Bachofner related a case where there were 70 providers and the opposing attorney would not provide records – he was looking at having to issue 70 subpoenas, which would be extremely expensive, or file a motion to compel in an outlying county, which would also be expensive. He stated that he would like to try to streamline the process so that there is a certain amount of predictability to it for both attorneys and judges. Mr. Bachofner noted that making a streamlined process is part of the Council's charge. Judge Miller observed that perhaps the process cannot be streamlined when you are dealing with people with body parts. Ms. David replied that it can, because the Council can help clarify the procedure to help assist the parties to reduce the needless expense and expenditure of time by getting them to a place where they can have that discussion.

Prof. Peterson asked that, as soon as anyone on the committee has any suggested language for a potential amendment, they send it to Ms. Nilsson. He observed that sometimes looking at the proposed language of an amendment helps to put things into better perspective. Ms. David asked that, if any Council members wish to submit suggestions or ideas to the committee, they do so in the next 10 days.

8. ORCP 45 (Ms. Wray)

Ms. Wray reported that the committee has met several times and feels like its charge has been completed. She referred the Council to the committee's report (Appendix E). The committee was dealing with several issues, including:

1) Whether ORCP 45 should state that the time for responding to or objecting to requests for admission starts to run after a party is represented by counsel or after the party has indicated that it has chosen to be self represented. Ms. Wray stated that the committee received feedback from the Oregon Trial Lawyers Association (OTLA) and the Professional Liability Fund, and concluded that the problem is not prevalent enough to consider a rule change.

2) What can be done about judges not enforcing requests for admission. The committee recommended no action be taken on this matter.

3) Whether ORCP 45 should specify that requests for admissions and their responses are to be filed with the court. The committee recommended no action be taken on this matter.

Mr. Bachofner stated that he can think of instances where requests for admissions

were either served with the complaint or immediately upon the attorney being available, when the defendant's attorney is not knowledgeable about the facts involved. Ms. Wray stated that the concern was not that it happens, but that attorneys are not finding out about the request for admissions in a timely manner from their clients. She stated that, for the few instances the committee heard about where the attorney did not have enough time to respond, the courts were more than willing to grant relief. Prof. Peterson noted that the committee was surprised by the OTLA responses that responding attorneys did not have any problem amending or clarifying responses. Mr. Keating stated that receiving immediate requests for admission is routine, and he can think of one lawyer who has a standard 57 requests for admission he files with every complaint. Mr. Bachofner observed that some attorneys play a game where they serve the summons and then immediately serve a request for admissions separately. Ms. Wray stated that the committee did not hear that the court was not granting relief if attorneys are caught in a situation where their client did not get them the request for admissions on time. Mr. Keating stated that, if service is made and the response is not filed within 30 days, or 45 days, the request is deemed admitted. He noted that to have a rule that says that a defense lawyer needs to rely on the plaintiff's lawyer saying "you can have more time," or the judge being understanding, is grossly unfair.

Ms. Wray asked what is unfair about the 45 days. Mr. Keating replied that, in the case of an early request for admissions, the defense attorney does not know anything about the case when it first comes in the door and is being asked, at some expense to his or her client, to deny something, thereby running the risk of attorney fees. Judge Miller asked whether it is a problem to contact the opposing side and ask for another 30 days. Ms. David replied that there are many practitioners who will not afford additional time. Ms. Wray asked if there is a procedure for filing a supplemental response later. Mr. Bachofner stated that a supplemental response may be used, but asked the purpose for serving a request for admissions that close to the commencement of a case. He wondered whether there is a reason for needing to know 30 or 45 days after the case is filed versus knowing later on. Prof. Peterson stated that one of the responses from OTLA indicated that there is an attorney who routinely sends a request for admission that the service is proper.

Ms. David stated that her sense is that what the committee was charged with is determining whether there is enough of a concern or direct problem in Oregon that we need to address a direct change to the rule. She recognizes that attorneys all have individualized issues they deal with, but judges have been accommodating about extending times and there are other fixes. She noted that the committee's position is that there is not enough of a problem to address at this time. Mr. Beattie asked whether anyone has ever had an award of attorney fees against them for failing to admit a fact, because that is the downside of just denying

everything. Ms. Wray stated that a judge once awarded $26,000 in fees for the plaintiff having to call a doctor, but that was the first time in her 16 years of practice she had heard of it. The defendant denied the fact because it was so early, and failed to revisit it before trial. Mr. Weaver stated that he received an award of attorney fees where the other side failed to stipulate to the foundation of medical records and he had to call a doctor to say, "Yes, these are the records." Ms. Payne stated that she does not understand the concern when an attorney has the ability to amend his or her responses a month before trial, before the point where fees would be awarded. Ms. David suggested that it is perhaps a bench and bar education issue, to get practitioners to tickle revisiting their admissions issues for 90 days before trial.

Mr. Beattie asked whether the relevant date for determining whether you have admitted is trial. Ms. Wray stated that the rule does not really address the amendment process. Judge Zennaché asked whether one can file an objection saying it is too early for me to respond because I just got the case. Mr. Bachofner stated that ORCP 45 says that this is not a basis for objection. Ms. Wray stated that she feels that the committee was not directed to evaluate this particular matter. Mr. Bachofner agreed that the discussion has moved on to other topics. He stated that, in considering whether to send the committee back for further contemplation, he was going to suggest a change to ORCP 45 F because it only allows 30 requests for admission. He suggested amending that section to not include requests to admit the authenticity of documents or records so that the need to call a records custodian as a witness would be obviated. This would streamline the trial process and benefit plaintiffs as well as defendants. Judge Miller asked whether this would be something along the lines of the rule of evidence about authentication. Mr. Bachofner stated that requests for admissions would attach the documents, and include language such as “admit that the documents attached as Exhibit A are what they purport to be,” so that a records custodian would not be required to appear. He stated that the number of documents would be unlimited so that the documents can be exchanged beforehand as a way to avoid having the records custodian at trial. Ms. David asked whether Mr. Bachofner would be willing to join the committee and asked whether the committee could come up with streamlined language in the next 30 days and run it by OTLA and the Oregon Association of Defense Counsel, since it is already February. Mr. Bachofner stated that he does not need to join committee; he can just give the suggested language to Ms. Wray. Ms. Wray agreed that the committee will meet again and discuss the new issues raised in today's meeting.

9. ORCP 46 and 55 (Judge Gerking)

Judge Gerking reported that the committee met again but that Mr. Eiva was not able to join the meeting. The committee talked about two issues regarding ORCP 55. The first was ORCP 55 H(2)(b), which the Council added last biennium. The committee suggested adding a new section, 55 H(2)(b)(i) (Appendix F). He stated that this seemed satisfactory because it provided a mechanism for resolving objections to the subpoena and the adequacy of the objections without involving ORCP 46 and the sanctions within that rule. He noted that he had subsequently talked to Mr. Eiva regarding the proposed language and he agreed. Prof. Peterson stated that the committee might consider reformatting the amendment by eliminating the subparagraph and just adding the new language to the previous paragraph. He stated that Council staff can make this change and resubmit the amendment for the Council's consideration next month.

Judge Gerking stated that the committee also considered ORCP 55 H(2) as to whether the rule, as currently drafted, requires advance notice to the party whose records are being sought as provided by ORCP 55 H(2)(a) prior to serving the subpoena on the health care provider for a request that copies of records be sent to trial under ORCP 55 H(2)(c) or whether advance notice would be required prior to serving a subpoena on a records custodian pursuant to ORCP 55 H(4). He stated that the committee was able to reach consensus on the need for clarifying amendments to make this confusing rule clear for the practitioner. Judge Gerking stated that the committee did not have enough background information during its meeting, but that Ms. Nilsson provided this information afterward and the committee will look at this history. He stated that Mr. Eiva will also research HIPAA to determine whether it would require notice to a party whose records are being sought in every instance no matter where the subpoena directs the records to be produced. He anticipates that the committee will have a more thorough discussion before the March meeting and will have more to report. He noted that the HIPAA research might help resolve it, and he is also considering the possibility of suggesting that the Council include some kind of pre-notice other than the notice required by ORCP H(2)(a).

Prof. Peterson stated that he believes that the committee's Rule 46 charge has been resolved, but he suggested that the committee look at last biennium's staff changes as well as Legislative Counsel's pink sheet suggestions to see whether any formatting and clarifying changes should be made. Ms. Nilsson will send those materials to Judge Gerking.

10. ORCP 54 A (Ms. Leonard)

Ms. Leonard was ill and unable to attend the meeting. Ms. Nilsson noted that the committee was still waiting for the Oregon State Bar to arrange for a survey of the bench and bar.

11. ORCP 54 E (Ms. Gates)

Prof. Peterson stated that we are waiting for the committee to write a short report on its findings.

12. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee is still waiting for results from its survey of the bench and should have a report available by the next Council meeting.

13. ORCP 69 (Mr. Campf)

Ms. David reported that the committee had met and is still in a conundrum about whether motions to show cause are or should be pleadings. She stated that Prof. Peterson had provided the committee with some draft language and the committee is working with the rule 13 committee to see if they can reach consensus. She stated that the committee's other issue is whether Rule 69 A's 10 day period is concurrent or consecutive with the 30 days to appear and defend afforded by Rule 7 C(2). She stated that the committee has had interesting conversations about different interpretations of the rule, and the strict reading of rule is not as clear as the committee first believed. Ms. David reported that the committee is working to clarify that.

14. Early Assignment of Cases/Scheduling (Judge Gerking)

Judge Gerking referred the Council to the committee's report (Appendix G). He stated that the issue is already covered by Uniform Trial Court Rule 7.020. He stated that no further action is necessary.

15. ORCP 79-85, Various Consumer Law Issues (Prof. Peterson)

Prof. Peterson stated that the committee has not met; he has been busy working on other committees' matters and he needs to get non-Council work group members involved as well. He will schedule a meeting as soon as possible.

16. Council's Authority to Amend ORCP Enacted by the Legislature (Prof. Peterson)

Prof. Peterson stated that the committee had a good, wide-ranging discussion, and that he will write a report and send it to committee members to see whether they have a consensus on what approach we would like to take. He noted that, as Justice Landau said, asking the Legislature to make each of our rules legislation is not without consequence but it is one of the options on the table. He stated that there is also an argument to be made that the Legislature set up the Council system to create the rules and the Legislature meant what it said, and they are good rules and it is a good system, and the concurrence is not consequential. He stated that Mr. Shields had talked to him just before the meeting and suggested engaging Susan Grabe of the Bar, but he stated that the committee is not quite ready to have that meeting yet.

V. New Business (Ms. David)

No new business was raised.

VI. Adjournment

Ms. David adjourned the meeting at 12:10 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

* * * * *

E Use of declaration under penalty of perjury in lieu of affidavit[*; "declaration" defined*].

E(1) Definition. As used in these rules, "declaration" means a declaration under penalty of perjury. A declaration [*under penalty of perjury*] may be used in lieu of any affidavit required or allowed by these rules. A declaration [*under penalty of perjury*] may be made without notice to adverse parties[,]**.**

E(2) Declaration made within the United States. A declaration made within the United States must be signed by the declarant[,] and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." [*As used in these rules, "declaration" means a declaration under penalty of perjury.*]

E(3) Declaration made outside the United States. A declaration made outside the United States as defined in ORS 194.805(1) must be signed by the declarant and must include the following language in prominent letters immediately following the signature of the declarant: "I declare under penalty of perjury under the laws of Oregon that the foregoing is true and correct, and that I am physically outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. Executed on the _____ (day) of _____ (month), _____ (year) at _____ (city or other location), _____ (country)."

* * * * *

JUDGMENTS

RULE 67

*****

[*C Demand for judgment.*] **C Relief granted.** Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

*****

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JUDGMENTS BY CONFESSION

RULE 73

*****

[*C Application by plaintiff.*] **C Filing of statement by plaintiff; entry, enforcement of judgment.** Judgment by confession may be ordered by the court upon the filing of the statement required by section B of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

*****

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SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

C(1) **Contents.** The summons shall contain:

C(1)(a) **Title.** The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) **Direction to defendant.** A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C(3) **Notice to party served.**

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C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(b) **Service for counterclaim.** A summons to join a party to respond to a counterclaim pursuant to Rule 22 D (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given

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to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or

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toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or[,] service by publication.

D(2) **Service methods.**

D(2)(a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served[,] to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed[,] by first class mail[,] true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or

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by statute, substituted service shall be complete upon such mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

D(2)(d) **Service by mail.**

D(2)(d)(i) **Generally.** When required or allowed by this rule or by statute, except as otherwise permitted, **an attorney for a party may serve the summons and the complaint pursuant to this paragraph.** [*s*]**S**ervice by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this section, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail which may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside the state, whichever first occurs.

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

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D(3)(a) **Individuals.**

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to such defendant or other person authorized by appointment or law to receive service of summons on behalf of such defendant, by substituted service, or by office service. Service may also be made upon an individual defendant **or other person authorized to receive service** to whom neither subparagraph (ii) nor (iii) of this paragraph applies by a mailing made in accordance with paragraph (2)(d) of this section provided the defendant **or other person authorized to receive service** signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) **Minors.** Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor and, also, upon such minor's father[,]**;** mother[,]**;** conservator of the minor's estate[,]**;** or guardian[,]**;** or, if there be none, then upon any person having the care or control of the minor, or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A(2).

D(3)(a)(iii) **Incapacitated persons.** Upon a person who is incapacitated or **is** financially incapable, as defined by ORS 125.005, by service in the manner specified in subparagraph (i) of this paragraph upon such person and, also, upon the conservator of such person's estate or guardian[,] or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

D(3)(a)(iv) **Tenant of a mail agent.** Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646A.340 by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the

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summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

D(3)(b) **Corporations including, but not limited to, professional corporations and cooperatives.** Upon a domestic or foreign corporation:

D(3)(b)(i) **Primary service method.** By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) **Alternatives.** If a registered agent, officer, or director cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent, officer, or director;

(B) by personal service on any clerk or agent of the corporation who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the corporation, if any, as shown by the records on file in the office of the Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation[,] and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

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D(3)(c) **Limited liability companies.** Upon a limited liability company:

D(3)(c)(i) **Primary service method.** By personal service or office service upon a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) **Alternatives.** If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

(B) by personal service on any clerk or agent of the limited liability company who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State**;** or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company[,] and**,** in any case**,** to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) **Limited partnerships.** Upon a domestic or foreign limited partnership:

D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited

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partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent or general partner of a limited partnership;

(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State**;** or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership[,] and**,** in any case**,** to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) **General partnerships and limited liability partnerships.** Upon any general partnership or limited liability partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership or limited liability partnership.

D(3)(f) **Other unincorporated association subject to suit under a common name.** Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) **State.** Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) **Public bodies.** Upon any county; incorporated city; school district; or other public corporation, commission, board, or agency by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(i) **Vessel owners and charterers.** Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

(A) any residence address provided by that defendant at the scene of the accident;

(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by **parts** (A) and (B) **of this subparagraph** that reasonably might result in actual notice to that defendant.

Sufficient service pursuant to this subparagraph may be shown if the proof of service

includes a true copy of the envelope in which each of the certified, registered, or express mailings required by **parts** (A), (B), and (C) **of this subparagraph** above was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by **parts** (A), (B), and (C) **of this subparagraph** [*above*] is made. If the mailing required by **part** (C) **of this subparagraph** is omitted because the plaintiff did not know of any address other than those specified in **parts** (A) and (B) **of this subparagraph** [*above*], the proof of service shall so certify.

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph (i) of this paragraph may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph (i) of this paragraph are as provided in Rule 69.

D(4)(b) **Notification of change of address.** Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of [*such defendant's*] **the person's** address occurring within three years after such accident, collision, or event.

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D(6) **Court order for service; service by publication.**

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

D(6)(b) **Contents of published summons.** In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) **of this rule** shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

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

D(6)(d) **Mailing summons and complaint.** If the court orders service by publication and

the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff shall mail true copies of the summons and the complaint to the defendant at such address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know and cannot upon diligent inquiry ascertain the current address of any defendant, true copies of the summons and the complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

D(6)(e) **Unknown heirs or persons.** If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in [*sections I and J of*] Rule 20 **I and J**, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy[,] at the time of the commencement of the action, and **who are** served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D(6)(f) **Defending before or after judgment.** A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment[,] shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not

be affected thereby.

D(6)(g) **Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection (3) of this section if: (i) service pursuant to subparagraph (4)(a)(i) of this section is not authorized, and the plaintiff attempted service of summons by all of the methods authorized by subsection (3) of this section and was unable to complete service, or (ii) if the plaintiff knew that service by such methods could not be accomplished.

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. However, service pursuant to subparagraph D(2)(d)(i) of this rule may **only** be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

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

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: **the specific documents that were served;** the time, place, and manner of service; that the

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server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt**, if any,** shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt**, if any,** shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

Affidavit of Publication

State of Oregon)

) ss.

County of)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a

newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 2_____.

_____

Notary Public for Oregon

My commission expires

___day of _____, 2___.

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

Declaration of Publication

State of Oregon)

) ss.

County of)

I, _____, say that I am the _____ (here set forth the title or job description of the person making the declaration), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

___day of _____, 2___.

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

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

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of **a** summons, issuance of **a** summons, or who may serve **a** summons shall not affect the validity of service of **that** summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of **a** summons that does not materially prejudice the substantive rights of the party against whom **the** summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of **a** summons that does not violate the due process rights of the party against whom **the** summons was issued.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

A Service; when required. Except as otherwise provided in these rules, every order; every pleading subsequent to the original complaint; every written motion other than one which may be heard ex parte; and every written request, notice, appearance, demand, offer of judgment, designation of record on appeal, and similar document shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7.

B Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party[,]**;** by mailing it to such attorney's or party's last known address**; by electronic service as provided in section H of this rule;** or, if the party is represented by an attorney, by [*telephonic*] facsimile communication [*device*] or **by** [*e-mail*] **electronic mail** as provided in sections F or G of this rule. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving [*it*] **the copy** in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving [*it*] **the copy** at such person's dwelling house or usual place of abode with some person [*over*] 14 years of age **or older** then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing a copy of the pleading or other document[*s*] with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon such party personally.

C Filing; proof of service. Except as provided by section D of this rule, all [*papers*]

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documents required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of service of all [*papers*] **documents** required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the [*papers*] **document** served or as a separate document attached [*to the papers*] **thereto**. [*Where*] **If** service is made by [*telephonic*] facsimile communication [*device*] or [*e-mail*] **electronic mail**, proof of service shall be made by affidavit or declaration of the person making service, or by certificate of an attorney or sheriff. [*Attached*] **If service is made by facsimile communication under section F of this rule, the person making service shall attach** to such affidavit, declaration, or certificate [*shall be the*] printed confirmation of receipt of the message generated by the [transmitting machine, if facsimile communication is used] **transmitting technology**. If service is made by [*e-mail*] **electronic mail** under section G of this rule, the person making service must certify that he or she received confirmation that the message was received, either by return [e-mail] **electronic mail**, automatically generated message, [*telephonic*] facsimile **communication**, or orally**; however, an automatically generated message indicating that the recipient is not in the office or is otherwise unavailable cannot support the required certification**.

D When filing not required. Notices of deposition, requests made pursuant to Rule 43, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial. Offers [*of compromise*] **to allow judgment** made pursuant to Rule 54 E shall not be filed with the court except as provided in Rule 54 E(3).

E Filing with the court defined. The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or document the time of day, the day of the month,

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the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless **a caption that includes** the name of the court[*,*]**; the register number of the action, if one has been assigned;** the title of the [*cause and the*] document[*,*]**; and** the names of the parties[*, and the attorney for the party requesting filing, if there be one,*] are legibly [*endorsed*] **displayed** on the front of the document, nor unless the contents thereof are legible. **Further, the clerk is not required to receive for filing any document that does not include the name, address, and telephone number of the party or the attorney for the party, if the party is represented.**

F Service by [*telephonic*] facsimile communication [*device*]. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of [*a telephonic*] facsimile communication [*device*] if the attorney [*maintains such a device at the attorney's office and the device*] **has such technology available and said technology** is operating at the time service is made. Service in this manner shall be [*equivalent to service by mail for purposes of*] **subject to** Rule 10 C. **Facsimile communication includes: a telephonic facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via electronic mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing electronic mail account.**

G Service by [e-mail] electronic mail. Service by [*e-mail*] **electronic mail** is prohibited unless attorneys agree in writing to [*e-mail*] **electronic mail** service. This agreement must provide the names and [*e-mail*] **electronic mail** addresses of all attorneys and the attorneys' designees, if any, to be served. **Any attorney who has consented to electronic mail service must notify the attorneys for other parties in writing of any changes to the attorney's electronic mail address.** Any attorney may withdraw his or her agreement at any time, upon proper notice via [*e-mail*] **electronic mail** and any one of the other methods authorized by this

rule. [*Service*] **Subject to Rule 10 C, service** is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or **is** otherwise unavailable.

H Service by electronic service. As used in this section, electronic service means using an electronic filing system provided by the Oregon Judicial Department. Service by electronic service is permitted as prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court. Service by electronic service is prohibited unless the person being served agrees to electronic service as prescribed in applicable rules adopted consistently with this section.

TIME

RULE 10

A Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court**,** or by order of court[**,**] the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day [*which*] **that** is not a Saturday or a legal holiday. If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business. When the period of time prescribed or allowed (without regard to section C of this rule) is less than 7 days, intermediate Saturdays and legal holidays, including Sundays, shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020. This section does not apply to any time limitation governed by ORS 174.120.

B Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending before it.

C Additional time after service by mail, electronic mail, or facsimile communication. Except for service of summons, whenever a party has the right or is required to do some act or **to** take some proceedings within a prescribed period after the service of a notice or other [*paper*] **document** upon such party and the notice or [*paper*] **document** is served by mail**,**

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electronic mail, or facsimile communication, 3 days shall be added to the prescribed period.

The Rule 13 work group met by telephone conference on February 5, 2014. Present were Kristen Sager-Kottre, Murray Pettit, Judge Miller, Judge Zennaché.

The committee reviewed the proposed change to ORCP 69A(2) prepared by Professor Mark Peterson. The committee had two concerns with the proposed draft. The first concern was with the language "or a party who has filed a response to such a motion." The members of the committee simply could not imagine a situation in which the party who filed a response to a motion to modify could take a default against the party who had filed the motion. The second concern raised by members of the committee had to do with the impact that this change would have on the way various courts handle these motions. Judge Miller pointed out that in her county and others all motions and orders to show cause to modify required a personal appearance at a show cause hearing while in other counties motions and orders to show cause why custody, parenting time or support should not be modified required a written appearance and only then were set for a hearing. She expressed concern that the proposed change to the rule would require all counties to do it the second way. She noted that right now, the OJD forms for such motions recognize and accommodate those different procedures. Mr. Pettit indicated that while private practitioners might like all courts to do it the same way, he did not want to force courts to change their procedures without more input. The committee also recognized that to the extent the SMRA applies to a matter, it must be complied with regardless of the procedure used by a county. The committee thereafter agreed that the change should not be required.

The next meeting is February 26 at 12:10 p.m..

KJH
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March 3, 2014

Council on Court Procedures

Re: Proposed Amendments to ORCP 44 C

Dear Council:

I submit the following to the Council members in response to Judge Zennache's request that those in favor of a change in Rule 44 C make their case as to what the problem is that we hope to resolve by making this change.

Proposed change: To clarify that the scope of discovery of ORCP 44 C is aligned with the scope of discovery in ORCP 44 E, by specifying that the phrase "relating to injuries for which recovery is sought" refers to information within the scope of discovery under ORCP 36 B.

Robert M. Keating
rkeating@keatingjones.com

BACKGROUND OF MEDICAL PRIVILEGE IN OREGON

Oregon is the only jurisdiction in the country where the medical provider-patient privilege, if one exists, is not waived by the filing of the complaint. *See* OEC 511; *State ex rel. Grimm v. Ashmanskas*, 298 Or 206, 212, 690 P2d 1063 (1984).[1] That rule has been limited by the adoption of OEC 504 (4)(b), which provides there is no psychotherapist-patient privilege as to communications relevant to an issue of the mental or emotional condition of the patient in (1) any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense and (2) after the patient's death, any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Most jurisdictions which hold that the privilege is waived upon filing of a complaint alleging personal injury hold the waiver is limited to those matters that are relevant to issues in the case or are likely to lead to the discovery of admissible evidence. There is a split as to the scope of the waiver among these states, with some holding the waiver extends to evidence that would be admissible at trial and others holding that the

[1] See also Attachment A, which is a survey of states regarding the waiver of the medical privilege upon filing of a personal injury lawsuit.

waiver extends to evidence that is likely to lead to the discovery of admissible evidence.[2]

Oregon took an alternative approach by adopting ORCP 44 C. That rule provides as follows:

> "In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of the party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply."[3]

The rule adopts a limited waiver of the medical privilege in so far as documents are concerned. The issue before the Council is whether there is a need to clarify the rule to define the scope of that waiver.

Some trial courts have adopted a very narrow interpretation of the rule by adopting the "same body part" rule, *i.e.* medical records relating only to the specific area of the injury are required to be produced upon a Rule 44 C request. This is inconsistent with the scope of discovery allowed under ORCP 44 E, which relates to medical records that can be obtained by subpoena. Rule 44 E reads 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 55 H[4] within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written

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[2] See Attachment B, which is a survey of states regarding the scope of the limited waiver of the medical privilege for medical records.

[3] See Attachment C, which is a history of the Rule 44 C and is similar to the information provided by Travis Eiva in his letter of February 28, 2014.

[4] ORCP 55 H(1)(a) defines "individually identified health information" as

> "information which identifies an individual or 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 healthcare clearing house; and which relates to the past, present, or future physical or mental health or condition of an individual; or the past, present, or future payment for the provision of health care to an individual."

patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H."[5]

The current system provides that anyone sued for personal injuries can obtain medical records by subpoena from health care providers. The scope of the waiver under Rule 44 E is defined as those documents within the scope of ORCP 36 B. Rule 36 B provides, in part:

> "Unless limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> "(1) For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

(Emphasis added.)

It is the contention of those of us who suggest a change in Rule 44 C to clarify the scope of the limited waiver that the easiest thing to do is to bring the text of Rule 44 C and 44 E into congruence, by explicitly including in Rule 44 C the reference to Rule 36 B. That way, the obligation for the claimant to produce records in response to a Rule 44 C request would be the same as the scope of the records an opposing party could obtain by subpoena under Rule 44 E.

THE PROBLEM CREATED BY THE PERCEIVED DIFFERENCE IN SCOPE

In any claim for personal injury, there is a broad range of medical information relevant to the claim. For example, in any action for a permanent injury, the jury is instructed under UCJI 74.01 regarding life expectancy to take into consideration "all evidence bearing on that issue, such as the plaintiff's occupation, sex, health, habits, and activities." (Emphasis added.) Thus, the existence of any injury, disease or condition that can affect the plaintiff's life expectancy is relevant and admissible. Any medical records are likely to contain information that will lead to the discovery of admissible evidence on those issues.[6]

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[5] See Attachment D, which is a history of Rule 44 E.

[6] In a recent case, however, a trial court applied the "same body part" rule to limit admissibility of the patient's preexisting heart condition because the case involved a claim of permanent injury to the kidney.

In any malpractice case where the plaintiff contends that the defendant physician failed to obtain an adequate history from the patient, the patient's medical history is directly relevant and admissible and surely is likely to lead to the discovery of admissible evidence. In any case where emotional distress or any other emotional or mental injury is claimed, the patient's history of mental health care is admissible and should be discoverable.[7] Medical records that are relevant to determining whether the patient's claimed injury is attributable to some other cause than that alleged by the plaintiff are admissible in evidence and surely should be discoverable.[8]

The perceived disparity between the scope of ORCP 44 C and the scope of ORCP 44 E is, in the real world, very prejudicial to the defense, because defendants cannot determine on whom to serve subpoenas under Rule 44 E unless plaintiffs produce all documents under Rule 44 C upon request. This is an avoidable problem addressed by our proposed solution.

CONCERNS RAISED BY OPPONENTS OF THE CHANGE

The primary objection made by opponents of the proposal to change the wording of the rule is to prevent the distribution of confidential and personal material which is in no way relevant to the issues of the case. Such circumstances do arise. There already exists a mechanism for the plaintiffs to protect themselves from this happening. They can object to production of the offending documents given the personal and irrelevant nature of the records and state they will not be produced absent a court order with a protective order. The defendant can then make a motion to compel disclosure. Plaintiff can provide the documents to the court for *in camera* review. The court then rules whether they are discoverable and whether they should be subject to a protective order. Defendants use this approach frequently, most commonly when plaintiffs seek records which contain information the defendants do not want in the hands of their competitors.

The suggestion has also been made that the Council lacks authority under ORS 1.735(1) to change the wording of ORCP 44 C because the change is allegedly substantive, not procedural. The opponents contend that medical provider privileges are substantive rights and are promulgated under the rules of evidence. They also note that, when originally promulgated, ORCP 44 C simply renumbered *former* ORS 44.620(2) without any substantive changes. Be that

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[7] *See Baker v. English*, 134 Or App 43, 46-47, 894 P2d 505 (1995), *rev'd on other grounds*, 324 Or 585 (1997) (holding that the trial court erred when it denied the defendant's motion to compel a psychologist's records and concluded that the records were discoverable under ORCP 36 B(1)).

[8] *See Doran v. Culver*, 88 Or App 452, 454-55, 745 P2d 817 (1987), *rev den*, 305 Or 102 (1988) (holding that the plaintiff's prior medical records regarding her gynecological condition and surgeries were relevant to determining the cause of the back and pelvic pain she attributed to the underlying automobile accident).

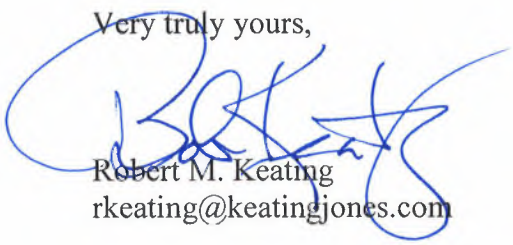
as it may, the Council has addressed this rule with clarifications on several occasions. It has also done so with regard to the scope of ORCP 44 E.[9] So, the precedents of Council action establish that this objection does not apply. Further, the requested change is not substantive. It merely makes explicit what is already implicitly provided for under the rule.

FINAL THOUGHT

It has been our position that the phrase "relating to the injuries for which recovery is sought" included all medical information having a bearing on the claim. Such information is relevant or likely to lead to the discovery of relevant evidence. It should, by right, be producible today. It is the aggressive assertion of the "same body part" rule which gives rise to the need for a clarification.

The context in which a defendant (presumed not to be negligent) is called upon to defend himself or herself is helpful to understand why this change is needed. The Supreme Court wants litigated matters to be resolved within one year of filing. A plaintiff with statute of limitations concerns need not serve the summons and complaint for 60 days after filing. Motions for summary judgment must be filed no later than 60 days before trial. This creates a relatively narrow window for the defendant to gather the necessary records, obtain reviews, take meaningful depositions, and be prepared to proceed to summary judgment or trial. Obstacles to the efficient gathering of evidence so that a party can be adequately represented should not be built any further into the rules. Making this change is one small step to unclogging the system.

Very truly yours,



Robert M. Keating
rkeating@keatingjones.com

RMK:SAC:pb

Attachments

Doc# 534237

[9] See Attachment D, which is a history of Rule 44 E.

MEMORANDUM

TO: RMK - Miscellaneous
Our File No. 90011-0001

FROM: SAC

DATE: December 18, 2013

RE: State survey regarding waiver of physician-patient privilege as to medical records upon filing of lawsuit

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Generally, the initiation of malpractice litigation in all states, including Oregon, will allow the disclosure of some measure of the plaintiff-patient's medical records. The following memo surveys the governing law in each of the 50 states as to the existence of a physician-patient privilege and the extent of its waiver as to the plaintiff's medical records upon initiation of malpractice litigation. This memo does not specifically address the extent of any such waiver as to the ability of defense counsel to depose treating physicians or the ability of defense counsel to conduct informal interviews with treating physicians.

1. **Alabama: except for in mental health area, no testimonial privilege to be waived; in area of mental health, malpractice litigation against the mental health provider waives the privilege**

Mull v. String, 448 So 2d 952, 954 (Ala 1984), provides:

"Persuaded by these cases, we recognize a similar exception with regard to Dr. String's disclosure of his letter report to the defendant hospital and its attorney, because this letter report on the diagnosis and prognosis of Mull's injuries was legally discoverable by the defendant hospital. The absence of a statutory physician-patient testimonial privilege in Alabama, moreover, evidences a legislative intent to uphold the public's interest in full disclosure to obtain a just determination of the controversy. *See Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973). And, most importantly, Mull effectively relegated his own privacy interest in non-disclosure in favor of the public's interest in full disclosure when he initiated litigation against the hospital which directly concerned the physical condition subsequently disclosed to the defendant hospital and its attorney by Dr. String."

As an example of the exception, ARE Rule 503, regarding the psychotherapist-patient privilege, provides in part:

"(4) Breach of duty arising out of psychotherapist-patient relationship. There is no privilege under this rule as to an issue of breach of duty by the psychotherapist to the patient or by

the patient to the psychotherapist."

2. **Alaska: initiation of litigation waives privilege as to information reasonably calculated to lead to the discovery of admissible evidence**

Ayuluk v. Red Oaks Assisted Living, Inc., 201 P3d 1183, 1204 (Alaska 2009) (footnotes omitted), provides:

"The filing of a personal injury action waives the physician/patient privilege as to all information concerning the plaintiff's health and medical history relevant to the matters at issue. And relevance is broadly defined for discovery purposes to include not only information that would be admissible in evidence at trial, but also information reasonably calculated to lead to the discovery of admissible evidence."

3. **Arizona: initiation of litigation waives privilege as to the underlying medical condition**

Phoenix Children's Hosp., Inc. v. Grant, 228 Ariz 235, 237-38, 265 P3d 417 (Ariz App 2011), provides:

"When a patient files a medical malpractice lawsuit, the privilege is impliedly waived to allow the defendant access to information necessary to make a defense. In *Bain v. Superior Court*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986), our supreme court explained that when a patient 'places a particular medical condition at issue by means of a claim or affirmative defense then the privilege will be deemed waived with respect to that particular medical condition.' (Citation omitted.)"

4. **Arkansas: initiation of litigation waives privilege as to relevant medical records**

ARE 503(d)(3) provides:

"(A) There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

"(B) Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures."

ARCP 35(c) provides:

"(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

"(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures."

5. California: initiation of litigation waives privilege as to relevant medical records

Vesco v. Superior Court, 221 Cal App 4th 275, 279, 164 Cal Rptr 3d 341 (Cal App 2013), provides:

"When a party raises her physical condition as an issue in a case, she waives the right to claim that the relevant medical records are privileged. (See Evid. Code, § 996 & *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232, 231 P.2d 26 ['The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too'].)"

Oiye v. Fox, 211 Cal App 4th 1036, 1068, 151 Cal Rptr 3d 65 (Cal App 2012), provides:

"A plaintiff is recognized as waiving physician-patient and psychotherapist-patient privileges to the extent he or she has put his or her medical or psychological condition in issue in a lawsuit. (Evid.Code, §§ 996, 1016; *In re Lifschutz* (1970) 2 Cal.3d 415, 435, 85 Cal.Rptr. 829, 467 P.2d 557.)"

6. Colorado: initiation of litigation waives privilege to medical records related to the injuries and damages claimed

Alcon v. Spicer, 113 P3d 735, 739 (Colo 2005), provides:

"One way a party can establish waiver is by showing that the privilege holder 'has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense.' *Id.*

at 10. Making such a showing does not mean that the party seeking to overcome the privilege has established a complete waiver of all communications between the physician and patient. The privilege is still retained with respect to communications unrelated to the claim or defense. Recently, we explained in *Weil* that a plaintiff, by making typical personal injury claims, 'did not waive his physician-patient privilege for medical records *wholly unrelated* to his injuries and damages claimed.' 109 P.3d at 128 (emphasis added)."

7. **Connecticut: initiation of litigation waives privilege as to defendant physician**

CGSA § 52-146o(b) (emphasis added), provides:

"Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court, *(2) by a physician, surgeon or other licensed health care provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to the physician's, surgeon's or other licensed health care provider's attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding,* (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with intellectual disability is known or in good faith suspected."

8. **Delaware: initiation of litigation waives privilege as to relevant medical information to the claim**

Green v. Bloodsworth, 501 A2d 1257, 1258 (Del Super 1985) (footnote omitted), provides:

"The law is clear that, by the filing of a personal injury action, plaintiffs waive the physician-patient privilege as to all medical information relevant to the claim. D.U.R.E. 503(d)(3). A contrary rule would lead to injustice and the suppression of the truth. 8 Wigmore, *Evidence* § 2389 (McNaughton rev. 1961); *McCormick on Evidence* § 105 (3d ed. 1984)."

9. **Florida: initiation of litigation waives privilege as to defendant physician**

FSA § 456.057(7)(d) provides, in part:

"Notwithstanding paragraphs (a)-(c), information disclosed by a patient to a health care practitioner or provider or records created by the practitioner or provider during the course of care or treatment of the patient may be disclosed:

"1. In a medical negligence action or administrative proceeding if the health care practitioner or provider is or reasonably expects to be named as a defendant[.]"

Royal v. Harnage, 826 So 2d 332, 335-36 (Fla App 2002), provides:

"The recent origins and the purposes of [*former*] section 455.667 are discussed at length in *Acosta v. Richter*, 671 So.2d 149 (Fla.1996). This statute 'provides for a broad physician-patient privilege of confidentiality for a patient's medical information and a limited exception to the privilege for disclosure by a defendant physician in a medical negligence action in order for the physician to defend herself.' 671 So.2d at 150. * * *

"In practical terms, the medical negligence exception is a limited waiver of an existing privilege. The waiver occurs when the patient chooses to pursue a claim."

10. Georgia: initiation of litigation waives privilege as to relevant medical records

Harris v. Tenet Healthsystem Spalding, Inc., 746 SE2d 618, 620 (Ga App 2013), provides:

"Georgia law has long held that once a plaintiff puts her medical condition at issue in a case, she waives her right to privacy with regard to any medical records that are relevant to that medical issue. *Moreland v. Austin*, 284 Ga. 730, 732, 670 S.E.2d 68 (2008)."

11. Hawaii: initiation of litigation waives privilege as to relevant medical records

HRS § 626-1, Rule 504(3), provides in part:

"Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

12. Idaho: initiation of litigation waives privilege as to relevant medical records

IRE 503(d)(3) provides:

"Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense."

IC § 9-203(4)(D) provides:

"That where any person or his heirs or representatives brings an action to recover damages

for personal injuries or death, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said injured or deceased person and whose testimony is material in the action may testify."

13. Illinois: initiation of litigation waives the privilege

735 ILCS 5/8-802 provides in part:

"No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only * * * (2) in actions, civil or criminal, against the physician for malpractice, * * * (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue[.]"

In re Marriage of Bonneau, 294 Ill App 3d 720, 728, 691 NE2d 123 (Ill App 1998), provides:

"A statutory privilege regarding mental or physical health should not be deemed waived unless the party asserting the privilege either expressly waived the privilege or specifically or affirmatively placed his or her mental or physical health in issue in the pleadings."

14. Indiana: initiation of litigation waives privilege as to those matters causally and historically related to the condition put in issue that have direct medical relevance to the claim

Vargas v. Shepherd, 903 NE2d 1026, 1030 (Ind App 2009), provides:

"Additionally, the physician-patient privilege is not absolute and may be waived by the patient either expressly or by implication. *Ley*, 698 N.E.2d at 384. When a party places his mental or physical condition at issue in a lawsuit, he has impliedly waived the physician-patient privilege to that extent. *Id.* However, the privilege is waived only as to those matters causally and historically related to the condition put in issue and which have direct medical relevance to the claim. *Andreatta*, 714 N.E.2d at 1157."

15. Iowa: initiation of litigation waives privilege

In re Marriage of Hutchinson, 588 NW2d 442, 447 (Iowa 1999), provides:

"That brings us to the patient-litigant exception in the statute which is the subject of this appeal: '[N]or does the prohibition apply to ... mental health professionals ... in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person.' Iowa

Code § 622.10. This exception denies the privilege where the patient, or someone claiming through or under the patient, has brought the mental or physical condition of the patient into issue as the basis for the claim or as a basis for the defense. The object of the patient-litigant exception is to prevent the patient from using the privilege to suppress evidence after the patient has frustrated the purpose of the privilege by introducing evidence on his or her own medical condition."

16. Kansas: initiation of litigation waives privilege

KSA 60-427(d) provides:

"There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party."

17. Kentucky: except for mental health area, no testimonial privilege to be waived; in mental health area, privilege waived on initiation of litigation

H. H. Waegner & Co. v. Moock, 303 Ky 222, 225, 197 SW2d 254 (Ky 1946), provides:

"At common law neither the physician and surgeon nor the patient is exempt from testifying as to communications between themselves."

As an example of the exception, KRE Rule 507, regarding psychotherapist-patient privilege, provides in part:

"(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

"* * * * *

"(3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense."

18. Louisiana: initiation of litigation waives the privilege as to relevant medical records

LSA-CE Art 510 provides in part:

"(2) Exceptions. There is no privilege under this Article in a noncriminal proceeding as to a communication:

"(a) When the communication relates to the health condition of a patient who brings or

asserts a personal injury claim in a judicial or worker's compensation proceeding.

"(b) When the communication relates to the health condition of a deceased patient in a wrongful death, survivorship, or worker's compensation proceeding brought or asserted as a consequence of the death or injury of the deceased patient.

"(c) When the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which a party deriving his right from the patient relies on the patient's health condition as an element of his claim or defense."

Acara v. Banks, 37 So3d 996, 997 (La. 2010), provides:

"La.Code Evid. art. 510(B)(2)(a) provides there is no physician-patient privilege in a non-criminal proceeding 'when the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or worker's compensation proceeding.' La.Code Evid. art. 510(E) further provides '[t]he exceptions to the privilege set forth in Paragraph B(2) shall constitute a waiver of the privilege only as to testimony at trial or to discovery of the privileged communication by one of the discovery methods authorized by Code of Civil Procedure Article 1421 et seq. ....'"

19. <u>Maine: initiation of litigation waives privilege as to relevant medical records</u>

Maine Rules of Evidence, Rule 503(3) provides:

"Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding in which any party puts the condition in issue."

20. <u>Maryland: except for in the mental health area, no testimonial privilege to be waived; in the mental health area, initiation of litigation waives privilege</u>

Butler-Tulio v. Scroggins, 139 Md App 122, 135-36, 774 A2d 1209 (Md App 2001) (footnote omitted), provides:

"We begin our analysis by observing that there is no physician-patient privilege in Maryland. 'Communications made to a physician in his professional capacity by a patient are neither privileged under the common law of Maryland, nor have they been made so by statute.' *Rubin v. Weissman*, 59 Md. App. 392, 401, 475 A.2d 1235 (1984) (citing *Robinson v. State*, 249 Md. 200, 221, 238 A.2d 875 (1968)); *see also O'Brien v. State*, 126 Md. 270, 284, 94 A. 1034

(1915). That has been the law of Maryland, and, except for a narrow exception created by the General Assembly in the mental health area, that remains the law of Maryland today."

As an example of the exception, MD Code, Courts and Judicial Proceedings, § 9-109 regarding patient-therapist privilege provides:

"(d) There is no privilege if:

"* * * * *

"(3) In a civil or criminal proceeding:

"(i) The patient introduces his mental condition as an element of his claim or defense; or

"(ii) After the patient's death, his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient;

"(4) The patient, an authorized representative of the patient, or the personal representative of the patient makes a claim against the psychiatrist or licensed psychologist for malpractice[.]"

21. Massachusetts: except in the mental health area, there is no testimonial privilege; in the mental health area, initiation of malpractice litigation waives the privilege as to relevant information

Tower v. Hirschhorn, 397 Mass 581, 588 n 9, 492 NE2d 728 (Mass 1986), provides:

"We note, however, that Massachusetts does not recognize a physician-patient testimonial privilege. Thus, in *Alberts* we stated that, notwithstanding a physician's tort duty of confidentiality, societal interests may require that he testify in court about information obtained from a patient in the course of treatment. *Alberts v. Devine, supra* 395 Mass. at 67, 479 N.E.2d 113. *See Hammonds v. Aetna Casualty & Sur. Co.*, 243 F.Supp. 793, 805 (N.D.Ohio 1965) (although patient's institution of personal injury suit may lead ultimately to waiver of his right to confidentiality, and such right will not prevent pretrial discovery of confidential information as to which physician might testify at trial, clandestine conference between physician and attorney for patient's adversary is not permissible)."

Regarding the exception, MGLA 233 § 20B, concerning the psychotherapist-patient privilege, provides in part:

"The privilege granted hereunder shall not apply to any of the following communications:--

"* * * * *

"(c) In any proceeding, except one involving child custody, adoption or adoption consent, in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

"(d) In any proceeding after the death of a patient in which his mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the patient as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

"* * * * *

"(f) In any proceeding brought by the patient against the psychotherapist, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist."

22. <u>Michigan: initiation of litigation waives privilege as to related medical records</u>

MCLA 600.2157 provides in part:

"If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition."

However, MCLA 600.2912b(5) provides:

"Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law."

And, MCLA 600.2912f provides:

"(1) A person who has given notice under section 2912b or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.

"(2) Pursuant to subsection (1), a person or entity who has received notice under section 2912b or who has been named as a defendant in an action alleging medical malpractice or that person's or entity's attorney or authorized representative may communicate with a person specified in section 5838a in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.

"(3) A person who discloses information under subsection (2) to a person or entity who has received notice under section 2912b or to a person or entity who has been named as a defendant in an action alleging medical malpractice or to the person's or entity's attorney or authorized representative does not violate section 2157 or any other similar duty or obligation created by law and owed to the claimant or plaintiff."

23. Minnesota: initiation of litigation waives privilege

Rules of Civil Procedure, Rule 35.03, provide:

"If at any stage of an action a party voluntarily places in controversy the physical, mental, or blood condition of that party, a decedent, or a person under that party's control, such party thereby waives any privilege that party may have in that action regarding the testimony of every person who has examined or may thereafter examine that party or the person under that party's control with respect to the same physical, mental, or blood condition."

24. Mississippi: initiation of litigation waives privilege as to relevant medical records

Miss. Code Ann. § 13-1-21(4) provides:

"In any action commenced or claim made after July 1, 1983, against a physician, hospital, hospital employee, osteopath, dentist, nurse, pharmacist, podiatrist, optometrist or chiropractor for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the medical privilege and any medical information relevant to the allegation upon which the cause of action or claim is based shall be disclosed upon the request of the defendant, or his or her counsel."

25. Missouri: initiation of litigation waives privilege as to related medical records

State ex rel. Maloney v. Allen, 26 SW3d 244, 247-48 (Mo App 2000) (internal citation omitted), provides:

"Once a party places the matter of his physical condition in issue under the pleadings, the party's physician/patient privilege is waived insofar as information from doctors or medical and hospital records bears on that issue. In such case, the opposing party is not entitled to any and all medical information. Rather, the opposing party may discover only those medical records that relate to the physical conditions at issue under the pleadings."

26. Montana: initiation of litigation waives privilege as to related medical records

MRCP 35(b)(4) provides:

"Waiver of Privilege. By requesting and obtaining the examiner's report, by deposing the examiner, or by commencing an action or presenting a defense which puts a party's condition at issue, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all treatments, prescriptions, consultations, or examinations for the same condition.

"The waiver of any privilege does not apply to any treatment, consultation, prescription, or examination for any condition not related to the pending action. On a timely motion for good cause and on notice to all parties and the person to be examined, the court in which the action is pending may issue an order to prohibit the introduction of evidence of any such portion of any person's medical record not related to the pending action."

27. Nebraska: initiation of litigation waives the privilege as to relevant medical records

NE ST § 27-504(4)(c) provides:

"There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense."

28. Nevada: initiation of litigation waives privilege as to relevant medical records

NRS 49.225 provides:

"A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient's doctor or persons who are

participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family."

But, NRS 49.245 provides:

"There is no privilege under NRS 49.225 or 49.235:

"* * * * *

"3. As to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense."

29. New Hampshire: initiation of litigation waives privilege as to relevant medical records

Nelson v. Lewis, 130 NH 106, 109-10, 534 A2d 720 (NH 1987) (internal citations omitted), provides:

"As we have frequently held, the physician-patient privilege is 'not absolute and must yield when disclosure of the information concerned is considered essential.' Because we have not specifically addressed this issue before, we now hold, as have the vast majority of courts in States recognizing the privilege, that the patient partially waives her right to confidentiality by putting her medical condition at issue in a suit for medical negligence. Disclosure of the plaintiff's treatment-related statements relevant to claimed negligence is essential if the defendant is to challenge such a claim or the court is to evaluate it. 'Even a statutory privilege is not fixed and unbending and must yield to countervailing considerations....' The legislature certainly did not intend to prevent just resolution of such claims by giving the plaintiff the right to deprive the defendant of relevant information.

"In holding that a patient waives her privilege in order to facilitate just resolution of her medical negligence action, however, we also hold that this waiver is only partial. It extends not to all information given in the course of treatment, but only to what is relevant to the plaintiff's claim."

30. New Jersey: initiation of litigation waives privilege as to relevant medical records

In re Pelvic Mesh/Gynecare Litigation, 426 NJ Super 167, 177, 43 A3d 1211 (NJ Super 2012) (footnote omitted), provides:

"But the physician-patient privilege, N.J.R.E. 506; N.J.S.A. 2A:84A–22.1 to –22.7, has limited significance in this dispute. Because plaintiffs have filed suit, they have waived a claim of privilege with respect to any medical condition relevant to their claims. *Stigliano v. Connaught Labs., Inc.*, 140 N.J. 305, 311, 658 A.2d 715 (1995); *Stempler v. Speidell*, 100 N.J. 368, 373, 495

A.2d 857 (1985); *see* N.J.R.E. 506; N.J.S.A. 2A:84A–22.4."

31. New Mexico: initiation of litigation waives privilege as to relevant medical records

As of December 13, 2013, NMRA, Rule 11-504(D)(3) provides:

"Elements of a claim or defense. If a patient relies on a physical, mental, or emotional condition as part of a claim or defense, no privilege shall apply concerning confidential communications made relevant to that condition. After a patient's death, should any party rely on a patient's physical, mental, or emotional condition as part of a claim or defense, no privilege shall apply for confidential communications made relevant to that condition."

32. New York: initiation of litigation waives privilege as to pertinent medical records

Gutierrez v. Trillium USA, LLC, 974 NYS2d 563, 567-68 (NYAD 2013) (internal citations omitted), provides:

"While physician-patient communications are privileged under CPLR 4504, '[a] litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue'. Further, 'a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR (see CPLR 3121, subd [a]) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue'.

"Here, the defendants' request for authorizations for the release of the plaintiff's medical records for the five-year period prior to the accident sought information that was material and necessary to the defense of the action, given the plaintiff's allegations in his bill of particulars and first supplemental bill of particulars, in effect, that the accident exacerbated or accelerated previously existing injuries to the plaintiff's knees, neck, back, and left shoulder."

33. North Carolina: initiation of litigation waives privilege as to the defendant physician

Midkiff v. Compton, 204 NC App 21, 28, 693 SE2d 172 (NC App 2010), provides:

"The majority in *Jones* began its analysis by noting that:

"'The filing of a medical malpractice suit by a patient against her physician, however, constitutes a limited implied waiver of the physician-patient privilege to the extent the defendant-physician may reveal the patient's confidential information contained in the defendant-physician's own records to third parties where it is reasonably necessary to defend against the suit.'

"*Id.* at 527-28, 518 S.E.2d at 533 (emphasis in the original)."

34. North Dakota: initiation of litigation waives privilege as to relevant medical records

NDRE 503(d)(3) provides:

"Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense."

35. Ohio: initiation of litigation waives privilege as to medical records that relate causally or historically to physical or mental injuries that are relevant to issues in the medical claim

RC § 2317.02(B) provides in part:

"(1) * * *

"The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

"(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

"* * * * *

"(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

"* * * * *

"(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or

optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code."

36. Oklahoma: initiation of litigation waives privilege as to relevant medical records

12 Okl St Ann § 2503(3) provides:

> "The privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense is qualified to the extent that an adverse party in the proceeding may obtain relevant information regarding the condition by statutory discovery[.]"

37. Oregon: initiation of litigation is a limited waiver of the privilege as to medical records relating to injuries for which recovery is sought

OEC 504-1(4)(b) provides:

"Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44."

ORCP 44 C, however, provides a limited waiver of the privilege for certain medical records:

"Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply."

38. Pennsylvania: initiation of litigation waives privilege

42 PCSA § 5929 (emphasis added) provides:

"No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, *except in civil matters brought by such patient, for damages on account of personal injuries."*

PRCP No. 4003.6 provides in part:

"Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter."

39. Rhode Island: initiation of litigation waives privilege as to medical records regarding condition put in issue

Gen Laws 1956, § 9-17-24 provide in part:

"Notwithstanding the foregoing, a health care provider may be required to testify or produce documentary evidence regarding the medical condition of a patient:

"(1) When a patient raises his or her own medical condition in a legal action[.]"

40. South Carolina: no testimonial privilege to be waived

Snavely v. AMISUB of South Carolina, Inc., 379 SC 386, 393, 665 SE2d 222 (SC App 2008) (footnote omitted), provides:

"While South Carolina does not recognize physician-patient testimonial privilege, the law does recognize an action against a physician for the disclosure of confidential information, unless the disclosure is compelled by law or consented to by the patient. *McCormick v. England*, 328 S.C. 627, 635-40, 494 S.E.2d 431, 435–37 (Ct.App.1997); *see also Aakjer v. Spagnoli*, 291 S.C. 165, 173, 352 S.E.2d 503, 508 (Ct.App.1987) ('There is no physician-patient privilege in South Carolina.')."

41. South Dakota: initiation of litigation waives privilege as to relevant medical records as to the time period or subject matter of the claim

SDCL § 19-2-3 (emphasis added) provides:

"In any action or proceeding or quasi-judicial administrative proceeding, if the physical or mental health of any person is in issue, any privilege under § 19-13-7 is waived at trial or for the purpose of discovery under chapter 15-6 if such action or proceeding is civil in nature. *However, the waiver of the privilege shall be narrow in scope, closely tailored to the time period or subject matter of the claim.* If any party or the holder of the privileged records objects to the discovery of the privileged communication on the grounds that disclosure of the communication would subject the party to annoyance, embarrassment, oppression, or undue burden or expense and that the disclosure of the privileged communication is not likely to lead to the discovery of relevant evidence, the court shall conduct an in camera review of the privileged communication to determine whether the communication is discoverable."

SDCL § 19-13-11 also provides:

"The privilege under § 19-13-7 as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient is waived at trial or for the purpose of discovery under chapter 15-6 in any proceeding in which the condition is an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense."

42. <u>Tennessee: except in mental health area, no testimonial privilege to be waived; rather, implied covenant of confidentiality is voided for purpose of discovery as to relevant information; in mental health area, initiation of litigation waives privilege</u>

Alsip v. Johnson City Medical Center, 197 SW3d 722, 725-27 (Tenn 2006), provides:

"Although no testimonial privilege protecting doctor-patient communications has ever been recognized by this Court or declared by Tennessee statute, * * * we [have] recognized an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. * * *

"* * * * *

"Most important to this case, public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant of physician-patient confidentiality be voided for the purpose of discovery. *See* Tenn. R. Civ. P. 26; *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 239 (Colo.2002) ('Strong public policy considerations support a construction of Rule 26(a)(2) favoring broad disclosure.'). Tennessee Rule of Civil Procedure 26.02, which defines the scope of discovery, clearly states that unprivileged information relevant to the lawsuit is discoverable. In *Givens* we stated 'a physician cannot withhold [the plaintiff's relevant medical] information in the face of a subpoena or other request cloaked with the authority of the court.' 75 S.W.3d at 408. This exception stems from 'public policy [concerns] as expressed in the rules governing pre-trial discovery': in any medical malpractice action, the dictates of due process require voidance of the covenant of confidentiality so that the truth of the matter can be revealed and the defendant can defend himself against civil liability. *Id.* Thus, for example, if the parties dispute whether certain information is relevant, the trial court may order discovery upon a finding of relevance because, by filing the lawsuit, the plaintiff impliedly consents to disclosure of his relevant medical information."

As an example of the exception, TCA § 24-1-207(a) concerning the psychiatrist-patient privilege provides in part:

"Neither the psychiatrist nor any member of the staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient except:

"(1) In proceedings in which the patient raises the issue of the patient's mental or emotional

condition[.]"

43. Texas: initiation of litigation waives privilege as to relevant medical records

TX Rules of Evidence, Rule 509(e) provides in part:

"Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

"* * * * *

"(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense[.]"

44. Utah: initiation of litigation waives privilege as to relevant medical records

Utah Rules of Evidence, Rule 506(d) provides in part:

"Exceptions. No privilege exists under paragraph (b) in the following circumstances:

"(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

"(A) in any proceeding in which that condition is an element of any claim or defense, or

"(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense[.]"

45. Vermont: initiation of litigation waives privilege as to relevant medical records causally or historically related to the patient's health put in issue

VRE 503(d)(3) provides:

"Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense, unless the state seeks to admit information obtained in the examination of the mental or emotional condition of a patient in a criminal case for the purpose of proving the commission of a criminal offense or for the purpose of impeaching the testimony of the patient."

Mattison v. Poulen, 134 Vt 158, 163, 353 A2d 327 (Vt 1976), provides:

"We hold that once the patient has waived the privilege afforded him under 12 V.S.A. s 1612, by the commencement of an action, such waiver applies to the discovery of matters causally or historically related to the patient-plaintiff's health put in issue by the injuries and damages claimed in the action."

46. Virginia: initiation of litigation waives privilege as to medical records

VA Code Ann § 8.01-399(B) provides in part:

"If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action."

47. Washington; privilege waived 90 days after initiation of litigation

RCWA 5.60.060(4) provides:

"Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

"(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

"(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules."

48. West Virginia: no statutory testimonial privilege; discovery of medical information related to condition at issue allowed

State ex rel. Kitzmiller v. Henning, 190 W Va 142, 144, 437 SE2d 452 (W Va 1993), provides:

"As the hospital asserts, West Virginia has not codified a physician-patient privilege. However, the absence of such a privilege contemplates the release of medical information only as

it relates to the condition a plaintiff has placed at issue in a lawsuit; it does not efface the highly confidential nature of the physician-patient relationship that arises by express or implied contract."

49. Wisconsin: initiation of litigation waives privilege as to medical records that are relevant or within the scope of discovery

WSA 905.04(4)(c) provides:

"Condition an element of claim or defense. There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

50. Wyoming: initiation of litigation waives privilege as to relevant medical records

Wardell v. McMillan, 844 P2d 1052, 1066 (Wyo 1992), provides:

"When a patient places his physical or mental condition into contest, the physician-patient privilege is waived to the extent that it is relevant to the controversy. *See Frias v. State*, 722 P.2d 135 (Wyo.1986). Under such circumstances, the patient can no longer expect to silence his physician relating to the subject matter of the litigation. See *McCormick on Evidence, supra* at § 103. The waiver, however, is not without boundaries. The physician may not discuss the patient's condition and treatment with the world at large, but he is bound to disclose the relevant circumstances only within the confines of the adversarial process. See 61 Am.Jur.2d, *supra*".

SAC:sac

cc: RMK

MEMORANDUM

TO: RMK - Miscellaneous
Our File No. 90011-0001

FROM: SAC

DATE: January 29, 2014

RE: Survey of other states regarding scope of limited waiver of physician-patient privilege as to "relevant" medical records

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The following memo surveys the scope of the limited waiver of the physician-patient privilege with regard to discovery of "relevant," "pertinent," or similarly restricted medical records in those states that allow such discovery. In sum, for those states that restrict records to those that are "relevant," the scope of relevance is typically either co-extensive with the general scope of discovery, *i.e.* reasonably calculated to lead to the discovery of admissible evidence, or co-extensive with the definition of "relevant evidence" for purposes of admission at trial.

1. **Alaska: initiation of litigation waives privilege as to information reasonably calculated to lead to the discovery of admissible evidence**

Ayuluk v. Red Oaks Assisted Living, Inc., 201 P3d 1183, 1204 (Alaska 2009) (footnotes omitted), provides:

> "The filing of a personal injury action waives the physician/patient privilege as to all information concerning the plaintiff's health and medical history relevant to the matters at issue. And relevance is broadly defined for discovery purposes to include not only information that would be admissible in evidence at trial, but also information reasonably calculated to lead to the discovery of admissible evidence."

In support of that conclusion, the court cited Alaska R. Civ. P. 26(b)(1). *Id.* at 1204 n 54. Rule 26(b)(1) generally provides for the scope of discovery in Alaska as follows:

> "Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In *Ayuluk*, the court also noted that that a reasonable limitation in terms of time of medical treatment could have been imposed to limit discovery. *Id.* at 1204 n 55.

In addition, recently, the Alaska Supreme Court narrowed the circumstances in which the physician and psychotherapist privileges were waived. In *Kennedy v. Municipality of Anchorage*, 305 P3d 1284, 1285 (Alaska 2013), the Court concluded that "the assertion of garden-variety mental anguish claims in an employment discrimination case does not automatically waive the physician and psychotherapist privilege." The Court further explained that "[a] claim is not a garden-variety anguish claim if it involves a diagnosable mental disease or disorder, medical treatment or medication, longstanding, severe, or permanent emotional distress, physical symptoms, or expert testimony. Garden-variety claims will typically involve *emotions* rather than *conditions*." *Id.* at 1292 (emphasis in original).

2. **Arizona: initiation of litigation waives privilege as to the underlying medical condition**

Phoenix Children's Hosp., Inc. v. Grant, 228 Ariz 235, 237-38, 265 P3d 417 (Ariz App 2011), provides:

> "When a patient files a medical malpractice lawsuit, the privilege is impliedly waived to allow the defendant access to information necessary to make a defense. In *Bain v. Superior Court*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986), our supreme court explained that when a patient 'places a particular medical condition at issue by means of a claim or affirmative defense then the privilege will be deemed waived with respect to that particular medical condition.' (Citation omitted.)"

In *Danielson v. Superior Court In and For Maricopa County*, 157 Ariz 41, 43, 754 P2d 1145 (Ariz App 1987), the court, citing *Bain*, noted explicitly that "[t]he scope of this type of waiver only extends to a condition which has been voluntarily placed at issue by the privilege holder."

3. **Arkansas: initiation of litigation waives privilege as to relevant medical records**

ARE 503(d)(3) provides:

> "(A) There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

> "(B) Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures."

ARCP 35(c) provides:

> "(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term 'medical records' means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.
>
> "(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures."

No case law in Arkansas further address what is meant by "relevant" records under ARE 503(d)(3)(A).

4. <u>California: initiation of litigation waives privilege as to relevant medical records</u>

Vesco v. Superior Court, 221 Cal App 4th 275, 279, 164 Cal Rptr 3d 341 (Cal App 2013), provides:

> "When a party raises her physical condition as an issue in a case, she waives the right to claim that the relevant medical records are privileged. (See Evid. Code, § 996 & *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232, 231 P.2d 26 ['The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too'].)"

Similarly, *Oiye v. Fox*, 211 Cal App 4th 1036, 1068, 151 Cal Rptr 3d 65 (Cal App 2012), provides:

> "A plaintiff is recognized as waiving physician-patient and psychotherapist-patient privileges to the extent he or she has put his or her medical or psychological condition in issue in a lawsuit. (Evid.Code, §§ 996, 1016; *In re Lifschutz* (1970) 2 Cal.3d 415, 435, 85 Cal.Rptr. 829, 467 P.2d 557.)"

California Evidence Code section 996 provides in part that "[t]here is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by: (a) the patient; (b) any party claiming through the patient[.]" In *Torres v. Superior Court*, 221 Cal App 3d 181, 185, 270 Cal Rptr 401 (Cal App 1990), *disapproved on other grounds*, *Heller c. Norcal Mutual Ins. Co*, 8 Cal 4th 30, 876 P2d 999 (Cal 1994), the court explained that "[o]nce the patient waives his right to confidentiality by putting his physical condition in issue by filing suit, any disclosure pertinent to the issues in litigation within the scope of section 996 is permitted." However, "any waiver must be narrowly construed and limited to matters 'as to which, based upon [the patient's] disclosures, it can reasonably be said [the patient] no longer retains a privacy interest.'" *San Diego Trolley, Inc. v. Superior Court*, 87 Cal App 4th 1083, 1092-93, 105 Cal Rptr 2d 476 (Cal App 2001) (internal citation omitted).

5. Colorado: in medical malpractice cases, statutory waiver of the privilege; in other contexts, initiation of litigation impliedly waives privilege to medical records related to the injuries and damages claimed

In the medical malpractice context, subsection 13-90-107(1)(d)(I), CRS (2011) mandates that the physician-patient privilege "shall not apply to: * * * [a] physician, surgeon, or registered professional nurse who is sued by or on behalf of a patient * * * on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient." In *Ortega v. Colorado Permanente Group, P.C.*, 265 P3d 444, 448 (Colo 2011), the court held that the text of subsection 13-90-107(1)(d)(I) was clear and that "when a patient institutes an action against a physician, and that action arises out of or is connected with the physician's care or treatment of the patient, the information acquired by the physician is not privileged." (Footnote omitted.) Thus, in certain circumstances, a patient's entire electronic medical record would be discoverable. *Id.* at 448-49.

Alcon v. Spicer, 113 P3d 735, 739 (Colo 2005), provides for an implied waiver:

> "One way a party can establish waiver is by showing that the privilege holder 'has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense.' *Id.* at 10. Making such a showing does not mean that the party seeking to overcome the privilege has established a complete waiver of all communications between the physician and patient. The privilege is still retained with respect to communications unrelated to the claim or defense. Recently, we explained in *Weil* that a plaintiff, by making typical personal injury claims, 'did not waive his physician-patient privilege for medical records *wholly*

unrelated to his injuries and damages claimed.' 109 P.3d at 128 (emphasis added)."

6. **Delaware: initiation of litigation waives privilege as to relevant medical information to the claim**

Green v. Bloodsworth, 501 A2d 1257, 1258 (Del Super 1985) (footnote omitted), provides:

"The law is clear that, by the filing of a personal injury action, plaintiffs waive the physician-patient privilege as to all medical information relevant to the claim. D.U.R.E. 503(d)(3). A contrary rule would lead to injustice and the suppression of the truth. 8 Wigmore, *Evidence* § 2389 (McNaughton rev. 1961); *McCormick on Evidence* § 105 (3d ed. 1984)."

In *Betty J.B. v. Division of Social Services*, 460 A2d 528, 531 (Del 1983), the Delaware Supreme Court cited to the Delaware Evidence Code's provisions on relevance, Rules 401, 402, and 403, when determining that a mother's psychiatric or psychological history was discoverable when she had raised her emotional conditions by her petition for visitation with her child. Rule 401 defines "relevant evidence" in the usual manner as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

7. **Georgia: initiation of litigation waives privilege as to relevant medical records**

Ga. Code Ann. Section 24-12-1 provides that the physician-patient privilege

"shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness."

Harris v. Tenet Healthsystem Spalding, Inc., 746 SE2d 618, 620 (Ga App 2013), provides:

"Georgia law has long held that once a plaintiff puts her medical condition at issue in a case, she waives her right to privacy with regard to any medical records that are relevant to that medical issue. *Moreland v. Austin*, 284 Ga. 730, 732, 670 S.E.2d 68 (2008)."

Further, *Orr v. Sievert*, 292 SE2d 548, 550 (Ga App 1982), explains:

"Once a patient places his care and treatment at issue in a civil proceedings, there no longer remains any restraint upon a doctor in the release of medical information concerning the patient within the parameters of the complaint. To hold otherwise would allow a patient to restrain a doctor who possesses the most relevant information and opinions from responding to inquiries as to such information or

giving such opinions without a written authorization, court order or subpoena."

8. **Hawaii: initiation of litigation waives privilege as to relevant medical records**

HRS § 626-1, Rule 504(3), provides in part:

> "Condition an element of claim or defense. There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

No case law in Hawaii further discusses the scope of such "relevant" communications.

9. **Idaho: initiation of litigation waives privilege as to relevant medical records**

IRE 503(d)(3) provides:

> "Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense."

IC § 9-203(4)(D) provides:

> "That where any person or his heirs or representatives brings an action to recover damages for personal injuries or death, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said injured or deceased person and whose testimony is material in the action may testify."

No case law in Idaho further discusses the scope of such "relevant" communications.

10. **Indiana: initiation of litigation waives privilege as to those matters causally and historically related to the condition put in issue that have direct medical relevance to the claim**

Vargas v. Shepherd, 903 NE2d 1026, 1030 (Ind App 2009) (internal citations omitted), provides:

"Additionally, the physician-patient privilege is not absolute and may be waived by the patient either expressly or by implication. When a party places his mental or physical condition at issue in a lawsuit, he has impliedly waived the physician-patient privilege to that extent. However, the privilege is waived only as to those matters causally and historically related to the condition put in issue and which have direct medical relevance to the claim."

In *Canfield v. Sandock*, 563 NE2d 526, 530 (Ind 1990), the court used the following hypothetical to explain that scope of the waiver:

"A complaint for damages alleges that the plaintiff suffered a broken arm as a result of the defendant's negligence. Discovery requests propounded by the defendant reveal that, in seeking treatment for the condition put in issue by the suit, the plaintiff consulted the family's physician, who has attended the plaintiff for a number of years and for a number of ailments, and an orthopedic surgeon, who treated only the broken arm. Pursuant to T.R. 34(C), motions to produce plaintiff's medical records and subpoenas duces tecum are then sent to both doctors. Under [the defendant's] interpretation of [prior case law], all of the files maintained by both doctors would be fully discoverable, without exception or limitation. This is untenable. It is possible that the information contained in the doctors' files is relevant to the cause or is irrelevant but innocuous. It is equally possible that the information contained in the documents, whether accumulated over years of treatment by the family physician or noted in the general medical history which most doctors take from new patients before beginning a specific course of treatment, could reveal a past or current medical condition which is totally unrelated to the condition in issue and the revelation of which would strike at the heart of the physician-patient privilege.

"Full and unlimited disclosure of the subpoened medical records could reveal, for example, that the plaintiff had been tested for or diagnosed as having AIDS or some other sexually transmitted disease or that a female plaintiff had undergone an abortion procedure. Clearly, none of this information has the slightest causal or historical connection to the condition in issue nor any possible relevance to the trial of this cause. *It would not be admissible at trial, nor could it be characterized as 'reasonably calculated to lead to the discovery of admissible evidence.'* A construction of the rules governing the discovery process which would authorize the disclosure of unrelated and potentially embarrassing or ruinous information could only undermine the purpose of the physician-patient privilege. Patients would be unwilling to discuss their problems with their physicians candidly for fear that this sort of intensely private information could be subject to revelation should they ever be party to a lawsuit where some unrelated aspect of their health is in issue."

(Emphasis added.)

11. Louisiana: initiation of litigation waives the privilege as to relevant medical records

LSA-CE Art 510 provides in part:

> "(2) Exceptions. There is no privilege under this Article in a noncriminal proceeding as to a communication:
>
> "(a) When the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or worker's compensation proceeding.
>
> "(b) When the communication relates to the health condition of a deceased patient in a wrongful death, survivorship, or worker's compensation proceeding brought or asserted as a consequence of the death or injury of the deceased patient.
>
> "(c) When the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which a party deriving his right from the patient relies on the patient's health condition as an element of his claim or defense."

Acara v. Banks, 37 So3d 996, 997 (La. 2010), provides:

> "La.Code Evid. art. 510(B)(2)(a) provides there is no physician-patient privilege in a non-criminal proceeding 'when the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or worker's compensation proceeding.' La.Code Evid. art. 510(E) further provides '[t]he exceptions to the privilege set forth in Paragraph B(2) shall constitute a waiver of the privilege only as to testimony at trial or to discovery of the privileged communication by one of the discovery methods authorized by Code of Civil Procedure Article 1421 et seq. ....'"

In *Rullan v. Adobbati*, 674 So 2d 417, 418-19 (1996), the Louisiana Court of Appeals explained that the plaintiff had waived the physician-patient privilege when he filed a personal injury action seeking damages including psychiatric treatment from various psychiatrists. Although the plaintiff had removed as an item of damages the bill as to one of his treating psychiatrists, Dr. Woodbury, the plaintiff's claims for damages to his psyche as to two other psychiatrists remained to be considered. The court noted that La.C.C.P. art 1422 permits discovery of all matters, not privileged, which are relevant to the subject matter of the action, and that it is not grounds for objection that the information sought will be inadmissible at trial if the information appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* at

419. For that reason, the Louisiana Court of Appeals held that the trial court did not abuse its discretion when it ordered *in camera* inspection of the Dr. Woodbury's records. *Id.*

12. Maine: initiation of litigation waives privilege as to relevant medical records

Maine Rules of Evidence, Rule 503(e)(3) provides:

> "Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding in which any party puts the condition in issue."

No case law in Maine further discusses the scope of such "relevant" communications.

13. Michigan: initiation of litigation waives privilege as to related medical records

MCR 2.314(A) provides, in part, that "(1) When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that (a) the information is otherwise discoverable under MCR 2.302(B), and (b) the party does not assert that the information is subject to a valid privilege." MCR 2.302(B) sets forth the general scope of discovery as follows:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In *LeGendre v. Monroe County*, 234 Mich App 708, 722, 600 NW2d 78 (Mich App 1999), the court explained that the "in controversy" requirement of MCR 2.314 "serves to limit the scope of discovery normally permitted by rule 2.302(B)[.]" Further, "'[h]owever loosely the courts interpret the "controversy" requirement, it will of necessity be more stringent than the liberal "relevant to the subject matter involved in the pending action" standard normally utilized by rule 2.302(B).'" *Id.* at 723 (quoting 2 Martin, Dean & Webster, Michigan Court Rules Practice, Authors' Comment, p. 382) (emphasis omitted).

Further, MCLA 600.2157 provides in part:

"If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition."

However, MCLA 600.2912b(5) provides:

"Within 56 days after giving notice under this section, the claimant shall allow the health professional or health facility receiving the notice access to all of the medical records related to the claim that are in the claimant's control, and shall furnish releases for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. Subject to section 6013(9), within 56 days after receipt of notice under this section, the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility. This subsection does not restrict a health professional or health facility receiving notice under this section from communicating with other health professionals or health facilities and acquiring medical records as permitted in section 2912f. This subsection does not restrict a patient's right of access to his or her medical records under any other provision of law."

And, MCLA 600.2912f provides:

"(1) A person who has given notice under section 2912b or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.

"(2) Pursuant to subsection (1), a person or entity who has received notice under section 2912b or who has been named as a defendant in an action alleging medical malpractice or that person's or entity's attorney or authorized representative may communicate with a person specified in section 5838a in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.

"(3) A person who discloses information under subsection (2) to a person or entity who has received notice under section 2912b or to a person or entity who has been named as a defendant in an action alleging medical malpractice or to the person's or entity's attorney or authorized representative does not violate section 2157 or any other similar duty or obligation created by law and owed to the claimant or plaintiff."

14. Minnesota: initiation of litigation waives privilege as to the same condition

Rules of Civil Procedure, Rule 35.03, provide:

"If at any stage of an action a party voluntarily places in controversy the physical, mental, or blood condition of that party, a decedent, or a person under that party's control, such party thereby waives any privilege that party may have in that action regarding the testimony of every person who has examined or may thereafter examine that party or the person under that party's control with respect to the same physical, mental, or blood condition."

Rules of Civil Procedure, Rule 35.04, provide:

"When a party has waived medical privilege pursuant to Rule 35.03, such party within 10 days of a written request by any other party,

"(a) shall furnish to the requesting party copies of all medical reports previously or thereafter made by any treating or examining medical expert, and

"(b) shall provide written authority signed by the party of whom request is made to permit the inspection of all hospital and other medical records, concerning the physical, mental, or blood condition of such party as to which privilege has been waived."

In *Wagner v. Thomas J. Obert Enterprises*, 396 NW2d 223, 228-29 (Minn 1986), the Minnesota Supreme Court stated: "Rule 35.03 is a discovery rule. It is designed, we think, to afford disclosure of relevant medical evidence plus facts which may lead to other relevant evidence. *See generally Wenninger v. Muesing*, 307 Minn. 405, 410-11, 240 N.W.2d 333, 336-37 (1976) (discusses the policy underlying Rule 35.03)."

15. Mississippi: initiation of litigation waives privilege as to relevant medical records

MRE 503(d)(3) provides that "[t]here is no privilege under this rule as to an issue of breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist." In addition, MRE 503(f) provides in part that "[a]ny party to an action or

proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule."

Miss. Code Ann. § 13-1-21(4) provides:

> "In any action commenced or claim made after July 1, 1983, against a physician, hospital, hospital employee, osteopath, dentist, nurse, pharmacist, podiatrist, optometrist or chiropractor for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the medical privilege and any medical information relevant to the allegation upon which the cause of action or claim is based shall be disclosed upon the request of the defendant, or his or her counsel."

In *Scott By and Through Scott v. Flynt*, 704 So 2d 998, 1003 (Miss 1996), the court explained under both MRE 503 and Miss. Code Ann. Section 13-1-21, that "[i]f a suit is filed on either medical malpractice grounds or other grounds placing the plaintiff's condition in issue, then the plaintiff's medical privilege regarding any relevant medical information from whatever source is automatically waived for the purposes of and only to the extent to which the plaintiff's condition is put in issue."

No case law in Mississippi further discusses the scope of such "relevant" medical information.

16. <u>Missouri: initiation of litigation waives privilege as to related medical records</u>

State ex rel. Maloney v. Allen, 26 SW3d 244, 247 (Mo App 2000) (internal citation omitted), provides:

> "Once a party places the matter of his physical condition in issue under the pleadings, the party's physician/patient privilege is waived insofar as information from doctors or medical and hospital records bears on that issue. In such case, the opposing party is not entitled to any and all medical information. Rather, the opposing party may discover only those medical records that relate to the physical conditions at issue under the pleadings."

In *State ex rel. Stecher v. Dowd*, 912 SW2d 462, 464-65 (Mo 1995), the Court emphasized:

> "defendants are not entitled to any and all medical records, but only those medical records that relate to the physical conditions at issue under the pleadings. It follows that medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis.

"In this case, [the plaintiff] maintains that the only injury alleged is to his heart, and therefore the authorizations should be limited to records concerning his heart. Defendants, on the other hand, assert that [the plaintiff's] petition puts virtually his entire body into issue, and therefore the broad medical authorizations accurately reflect the scope of the injuries pleaded.

"We agree that [the plaintiff's] pleaded injuries are not narrowly limited to his heart; instead, the allegations include risk of skin rash, cancer, adverse consequences regarding fertility, and potential exposure to HIV or hepatitis, to name but a few. However, broad allegations of injuries do not automatically entitle defendants to an essentially unlimited medical authorization. * * * [T]he trial court has the power to limit production of medical records '*to those which reasonably relate to the injuries and aggravations claimed by the plaintiffs in the present suit.*' * * * [D]espite broad allegations of injury, '[t]he waiver * * * does not mean that it automatically extends to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing, as may be, on the matters in issue.'"

(Internal citations omitted; emphasis added.)

17. <u>Montana: initiation of litigation waives privilege as to related medical records</u>

MRCP 35(b)(4) provides:

"Waiver of Privilege. By requesting and obtaining the examiner's report, by deposing the examiner, or by commencing an action or presenting a defense which puts a party's condition at issue, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all treatments, prescriptions, consultations, or examinations for the same condition.

"The waiver of any privilege does not apply to any treatment, consultation, prescription, or examination for any condition not related to the pending action. On a timely motion for good cause and on notice to all parties and the person to be examined, the court in which the action is pending may issue an order to prohibit the introduction of evidence of any such portion of any person's medical record not related to the pending action."

In *Henricksen v. State*, 319 Mont 307, 317-18, 84 P3d 38 (Mont 2004), the court explained:

"'[w]hen a party claims damages for physical or mental injury, he or she places the extent of that physical or mental injury at issue and waives his or her statutory right to confidentiality to the extent that it is necessary for a defendant to discover

whether plaintiff's current medical or physical condition is the result of some other cause.' Nonetheless, the waiver is not unlimited; the defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages. The plaintiff's right to confidentiality is balanced against the defendant's right to defend itself in an informed manner. A defendant 'is not entitled to unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters.'"

(Internal citations omitted.)

18. Nebraska: initiation of litigation waives the privilege as to relevant medical records

NE ST § 27-504(4)(c) provides:

"There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense."

No case law in Nebraska further discusses the scope of such "relevant" communications.

19. Nevada: initiation of litigation waives privilege as to relevant medical records

NRS 49.225 provides:

"A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient's doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family."

But, NRS 49.245 provides:

"There is no privilege under NRS 49.225 or 49.235:

"* * * * *

"3. As to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense."

In *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev 189, 192, 561 P2d 1342 (Nev 1977), the court stated that:

> "The scope of discovery in civil actions is limited to matter, not privileged, 'which is relevant to the subject matter involved in the pending action, . . .' NRCP 26(b)(1). Where, as here, a litigant's physical condition is in issue, a court may order discovery of medical records containing information relevant to the injury complained of or any pre-existing injury related thereto."

(Internal citation omitted.)

20. New Hampshire: initiation of litigation waives privilege as to relevant medical records

Nelson v. Lewis, 130 NH 106, 109-10, 534 A2d 720 (NH 1987) (internal citations omitted), provides:

> "As we have frequently held, the physician-patient privilege is 'not absolute and must yield when disclosure of the information concerned is considered essential.' Because we have not specifically addressed this issue before, we now hold, as have the vast majority of courts in States recognizing the privilege, that the patient partially waives her right to confidentiality by putting her medical condition at issue in a suit for medical negligence. Disclosure of the plaintiff's treatment-related statements relevant to claimed negligence is essential if the defendant is to challenge such a claim or the court is to evaluate it. 'Even a statutory privilege is not fixed and unbending and must yield to countervailing considerations....' The legislature certainly did not intend to prevent just resolution of such claims by giving the plaintiff the right to deprive the defendant of relevant information.
>
> "In holding that a patient waives her privilege in order to facilitate just resolution of her medical negligence action, however, we also hold that this waiver is only partial. It extends not to all information given in the course of treatment, but only to what is relevant to the plaintiff's claim."

No case law in New Hampshire further discusses the scope of such "relevant" information.

21. New Jersey: initiation of litigation waives privilege as to relevant medical records

In re Pelvic Mesh/Gynecare Litigation, 426 NJ Super 167, 177, 43 A3d 1211 (NJ Super 2012) (footnote omitted), provides:

> "But the physician-patient privilege, N.J.R.E. 506; N.J.S.A. 2A:84A–22.1 to –22.7, has limited significance in this dispute. Because plaintiffs have filed suit, they have waived a claim of privilege with respect to any medical condition relevant to their

claims. *Stigliano v. Connaught Labs., Inc.*, 140 N.J. 305, 311, 658 A.2d 715 (1995); *Stempler v. Speidell*, 100 N.J. 368, 373, 495 A.2d 857 (1985); *see* N.J.R.E. 506; N.J.S.A. 2A:84A–22.4."

No case law in New Jersey further discusses the scope of such "relevant" medical conditions.

22. New Mexico: initiation of litigation waives privilege as to relevant medical records

NMRA, Rule 11-504(D)(3) provides:

> "Condition an Element of Claim or Defense. There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

In *Pina v. Espinoza*, 130 NM 661, 665-66, 29 P3d 1062 (NM App 2001), the court discussed the scope of relevance under Rule 11-504(D)(3):

> "We read Rule 11-504(D)(3) as imposing two limitations over and above Rule 1-026(B)(1)'s requirement of relevance to the subject matter of the action. First, as part of the Rules of Evidence, Rule 11-504(D)(3) necessarily incorporates the Rules' definition of relevance. Rule 11-504(D)(3) therefore incorporates the standard of relevance that governs *admissibility at trial.* In contrast, Rule 1-026(B)(1) allows a far looser nexus: to be discoverable, information need not be admissible at trial so long as it 'appears reasonably calculated to lead to the discovery of admissible evidence.' Second, Rule 11-504(D)(3) requires that the communication be relevant to an issue of a medical condition that the patient will rely upon to establish 'an element of the patient's claim or defense.' Once again, Rule 11-504(D)(3) requires a tighter nexus than Rule 1-026(B)(1), which merely requires that the information subject to a discovery request be relevant to the 'subject matter involved in the pending action.'"

(Emphasis in original; internal citation omitted.)

23. New York: initiation of litigation waives privilege as to pertinent medical records

Gutierrez v. Trillium USA, LLC, 974 NYS2d 563, 567-68 (NYAD 2013) (internal citations omitted), provides:

> "While physician-patient communications are privileged under CPLR 4504, '[a]

> litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue'. Further, 'a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR (see CPLR 3121, subd [a]) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue'.
>
> "Here, the defendants' request for authorizations for the release of the plaintiff's medical records for the five-year period prior to the accident sought information that was material and necessary to the defense of the action, given the plaintiff's allegations in his bill of particulars and first supplemental bill of particulars, in effect, that the accident exacerbated or accelerated previously existing injuries to the plaintiff's knees, neck, back, and left shoulder."

Weber v. Ryder TRS, Inc., 854 NYS2d 480, 481 (NY AD 2008), also notes that, in addition to providing written authorizations for the release of "pertinent" medical records under CPLR 31219(a), CPLR 3101(a) requires "full disclosure of all evidence material and necessary to the prosecution or defense of an action, regardless of the burden of proof." *Robinson v. Meca*, 632 NYS2d 728, 730 (NY AD 1995), notes that "[i]nformation sought in good faith for possible use as evidence-in-chief, in rebuttal or for cross-examination should be considered material in the prosecution or defense of the case." "Furthermore, for the information to be necessary it is not required that it be indispensable but only that it be needful. The fact that the material may later be ruled inadmissible does not foreclose disclosure." *Id.* (internal citations omitted).

24. North Dakota: initiation of litigation waives privilege as to relevant medical records

As of March 1, 2014, NDRE 503(d) will provide in relevant part:

> "There is no privilege under this rule for communication: * * * (3) relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense; * * * (7) relevant to a breach of duty by the physician or mental health professional[.]"

No case law in North Dakota further discusses the scope of such "relevant" communications.

25. Ohio: initiation of litigation waives privilege as to medical records that relate causally or historically to physical or mental injuries that are relevant to issues in the medical claim

RC § 2317.02(B) provides in part:

"(1) * * *

"The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

"(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

"* * * * *

"(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

"* * * * *

"(3)(a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code."

No case law in Ohio further discusses the scope of such medical records that relate "causally or historically" to physical or mental injuries that are "relevant" to issues in the medical claim. However, as explained in *Mason v. Booker*, 185 Ohio App 3d 19, 24-25, 922 NE2d 1036 (Ohio App 2009), once there is an apparent dispute between the parties as to whether certain medical records remain privileged, the trial court should conduct an *in camera review* of the plaintiff's medical records in order to ascertain what was "causally or historically related."

26. <u>Oklahoma: initiation of litigation waives privilege as to relevant medical records</u>

12 Okl St Ann § 2503(D)(3) provides:

> "The privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense is qualified to the extent that an adverse party in the proceeding may obtain relevant information regarding the condition by statutory discovery[.]"

In *Nitzel v. Jackson*, 879 P2d 1222, 1223 (Okl 1994), the Oklahoma Supreme Court stated that:

> "Title 12 O.S.1991 § 3226(B)(1) allows discovery of any unprivileged relevant information. Prior medical records relating to the injuries claimed to have been caused by the tortfeasor fall outside the patient-physician privilege. Title 12 O.S.1991 § 2503(D)(3). They are relevant in a personal injury suit to the injuries claimed and may be discovered under § 3226(B)(1). However, the privilege is waived only to the extent of the condition claimed to have been caused by the negligence of the tortfeasor. There is no statutory discovery method contained in the Oklahoma Discovery Code, 12 O.S. 1991 § 3224 et seq., which requires a plaintiff in a personal injury lawsuit to execute a general medical authorization entitling the defendant to obtain all of the plaintiffs' medical records."

Section 3226(B)(1)(a) incorporates the general discovery standard in Oklahoma:

> "Unless otherwise limited by order of the court in accordance with the Oklahoma Discovery Code, the scope of discovery is as follows: * * * Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

27. <u>Rhode Island: initiation of litigation waives privilege as to medical records regarding condition put in issue</u>

Gen Laws 1956, § 9-17-24 provide in part:

> "Notwithstanding the foregoing, a health care provider may be required to testify or produce documentary evidence regarding the medical condition of a patient:
>
> "(1) When a patient raises his or her own medical condition in a legal action[.]"

In addition, Gen Laws 1956, § 5-37.3-4 provides in part:

> "(a)(1) Except as provided in subsection (b) of this section or as otherwise specifically provided by the law, a patient's confidential health care information shall not be released or transferred without the written consent of that patient or his authorized representative[.] * * *
>
> "(b) No consent for release or transfer of confidential health care information is required in the following situations:
>
> "* * * * *
>
> "(8)(i) To the health care provider's own lawyer or medical liability insurance carrier if the patient whose information is at issue brings a medical liability action against a health care provider."

In *Lewis v. Roderick*, 617 A2d 119, 121 (RI 1992), the court determined that the plaintiff-patient had waived the privilege by bringing a medical malpractice action. It then held:

> "Having determined that plaintiff has waived the confidentiality she shares with her subsequent treating physicians, we must now turn to the methods of discovery as they exist in this state. Rule 26(b)(1) of the Superior Court Rules of Civil Procedure allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." In a medical-malpractice action, a defendant-physician's quest for information regarding a plaintiff's pertinent physical or mental condition is undoubtedly relevant and, as we have stated, not privileged."

Id. at 121-22.

Rule 26(b)(1) sets the general scope of discovery in Rhode Island as follows:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and

location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

28. South Dakota: initiation of litigation waives privilege as to relevant medical records as to the time period or subject matter of the claim

SDCL § 19-2-3 (emphasis added) provides:

"In any action or proceeding or quasi-judicial administrative proceeding, if the physical or mental health of any person is in issue, any privilege under § 19-13-7 is waived at trial or for the purpose of discovery under chapter 15-6 if such action or proceeding is civil in nature. *However, the waiver of the privilege shall be narrow in scope, closely tailored to the time period or subject matter of the claim.* If any party or the holder of the privileged records objects to the discovery of the privileged communication on the grounds that disclosure of the communication would subject the party to annoyance, embarrassment, oppression, or undue burden or expense and that the disclosure of the privileged communication is not likely to lead to the discovery of relevant evidence, the court shall conduct an in camera review of the privileged communication to determine whether the communication is discoverable."

SDCL § 19-13-11 also provides:

"The privilege under § 19-13-7 as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient is waived at trial or for the purpose of discovery under chapter 15-6 in any proceeding in which the condition is an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense."

In *Maynard v. Heeren*, 563 NW2d 830, 835 (SD 1997), the court explained that the exceptions of SDCL 19-13-11 and 19-2-3 are grounded in the theory that when a patient makes a claim or defense in litigation on the basis of the patient's condition, it would be unjust to deny the other party an opportunity to show the invalidity of that claim or defense. Further, the court noted that "[t]he general rule is that unless there is a privilege, all relevant evidence is discoverable. SDCL 15–6–26; *Kaarup v. St. Paul Fire & Marine Ins.*, 436 N.W.2d 17, 20 (S.D.1989)." SDCL 15-6-26(b)(1) sets forth the general discovery standard in South Dakota as follows:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any

other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

29. **Tennessee: except in mental health area, no testimonial privilege to be waived; rather, implied covenant of confidentiality is voided for purpose of discovery as to relevant information; in mental health area, initiation of litigation waives privilege**

Alsip v. Johnson City Medical Center, 197 SW3d 722, 725-27 (Tenn 2006), provides:

"Although no testimonial privilege protecting doctor-patient communications has ever been recognized by this Court or declared by Tennessee statute, * * * we [have] recognized an implied covenant of confidentiality in medical-care contracts between treating physicians and their patients. * * *

"* * * * *

"Most important to this case, public policy considerations reflected in the Tennessee Rules of Civil Procedure require that the covenant of physician-patient confidentiality be voided for the purpose of discovery. *See* Tenn. R. Civ. P. 26; *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 239 (Colo.2002) ('Strong public policy considerations support a construction of Rule 26(a)(2) favoring broad disclosure.'). Tennessee Rule of Civil Procedure 26.02, which defines the scope of discovery, clearly states that unprivileged information relevant to the lawsuit is discoverable. In *Givens* we stated 'a physician cannot withhold [the plaintiff's relevant medical] information in the face of a subpoena or other request cloaked with the authority of the court.' 75 S.W.3d at 408. This exception stems from 'public policy [concerns] as expressed in the rules governing pre-trial discovery': in any medical malpractice action, the dictates of due process require voidance of the covenant of confidentiality so that the truth of the matter can be revealed and the defendant can defend himself against civil liability. *Id.* Thus, for example, if the parties dispute whether certain information is relevant, the trial court may order discovery upon a finding of relevance because, by filing the lawsuit, the plaintiff impliedly consents to disclosure of his relevant medical information."

Tenn. R. Civ. P. 26.02, which provides for the general scope of discovery, states:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any

other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In *Stevens ex rel. Stevens v. Hickman Community Health Care Services, Inc.*, 2013 WL 6158000, 7 (Tenn Nov 25, 2013) (unpublished opinion), the court stated:

"In determining whether medical records are relevant for purposes of litigation, defendants should continue to adhere to the 'minimum necessary' standard that traditionally applies to a provider's use and disclosure of a patient's private health records under 45 C.F.R. § 164.502(b)(1): 'When using or disclosing protected health information or when requesting protected health information from another covered entity or business associate, a covered entity or business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.'"

As an example of the statutory exception, TCA § 24-1-207(a) concerning the psychiatrist-patient privilege provides in part:

"Neither the psychiatrist nor any member of the staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient except:

"(1) In proceedings in which the patient raises the issue of the patient's mental or emotional condition[.]"

30. <u>Texas: initiation of litigation waives privilege as to relevant medical records</u>

TX Rules of Evidence, Rule 509(e) provides in part:

"Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

"* * * * *

"(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense[.]"

No case law in Texas further discusses the scope of such "relevant" records. Rather, Texas courts appear to focus on whether the asserted condition is "part of" a party's claim or defense. *R.K. v. Ramirez*, 887 SW2d 836, 843 (Tex 1994), states that "information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense."

31. Utah: initiation of litigation waives privilege as to relevant medical records

Utah Rules of Evidence, Rule 506(d) provides in part:

> "Exceptions. No privilege exists under paragraph (b) in the following circumstances:
>
> "(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:
>
> "(A) in any proceeding in which that condition is an element of any claim or defense, or
>
> "(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense[.]"

In *Sorensen v. Barbuto*, 177 P3d 614, 617 (2008), the court noted that the exception for relevant communications was "a limited waiver of privilege, confined to court proceedings, and restricted to the treatment related to the condition at issue." Further, in *Debry v. Goates*, 999 P2d 582, 587 (Utah App 2000), the court also stated that exception was limited in nature:

> "[A] party must show with 'reasonable certainty' that some evidence favorable to his or her claim exists. If such a showing is made, then the party may request that the court review the otherwise confidential records 'to determine if they contain material evidence.' If, after review, the court determines the records contain material evidence, the records should be exposed only to the extent necessary to present the evidence, thereby striking a balance between the important interests of physician-patient confidentiality and the pursuit of a claim or defense."

(Internal citations omitted.)

32. Vermont: initiation of litigation waives privilege as to relevant medical records causally or historically related to the patient's health put in issue

VRE 503(d)(3) provides:

"Condition an Element of Claim or Defense. There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense, unless the state seeks to admit information obtained in the examination of the mental or emotional condition of a patient in a criminal case for the purpose of proving the commission of a criminal offense or for the purpose of impeaching the testimony of the patient."

The Reporter's Notes following VRE 503 explains:

"The provision of paragraph (3) for an exception as to any information relevant to a condition put in issue by the patient is taken from Uniform Rule 503(d)(3). It carries forward the Court's interpretation of 12 V.S.A. § 1612 in *Mattison v. Poulen*, 134 Vt. 158, 163, 353 A.2d 327, 330 (1976), that the privilege is waived by the commencement of the action not only as to the actual condition in suit but as to 'matters causally or historically related' to that condition. See Rule 401. Such waiver has been held to make the reports of plaintiff's treating physician discoverable under V.R.C.P. 26(b)(1), 34 and 35(b)(3)."

Mattison v. Poulen, 134 Vt 158, 163, 353 A2d 327 (Vt 1976), provides:

"We hold that once the patient has waived the privilege afforded him under 12 V.S.A. s 1612, by the commencement of an action, such waiver applies to the discovery of matters causally or historically related to the patient-plaintiff's health put in issue by the injuries and damages claimed in the action."

VRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." VTCP 26(b)(1), meanwhile, provides that the scope of discovery reaches to information "reasonably calculated to lead to the discovery of admissible evidence."

33. <u>Virginia: initiation of litigation waives privilege as to related medical records</u>

VA Code Ann § 8.01-399(B) provides in part:

"If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with

> such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action."

In *City of Portsmouth v. Cilumbrello*, 204 Va 11, 15, 129 SE2d 31 (Va 1963), the court opined that "a trial court, upon proper motion, should order the opposing party to submit to the taking of a deposition for discovery and, in such discovery process, produce medical reports, subject to his control, *relating to the injuries at issue*." (Emphasis added.)

34. West Virginia: no statutory testimonial privilege; discovery of medical information related to condition at issue allowed

State ex rel. Kitzmiller v. Henning, 190 W Va 142, 144, 437 SE2d 452 (W Va 1993), provides:

> "As the hospital asserts, West Virginia has not codified a physician-patient privilege. However, the absence of such a privilege contemplates the release of medical information only as it relates to the condition a plaintiff has placed at issue in a lawsuit; it does not efface the highly confidential nature of the physician-patient relationship that arises by express or implied contract."

In *Keplinger v. Virginia Elec. and Power Co.*, 208 WVa 11, 23, 537 SE2d 632 (WVa 2000) (emphases in *Keplinger*), the court further explained:

> "While we acknowledge that a person who has filed a civil action that places a medical condition at issue has impliedly consented to the release of medical information, this implied consent involves *only* medical information *related to the condition placed at issue.* In this regard, we stated in *Kitzmiller* that 'the absence of [a physician-patient] privilege contemplates the release of medical information only as it relates to the condition a plaintiff has placed at issue in a lawsuit; it does not efface the highly confidential nature of the physician-patient relationship that arises by express or implied contract.' 190 W.Va. at 144, 437 S.E.2d at 454. *See also* W. Va. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." (emphasis added)).

W. Va. R. Civ. P. 26(b)(1) sets forth the general scope of discovery to include information "reasonably calculated to lead to the discovery of admissible evidence."

35. Wisconsin: initiation of litigation waives privilege as to medical records that are relevant or within the scope of discovery

WSA 905.04(4)(c) provides:

> "Condition an element of claim or defense. There is no privilege under this section as to communications *relevant to or within the scope of discovery* examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

(Emphasis added.) WSA 804.01(2) sets forth the scope of discovery as follows:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

36. <u>Wyoming: initiation of litigation waives privilege as to relevant medical records</u>

Wardell v. McMillan, 844 P2d 1052, 1066 (Wyo 1992), provides:

> "When a patient places his physical or mental condition into contest, the physician-patient privilege is waived to the extent that it is relevant to the controversy. *See Frias v. State*, 722 P.2d 135 (Wyo.1986). Under such circumstances, the patient can no longer expect to silence his physician relating to the subject matter of the litigation. See *McCormick on Evidence, supra* at § 103. The waiver, however, is not without boundaries. The physician may not discuss the patient's condition and treatment with the world at large, but he is bound to disclose the relevant circumstances only within the confines of the adversarial process. See 61 Am.Jur.2d, *supra*".

In discussing whether particular records were discoverable in *Wardell*, the court referred to the scope of discovery in WRCP 26(b), which includes "any matter, not privileges, which is relevant * * * [or which] appears reasonably calculated to lead to * * * admissible evidence." *Id.*

SAC:sac

cc: RMK

MEMORANDUM

TO: RMK - Miscellaneous
Our File No. 90011-0001

FROM: SAC

DATE: December 18, 2013

RE: History of ORCP 44 C

Bob,

The following summarizes the history of ORCP 44 C.

Legislative Enactment of *Former* ORS 44.620(2)

ORCP 44 C derives from *former* ORS 44.620, *repealed by* Oregon Laws 1979, chapter 284, section 199. *Former* ORS 44.620 was enacted by House Bill (HB) 2101 (1973), which had been proposed by the Oregon State Bar. Sections 2 and 3 of HB 2101 were ultimately codified as sections 1 and 2 of *former* ORS 44.620. HB 2101 provided in relevant part:

> "'Section 1. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, the court in which the action is pending may order the person claiming to be injured to submit to a physical or mental examination by a physician employed by the moving party. The order may be made only on motion for good cause shown and upon notice to the persons to be examined and to all parties. The motion and order shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
>
> "'Section 2. Upon the request of any party the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his finding, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.
>
> "'Section 3. Upon the request of the party against whom the claim is pending the claimant shall deliver to him a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply."

The legislative history of HB 2101 addresses the purpose of the bill. On January 16, 1973, the Chairman of the House Judiciary Committee recommended the introduction of HB 2101 by unanimous consent. HB 2101 was described at that committee meeting as "relating to medical examination, which permits pretrial discovery in personal injury actions of medical information, including physical or mental examination of plaintiffs and delivery of medical reports of plaintiff's treating physician and defendants' examining physician." Minutes, House Judiciary Committee, HB 2101, p 2 (Jan 16, 1973). On January 18, 1973, HB 2101 was given its first reading in the House and was ultimately referred to the House Judiciary Committee.

On February 12, 1973, Subcommittee #2 of the House Judiciary Committee held its first hearing on HB 2101. The minutes from that meeting provide:

> "Austin Crowe, representing the Oregon State Bar, spoke in support of the bill, which permits pretrial discovery, in personal injury actions, of medical information. He said this bill designed to correct a situation which has existed in this state for several years; namely, that medical reports of the private treating physician of an injured person filing a lawsuit are not subject to being produced by the plaintiff, whereas if defendant orders an independent medical examination of plaintiff, such a report is required to be produced.
>
> "Mr. Crowe said it has been decided by both the plaintiffs' and defense bar in Oregon that it would be more fair and appropriate if there were an exchange between the parties of any doctor's report dealing with a specific action or suit. He said he believed this procedure would result in fewer independent medical examinations, with fewer doctors involved, and would bring about earlier settlements between the parties, since each would know the nature and extent of the injury allegedly suffered by plaintiff.
>
> "* * * He said this bill amends the existing statute on the patient-doctor privilege, but that discussion was had with the Oregon Medical Society on the proposal and full approval was given by that society.
>
> "* * * * *
>
> "[David] Landis discussed briefly the current procedure, under case, not statutory, law, advising that an injured plaintiff need not disclose, prior to trial, the medical report of his treating physician. In such cases, he added, the defendant's attorney will call for an independent medical examination of plaintiff, and a copy of this report must be supplied to plaintiff's attorney. At this point, Mr. Landis said, plaintiff's physician still need not divulge his medical report and the contents of such a report, and the testimony of the treating physician, will not be known by defendant's attorney until trial is in process. He said this procedure discourages settlement and violates the theory of fair play and the free exchange of information,

adding that he believed the courts and the legislatures are striving for more liberalized procedures and practices.

"A partial adaptation of a similar federal rule was used as the model for this proposed legislation, Mr. Landis said, and he stated that sections 1 and 2 would merely codify existing case law. Section 3, which would require the plaintiff, upon request, to deliver to the defendant a copy of all written reports and examinations relating to the injury, is a new provision, he added.

"Section 4, Mr. Landis said, imposes the sanction that if a treating doctor did not supply his written report, then defendant's attorney could submit the doctor to a deposition in order to carry out the discovery purpose and thus obtain information that would have been included in the written report. He said he hoped the deposition process would not have to be used, but that it was a threat to the doctor that he would have to take time from his practice to answer the deposition if he refused to furnish a written report.

"Mr. Landis said that section 5 is merely a housekeeping section, providing that this act will apply even if there is an agreement between the parties, pointing out that such agreement is often possible. The rest of the act, Mr. Landis said, is also for housekeeping purposes and he said this Act is being engrafted onto the Oregon privilege statutes. He said he wanted it absolutely clear that other aspects of the doctor-patient privilege will not be changed by passage of this statute and that abolition of the doctor-patient privilege is not being proposed.

"Mr. Landis referred to the exhibits hereinbefore mentioned, * * * saying that, as an attorney for defendant, he has ordered an independent medical examination, but plaintiff's attorney refused to furnish the report of the treating physician, claiming that he 'preferred the sporting theory of justice', a phrase which Mr. Landis quoted in his affidavit to the court.

"Mr. Landis concluded his statement with the remark that in many cases, plaintiff's attorney will supply the report of the treating physician, but only when it serves the purpose of the plaintiff, and he said this was not a satisfactory way of preparing and trying bodily injury lawsuits."

Minutes, House Judiciary Committee, Subcommittee # 2, HB 2101, pp 1-3 (Feb 12, 1973).

HB 2101 was eventually passed out of the House Judiciary Committee and out of the House with no amendments. On May 2, 1973, the Senate Judiciary Committee held its first hearing on HB 2101. The minutes from that meeting provide:

"AUSTIN CROW: Oregon State Bar. This bill is designed to cope with a problem

> that arises in the trial of personal injury cases. * * * Under the present status of the law, a person who brings a personal injury case does not have to divulge any of the information concerning the nature of the claim until such a time as she or he gets on the witness stand. In order to promote settlements and eliminate some of the unnecessary medical examinations the Oregon State Bar drew up this bill which attempts to incorporate the existing laws and provide some additional tools so the medical reports will come out in the beginning and at the start of a lawsuit, everyone will find out what the nature of your claim is. Section 1 tries to codify the existing state law which means that a defendant can have an examination of the plaintiff after the trial has started. If he does have an examination, he is required to give a copy of that report to the plaintiff's lawyer. This bill intends to make the report of the treating physician available to the defense lawyer in the case. We talked with the medical society and discussed some of their problems and they have approved the bill. They are for this bill because (1) it will probably reduce the number of independent medical examinations that will be required, (2) the bill does not reduce or eliminate the priviledge [*sic*] of confidentiality. This will require a report by the doctor. This is not mandatory now. It is provided that if a physician refuses to provide a written report, he may be required to appear for a deposition. This will help to promote doctors to write these reports. This is not a plaintiffs bill or a defendant's bill. It is a bill that should reduce the amount of litigation in the courts, promote settlements, and reduce the amount of time a doctor has to spend in personal injury cases.
>
> "DAVID LANDIS: Member of the Bar Committee that drafted this bill. Mr. Landis related the present law as related to the mechanics of the present personal injury system. There are inequities in the exchange of material between the lawyers before trial. This bill should help to alleviate this situation. Section 1 would codify the existing case law. Section 2 would codify existing case law. Section 3 would be a new part—it would require the plaintiff's attorney to forward copies of his reports to the defense attorney. Section 4 refers to the plaintiff's docotr [*sic*] appearing for a deposition if a report is not made available."

Minutes, Senate Judiciary Committee, HB 2101, pp 4-5 (May 2, 1973).

HB 2101 was eventually passed out of the Senate Judiciary Committee and out of the Senate with no amendments. It was signed by the House Speaker on June 22, 1973, by the Senate President on June 25, 1973, and by the Governor on June 26, 1973.

As noted above, section 3 of HB 2101 was codified as *former* ORS 44.620(2). *See A.G. v. Guitron*, 351 Or 465, 473-74, 268 P3d 589 (2011). ORS 44.620(2) was not amended between its enactment in 1973 and the promulgation of ORCP 44 C in 1978.

Council on Court Procedures Promulgation of ORCP 44 C

On December 2, 1978, the Council on Court Procedures promulgated ORCP 44 pursuant to the authority granted to the Council in ORS 1.735. ORS 1.735(1) provides, in relevant part:

> "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."

In the 1978 promulgation, ORCP 44 C, which appears to have been mislabeled 44 D as a result of a scriveners' error, provided:

> "Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply."

A Comment followed ORCP 44 that stated "Section 44 C is based on ORS 44.620(2)." That Comment had been prepared by Council staff and represented staff interpretation of the rule and the intent of the Council, but was not officially adopted by the Council. *See* Council on Court Procedures, *Oregon Rules of Civil Procedure*, Introduction, p 1 (promulgated Dec 2, 1978).

In 1978, the Council also published also published a multivolume Legislative History Relating to the Promulgation of the Oregon Rules of Civil Procedure. Those materials indicated that ORCP 44 C is, in fact, ORS 44.620(2). The Council noted:

> "The 1973 Oregon State Bar bill, which became ORS 44.610, was expressly designed to create a duty on the part of plaintiffs in personal injury cases to furnish medical reports apart from any exchange with the defendant or any court-ordered examination. The practice and procedure committee's comment on the Bar bill are as follows:
>
> > "'Under existing case law the medical reports of a bodily injury claimant's physician are not subject to discovery. However, the report of the independent examining physician is subject to discovery. This creates a disparity in the pre-trial exchange of information. It delays settlements. In many cases, it causes delay because the length of time it takes to schedule an independent medical examination. It causes added expense. In many cases, an

> independent medical examination would not be necessary if defense counsel were supplied with detailed reports by plaintiff's treating doctors.
>
> "'The purpose of this bill is to require plaintiff to produce copies of the medical reports of his treating physician.

"See Woolsey v. Dunning, 268 Or 233 (1974)."

Council on Court Procedures, *Legislative History Relating to the Promulgation of the Oregon Rules of Civil Procedure*, vol 3, p 58 (1978).

The Court in *Woolsey v. Dunning* referred to the action taken by the Oregon State Bar in 1973 to propose a bill to amend the provisions of ORS 44.040 by "providing for the disclosure of certain specified medical information upon the filing of a lawsuit." 268 Or at 242 (footnote omitted). The Court noted that "[t]he legislature then enacted a bill providing that upon the filing of an action for personal injuries the physician-patient privilege is waived to the limited extent of permitting defendant to demand 'a copy of all written reports of any examinations relating to injuries for which recovery is sought.'" *Id.* (footnote omitted). The Court in *Woolsey* explained further that

> "the legislature did not otherwise change the provisions of ORS 44.040 forbidding a physician to disclose information 'without the consent of his patient' or those providing that if a party 'offers himself as a witness, it is deemed a consent' to the examination of his physician. Indeed, the sponsors of that bill stated that they wanted it 'absolutely clear that other aspects of the doctor-patient privilege will not be changed by passage of this statute and that abolition of the doctor-patient privilege is not being proposed.'"

Id. at 242-43 (footnote omitted).

Amendment to ORCP 44 C after Promulgation

Following its promulgation in 1978, ORCP 44 C has been subsequently amended. On December 13, 1986, the Council amended Section 44 C to provide:

> "**Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or- to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports *or existing notations* of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply."

(Emphasis added.)

The Comment following the amendment provided:

> "The amendment to Rule 44 was made as a response to rulings out of the Multnomah County Circuit Court. The current language 'written reports' has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding 'or existing notations' is intended to broaden the rule to include office and chart notes."

In 1988, the legislature substituted "and existing notations" for "or existing notations" in ORCP 44 C. *See A.G. v. Guitron*, 351 Or 465, 482 n 5, 268 P3d 589 (2011).

ORCP 44 C has not been amended since 1988.

Case Law Discussing Scope of ORCP 44 C

The only case law to address the scope of discovery allowed under ORCP 44 C is *A.G. v. Guitron*, 351 Or 465, 268 P3d 589 (2011). There, the issue presented was of statutory interpretation of ORCP 44 C and, specifically, whether that rule required the plaintiff to produce the report of an expert who examined the plaintiff for purposes of litigation and not for purposes of treatment. *Id.* at 468-69. The Court noted that ORCP 44 C required the plaintiff, the party making a claim for injuries, to deliver to the defendants, the party against whom the claim was pending, at the defendants' request, a copy of "all written reports" of "any examinations" relating to plaintiff's injuries. *Id.* at 469. The defendants had requested that the plaintiff produce all reports of "examinations for the same condition which relate to the Plaintiff's claimed injuries," but the plaintiff had failed to provide the defendants with a copy of the report by the psychologist the plaintiff's counsel had retained for purposes of litigation. *Id.* As a result, the trial court excluded the testimony of the psychologist at trial under ORCP 44 D. *Id.* at 467.

Initially, the Court stated that "the text of ORCP 44 C supports the decision of the trial court." *Id.* at 469. The Court then examined the context and legislative history of ORCP 44 C. After discussing the history of HB 2101, the Court noted that

> "the drafters of HB 2101 contemplated that, on request, at any time after initiation of an action for personal injuries, a plaintiff would be required to produce the reports of his or her treating experts. The drafters anticipated that early disclosure of such reports could eliminate the need for a defense examination, promote settlement, and reduce costs. *Whether the drafters, and, more importantly, the legislature, intended to limit the bill's disclosure requirements to that circumstance is, however, far less clear.* We therefore consult the legislature's later discussion

and amendment of those statutes for assistance."

Id. at 478 (emphasis added). The Court then examined the history of ORCP 44 C's promulgation and subsequent amendments. It stated:

> "Although plaintiff has raised a substantial question about the meaning of ORCP 44 C, the contextual clues and history that she has provided and that we have reviewed are not convincing, particularly given the text of the rule which, on its face, is unambiguous. ORS 44.620(2) required, and ORCP 44 C requires, plaintiffs to produce copies of 'all written reports * * * of any examinations' relating to the injuries that plaintiffs' claim. The words of statutes and rules of civil procedure are the best indication of the intent of those who promulgate them. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (words used by legislature to give expression are best evidence of intent). Here, those words are encompassing rather than limiting. The words 'all written reports * * * of any examinations' encompass the reports of both litigation and treating experts who examine a plaintiff. Those words do not define or limit the experts whose reports are subject to discovery, as long as those experts have examined the plaintiff."

Id. at 484-85. Ultimately, the Court concluded that

> "in adopting ORCP 44 C, the legislature, as did this court in *Carnine* and *Nielsen*, considered the 'search for truth and justice' to be paramount and required plaintiffs to produce, on request, the reports of the experts who examine them for purposes of litigation as well as for treatment. Therefore, we also conclude that, in this case, the trial court was correct that plaintiff was required to produce the report of [the psychologist], and did not err by excluding his testimony under ORCP 44 D."

Id. at 485.

SAC:sac

MEMORANDUM

TO: RMK - Miscellaneous
Our File No. 90011-0001

FROM: SAC

DATE: January 24, 2014

RE: History of ORCP 44 E

Bob,

The following memo addresses the history of Rule 44 E and how the history can inform the interpretation of Rule 44 C.

The History of Rule 44 E

ORCP 44 E was initially promulgated by the Council in 1978 as follows:

> "E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person."

See Council on Court Procedures, *Oregon Rules of Civil Procedure,* p 133 (promulgated Dec 2, 1978). The Comment following the rule explained that it was based on *former* ORS 441.810, which was "apparently intended to allow examination of hospital records related to injuries forming the basis for a claim." The statutory text, however, did not make that intent clear, as discussed in *State ex rel. Calley v. Olsen*, 271 Or 369 (1975). The Council used language similar to the statute and "intended to allow examination of any hospital records of the injured person." Council on Court Procedures, *Oregon Rules of Civil Procedure* at 133.

In *Calley*, the Court had explained that *former* ORS 441.810 was based on Oregon Laws 1931, chapter 400, section 5, which was a part of the statute providing for hospital liens upon the proceeds of actions by persons hospitalized for personal injury against persons who caused such injuries. The 1931 law had provided, in part, that "[a]ny party legally liable or against whom a claim shall be asserted for compensation or damages for Such injuries shall have a right to examine and make copies of all records of any hospital in reference to and connected with Such hospitalization of such injured person." 271 Or at 374 (emphasis in *Calley*). When comparing the text of the 1931 law and that of *former* ORS 441.810, the Court stated:

> "it is apparent that significant changes in wording were made in the process of adapting that statutory provision [the 1931 law] for inclusion as a part of the

> Oregon Revised Statutes. This provision, as adopted by the legislature, provided for no more than an examination of hospital records 'in reference to and connected with Such hospitalization,' i.e., the hospitalization for 'such injuries' for which a claim for damages is asserted. It thus becomes clear that in enacting s 5 of this statute the legislature did not intend by this provision to open for examination all records in any hospital relating to Previous ailments or injuries suffered by a person who may make any subsequent claim for compensation for damages for any subsequent injuries."

Id. at 374-75 (footnote omitted).

In 1979, the legislature amended Rule 44 E in Oregon Laws 1979, chapter 284, section 28, to read:

> "E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make 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 within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney, or if the injured person does not have an attorney, to the injured person."

That amendment appears to have broadened and clarified the scope of access to hospital records from "all records of any hospital in reference to and connected with *the hospitalization of the injured person*" to "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 within the scope of discovery under Rule 36 B.*" Thus, both inpatient and outpatient hospital records were accessible, so long as the records were reasonably calculated to lead to the discovery of admissible evidence per Rule 36 B. *See A.G. v. Guitron*, 351 Or 465, 478 n 11 (2011) (explaining that, in Oregon Laws 1979, chapter 284, section 28, the legislature amended Rule 44 E "to clarify the scope of that provision and provide notice to the party whose records are sought").

On April 4, 1981, the Procedure and Practice Committee of the Oregon State Bar met and discussed a proposed amendment to Rule 44 E that would have broadened access to medical records beyond mere hospital records to records of "*any health care provider* in reference to and connected with any hospitalization or provision of medical treatment by the *health care provider* of the injured person within the scope of discovery under Rule 36B." Minutes, Oregon State Bar Procedure and Practice Committee, p 2 (Apr 4, 1981). John Stone expressed concern that notice to the plaintiff be given before any records could be obtained. He suggested adding a requirement that plaintiff be given at least 10 days' notice before seeking access to records and that, upon such notice, the plaintiff could seek a protective order under Rule 36. *Id.* The following proposed amendment to Rule 44 E was passed unanimously by the Bar committee:

> "Access to Medical Records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any health care provider in reference to and connected with any hospitalization or provision of medical treatment by the health care provider of the injured person within the scope of discovery under Rule 36B. Any party seeking access to medical records under this section shall give written notice of any proposed action to seek access to medical records at a reasonable time, but no less than 10 days prior to such action, to the injured person's attorney, or if the injured person does not have an attorney, to the injured person. Upon receipt of the notice of the proposed action, the injured person's attorney or the injured person may seek a protective order pursuant to ORCP 36."

Id. The committee then sent the proposed amendment to the Council, but it did not arrive until it was resent on January 22, 1982. *See* Minutes, Council on Court Procedures Subcommittee on ORCP 44 E (May 8, 1982) (Composite Exhibit A, letter of Robert D. Newell to E.B. Sahlstrom).

Meanwhile, on July 15, 1981, the Council noted problems for the 1981-1983 biennium, among which were possible amendments to Rule 44 C and 44 E. *See* Problems for 1981-1983 Biennium, p 3. As to Rule 44 C, "[t]he Council gave a lot of thought to access to hospital records not directly related to the claim, but which might show pre-existing injury." The Council also considered access to medical reports and whether a defendant could demand "older written reports on the grounds they 'relate' to the injury by showing pre-existing injury." As to Rule 44 E, the Council initially considered whether records from care facilities, nursing homes, and clinics such as Kaiser should also be accessible. *Id.* The Council does not appear to have proposed any amendments on any of these issues.

On November 14, 1981, the Council revisited Rule 44 E, this time to discuss what was viewed as an abuse by hospitals in releasing records prior to any claim being filed. Minutes, Council on Court Procedures, p 2 (Nov 14, 1981). Apparently, insurance adjusters and hospital officers considered the term "claim," as used in the rule, to have its everyday meaning as opposed to the technical meaning used in the ORCPs. *Id.* James C. Tait, a Council member had proposed amending Rule 44 E to address this problem as follows:

> "All records sought pursuant to this rule are presumed to be within the scope of discovery under Rule 36 B. Access to such records shall be allowed unless a motion for a protective order is filed pursuant to Rule 36 C[] and a subpoena duces tecum pursuant to Rule 55 specifying the time and place for a protection order is served upon the custodian of records. Access to such records shall then be denied except by order of the court."

This issue was referred to a Council subcommittee for further consideration. *Id.*

On May 8, 1982, the Council subcommittee met to discuss the proposed amendment to Rule 44 E that had been passed by the Practice and Procedure Committee of the Bar back on April 4, 1981, and which would have broadened access to medical records outside of hospital records.

See Minutes, Council on Court Procedures Subcommittee on ORCP 44 E, p 1 (May 8, 1982). The Council subcommittee unanimously rejected the proposed amendment by the Bar. *Id.*

The Council subcommittee went on to consider its own proposed amendments to Rule 44 E. Lyle Velure moved to substitute the term "civil action" for the term "claim," to clarify that the rule contemplates access to records after an action has been filed. His motion was approved. *Id.* Mr. Velure and Jim Walton then complained that access to hospital records under Rule 44 E was too broad. Austin Crowe urged retention of the current rule. Mr. Velure moved to amend the rule to limit access to hospital records to "those records arising out of the accident, incident, or occurrence for which the civil action had been brought." In addition, Mr. Velure would require the party obtaining copies of the hospital records to supply the opposing side with a copy. Further, for access to records not involving the accident, incident, or occurrence for which the civil action was brought, Mr. Velure proposed that a procedure should be devised similar to that provided by Rule 36 B(3), regarding discovery of trial preparation materials. Mr. Velure's motion passed 3-1, with Mr. Crowe opposing. *Id.*

On June 19, 1982, the Council met and considered whether to adopt the subcommittee's proposed amendments to Rule 44 E, which were as follows:

"E. Access to hospital records.

"E. (1) Records relating to civil action. Any party legally liable or against whom a [claim] civil action is [asserted] filed for compensation or damages for injuries may examine and make 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 within the scope of discovery under Rule 36 B., and arising out of the accident, incident, or occurrence for which the civil action has been filed. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney, or if the injured person does not have an attorney, to the injured person. Any person gaining access to hospital records under this section shall forward copies of those records, within a reasonable time after gaining access, to the injured person's attorney, or, if the injured person does not have an attorney, to the injured person.

"E.(2) Other records. Any party legally liable or against whom a civil action is filed for compensation or damages for injuries may examine and make 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 within the scope of discovery under Rule 36 B., not arising out of the accident, incident, or occurrence for which the civil action has been filed, only upon a showing that the party seeking discovery has substantial need of the records in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the records by other means."

Minutes, Council on Court Procedures (June 19, 1982) (Exhibit B, proposed amendments).

In discussing the proposed amendments, Mr. Tait "expressed his concern that the proposal, in restricting access to records which are now available, would be substantive in nature and was beyond the jurisdiction of the Council." *Id.* at p 2. Walter H. Sweek of the OADC spoke against the proposal, "stating that the clear trend had been toward promoting and expanding discovery rather than restricting it." *Id.* The proposed amendments were voted on in three parts. That portion of the amendments "requiring that a civil action be filed before access would be allowed" passed 9-4. That portion of the amendments "limiting access to records relating directly to the subject incident and requiring a showing of substantial need before other records would be accessible" failed 6-7. And finally, that portion of the amendments "requiring that copies of records discovered be provided to opposing counsel" failed 5-8. *Id.*

On July 31, 1982, Mr. Velure moved the Council to reconsider action on the proposed amendments to Rule 44 E previously rejected by the Council. Minutes, Council on Court Procedures, p 4 (July 31, 1982). The motion to reconsider failed. *Id.* Ultimately, the only amendment promulgated by the Council in 1982 to Rule 44 E was to require the filing of a civil action before access to hospital records was allowed. Council on Court Procedures, *Amendments to Oregon Rules of Civil Procedure*, p 15 (promulgated Dec 4, 1982).

Sometime prior to 1989 (likely in 1988 by the Council), Rule 44 E was further amended to provide:

> "E. Access to hospital records. 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 within the scope of discovery under Rule 36 B. Hospital records shall be obtained by subpoena in accordance with Rule 55 H."

See Or Laws 1989, ch 1084, § 2 (amending Rule 44 to include reference to physicians or psychologists, but setting forth the then current version of Rule 44 E).

In 2002, the Council further amended Rule 44 E to its present form:

> "**E Access to individually identifiable health information.** 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 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H."

See Council on Court Procedures, *Amendments to Oregon Civil Rules of Procedure*, p 4 (promulgated Dec 14, 2002).

Interpreting the Current Scope of Rule 44 C

The history of the scope of Rule 44 E should inform, as context, the determination of the scope of Rule 44 C. When initially promulgating Rule 44 E, the Council expressly stated its intent "to allow examination of any hospital records of the injured person." Moreover, as clarified by the legislature in 1979, Rule 44 E reached all hospital records in reference to or connected with inpatient or outpatient procedures provided by the hospital to an injured person that fell within the general scope of discovery under Rule 36 B. In 1981-82, unsuccessful attempts were made to narrow the scope of access to hospital records under Rule 44 E. Similarly, unsuccessful attempts also were made to broaden the scope of Rule 44 E from hospital records specifically to health care provider records more generally. Ultimately, in 2002, Rule 44 E was, in fact, broadened to sweep in all "individually identifiable health information * * * within the scope of discovery under Rule 36 B."

Any interpretation of the scope of Rule 44 C that would reach a narrower selection of hospital records than that provided under Rule 36 B would seemingly conflict with the scope of discovery allowed under Rule 44 E. On the other hand, the legislature only incorporated Rule 36 by reference into Rule 44 E. It did not likewise do so under Rule 44 C. That said, however, ORCP 36 B provides for the general scope of discovery under the rules "[u]nless otherwise limited *by order of the court* in accordance with [the] rules." (Emphasis added.)

In sum, Rule 44 C sets forth the records that a claimant-patient must provide to the party against whom a claim is made. Rule 44 E, by contrast, sets forth the records which the party against whom a claim has been made is allowed to access through appropriate procedures. Rule 44 E provides for access to records that fall within the scope of 36 B. It would be a perplexing result to interpret Rule 44 in such a way so as to allow the defendant greater access to the plaintiff-patient's records under Rule 44 E than the plaintiff-patient is required to produce under Rule 44 C. Although the standard of Rule 36 B is not explicitly set forth in Rule 44 C, its incorporation in Rule 44 E and its general application to the ORCPs, except where a court orders differently, support interpreting the scope of Rule 44 C to be co-extensive with both Rules 44 E and 36 B.

SAC:pb

cc: RMK

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February 28, 2014

Sent Via Email

Council on Court Procedures

Re: Proposed Amendments to ORCP 44C

Dear Council:

The proposed amendments to ORCP 44C seek to make it coextensive with ORCP 36B(1). I write to provide some thoughts on whether the amendments are outside this Council's authority.

A. A brief summary of the role of ORCP 44C in personal injury discovery.

ORCP 36B(1) allows for discovery into all matters, "not privileged," that may lead to the discovery of admissible evidence. Communications with a physician or psychotherapist are privileged. OEC 504; OEC 504-1. Accordingly, a party need not provide discovery of such communications. The privileges extend to written communications including medical records, notes, and reports. Litigation does not waive those privileges. OEC 511 (waiver of a privilege "does not occur with the mere commencement of litigation"); *State ex rel. Grimm v. Ashmanskas*, 298 Or 206 (1984) (recognizing that the plaintiff medical provider privileges when he or she "tak[es] a voluntary pretrial discovery deposition" of their own medical provider).

ORCP 44C provides a limited exception to the above privileges for plaintiffs in personal injury cases. Upon the request of a defendant, a plaintiff must provide examination reports "relating to injuries for which recovery is sought." ORCP 44C. Notably, the text of ORCP 44C does not track the broad terms of ORCP 36B(1) (allowing discovery of records "reasonably calculated to lead to the discovery of admissible evidence") and therefore the rules, at present, do not appear to be coextensive.

B. The nature of this Council's authority.

Whether ORCP 44C and 36B(1) are coextensive is important, because if 36B(1) is broader, then the amendments would require that ORCP 44C intrude further into a plaintiff's medical provider privileges. Before this Council creates such an intrusion, it must consider whether it has the authority to do so.

Pursuant to ORS 1.735(1), this Council "shall not abridge . . . or modify the substantive rights of any litigants." Moreover, the Council likely does not have authority to alter the rules of evidence. *Id.* ("The rules authorized by the section do not include rules of evidence[.]").

The medical provider privileges are substantive rights. Black's Law Dictionary at 1077 (5th ed 1979) (defining "privilege" as a "right, power, franchise, or immunity held by a person or class, against or beyond the course of law"). Just as importantly, the privileges are promulgated under the Evidence Code, *i.e.*, they are rules of evidence. A change to the privileges seem to be outside the scope of ORS 1.735.

Due to the Council's limited authority on such matters, the Council only was able to first promulgate 44C in 1978 because the rule simply renumbered a statute, *former* ORS 44.620(2), without any substantive changes. The rule merely restated the law that already existed relating to a plaintiff's medical provider privileges and therein did not change the evidence code or abridge a substantive right.

In light of the above, the only way that the Council can adopt the currently proposed amendments is if we could reasonably read ORCP 44C and ORCP 36B(1) to already be coextensive (and therefore the changes could be justified as merely clarifying amendments). However, the plain text and the legislative history do not support such an interpretation.

C. A review of the text and legislative history of ORCP 44C indicates that it is narrower in scope than ORCP 36B(1).

1. *The Text*

A basic rule of textual construction suggests that ORCP 44C and ORCP 36B(1) are not coextensive. In particular, when different terms are used in related statutes, we should presume that different meanings were intended. *State v. Guzek*, 322 Or 245, 265(1995); *see Pamplin v. Victoria*, 319 Or 429, 433 (1994) (rules of statutory construction apply when interpreting the ORCPs). If the legislature intended that ORCP 44C and 36B1 be coextensive it could have made that very clear by using identical or similar terms. But, the legislature did not.

2. *The Legislative History*

ORCP 44C adopted the text of *former* ORS 44.620(2) nearly verbatim. Commentary of Oregon Rules of Civil Procedure at 133 (1978). When considering whether to renumber ORS 44.460(2) as ORCP 44C, the Council reviewed the legislative history behind the statute.

Forty years ago, pursuant to the medical provider privileges, a plaintiff did not have to share any medical records that described the injury for which recovery was sought. Therefore, a defendant had no means to evaluate the extent of a plaintiff's injury other than its statutory right to an independent medical exam. That created a barrier to efficient settlement, because a defendant had to first incur the expense of the independent exam or else have no basis to predict the settlement value of the case. On the other side of the coin, a plaintiff was entitled to the report from such a defendant's hired medical examiner, but did not have to share with the defendant the examination reports of the plaintiff's treating physicians.

ORS 44.620 was proposed by the Oregon State Bar to limit this inefficiency and unfair exchange of information. It created a limited exception to the medical provider privileges so that a plaintiff had to provide the defendant the examination reports of his or her treating physician for the injuries for which recovery was sought. Accordingly, a defendant could evaluate the claim without the expense of an independent exam. This also provided a fair exchange of information, in which the defendant knew the opinion of the treating physician and the plaintiff knew the opinion of the defendant's hired medical examiner.

In other words, the intent behind the law was to provide the defendant the examination reports of the plaintiff's treating physicians for the injuries for which recovery was sought (the equivalent of the post-injury information obtainable from an independent medical exam). Nowhere in the history of ORS 44.620 is there any suggestion that the law was intended to require a plaintiff to provide all medical records beyond the examination reports of the treating physician.

The Council specifically took note of the above history behind the rule when promulgating ORCP 44C:

> "The 1973 Oregon State Bar Bill which became ORS 44.610, was expressly designed to create a duty on the part of the plaintiffs in personal injury cases to furnish medical reports apart from any exchange with the defendant or any court-ordered examination. The practice and procedure committee's comment on the Bar bill are as follows:
>
> > 'Under existing case law the medical reports of a bodily injury claimant's physician are not subject to discovery. However, the report of the independent

examining physician is subject to discovery. This creates a disparity in the pretrial exchange of information. It delays settlements. In many cases, it causes delay because of the length of time it takes to schedule an independent medical examination. It causes added expense. In many cases, an independent medical examination would not be necessary if defense counsel were supplied with detailed reports by plaintiff's treating doctors.

'The purpose of this bill is to require plaintiff to produce copies of the medical reports of his treating physician.'"

Legislative History relating to Promulgation of Oregon Rules of Civil Procedure, vol 3 of 7 at 58 (1978).

The testimony in front of the Senate and House Judiciary Committees likewise identified a limited intent to create a fair exchange of examination reports between plaintiffs and defendants, nothing more. No testimony suggests that ORCP 44C was intended to open up pre-injury medical history or discovery into all medical records that were not examination reports.

"Austin Crowe, representing the Oregon State Bar ... said this bill is designed to correct a situation which has existed in this state for several years; namely that medical reports of the private treating physician of an injured person filing a lawsuit are not subject to being produced by the plaintiff, whereas if defendant orders an independent medical examination of plaintiff, such report is required to be produced.

"Mr. Crowe said it has been decided by both the plaintiffs' and defense bar in Oregon that *it would be more fair and appropriate if there were an exchange between the parties of any doctor's report dealing with a specific action or suit.* He said he believed this procedure would result in fewer independent medical examinations, with fewer doctors involved, and would bring about earlier settlements between parties, since each would know the nature and extent of the injury allegedly suffered by plaintiff."

Minutes, House Judiciary Committee, Subcommittee #2, HB 2101, pp. 1, (Feb. 12, 1973) (emphasis added). Other testimony suggested the same:

"Mr. Landis[, a member of the Oregon State Bar Committee on Practice and Procedure,] discussed briefly the current procedure, under [case law] advising that an injured plaintiff need not disclose, prior to trial, the medical report of his treating physician. In such cases, he added, the defendant's attorney will call for an independent medical examination of plaintiff, and a copy of this report must be supplied to plaintiff's attorney. At this point, Mr. Landis said, plaintiff's physician still need not divulge his medical report and the contents of such a report and the testimony of the treating physician will not be known by defendant's attorney until trial is in process. He said this procedure discourages settlement and violates the

theory of fair play[.]

> "….Section 3, which would require the plaintiff, upon request, to deliver to the defendant a copy of all written reports and examinations relating to the injury[.] …*He said he wanted it absolutely clear that other aspects of the doctor-patient privilege will not be changed by passage of this statute and that abolition of the doctor-patient privilege is not being proposed.*"

Minutes, House Judiciary Committee, Subcommittee #2, HB 2101, pp. 2-3, (Feb. 12, 1973) (emphasis added). Testimony provided to the Senate Judiciary Committee expressed the same understanding of the limited application of ORS 44.620(2):

> "In order to promote settlements and eliminate some of the unnecessary medical examinations the Oregon State Bar drew up this bill which attempts to incorporate the existing laws and provide some additional tools so medical reports will come out in the beginning and at the start of a lawsuit, *everyone will find out what the nature of your claim is. Section 1 tries to codify the existing state law which means that a defendant can have an examination of the plaintiff after the trial has started. If he does have an examination, he is required to give a copy of that report to the plaintiff's lawyer. This bill intends to make the report of the treating physician available to the defense lawyer in the case*. We talked with the medical society and discussed some of their problems and they have approved the bill. They are for this bill because (1) it will probably reduce the number of independent medical exams that will be required, (2) the bill does not reduce or eliminate the priviledge [*sic*] of confidentiality. This will require a report by the doctor. This is not mandatory now. It is provided that if a physician refuses to provide a written report, he may be required to appear for a deposition. This will help to promote doctors to write these reports. This is not a plaintiff's bill or a defendant's bill. It is a bill that should reduce the amount of litigation in the courts, promote settlements, and reduce the amount of time a doctor has to spend in personal injury cases."

Minutes, Senate Committee on Judiciary, HB 2101, pp. 4-5, (May 2, 1973) (attached as Exhibit 5).

In the end, ORS 44.620(2) only contemplated an exchange of equivalent information between the parties; the plaintiff must provide the examination reports of the treating physician for his or her *alleged* injuries ("relating to injuries for which recovery is sought") and the defendant must provide the report of any hired medical examiner. If a plaintiff's physician does not make a report after an examination, the defendant can require that one be made, but the rule was not intended to "eliminate the privilege[*sic*] of confidentiality" in any other way. *Id.* There is nothing in the legislative history that suggests that ORCP 44C allows discovery into pre-injury medical history or medical records beyond the examination reports of the plaintiff's physician or psychologists. *See* ORCP 44D (recognizing that the reports discoverable under ORCP 44B and C are the reports of "physician[s] or psychologist[s]").

3. *The Legislature never authorized ORCP 44C to include "existing notations."*

In 1986 and 1989, this Council expanded ORCP 44C to include "any existing notations" as well as "written reports" from examinations. This Council acknowledged that the amendment would expand what a plaintiff was required to produce under ORCP 44C:

> "This rule change is proposed as a response to rulings out of the Multnomah County circuit Court. The current language 'written reports' has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for the purposes of litigation and notes made contemporaneous wiht an examination. *Adding 'or existing notations' would seem to broaden the rule to include office and chart notes.*"

Exhibit A, Council on Court Procedures Meeting (November 8, 1986). The Council was correct that the "inclu[sion] of office and chart notes" would broaden the incursion into the medical provider privileges originally allowed by the Legislature. As is clear from the legislative history behind ORCP 44C, the legislature only intended a fair exchange of examination "reports" between the plaintiff's physicians and the defendant's hired medical examiners.

Very likely, the Council overstepped its authority when it so expanded ORCP 44C to include "existing notations." It further abridged the privilege rights of plaintiffs and altered a rule of evidence (the physician-patient privilege). ORS 1.735(1) (prohibiting the Council from abridging substantive rights and expressly precluding the Council's authority from extending to the Rules of Evidence.).

Also, if the Council recognized in 1986 that ORCP 44C did not include existing notations, it is difficult to imagine that the original ORCP 44C was coextensive with ORCP 36B(1).

4. *The Legislature never authorized ORCP 44E to include any medical records other than "hospitalization" records.*

Mr. Keating as a sponsor of the proposed amendment to ORCP 44C suggests that the scope of ORCP 44C is coextensive with ORCP 44E. It follows that because the latter rule expressly states that it is coextensive with ORCP 36B(1), the former must be coextensive with ORCP 36B(1) as well. Respectfully, a brief review of the history behind ORCP 44E and this Council's amendments to that rule suggests otherwise.

Former ORS 441.810 is the statutory precursor to ORCP 44E. That statute only allowed for a defendant to obtain "*all records of any hospital* in reference to and connected with any hospitalization of the injured person." (Emphasis added).

In 1978, the Council on Court Procedures adopted *former* ORS 441.810 as ORCP

44E. In 1979, the Oregon Legislature amended ORCP 44E to provide defendants access to

> "*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 within the scope of discovery under Rule 36B."

Oregon Laws c. 284, sections 27, 28 (emphasis added).

The Oregon Legislature never made any other changes to ORCP 44E. So, in drafting the original statute and the amendments to ORCP 44E, the legislature only intended that defendants would have access to "hospital" records and provided no further intrusion into a plaintiff's medical provider privileges. Though there is sometimes overlap, hospital records are very different from physician records, examination reports, physical therapy records, and all other records of non-hospital medical providers. The legislature never provided a privilege waiver to those records.

The legislature took a balanced approach in drafting ORCP 44 C and E that both preserved meaningful aspects of the medical provider privileges and allowed defendants to have access to substantial medical information of a personal injury plaintiff. Defendants have never been permitted to have access to all medical records that could fall under ORCP 36B(1). Rather, defendants were permitted to only written examination reports of physicians and psychologists and records of any hospitalization of the plaintiff. Plaintiffs would maintain their right to confidentiality in all other records.

Finally, it should be noted that this Council expanded ORCP 44E beyond the legislative amendments of 1978 to go far beyond just "hospital" records. Specifically, this Council has made subsequent amendments to ORCP 44E that now give defendants access to all "individually identifiable health information" of plaintiffs. Much like the Council's later amendments to ORCP 44C, the legislature did not authorize that greater intrusion into a plaintiff's medical provider privileges. Respectfully, this Council may want to consider amending ORCP 44E to only apply to "hospital" records so that it falls back in line with our limited rule-making authority.

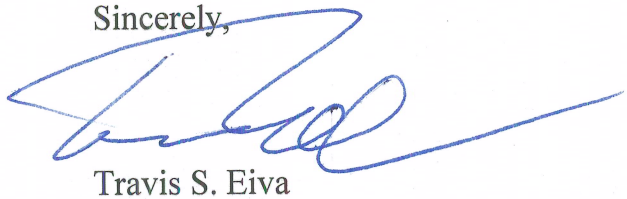
D. *Conclusions*

It appears that ORCP 44C is not nearly as extensive as ORCP 36B(1). Accordingly, for the Council to adopt the proposed amendments, the Council would necessarily have to abridge privilege rights and change the scope of a rule of evidence. The Council does not have the authority to do either. ORS 1.735(1).

Also and regretfully, it appears that this Council's previous amendments to ORCP 44 C and E may have gone too far. Rather than consider the proposed amendments, in recognition of our limited authority, a better approach may be to amend those rules to the language originally authorized by the legislature.

Thank you much for your time in reviewing these materials and I look forward to working with you further on these matters. Please feel free to contact me directly if you have any questions or concerns.

Sincerely,



Travis S. Eiva

Circuit Court of the State of Oregon for Jackson County

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Telephone (541) 776-7171 FAX (541) 776-7057

Tim Gerking, Judge

March 6, 2014

ORCP 46 & 55 COMMITTEE REPORT

Shari Nilsson
Council on Court Procedures

A committee meeting was held on March 4, 2014 with all committee members (Keating, Eiva, Bachofner and Payne) attending by telephone conference call. During the meeting the following subjects were discussed:

1. The need for revision of ORCP 55 H with respect to pre-subpoena notice issues, particularly when the subpoena, pursuant to H(2)(d), directs that copies of medical records be delivered to the Court for a trial or other court proceeding; and

2. Review of draft revisions by CCP to ORCP 55 D & H.; and

3. Review of draft revisions by CCP to ORCP 46 A and Legislative Council suggested changes to ORCP 46 B.

The discussion concerning agenda item 1 was aided by a memo prepared by the undersigned regarding historical changes that have been made to ORCP 55 H, as well as ORCP 55 I and 44 E, with a specific focus on the need for pre-subpoena notice to the party whose records are being sought and a memo prepared by Travis Eiva on HIPAA notice requirements. Both memos are attached. The committee members (other than myself), composed of two attorneys on the claimant side and two on the defense side, presented two diametrically opposing views on the issue. The defense side maintained that when subpoenaing copies of sealed medical records into court, pursuant to H(2)(d), no notice beforehand is required to be given to the party whose records are being sought, nor would it be practical or consistent with established practice to do so. On the other hand, the claimant side was strongly of the view that HIPAA requires that a pre-subpoena notice be given to the party whose records are being sought under these circumstances and that the current language of ORCP 55 H was intended to capture the requirements of HIPAA. Accordingly, because committee members are at an impasse on this issue, we will be asking for further direction from the Council at the March 8th meeting.

Council on Court Procedures
March 8, 2014, Meeting
Appendix F-1

With respect to the two other agenda items, we did not have enough time to discuss the proposed revisions, so the committee members will be reviewing those suggested revisions and will be reporting back to me prior to our March 8th, 2014 meeting.

Sincerely,

Timothy C. Gerking
Circuit Court Judge

Cc: Robert Keating
Travis Eiva
John Bachofner
Shenoa Payne
ORCP 46 and 55 Committee

MEMORANDUM

JACKSON COUNTY CIRCUIT COURT

To: Travis Eiva, Bob Keating, Shenoa Payne and John Bachofner
From: Timothy C. Gerking, Circuit Court Judge
CC: Shari Nilsson
Date: 3/3/2014
Re: History of ORCP 55 H and 44 E.

This memo is intended to give a historical perspective of ORCP 55 H, with a specific focus on the extent to which a party seeking medical records has an obligation to provide notice to the party whose medical/hospital records are being sought prior to obtaining those records from a hospital/health care provider pursuant to a subpoena. Review of the historical changes to ORCP 55 I and 44 E are also provided as is relevant to this issue.

ORCP 55H, in its original form passed in December 1978, applied only to hospital records, did not impose a notice obligation on the party issuing the subpoena, provided a procedure by which copies of the records could be mailed by the hospital and a procedure for inspecting the records by any party at a trial, hearing or deposition where the records were directed to be delivered.

In 1979 ORCP 44 E entitled "Access to Hospital Records" was amended to require notice to the party whose records are being sought, as follows:

> Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a <u>reasonable time</u> prior to such action to the injured person's attorney, or if the injured person does not have an attorney, to the injured person. [emphasis added]

A notice requirement was first added to ORCP 55H in 1986 when the following change to (2)(c) occurred:

> After filing <u>and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection</u>, 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 [change in rule emphasized].

Presumably, this change was to provide some consistency between this rule and ORCP 44 E.

In 1988 ORCP 55 H(2) was modified again in several significant respects. First, H(2) was modified to provide that, although hospital records may be obtained by a subpoena duces tecum, if disclosure of those records was restricted by law then the requirements of that law must be met prior to any disclosure. Secondly, H(2)(b) was modified to allow for the first time that a subpoena may instruct that records be delivered directly to a party (rather than to a trial, hearing or deposition) as long as "a copy of the subpoena was served on the injured party at least 10 days prior to the service of the subpoena duces tecum" [emphasis added] H(2)(c) was not changed.

In 1988 ORCP 44 E was changed to drop the notice language that was previously present in the rule and, at that point, it simply stated that hospital records must be obtained by subpoena in accordance with ORCP 55 H.

ORCP 55 H was changed again in 1990 by expanding the definition of hospital to include any "health care facility" and "community health programs" and to expand the notice requirement in H(2)(b) from 10 days to 14 days when the subpoena instructed that the records be delivered directly to a party. Again, H(2)(c) was left unchanged.

Another significant change to ORCP 55 H occurred in 1994. H(2)(a) was further limited by providing that if disclosure of the hospital records was restricted by state or federal law, then no records could be disclosed without compliance with those laws and a proof of compliance (i.e. court order, consent) must also accompany the subpoena. H(2)(b) was also expanded by providing that when the subpoena directed delivery of the records to a party, the 14 day notice was to be provided to all parties in the case, not just to the party whose records were being sought. H(2)(c) was not changed.

That same year, 55 I was promulgated that applied to obtaining "medical records" by subpoena. That subsection, among other things, required 24 hour notice to the attorney for the party whose records were being sought, before the subpoena could be served. Sometime prior to 1998 (I am not sure when), the 24 hour notice was changed to 15 days and then, in 1998, the 15 day notice period was reduced to 14 days.

A major overhaul occurred to ORCP 55 H in 2002 with the following significant changes:

1. H(1) was expanded to apply to all "individually identifiable health information";
2. H(2) provided that medical records could not be disclosed unless there has been compliance with all applicable laws;
3. H(2)(a) was totally restructured to require a party seeking medical records to go through a process of providing 14 days' notice to the party whose records were being sought before the health care provider could comply with the subpoena; and
4. H(2)(c) (Scope of Discovery) was included for the first time.

Significantly, H(2)(b), renumbered to H(2)(c), was not changed and still required that a copy of the proposed subpoena must be served on all parties at least 14 days prior to the service of the subpoena when the subpoena directed that the records be delivered directly to a party. Additionally, H(2)(c), renumbered to H(2)(d), was again left unchanged. Finally, 55 I was dropped from the rule.

Also that same year, the title of ORCP 44 E was changed from "Access to Hospital Records" to "Access to Individually Identifiable Health Information" and now provides, in part: "Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H."

No changes with respect to any notice requirements have been made to 55 H since 2002.

I am also attaching the February 25, 2014 memo from committee member, Travis Eiva which also sheds light on the subject.

Sincerely,

Timothy C. Gerking
Circuit Court Judge

ORCP 55 & HIPAA
Travis Eiva to: Tim.Gerking
Cc: spayne

02/25/2014 12:20 PM

Dear Judge Gerking,

Sorry for my delay in getting this research to you, we have been ramping up for a big trial that just resolved on Friday afternoon. Now that my head is finally above water, I have been able to give this matter the attention it needs. Also, I have CC'ed Shenoa Payne on this email, as she was the one whose interpretation of the competing notice requirements of 55H2(a) and H2(c) triggered the need for this research. She may have some additional insights on the matter.

45 CFR 164.512(e)(1)(i-iii) sets out the HIPAA requirements for subpoenas and, in relevant part, provides as follows:

(e) *Standard: Disclosures for judicial and administrative proceedings—*

(1) *Permitted disclosures.* A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party 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

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement

and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(*1*) No objections were filed; or

(*2*) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

Based on the above, it looks like HIPAA does not allow for the medical provider to produce records in response to any subpoena unless the defendant assures the medical provider that it has "made a good faith attempt to provide written notice" to the individual whose records are being sought (in most cases, this is the Plaintiff, but in some cases it could be a non-party). Such assurance of notice is not just a statement that the individual is aware of the subpoena but specifically includes that the issuing party (defendant) provided the individual (plaintiff):

(1) Written notice;
(2) Sufficient information about the litigation to permit the individual whose records are being sought to raise an objection to the court; ***and***
(3) The time for the individual to raise the objection has "elapsed" and either no objection was filed or the court has resolved all objections.

In other words, HIPAA requires that ***before*** a medical provider can deliver medical records in response to a subpoena, no matter if the subpoena directs delivery of the records to the court, an attorney's office, or otherwise, the requesting party must assure that a "good faith attempt" has been made to give the individual whose records are being sought notice of the subpoena, the opportunity to object, and the opportunity to have those objections resolved. Any reading of an ORCP 55H subpoena that directs the medical provider to deliver records ***before*** those things can happen creates a HIPAA violation.

<u>The Interplay with ORCP 55H</u>
The HIPAA requirements discussed above for all subpoenas, including those directing delivery

of the records to the Court, are strikingly similar to the notice requirements laid out in 55H(2)(a). That suggests that Shenoa's reading of the rule that the H2(a) requirements necessarily apply to all subpoenas, including those directing delivery of the records to the court as described in H(2)(c), is correct. The second notice requirement described in 55H(2)(c) does not relieve the requesting party of 55H2(a) notice. Rather, ORCP 55H(2)(c) simply makes an ***additional*** requirement for subpoenas that direct delivery of the records to the attorney of the requesting party. For those subpoenas, the "good faith attempt" at notice required by H(2)(a) is not good enough. For those subpoenas, 55H(2)(c) also requires ***actual*** service of the subpoena on the individual-- "the proposed subpoena ***shall be served*** " on the person whose records are sought.

In most cases the individual whose records are being sought is the plaintiff. So, for all practical purposes, a defendant's "good faith attempt" at notice will meet the added "service requirement" of 55H(2)(c) and therefore that aspect of the rule creates no additional steps. In particular, 55H(2)(c) service is met as long as the defendant mailed, faxed, or personally served the subpoena on the plaintiff's attorney when meeting the minimal requirements of 55H(2)(a). *See* ORCP 7B (service on party's attorney = service on party) (permitting such service by mail, fax, and personal service). I think the added service requirement of ORCP 55H(2)(c) will come up in cases in which the medical records sought relate to a non-party whose location is not known. In those cases, actual service on the individual may not be possible, and therefore the defendant cannot have the records sent to its attorney's office but must have the subpoena direct delivery to a court, hearing, or deposition, (as described in H(2)(c)(i-iii)) where the other parties to the case, the court, or both are present for the opening of the records.

I hope this research and analysis is helpful, Judge. Let me know if you have any additional thoughts or interpretations regarding how we should be looking at this. Thanks much.

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MEMORANDUM

JACKSON COUNTY CIRCUIT COURT

To: Travis Eiva, Bob Keating, Shenoa Payne and John Bachofner
From: Timothy C. Gerking, Circuit Court Judge
CC: Shari Nilsson
Date: 3/3/2014
Re: History of ORCP 55 H and 44 E.

This memo is intended to give a historical perspective of ORCP 55 H, with a specific focus on the extent to which a party seeking medical records has an obligation to provide notice to the party whose medical/hospital records are being sought prior to obtaining those records from a hospital/health care provider pursuant to a subpoena. Review of the historical changes to ORCP 55 I and 44 E are also provided as is relevant to this issue.

ORCP 55H, in its original form passed in December 1978, applied only to hospital records, did not impose a notice obligation on the party issuing the subpoena, provided a procedure by which copies of the records could be mailed by the hospital and a procedure for inspecting the records by any party at a trial, hearing or deposition where the records were directed to be delivered.

In 1979 ORCP 44 E entitled "Access to Hospital Records" was amended to require notice to the party whose records are being sought, as follows:

> Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action to the injured person's attorney, or if the injured person does not have an attorney, to the injured person. [emphasis added]

A notice requirement was first added to ORCP 55H in 1986 when the following change to (2)(c) occurred:

> 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 [change in rule emphasized].

Presumably, this change was to provide some consistency between this rule and ORCP 44 E.

In 1988 ORCP 55 H(2) was modified again in several significant respects. First, H(2) was modified to provide that, although hospital records may be obtained by a subpoena duces tecum, if disclosure of those records was restricted by law then the requirements of that law must be met prior to any disclosure. Secondly, H(2)(b) was modified to allow for the first time that a subpoena may instruct that records be delivered directly to a party (rather than to a trial, hearing or deposition) as long as "a copy of the subpoena was served on the injured party at least 10 days prior to the service of the subpoena duces tecum" [emphasis added] H(2)(c) was not changed.

In 1988 ORCP 44 E was changed to drop the notice language that was previously present in the rule and, at that point, it simply stated that hospital records must be obtained by subpoena in accordance with ORCP 55 H.

ORCP 55 H was changed again in 1990 by expanding the definition of hospital to include any "health care facility" and "community health programs" and to expand the notice requirement in H(2)(b) from 10 days to 14 days when the subpoena instructed that the records be delivered directly to a party. Again, H(2)(c) was left unchanged.

Another significant change to ORCP 55 H occurred in 1994. H(2)(a) was further limited by providing that if disclosure of the hospital records was restricted by state or federal law, then no records could be disclosed without compliance with those laws and a proof of compliance (i.e. court order, consent) must also accompany the subpoena. H(2)(b) was also expanded by providing that when the subpoena directed delivery of the records to a party, the 14 day notice was to be provided to all parties in the case, not just to the party whose records were being sought. H(2)(c) was not changed.

That same year, 55 I was promulgated that applied to obtaining "medical records" by subpoena. That subsection, among other things, required 24 hour notice to the attorney for the party whose records were being sought, before the subpoena could be served. Sometime prior to 1998 (I am not sure when), the 24 hour notice was changed to 15 days and then, in 1998, the 15 day notice period was reduced to 14 days.

A major overhaul occurred to ORCP 55 H in 2002 with the following significant changes:

1. H(1) was expanded to apply to all "individually identifiable health information";
2. H(2) provided that medical records could not be disclosed unless there has been compliance with all applicable laws;
3. H(2)(a) was totally restructured to require a party seeking medical records to go through a process of providing 14 days' notice to the party whose records were being sought before the health care provider could comply with the subpoena; and
4. H(2)(c) (Scope of Discovery) was included for the first time.

Significantly, H(2)(b), renumbered to H(2)(c), was not changed and still required that a copy of the proposed subpoena must be served on all parties at least 14 days prior to the service of the subpoena when the subpoena directed that the records be delivered directly to a party. Additionally, H(2)(c), renumbered to H(2)(d), was again left unchanged. Finally, 55 I was dropped from the rule.

Also that same year, the title of ORCP 44 E was changed from "Access to Hospital Records" to "Access to Individually Identifiable Health Information" and now provides, in part: "Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H."

No changes with respect to any notice requirements have been made to 55 H since 2002.

I am also attaching the February 25, 2014 memo from committee member, Travis Eiva which also sheds light on the subject.

Sincerely,

Timothy C. Gerking
Circuit Court Judge

ORCP 55 & HIPAA
Travis Eiva to: Tim.Gerking 02/25/2014 12:20 PM
Cc: spayne

Dear Judge Gerking,

Sorry for my delay in getting this research to you, we have been ramping up for a big trial that just resolved on Friday afternoon. Now that my head is finally above water, I have been able to give this matter the attention it needs. Also, I have CC'ed Shenoa Payne on this email, as she was the one whose interpretation of the competing notice requirements of 55H2(a) and H2(c) triggered the need for this research. She may have some additional insights on the matter.

45 CFR 164.512(e)(1)(i-iii) sets out the HIPAA requirements for subpoenas and, in relevant part, provides as follows:

(e) *Standard: Disclosures for judicial and administrative proceedings—*

(1) *Permitted disclosures.* A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party 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

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement

and accompanying documentation demonstrating that:

> (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
>
> (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and
>
> (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
>
> (*1*) No objections were filed; or
>
> > (*2*) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

Based on the above, it looks like HIPAA does not allow for the medical provider to produce records in response to any subpoena unless the defendant assures the medical provider that it has "made a good faith attempt to provide written notice" to the individual whose records are being sought (in most cases, this is the Plaintiff, but in some cases it could be a non-party). Such assurance of notice is not just a statement that the individual is aware of the subpoena but specifically includes that the issuing party (defendant) provided the individual (plaintiff):

> (1) Written notice;
> (2) Sufficient information about the litigation to permit the individual whose records are being sought to raise an objection to the court; ***and***
> (3) The time for the individual to raise the objection has "elapsed" and either no objection was filed or the court has resolved all objections.

In other words, HIPAA requires that ***before*** a medical provider can deliver medical records in response to a subpoena, no matter if the subpoena directs delivery of the records to the court, an attorney's office, or otherwise, the requesting party must assure that a "good faith attempt" has been made to give the individual whose records are being sought notice of the subpoena, the opportunity to object, and the opportunity to have those objections resolved. Any reading of an ORCP 55H subpoena that directs the medical provider to deliver records ***before*** those things can happen creates a HIPAA violation.

<u>The Interplay with ORCP 55H</u>

The HIPAA requirements discussed above for all subpoenas, including those directing delivery

of the records to the Court, are strikingly similar to the notice requirements laid out in 55H(2)(a). That suggests that Shenoa's reading of the rule that the H2(a) requirements necessarily apply to all subpoenas, including those directing delivery of the records to the court as described in H(2)(c), is correct. The second notice requirement described in 55H(2)(c) does not relieve the requesting party of 55H2(a) notice. Rather, ORCP 55H(2)(c) simply makes an ***additional*** requirement for subpoenas that direct delivery of the records to the attorney of the requesting party. For those subpoenas, the "good faith attempt" at notice required by H(2)(a) is not good enough. For those subpoenas, 55H(2)(c) also requires ***actual*** service of the subpoena on the individual-- "the proposed subpoena ***shall be served*** " on the person whose records are sought.

In most cases the individual whose records are being sought is the plaintiff. So, for all practical purposes, a defendant's "good faith attempt" at notice will meet the added "service requirement" of 55H(2)(c) and therefore that aspect of the rule creates no additional steps. In particular, 55H(2)(c) service is met as long as the defendant mailed, faxed, or personally served the subpoena on the plaintiff's attorney when meeting the minimal requirements of 55H(2)(a). *See* ORCP 7B (service on party's attorney = service on party) (permitting such service by mail, fax, and personal service). I think the added service requirement of ORCP 55H(2)(c) will come up in cases in which the medical records sought relate to a non-party whose location is not known. In those cases, actual service on the individual may not be possible, and therefore the defendant cannot have the records sent to its attorney's office but must have the subpoena direct delivery to a court, hearing, or deposition, (as described in H(2)(c)(i-iii)) where the other parties to the case, the court, or both are present for the opening of the records.

I hope this research and analysis is helpful, Judge. Let me know if you have any additional thoughts or interpretations regarding how we should be looking at this. Thanks much.

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FAILURE TO MAKE DISCOVERY; SANCTIONS

RULE 46

A **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may [*apply*] **move** for an order compelling discovery as follows:

A(1) **Appropriate court.**

A(1)(a) **Parties.** [*An application*] **A motion** for an order [*to*] **directed against** a party may be made to the court in which the action is pending[,] and, on matters relating to a deponent's failure to answer questions at a deposition, such [*an application*] **a motion** may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A(1)(b) **Non-parties.** [*An application*] **A motion** for an order [*to*] **directed against** a deponent who is not a party shall be made to a court of competent jurisdiction in the political subdivision where the non-party deponent is located.

A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make [*such*] **any** protective order [*as*] it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) **Evasive or incomplete answer.** For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A(4) **Award of expenses of motion.** If the motion is granted, the court may, after **an**

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opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct**,** or both of them**,** to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after **an** opportunity for hearing, require the moving party or the attorney advising the motion**,** or both of them**,** to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B **Failure to comply with order.**

B(1) **Sanctions by court in the county where the deponent is located.** If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the county in which the deponent is located, the failure may be considered a contempt of court.

B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or **Rule** 40 A to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make [*such*] orders in regard to the failure as are just, including among others, the following:

B(2)(a) **Establishment of facts.** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order**.**[*;*]

B(2)(b) **Designated matters.** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing

designated matters in evidence.[;]

B(2)(c) **Strike, stay, or dismissal.** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.[;]

B(2)(d) **Contempt of court.** In lieu of **or in addition to** any of the [*foregoing orders or in addition thereto*] **orders listed in paragraph (a), (b), or (c) of this subsection**, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B(2)(e) **Inability to produce person.** [*Such orders*] **Orders** [*as are*] listed in paragraphs (a), (b), and (c) of this subsection, [*where*] **when** a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B(3) **Payment of expenses.** In lieu of **or in addition to** any order listed in subsection (2) of this section**,** [*or in addition thereto,*] the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * *

SUBPOENA

RULE 55

*****

D **Service; service on law enforcement agency; service by mail; proof of service.**

D(1) **Service.** Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. If the witness is under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent, guardian or guardian ad litem. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i), D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) **Service on law enforcement agency.**

D(2)(a) **Designated individuals.** Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the

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designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) **Time limitation.** If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer. A subpoena may be served by delivery to one of the individuals designated by the agency that employs the officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is required, the officer is currently employed as a peace officer by the agency, and the officer is present within the state at the time of service.

D(2)(c) **Notice to officer.** When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) **"Law enforcement agency" defined.** As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

[*D(3) Service by mail.*]

D(3) Service by mail. Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) **Contact with willing witness.** The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) **Payment to witness of fees and mileage.** The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) **Time limitations.** The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(4) **Service by mail**[*; exception*] **of subpoena not accompanied by command to appear.** Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(5) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action, an attorney for a party in the action or an officer, director or employee of a party in the action.

*****

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

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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 the destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

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:

H(2)(a)(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;

H(2)(a)(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; and

H(2)(a)(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)(b) Within 14 days from the date of a notice requesting individually identifiable health information, the individual or the individual's attorney objecting to the subpoena shall respond in

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writing to the party issuing the notice, stating the reason for each objection. **The party issuing the notice may at any time file a motion with the court to have objections resolved or to otherwise seek compliance with the rule.**

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

H(2)(d) 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: if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; 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; in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records to the attorney or party issuing the subpoena, 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 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)(e) 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 by 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 who produced them.

H(2)(f) 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 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 records, stating in substance each of the following:

H(3)(a)(i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records;

H(3)(a)(ii) that the copy is a true copy of all the records responsive to the subpoena; and

H(3)(a)(iii) that the records were prepared by the personnel of the entity or person acting under the control of either, in the ordinary course of 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 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 used.

H(4) **Personal attendance of custodian of records may be required.**

H(4)(a) The personal attendance of a custodian of records and the production of original records is required if the subpoena duces tecum contains the following statement:

_____

The personal attendance of a custodian of 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 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.

Council On Court Procedures Survey 2014

SurveyMonkey

1. Dismissal without court approval should be available:

	Response Percent	Response Count
not less than 30 days before trial	14.3%	34
not less than 14 days before trial	16.5%	39
not less than 10 days before trial	9.7%	23
not less than 5 days before trial (THIS IS THE CURRENT RULE)	**37.1%**	**88**
up to commencement of trial	13.9%	33
during trial	7.6%	18
should not be available	0.8%	2
answered question		**237**
skipped question		**2**

2. What would the advantages/disadvantages be of the rule written in the way you chose above?

	Response Count
	115
answered question	**115**
skipped question	**124**

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
1	I think its fine the way it is, although a plaintiff should be able to dismiss without prejudice unilaterally, whether or not defendant has filed a counterclaim. Less than five days before trial or during trial should require a motion, since the defendant might argue and the Court might agree the dismissal should be with prejudice.	Feb 26, 2014 2:53 PM
2	For trials to be set, an answer would have to be filed. This question only seems to apply	Feb 25, 2014 5:06 PM
3	Better balance between letting lawyers make the decision with all the relevant information, and not putting opposing counsel through the process of preparing for a trial that gets yanked at the last minute.	Feb 25, 2014 3:43 PM
4	Would encourage settlement. Might also discourage settlement. Could end trials going badly.	Feb 25, 2014 9:32 AM
5	Would hopefully cure the issue of plaintiffs waiting until after an adverse ruling on summary judgment to dismiss their claims without prejudice and then refile.	Feb 25, 2014 8:40 AM
6	Plaintiff's counsel should be able to determine what he/she needs to do much further ahead than 5 days. A "for cause" rule would be appropriate. The defense is naturally spending a lot of time (client's $) in prep and the court needs notice so that other matters can be scheduled with proper notice to the litigants. I don't recall why we have allowed a 5 day rule at this time.	Feb 24, 2014 12:55 PM
7	So that defendants would not have to pay attorney fees for final case preparation.	Feb 24, 2014 12:32 PM
8	Most of the work in preparation for trial occurs during the last two weeks. Prohibiting dismissal without court approval less that 14 days before trial would save needless time and effort spent in preparing for a trial that will not occur.	Feb 24, 2014 11:30 AM
9	14 days will give more notice so defense does not incur trial preparation costs, travel costs and expert witness costs and cancellation fees.	Feb 24, 2014 9:32 AM
10	Preserving a litigant's right to drop the claim when desired is important. There are some risks of abuse, but there is also the right of the litigant to control the claim. Keeping it to the present rule strikes a reasonable balance and keeps someone from seeking a "do-over" if the case does not seem to be panning out during trial.	Feb 23, 2014 11:15 AM
11	The advantage is that a defendant, who is preparing for trial, does not waste the time and energy preparing only to have the case dismissed shortly before trial.	Feb 22, 2014 3:29 PM
12	Don't fix what ain't broke. These decisions get made as negotiations occur the week before trial. True prejudice can happen so judicial input/review is a good thing which can address fairness issues. We know the 5 day rule, which gives an aggrieved party time to react at the last minute, but given that it is "last minute", there is a an overall dynamic that pushes the parties to try it or resolve it.	Feb 22, 2014 11:35 AM
13	Avoidance of fees and expenses that would necessarily be incurred under the current rule.	Feb 22, 2014 11:34 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
14	I can't think of any disadvantages unless forcing people to consume public resources after they want to settle is somehow an advantage.	Feb 21, 2014 7:12 PM
15	Avoidance of trial preparation costs in a case that could simply be dismissed voluntarily, but balancing the right to do so relatively close to trial.	Feb 21, 2014 1:08 PM
16	Avoids unnecessary costs and requires earlier evaluation of trial merits	Feb 21, 2014 12:05 PM
17	The current rule works well. This gives both certainty to the parties and enough advance notice to the court for resources to be used wisely.	Feb 21, 2014 7:30 AM
18	An advantage is that that the closer parties are to trial, the more inclined they are to negotiate a resolution - including a dismissal. The disadvantage is that the current rule is still very close to the trial date and most conscientious attorneys and parties will have done a lot of work and trial prep by this time. I don't really have a strong opinion about changing the rule, though.	Feb 20, 2014 11:56 AM
19	it isn't broken, why change it.	Feb 20, 2014 11:54 AM
20	Current rule and predictable; since a counterclaim could not be dismissed, it doesn't inconvenience defending party. Defending party can still seek a fee award.	Feb 20, 2014 10:22 AM
21	Would cut off significant amount of trial prep and save client funds.	Feb 20, 2014 10:17 AM
22	Extending the period to 30 days would avoid the need for defendants to unnecessarily prepare for trial, only to be dismissed a week or so before trial is set to begin. It would also seem beneficial to the court, and allow better management of the docket since dismissal notices can be sent in by mail, and may not come to the attention of the appropriate court personnel before a case is set to be assigned for trial.	Feb 20, 2014 10:09 AM
23	i dont see any need to change the rule as it stands	Feb 20, 2014 8:54 AM
24	Parties often want to settle on the verge of trial or during trial if information becomes available that makes their case less viable. Allowing a dismissal even during trial urges settlement in a way that allows parties not to waste the precious time of judges and juries during a trial that neither party cares to complete.	Feb 20, 2014 8:03 AM
25	In reality, cases settle any time before and even during trial. Why should the parties need court approval for this? Dismissal during trial necessarily requires court approval, because it involves ending the trial.	Feb 19, 2014 8:02 PM
26	5 days before trial is too close to the eve of trial, stresses court scheduling, and encourages people to wait until the last minute.	Feb 19, 2014 5:48 PM
27	More advance notice of voluntary dismissal may avoid incurring some expert witness costs, and likely free up the court calendar soon enough to allow use of the time for something else.	Feb 19, 2014 4:32 PM
28	I would think that if it were moved up then people might look at their cases a bit earlier? But that may be silly.	Feb 19, 2014 4:10 PM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
29	The parties may be able to save the costs of trial preparation and expert witness costs.	Feb 19, 2014 3:55 PM
30	Leave the parties in control of their litigation.	Feb 19, 2014 3:45 PM
31	none of the above; I would specify not less than 3 days before trial. The primary advantage to this rule from my perspective is where a case settles with mutliple parties, it saves the time of securing counsel's signature on a stipulated dismissal order.	Feb 19, 2014 2:45 PM
32	It is unfair for defendants to have to "gear up" for trial, at great expense to defendants, to allow plaintiffs to "sand bag" and wait until only the week before trial to dismiss the case.	Feb 19, 2014 2:15 PM
33	It gives litigants maximum control over their case but includes a consequence once the trial commences and it becomes a matter of public record.	Feb 19, 2014 1:45 PM
34	Cost to the opposing party	Feb 19, 2014 1:26 PM
35	Most civil litigation involves substantial legal issues or money these days. This change would save some defendants from the cost of pre-trial preparations if the plaintiff intends to dismiss without prejudice. It gives the court an opportunity to prevent abuse by ordering that the dismissal be with prejudice if brought within 30 days of trial. At least that's how I recommend the rule to be implemented.	Feb 19, 2014 1:23 PM
36	Close enough to trial for the parties to be serious, far enough away that court should be able to slot something else productive into the empty time.	Feb 19, 2014 1:05 PM
37	encourage dismissal and minimize judicial interference.	Feb 19, 2014 1:01 PM
38	I am not aware of any good reasons to change the rule. So why change it?	Feb 19, 2014 12:36 PM
39	Advantage: extra week would save client money by not having to ramp up for trial; would require plaintiffs to "make the call" on whether to commit to trial. Disadvantage: could prejudice counsel/plaintiff if trial prep discloses legitimate reason for dismissing case closer to trial date	Feb 19, 2014 12:14 PM
40	Gives the parties a bit more time to know what trial of case will ultimately look like.	Feb 19, 2014 12:09 PM
41	plaintiff in civil case should not be able to drag defendant(s) through civil process and expense up until 5 days before trial and face no consequences if it was a frivolous case all along. There is no harm in requiring court approval of dismissal.	Feb 19, 2014 11:59 AM
42	The problem is the prejudice to opposing party in preparing for a trial that the other party suddenly doesn't want. The issue is not whether to dismiss. Unless there are counterclaims, both sides will want the dismissal. The issue is how late you can dismiss without having to compensate the other side for the expense of preparing for a trial in a case that one party has come to realize should never have been filed. You should leave some opportunity for a misguided party, after discovery, to come to their senses.	Feb 19, 2014 11:59 AM
43	The less policing the courts have to participate in, the more efficiently they can	Feb 19, 2014 11:33 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
	run.	
44	ALLOWS A PARTY TO WITHDRAW FROM THE CASE--HOWEVER IT WOULD BE DONE AT THE RISK OF THE OTHER SIDE BEING AWARDED FEES AND COSTS PROBLEM NOW IS GETTING THE MATTER HEARD BEFORE THE COURTS ON A TIMELY BAIS	Feb 19, 2014 11:17 AM
45	Cases should be dismissed before adverse attorney has to start serious trial preparation	Feb 19, 2014 11:15 AM
46	For me, this does not come up enough to say whether it is a problem or not. I find the current rule very workable.	Feb 19, 2014 11:04 AM
47	In my experience, this rule is relied on when a party really has no intention of taking a case to trial. By requiring that it be employed earlier, it forces such a party to make a decision sooner and lowers the chance that the opposing party will spend the time/money getting ready for a trial that isn't going to happen.	Feb 19, 2014 10:53 AM
48	perhaps i am missing something but how does this hurt someone. if it is a cost or atty fee issue, dismissing voluntarily will not affect any right the opposing party has to file a petition for fees/costs.	Feb 19, 2014 10:52 AM
49	Continuity	Feb 19, 2014 10:52 AM
50	The advantage of allowing a plaintiff to dismiss a case 30 days before trial is to save the expenses for both the plaintiff and the defendant as they will not have to incur expenses in preparing for trial.	Feb 19, 2014 10:50 AM
51	It seems to me that except in the case of a minor, incapacitated person or a class action, there should be no need for Court approval for dismissal an action. Requiring Court approval of a dismissal takes up scarce judicial resources and increases expenses to the litigants.	Feb 19, 2014 10:46 AM
52	Let the attorneys and their clients decide when the matter is over.	Feb 19, 2014 10:44 AM
53	A great deal of work occurs right before trial. If a party intends to dismiss, that wasted work can be avoided if a party communicates the dismissal two weeks before trial. It requires parties to take a serious look at the case before incurring those costs. Though 30 days would be preferable for large cases, 14 days is probably the right compromise for all cases.	Feb 19, 2014 10:43 AM
54	I see no reason to change this rule	Feb 19, 2014 10:37 AM
55	There is no point in continuing a lawsuit that the plaintiff/counterclaimant no longer wishes to pursue. A disadvantage to dismissal during trial is that it might complicate a prevailing party analysis. The defendant might claim that the dismissal was due to the fact that the plaintiff was losing, for example.	Feb 19, 2014 10:32 AM
56	I see no reason the court needs to approve a dismissal when no counterclaim is pleaded. Why not clear the court calendar?	Feb 19, 2014 10:28 AM
57	Defendants prepare for trial in earnest in the two-week period before trial and, unless dismissed by stipulation, a plaintiff should not be able to dismiss within that timeframe because of resources the defendant may have already	Feb 19, 2014 10:24 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
	committed. The defendant may be looking for an attorney fee award at the conclusion of trial to compensate for having to prepare for and participate in the trial and it would be my understanding that he/she/it could lose that opportunity unless the trial goes on as scheduled due to alleged counterclaims. A good argument could be made for the 30-day period.	
58	It would potentially allow for significant reduction in litigation/trial preparation expenses.	Feb 19, 2014 10:23 AM
59	If a plaintiff dismisses 5 days before trial, the defendant has spent a lot getting ready. Note: this question does not say whether the rule against dismissal without court approval when a counterclaim has been pleaded would remain. I assume that it would.	Feb 19, 2014 10:22 AM
60	Better opportunity to call off witnesses, particularly experts, but close enough to trial date so dismissing party is facing the realities.	Feb 19, 2014 10:20 AM
61	Would help tremendously with trial docket.	Feb 19, 2014 10:14 AM
62	To give the parties maximum flexibility.	Feb 19, 2014 10:13 AM
63	A plaintiff should be able to control its claim.	Feb 19, 2014 10:05 AM
64	I only do family law and have never used this rule, so I don't really have an opinion	Feb 19, 2014 10:00 AM
65	It gives some leeway to the plaintiff, but does not burden the defense as much in preparation for trial.	Feb 19, 2014 9:56 AM
66	10 days prior to trial is also the same as the deadline for an offer of judgment prior to trial. At 10 days prior to trial, if the case is unilaterally dismissed by the plaintiff without an agreement with the defendant, the defendant should be entitled to be heard on the dismissal issue as the defendant will be ready for trial.	Feb 19, 2014 9:53 AM
67	Discontinue preparation time for trial 2 weeks prior to trial. That would be reasonable.	Feb 19, 2014 9:53 AM
68	Advantage: dismissal would occur before Defendant has invested increased time and money into trial prepration. also gives the court more flexibility with calendering if a case is to be dismissed. Disadvantage: none. by 30 days prior to trial, a plaintiff should know whether or not the case is viable and should be taken to trial.	Feb 19, 2014 9:52 AM
69	it would save the defendant legal fees in preparing for a trial which, unknown to defendant, is not going to occur	Feb 19, 2014 9:51 AM
70	Much trial planning, cost, expense could be negated if the other side had notice 14 days in advance but I am not sure how this could effect attorney fee claims, if at all.	Feb 19, 2014 9:50 AM
71	Reflects practical realities of settlement but avoids settlements on the courthouse steps.	Feb 19, 2014 9:50 AM
72	Why should you force litigants to continue with a case that the plaintiff wants to	Feb 19, 2014 9:45 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
	dismiss?	
73	I have not noticed any disadvantages with the current rule, but I rarely represent defendants, and I have never needed to get court approval of a dismissal I wanted. Getting court approval to do anything is expensive, and I don't see the advantage to plaintiffs to requiring court approval of a dismissal.	Feb 19, 2014 9:41 AM
74	I have no idea what the advantages of change would be; someone doesn't have enough to do.	Feb 19, 2014 9:36 AM
75	It allows the court more flexibility in scheduling matters and fill in a case when one is dismissed. In the vast majority of cases, a party will know 30 days prior to trial whether it should be dismissed. It will be a rare case where something will happen during the last 30 days before trial that causes a party to want to dismiss it.	Feb 19, 2014 9:36 AM
76	In preparing for trial, a plaintiff should know within 2 weeks before trial if they need to dismiss as required by 54A. Five days before trial means the other side has likely spent considerable time preparing and incurring fees and costs in preparation for trial. Five days or less before trial or during trial just seems like a lack of preparation by the plaintiff which would incur significant fees and costs and waste the court's time.	Feb 19, 2014 9:35 AM
77	so long as the dismissing plaintiff is required to pay any costs or (if applicable) attorney fees as the non-prevailing party.	Feb 19, 2014 9:34 AM
78	It is not a drastic change from the current rule, but since trials are more expensive now to put on, the extra time seems to make sense and potentially saves unnecessary preparation expense in the event of a dismissal.	Feb 19, 2014 9:34 AM
79	I've used the rule as currently written, and had opposing counsel use it. It ain't broke; don't fix it.	Feb 19, 2014 9:32 AM
80	Saves trial preperation costs and let court set its calander.	Feb 19, 2014 9:31 AM
81	Parties should bear the costs for dismissing a case so close to a trial date. It causes crowded dockets and compounds inefficiency. There should be a sanction or some sort of penalty for cancelling a trial so close to a trial date.	Feb 19, 2014 9:31 AM
82	Less cost to client	Feb 19, 2014 9:30 AM
83	reduction of trial prep expenses	Feb 19, 2014 9:28 AM
84	Most of the expense of trial is in the last two weeks before trial. Dismissal after that point should require stipulation or an order.	Feb 19, 2014 9:28 AM
85	It depends on the form of dismissal. If without prejudice, the dismissal should not be allowed once the case is within __ days of trial (I picked 14, but am not wedded to that timeframe) because, otherwise, the plaintiff can cause the defendant to incur a lot of costs, then start over. With prejudice at any time.	Feb 19, 2014 9:25 AM
86	Substantial cost saving as a result of reduced trial preparation and forcing litigants to critically review and evaluate their cases earlier in the process.	Feb 19, 2014 9:25 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
87	I don't know the reason for not letting plaintiff dismiss if no counterclaim is pled. Absent a counter claim or the administrative inconvience of dismissing just before the trial or call date, I don't know why plaintiff wouldn't be able to voluntarily dismiss a claim he/she/it doesn't want to pursue. Maybe there is an issue I am not aware of that would motivate a change in this rule, but otherwise my feeling is that if the rule's not broke, don't fix it.	Feb 19, 2014 9:24 AM
88	I think the rule is acceptable as is.	Feb 19, 2014 9:24 AM
89	Depending on the size of the trial, 5 days is sufficient time to estimate whether trial will commence. Inherent in that decision is the attorneys fees involved in preparing for trial. Should parties settle on the day of trial, that factor is generally part of the settlement discussion. Allowing anything less than that will impact the weight of attorneys fees as a factor for settlement discussions. For the larger time periods, discussion is not relevant, as the current rule allows dismissal within a 5 day window prior to trial.	Feb 19, 2014 9:21 AM
90	Advantage would be to give court opportunity to schedule something else in time allotted for trial, i.e., judicial efficiency.	Feb 19, 2014 9:21 AM
91	Less wasted attorney prep time	Feb 19, 2014 9:21 AM
92	often cases settle at the eve of trial and the court should support that. if it is an issue about scheduling judges, you could schedule back up cases, ie, if trial X settles, than trial Y goes forward. if it doesn't go, its scheduled for the next day. etc	Feb 19, 2014 9:19 AM
93	Advantage: more time to call off witnesses and prevent expenditure on related travel costs; counsel can avoid additional expenses such as juror notebooks, demonstrative exhibit preparation, etc.	Feb 19, 2014 9:19 AM
94	Maximum flexibility for the litigants. An arbitrary rule should not prevent dismissal where it is appropriate.	Feb 19, 2014 9:19 AM
95	Some cases become problematic due to fact problems or choice of remedy. The old saw that a case doesn't get any better after the first day in comes in the door comes true on occasion. To the extent the defendant has been put to a lot of work and absent counterclaims, attorney fees could be made available for late dismissals.	Feb 19, 2014 9:18 AM
96	Same money on unnecessary trial prep.	Feb 19, 2014 9:18 AM
97	If we shorten the time up to the commencement of trial, this allows a plaintiff to wait until the last moment to dismiss while the defendant has incurred significant fees/costs in the last 5 days preparing for trial. Both parties should know their case pretty well when they are 5 days before trial.	Feb 19, 2014 9:17 AM
98	5 days allows sufficient time for negotiation and settlement. Expanding this to commencement of trial or during trial encourages delay to the detriment of the judicial system.	Feb 19, 2014 9:17 AM
99	in many cases that go to trial, the majority of expenses (mainly attorney's fees and expert witness fees) are incurred in the month before trial when final	Feb 19, 2014 9:17 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
	preparation is occuring. If a plaintiff's lawyer knows that he/she is likely to dismiss the case and file a new suit asserting the same claim if the current claim does not settle, the plaintiff's lawyer could as a strategic matter wait until almost the last minute to dismiss the case in hopes of obtaining a settlement, but not incurring trial preparation costs because the lawyer knows the case won't be going to trial. The defense, however, will be required to incur the final preparation costs, only to have the case dismissed at the last minute. Changing the deadline from 5 days to 30 days would eliminate some of the gamesmanship that has been played with last-minute dismissals. If there are legitimate reasons to dismiss the case without prejudcie less than 30 days before trial, the trial judge can always allow that if there is good cause.	
100	Too often I see counsel waiting to the last possible minute. At 14 days the parties should be well aware of their position. Less than 14 days is an undue burden on the courts.	Feb 19, 2014 9:16 AM
101	It would save some last minute trial preparation expense.	Feb 19, 2014 9:15 AM
102	Why should a plaintiff ever be prevented from dismissing an action? Or, to ask the question in another way, why is there ever a benefit in forcing a plaintiff to continue with an action that it wants to dismiss?	Feb 19, 2014 9:13 AM
103	By the time trial is only 14 days out, primary preparation is underway- expending time and money that is unnecessary inat he event of a dismissal.	Feb 19, 2014 9:12 AM
104	14 days prior to trial rather than 5 days prior to trial would save defendants from some trial preparation.	Feb 19, 2014 9:12 AM
105	We might be able to alleviate court burdens and reduce litigation costs.	Feb 19, 2014 9:11 AM
106	Two weeks is a reasonable time to know you will dismiss your case- everyone is preparing for trial and significant expenditures occur in this timeframe.	Feb 19, 2014 9:10 AM
107	Status quo works just fine.	Feb 19, 2014 9:10 AM
108	Avoid forcing the defendant to incur costs that are unrecoverable. Court approval could entail an award of costs as a condition for dismissal.	Feb 19, 2014 9:10 AM
109	It would limit the amount of prejudice suffered by the defendant in preparing for trial. At least in the world of complex litigation, significant trial preparation starts at least 30-days out. Once only five days remain before trial, most of the cost of preparing for trial will already have been incurred.	Feb 19, 2014 9:09 AM
110	Flexibility	Feb 19, 2014 9:09 AM
111	The reality is there are too many lawyers who want to settle on the courthouse stairs. If you push dismissal out further, it is more efficient for the court and pushes folks to resolve in a more timely manner.	Feb 19, 2014 9:09 AM
112	Limits the amount of preparation time potentially wasted by a unilateral dismissal so close to the trial date.	Feb 19, 2014 9:09 AM
113	Allows parties to settle without the additional transaction cost of getting court approval (as long as the Presiding Judge is advised for scheduling purposes).	Feb 19, 2014 9:09 AM

Page 1, Q2. What would the advantages/disadvantages be of the rule written in the way you chose above?		
	When in trial then approval is easy since the partiesa re before the court.	
114	Defendants should not be placed in the position on having to prepare for trial if a plaintiff is contemplating voluntary dismissal. 30 days would provide a better deadline. In the vast majority of cases, the other side will stipulate to voluntary dismissal in any event, so this is really just for those circumstances where you are close to trial, and the defendant has some interest in proceeding and obtaining a defense verdict.	Feb 19, 2014 9:08 AM
115	Gives parties more leeway on negotiating a settlement or resolution leading up to trial without involvement or approval of the court.	Feb 19, 2014 9:07 AM

3. Should court approval be required?

		Response Percent	Response Count
Yes		30.4%	68
No (CURRENT RULE REQUIRES THE COURT'S PERMISSION IF DISMISSAL IS REQUESTED LESS THAN 5 DAYS BEFORE TRIAL)		**69.6%**	**156**
		answered question	**224**
		skipped question	**15**

4. Why or why not?

	Response Count
	111
answered question	**111**
skipped question	**128**

Page 2, Q2. Why or why not?		
1	The plaintiff should be allowed to dismiss unilaterally up to five days before trial, whether or not a counterclaim has been filed, because we want to encourage that, not deter it. There are a variety of reasons why plaintiffs dismiss cases, some of which have nothing to do with the merits of the plaintiffs' claims.	Feb 26, 2014 2:54 PM
2	Court approval should be necessary when you're close to trial -- otherwise, unsavory counsel can yank around their opponents without it ever coming to the court's attention.	Feb 25, 2014 3:44 PM
3	The case does not belong to the court, it belongs to the petitioner.	Feb 25, 2014 9:33 AM
4	Typically the court is called upon to invest significant resources in scheduling a trial, reviewing a motion for summary judmgent and supporting evidence, issuing an order, and ruling on similar motions. Those limited judicial resources should not be wasted because a plaintiff wants to refile and take another bite at the apple or try to draw a different judge.	Feb 25, 2014 8:42 AM
5	Its a plaintiffs decision not to proceed, I do not understand why a court would want a case to proceed if the initiating party no longer wishes to pursue this course of action.	Feb 24, 2014 2:38 PM
6	a very liberal allowance rule would be appropriate and the closer one gets to trial the more weight that might be placed upon the consent of the other party (ies).	Feb 24, 2014 12:57 PM
7	If required to be done sufficiently in advance of trial, court approval should not be necessary. It would be much more efficient for the court and the parties if court approval were not required.	Feb 24, 2014 11:33 AM
8	The defense should have the opportunity to argue prejudice, unfairness, etc.	Feb 24, 2014 9:33 AM
9	There does need to be some control over the risk of abuse, and the potential imposition of a sanction is a litigant has just pulled the chain of a defendant, or is just running a bluff hopiong to squeeze out a settlement.	Feb 23, 2014 11:16 AM
10	If a plaintiff wants to dismisss 30 days before trial, why should court approval be required. If there is a fee shifting provision, defendant will have "prevailed" and gets fees anyway.	Feb 22, 2014 3:30 PM
11	Some circumstances call for finality which is evasive with a voluntary dismissal.	Feb 22, 2014 11:38 AM
12	See prior answer.	Feb 22, 2014 11:36 AM
13	It's not the court's dispute; the court is a forum; if the dispute is over (the parties have reached a settlement), why should the court be asked whether it's OK for the dispute to be resolved?	Feb 21, 2014 7:13 PM
14	Should be required if less than 14 days, or if there is a counterclaim, but not where there are no counterclaims and longer than 14 days before trial. Court approval should be required under those circumstances so that the court can address handling of the counterclaims and to make the party requesting dismissal on the eve of trial offer an explanation and so that the court can address the additional costs incurred by the defending party leading up to trial.	Feb 21, 2014 1:10 PM
15	No court approval if 30 days before trial, otherwise court approval should be	Feb 21, 2014 12:06 PM

Page 2, Q2. Why or why not?		
	required.	
16	By my "No" answer, i mean that the rule should stay the same, which requires approval in some instances.	Feb 21, 2014 10:33 AM
17	So that there assurance that all parties are notified and court resources are not depleted (with scheduling for trials that are not going to occur).	Feb 21, 2014 7:31 AM
18	This is the current rule and was enacted after debate and consideration of the pros and cons of the rule. What data exists that the curent rule is unworkable or is being abused?	Feb 20, 2014 2:49 PM
19	The parties will know their case better than the court, so I don't think a judge needs to be thrown into the mix. However, if a party objects to the dismissal for some reason, court permission should be required....	Feb 20, 2014 11:58 AM
20	it shouldn't be the court's decision if the case is eligible for voluntary dismissal	Feb 20, 2014 11:54 AM
21	current rule is satisfactory	Feb 20, 2014 10:22 AM
22	Delays the process and adds uncertainty.	Feb 20, 2014 10:17 AM
23	My work is mainly defense-oriented in civil litigation. I feel it's appropriate to retain the need for court approval of late dismissals in the unlikely event that they may be unduly prejudicial to a defendant, or if other considerations warrant the imposition of conditions in conjunction with the dismissal order. However, when court approval is required I believe it should be granted in most cases, and that the default position should be that approval will be granted if the plaintiff presents any valid reason for needing a late dismissal.	Feb 20, 2014 10:14 AM
24	There is always plenty of work to be done in courthouses around the state. There's no reason to tie up the court if a party doesn't care to have a judge or jury decide the matter. Requiring the court's approval may result in making an anticipated settlement public, when that is not the desire of the parties.	Feb 20, 2014 8:39 AM
25	Unless trial has already started the court has no compelling interest in dictating whether or not the case may settle. After trial has started, the court might, in its discretion, find that a dismissal would work an undue hardship on a defendant who has spent great time and money preparing for trial, especially if the claim might not be barred by the dismissal. Of course, this same reasoning can be used to support the present 5-day rule.	Feb 19, 2014 8:08 PM
26	Provides incentive to dismiss prior to the court approval deadline	Feb 19, 2014 5:49 PM
27	Allows court to consider burden on and costs incurred by the opposing party, and enter appropriate order.	Feb 19, 2014 4:33 PM
28	I do not have an opinion	Feb 19, 2014 4:11 PM
29	Not the court's issue.	Feb 19, 2014 3:45 PM
30	To allow a party to object; the rule is not clear whether a party may seek costs or attorney fees for having a case dismissed at the last minute.	Feb 19, 2014 2:46 PM

Page 2, Q2. Why or why not?		
31	The current rules require stipulated dismissal when counterclaims have been plead.	Feb 19, 2014 2:16 PM
32	If the parties settle the dispute, it makes no sense to waste the time of the litigants, their attorneys, and the Court, by requiring the Court's permission	Feb 19, 2014 1:50 PM
33	Litigants should have complete control if they are in agreement on whether to utilize court for dispute resolution. The court does not have an independent interest in how or if the case resolves.	Feb 19, 2014 1:46 PM
34	If it is done prior to 30 days before trial - no court approval but if less than 30 days before trial - court approval in order to deal with potential claims of cost incurred by opposing party.	Feb 19, 2014 1:28 PM
35	For reasons cited in answer to previous question - if the dismissal happens within 30 days of the trial date.	Feb 19, 2014 1:23 PM
36	Current Rule suffices.	Feb 19, 2014 1:09 PM
37	Most of the time, the approval of a settlement isn't an appropriate role for a court. In those cases where a court does have a role to play, it's set out in statute.	Feb 19, 2014 1:08 PM
38	A party should be able to dismiss their claims without the court's permission. Requiring court permission just adds costs and inefficiencies to the process.	Feb 19, 2014 1:02 PM
39	Again, why change the rule?	Feb 19, 2014 12:38 PM
40	If without prejudice, yes. Would prevent dismissal solely on the basis that counsel isn't ready.	Feb 19, 2014 12:15 PM
41	Court approval provides remaining defendant opportunity to mitigate any adverse impact due to 11th hour dismissal of co-defendant.	Feb 19, 2014 12:11 PM
42	see prior comments, no harm in requiring court approval.	Feb 19, 2014 11:59 AM
43	See, last answer.	Feb 19, 2014 11:59 AM
44	See above.	Feb 19, 2014 11:33 AM
45	It is not so much the timing as the repercussions, but the question does not deal with that. The issue of course if whether the dismissal is with prejudice and, if it is not, what must the plaintiff do to make it without prejudice (such as paying costs or attorney fees). When the dismissal occurs should be a factor to consider, along with other factors.	Feb 19, 2014 11:31 AM
46	CNA'T GET THE MATTER BEFORE THE COURT	Feb 19, 2014 11:17 AM
47	If the case is being dismissed 30 days before the trial, there is no need. Securing approval is time consuming and expensive to the client.	Feb 19, 2014 11:17 AM
48	Same answer as prior question.	Feb 19, 2014 11:05 AM
49	I think court approval gives an opportunity to request fees/costs for the party seeking dismissal because it puts on the record why the trial isn't going to take	Feb 19, 2014 10:53 AM

Page 2, Q2. Why or why not?		
	place.	
50	if less than 5 days, for court management purposes.	Feb 19, 2014 10:53 AM
51	Current rule	Feb 19, 2014 10:52 AM
52	Court approval should be required only if dismissal is sought outside what the rule requires.	Feb 19, 2014 10:52 AM
53	If the Plaintiff agrees that a case should be dismissed, the Court should dismiss the case. If the Court were to deny a request for dismissal in the middle of a trial what would happen? Would the Plaintiff then be required to finish the trial against his wishes? Except in the case of a minor, incapacitated person or a class action, there appears to be no benefit to requiring Court approval.	Feb 19, 2014 10:46 AM
54	The threat of requiring court approval 14 days before trial will motivate the parties to analyze dismissal, and game the system less, if the right to dismiss requires court approval earlier.	Feb 19, 2014 10:45 AM
55	Judges have better things to do with their time.	Feb 19, 2014 10:44 AM
56	Because it is a hassle to deal with and makes it difficult to dismiss cases that really have little to no merit after conducting discovery, discussion with clients and witnesses, etc. Forcing parties to try a case that they don't want to try is not efficient.	Feb 19, 2014 10:34 AM
57	No purpose.	Feb 19, 2014 10:28 AM
58	If the request comes less than a specified period of time before trial, Court approval should be required and attorney fee award should be permitted to the defendant.	Feb 19, 2014 10:25 AM
59	Administration of Justice	Feb 19, 2014 10:24 AM
60	Yes, so that the court can consider terms	Feb 19, 2014 10:24 AM
61	Only if case is dismissed wtihin the period set by the rule.	Feb 19, 2014 10:21 AM
62	For docket management.	Feb 19, 2014 10:15 AM
63	Why should the court have authority to force parties to litigate when the parties do not want to litigate?	Feb 19, 2014 10:13 AM
64	Party shoudl be free to dismiss own case. not up to court.	Feb 19, 2014 10:12 AM
65	but leave exception for less than 5 days.	Feb 19, 2014 10:07 AM
66	Is "court approval", the dismissal judgment? (Because the rule requires notice of dismissal and then a judgment. How does this affect attorney fee claims for defendants? Perhaps it would lighten the load for judges if Notices (without Court signed Judgments) could be filed but are the defendants more satisfied with a "Judgment of Dismissal"? But - I guess I'll settle on no judge's signature needed generally, unless this affects remedies or implications in other statutes that require a "judgment" of dismissal.	Feb 19, 2014 9:57 AM

Page 2, Q2. Why or why not?		
67	The parties should remain free to resolve the case however they see fit by stipulation. Absent stipulation, the plaintiff should not have the ability to unilaterally control the disposition of the case on the eve of trial.	Feb 19, 2014 9:55 AM
68	Especially, if lengthening the time to dismiss before trial, it's okay for Plaitniff to abandon an action that isn't panning out. However, if keeping the 5-day before trial rule, then court approval should be required, OR plaintiff should owe some of defendant's costs.	Feb 19, 2014 9:53 AM
69	there is probably more likelihood that a plaintiff will dismiss if court approval is not required	Feb 19, 2014 9:52 AM
70	Anything done within 5 days of trial could benefit from the court's oversight.	Feb 19, 2014 9:51 AM
71	You shouldn't need court approval to dismiss a case. If there is an attorney fee issue, that can be dealt with after the fact.	Feb 19, 2014 9:46 AM
72	Unless the defendant has a claim for attorney fees or other recovery that would suffer from the dismissal, there is no need for the court to weigh in on it.	Feb 19, 2014 9:45 AM
73	I don't see any advantage to a plaintiff who wants to dismiss to get court approval. I rarely represent defendants, so I don't know if a court approval requirement would benefit a defendant.	Feb 19, 2014 9:43 AM
74	If there is not counterclaim, there is no reason to require court approval. The dismissal will still allow the opposing party to collect costs and that is sufficient.	Feb 19, 2014 9:38 AM
75	If the parties agree to dismiss whose business is it otherwise.	Feb 19, 2014 9:37 AM
76	Would recommend 14 days before trial.	Feb 19, 2014 9:37 AM
77	If a party wants to dismiss they should be allowed to. I can't imagine the court not agreeing and if there is no counterclaim then requiring court approval is only going to rush an opposing party into filing a counter claim which should have been done long before.	Feb 19, 2014 9:37 AM
78	It should only be required once the trial has begun.	Feb 19, 2014 9:34 AM
79	Keep the rule as is.	Feb 19, 2014 9:32 AM
80	I don't know what the reason for the proposal is and therefore default to the current rule as being sufficient. Generally, I prefer state to federal court because I don't have to get a court order to do relatively simple things that probably don't need to take up judge or attorney time. Obviously, I'd reconsider the rule change if I had a better understanding of why it was being proposed.	Feb 19, 2014 9:32 AM
81	the case belongs to the clients not the court	Feb 19, 2014 9:30 AM
82	Not if it is more than two weeks before trial, and no counterclaim has been made.	Feb 19, 2014 9:29 AM
83	If the dismissal is with prejudice, then court approval should not be required. If, however, the dismissal is without prejudice and is late in the game, court approval should be required because not only does a last-minute dismissal	Feb 19, 2014 9:29 AM

Page 2, Q2. Why or why not?		
	impact the defense, it also has an impact on the court's limited resources because if the case is re-filed, the court's original work will be for naught, as the court will have to start over once the new case is filed. Regardless of whether the cut-off date is 5 days or 30 days, or whether court approval is required, there is another portion of the rule that I believe should be addressed. Under the current rule and case law, a plaintiff's attorney can effectively overrule an Order granting a motion for summary judgment by dismissing the lawsuit after a MSJ has been granted, but before a Judgment has been entered (this is not a hypothetical, I have seen this happen multiple times). The plaintiff then can re-file the case at a later time, and presumably the second time around will specifically respond to the deficiencies in the prior MSJ. I don't think the council on court procedures intended the rules to effectively allow for two bites at the apple on summary judgments (and I don't think the courts like that, considering how time consuming MSJ's can be), but that is one of the unintended consequences of the way the rules are written now.	
84	What problems are caused by the current rule? I have been practicing for over 30 years and have yet to see a problem.	Feb 19, 2014 9:26 AM
85	Court approval would significantly add to the expense of what is likely already considered a less than meritorious action	Feb 19, 2014 9:26 AM
86	Litigants should not be able to put the other side to the expense and considerable effort to prepare for trial only to then dismiss the case on the eve of trial, and then refile the case (which they can do once under the rules). There is a good reason for the current rule.	Feb 19, 2014 9:26 AM
87	The current version of the rule has worked fine for me. I have used it several times.	Feb 19, 2014 9:23 AM
88	Not if per stipulation of all parties (and per prior answer, should be 30 days prior to trial--)	Feb 19, 2014 9:22 AM
89	The court can assess whether dismissal is in good faith and also address any loose-ends that might be necessary.	Feb 19, 2014 9:21 AM
90	At least not in cases represented by legal counsel. Why should a judge be involved in a voluntary dismissal by a party? The party should have control over their action.	Feb 19, 2014 9:21 AM
91	some judges get angry.	Feb 19, 2014 9:20 AM
92	It should be only within a few days of trial.	Feb 19, 2014 9:19 AM
93	Costs and attorney fees (when involved) available to prevailing party.	Feb 19, 2014 9:19 AM
94	Approval should be required close to the trial date to prevent plaintiffs unprepared for trial from dismissing without prejudice and refiling.	Feb 19, 2014 9:19 AM
95	There is no point in having court approval. It is a waste of the court's time and the clients' money.	Feb 19, 2014 9:18 AM
96	Court permission encourages parties to settle more than 5 days out which	Feb 19, 2014 9:18 AM

Page 2, Q2. Why or why not?		
	facilitates judicial efficiency.	
97	This makes no sense. Court approval if less than 5 days? If more than 5 days? If less than 5 or even 14 days there should be court approval, even if just to give the court an opportunity to check for abuse.	Feb 19, 2014 9:18 AM
98	If the plaintiff wants to dismiss I would hope they would call and ask for a waiver of costs in exchange for a dismissal so the dismissal could be with prejudice rather than without prejudice so the file could be closed for good rather than having the case refiled later.	Feb 19, 2014 9:17 AM
99	The court may have its reasons as well as an objection may be forthcoming from the other party e.g. what if there is counter-pleading? or does the dismissal come with prejudice or not? It may be necessary for the court to rule on issues- and parties should take litigation seriously so that they have to think twice about filing and dismissing at will.	Feb 19, 2014 9:14 AM
100	The current rule is fine.	Feb 19, 2014 9:13 AM
101	The court should get involved to determine whether fees or costs should be imposed.	Feb 19, 2014 9:12 AM
102	The court is not as familiar with the case as the attorneys.	Feb 19, 2014 9:12 AM
103	Court approval in general for a dismissal should not be required but if w/in the time specified it should be required	Feb 19, 2014 9:11 AM
104	If parties can settle they should not be tied up by seeking court approval to dismiss a case.	Feb 19, 2014 9:11 AM
105	Approval should be liberally granted, but the approval hearing should be the forum in which a defendant gets to seek fees and the like. If a settlement has been reached, the court should approve the dismissal as a matter of course.	Feb 19, 2014 9:11 AM
106	plaintiff should be able to dismiss without court approval. The formality of court approval seems unnecessary	Feb 19, 2014 9:11 AM
107	I believe the parties involved in the case negotiations should have control over their cases. Sometimes the court is not aware, for good reason, to negotiations and the strengths and weaknesses of cases. The parties should be in control of their cases.	Feb 19, 2014 9:11 AM
108	Same as above.	Feb 19, 2014 9:10 AM
109	The rule works fine the way it is now	Feb 19, 2014 9:10 AM
110	The parties are the best persons to determine if a settlement is reasonable or appropriate, or if voluntary dismissal before trial is appropriate.	Feb 19, 2014 9:10 AM
111	Court approval provides a judicial check on plaintiffs voluntarily dismissing close to trial when the defendant may have some legitimate interest in proceeding to trial due to the time/effort/money already used to prepare for trial.	Feb 19, 2014 9:09 AM

FINAL

ORCP 68 Survey (Judges' Listserv)

Dear colleagues:

We are current members of the Council on Court Procedures and are writing to get your input on two potential amendments to ORCP 68. The first potential rule change would allow a party to submit a statement of attorney fees within 14 days after the entry of a limited judgment, consistent with the timing for such a statement after a general judgment. Currently ORCP 68 C(5)(a), authorizes the award of attorney fees only when that award is included in the proposed limited judgment. Under the proposed change, an attorney fee award could also be entered as a second limited judgment. Of course, the trial court would retain the authority to deny or defer such a request until after the entry of a general judgment.

We are aware that there are good reasons not to award attorney fees and costs as part of a limited judgment. We are also aware that there may be times when it might be appropriate – for instance when all the claims against a particular party in a multi-party case are dismissed. Therefor before considering and further debating this potential rule change, we would like your input on how this change might affect current court procedures. Please provide your thoughts on the following questions:

1. Do you allow awards of attorney fees as part of a limited judgment in a general civil case?
2. If so, under what circumstances?
3. What do you think of the potential change?
4. What impact, if any, do you think the potential change would have on your workload and the workload of your court's staff?

The second potential change would be to add language in Rule 68 to explicitly authorize the filing of a statement of attorney fees for efforts to collect or otherwise enforce the judgment after the general judgment has been entered. The language of the rule requires the statement of attorney fees to be filed and served within 14 days after entry of the general judgment, well in advance of when post-judgment work would typically be undertaken. However, the court of appeals has found that trial courts have the discretion to allow such awards and have even suggested that such a process might be better than allowing anticipatory awards of attorney fees.

1. Do you see statements of attorney fees for post-judgment collection/ enforcement of a general judgment and, if so, do you award fees or even consider statements of attorney fees for post general judgment enforcement work?
2. If such applications are allowed, at what point (and how often) should such statements of fees be allowed?
3. If allowed, under what circumstances?
4. What do you think of the potential change?
5. What impact, if any, do you think the potential change would have on your workload and the workload of your court's staff?

A-Engrossed

House Bill 4143

Ordered by the House February 14
Including House Amendments dated February 14

Sponsored by Representative READ; Representatives BARKER, GOMBERG, KENY-GUYER, LININGER, OLSON, SMITH WARNER, TOMEI, WILLIAMSON, Senators DEMBROW, HASS, PROZANSKI, ROBLAN (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Authorizes court, as part of settlement or judgment in class action, to approve process for payment of damages. Directs court to order that amounts awarded as damages that are not paid to class members be paid to [Oregon Rainy Day Fund] Legal Aid Supplementary Account. Directs Oregon Department of Administrative Services to make quarterly distributions of interest earned by account to Oregon State Bar for funding Legal Services Program.

Establishes Legal Aid Supplementary Account in State Treasury.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to lawsuits; creating new provisions; amending ORCP 32 F and 32 L; appropriating money; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 32 F is amended to read:

F Notice and exclusion.

F (1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E (2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

[F (2)(i) Prior to the entry of a judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage.]

[F (2)(ii) The form of the statement shall be designed to meet the ends of justice. In determining the

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

language and form of the documents to be sent class members under subsection F(2)(i) or (iii), the court shall consider at least: (a) the nature of the acts of the defendant; (b) the amount of knowledge a class member would have about the extent of such member's damages; (c) the nature of the class including the probable degree of sophistication of its members and any special needs created by class members' disabilities; (d) whether it is appropriate for the statement to be prepared in alternative formats, such as large type, Braille, or in languages in addition to English; and (e) the availability of relevant information from sources other than the individual class members.]

[F(2)(iii) When the names and addresses of the class members can reasonably be determined from the defendant's business records and individual monetary recoveries are capable of calculation without the need for individualized adjudications, the court, instead of requiring the statement referred to in subsection F(2)(i), may direct the defendant to send each class member notice of (a) the amount of the monetary recovery that has been calculated for that person and (b) that person's right to request exclusion from the class. All class members who do not request exclusion within the time specified by the court shall be deemed to have requested affirmative relief in the calculated amount.]

[F(2)(iv) The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for all individual class members who have filed the statement required by the court under subsection F(2)(i) or who are deemed to have requested affirmative relief under subsection F(2)(iii), assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[F(2)(v) If the parties agree and the court approves, any of the procedures set forth in subsection F(2)(i) to subsection F(2)(iv) may be waived in a particular case.]

[F(3) If a class member fails to file the statement required by the court under subsection F(2)(i) or if a class member requests exclusion under subsection F(2)(iii) within the time specified by the court, that person's claim for monetary recovery shall be dismissed without prejudice to the right to maintain an individual, but not a class, action for such claim.]

[F(4) Nothing in subsections F(2) or F(3) is intended to allow the court to award any monetary recovery that is not claimed either because a class member failed to file the statement required by the court under subsection F(2)(i), or because a class member requested exclusion under subsection F(2)(iii) within the time specified by the court.]

[F(5)] F(2) Plaintiffs shall bear costs of any notice ordered prior to a determination of liability. The court may, however, order that defendant bear all or a specified part of the costs of any notice included with a regular mailing by defendant to its current customers or employees. The court may hold a hearing to determine how the costs of such notice shall be apportioned.

[F(6)] F(3) No duty of compliance with due process notice requirements is imposed on a defendant by reason of the defendant including notice with a regular mailing by the defendant to current customers or employees of the defendant under this section.

[F(7)] F(4) As used in this section, "customer" includes a person, including but not limited to a student, who has purchased services or goods from a defendant.

SECTION 2. ORCP 32 L is amended to read:

L Form of judgment. The judgment in an action ordered maintained as a class action, whether or not favorable to the class, must generally describe the members of the class and must specifically identify any persons who requested exclusion from the class and are not bound by the judgment. [shall specify or describe those found to be members of the class or who, as a condition of exclusion, have agreed to be bound by the judgment. If a judgment that includes a money award is entered in favor of a class, the judgment must, when possible, identify by name each member of the

class and the amount to be recovered thereby.]

SECTION 3. ORCP 32 is amended by adding a new section O to read:

O Payment of damages. As part of the settlement or judgment in a class action, the court may approve a process for the payment of damages. The process may include the use of claim forms. If any amount awarded as damages is not claimed within the time specified by the court, or if the court finds that payment of all or part of the damages to class members is not practicable, the court shall order that any amounts not paid to class members be deposited in the Legal Aid Supplementary Account established under section 4 of this 2014 Act.

SECTION 4. (1) The Legal Aid Supplementary Account is established in the State Treasury, separate and distinct from the General Fund. All moneys in the account are continuously appropriated to the Oregon Department of Administrative Services for the purpose of the distributions required by this section. Interest earned by the account shall be credited to the account.

(2) Moneys deposited in the account under section 3 of this 2014 Act may not be expended for any purpose and shall be retained in the account.

(3) As soon as possible after the end of each calendar quarter, the department shall distribute the interest earned by the account in the previous calendar quarter to the Oregon State Bar. Amounts distributed to the Oregon State Bar under this subsection may be used only for the funding of the Legal Services Program established under ORS 9.572.

SECTION 5. Section 3 of this 2014 Act and the amendments to ORCP 32 F and 32 L by sections 1 and 2 of this 2014 Act apply only to class actions in which a judgment has not been entered before the effective date of this 2014 Act.

SECTION 6. This 2014 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect on its passage.

Minority Report

B-Engrossed

House Bill 4143

Ordered by the Senate March 3
Including House Amendments dated February 14 and Senate Minority Report Amendments dated March 3

Sponsored by nonconcurring members of the Senate Committee on Judiciary: Senators CLOSE, KRUSE

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Authorizes court, as part of settlement or judgment in class action, to approve process for payment of damages. Directs court to order that amounts awarded as damages that are not paid to class members be paid to Legal Aid Supplementary Account. Directs Oregon Department of Administrative Services to make quarterly distributions of interest earned by account to Oregon State Bar for funding Legal Services Program.]

[Establishes Legal Aid Supplementary Account in State Treasury.]

[Declares emergency, effective on passage.]

Provides that if amounts awarded in certain class actions are not claimed within time specified by court, 50 percent of unclaimed amounts be paid to Legal Aid Account and 50 percent of unclaimed amounts be paid to Domestic Violence Programs Account. Provides that unclaimed amounts may not be considered in attorney fees award.

Establishes Domestic Violence Programs Account in State Treasury. Continuously appropriates moneys in account for use in domestic violence programs.

Directs Secretary of State to conduct financial audit of Legal Services Program at least once every five years.

Directs Oregon State Bar to report biennially on Legal Services Program.

A BILL FOR AN ACT

Relating to lawsuits; creating new provisions; amending ORS 9.577 and ORCP 32 M; and appropriating money.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 32 M is amended to read:

M Attorney fees, costs, disbursements, and litigation expenses.

M (1)(a) Attorney fees for representing a class are subject to control of the court.

M (1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those amounts. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M (1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M (1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M (1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

M (1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

M (1)(e)(ii) Results achieved and benefits conferred upon the class, not including damages that are unclaimed as provided in section 2 of this 2014 Act;

M (1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

M (1)(e)(iv) The contingent nature of success; and

M (1)(e)(v) Appropriate criteria in Rule 1.5 of the Oregon Rules of Professional Conduct.

M (2) Before a hearing under section C of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M (2)(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M (2)(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees; and

M (2)(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

M (3) If an agreement between the representative parties and their attorney provides for the representative parties to pay to the attorney a percentage of damages recovered by the class as attorney fees, the court may not award as attorney fees any percentage of damages that are unclaimed as provided in section 2 of this 2014 Act.

SECTION 2. ORCP 32 is amended by adding a new section O to read:

O Payment of damages. If any amount awarded in a judgment in a class action, other than a judgment approving a settlement, is not claimed within the time specified by the court, the court shall order that:

(1) Fifty percent of the amounts not paid to class members be deposited in the Legal Aid Account established in ORS 9.577; and

(2) Fifty percent of the amounts not paid to class members be deposited in the Domestic Violence Programs Account established in section 4 of this 2014 Act.

SECTION 3. ORS 9.577 is amended to read:

9.577. (1) The Legal Aid Account is established in the General Fund of the State Treasury. All moneys in the account are continuously appropriated to the State Court Administrator for the purpose of [the distributions required by this section.] funding the Legal Services Program established under ORS 9.572. Upon request of the State Court Administrator, the State Treasurer shall create subaccounts within the account for the purposes of managing moneys in the account and distributing moneys from the account as described in this section. The State Treasurer may charge the account for actual costs associated with the administration of the account. Interest earned by the account shall be credited to the General Fund.

(2) Each month, the State Court Administrator shall transfer to the Legal Aid Account, from amounts collected by the State Court Administrator as fees and charges in the circuit courts, the amounts necessary to make the distributions required by subsection (3) of this section.

(3) Each biennium, the State Court Administrator shall distribute to the Oregon State Bar $11.9 million from the Legal Aid Account, using the amounts transferred to the account under sub-

section (2) of this section. Distributions under this [section] subsection shall be made by the State Court Administrator in eight quarterly installments of equal amounts[, with the first distribution to be made as soon as possible after July 1, 2011]. Amounts distributed to the Oregon State Bar under this subsection may be used only for the funding of the Legal Services Program established under ORS 9.572.

(4) The State Court Administrator may make further distributions to the Oregon State Bar from the amounts deposited in the Legal Aid Account under section 2 of this 2014 Act. Amounts distributed to the Oregon State Bar under this subsection may be used only for the funding of legal services related to domestic violence offered by the Legal Services Program.

SECTION 4. The Domestic Violence Programs Account is established in the State Treasury, separate and distinct from the General Fund. All moneys in the account are continuously appropriated to the Department of Justice and may be used only for distribution to district attorneys for use in domestic violence programs. The State Treasurer may charge the account for actual costs associated with the administration of the account. Interest earned by the account shall be credited to the General Fund.

SECTION 5. At least once every five years for as long as the Legal Services Program established under ORS 9.572 receives funding from the state or from local governments, the Secretary of State shall conduct a financial audit of the Legal Services Program established under ORS 9.572. The actual costs of conducting the audits shall be charged to the Oregon State Bar.

SECTION 6. (1) On or before December 31 of every even-numbered year, the Oregon State Bar shall prepare and submit to an appropriate interim committee of the Legislative Assembly a detailed report on the Legal Services Program. The report must include, but need not be limited to:

(a) A list of all legal services providers and individual attorneys that provided services under the program during the previous two years.

(b) A financial report for each legal service provider that provided services through the program during the previous two years, including sources of all revenues.

(c) The number of files opened during the previous two years in each of the following subject areas:

(A) Domestic relations.

(B) Landlord and tenant.

(C) Employment law.

(D) Torts.

(E) Debtor and creditor.

(d) The number of actions filed during the previous two years in each of the subject areas listed in paragraph (c) of this subsection.

(e) The number of cases resulting in a judgment during the previous two years in each of the subject areas listed in paragraph (c) of this subsection.

(f) The number of cases that were filed as an action resulting in a settlement during the previous two years in each of the subject areas listed in paragraph (c) of this subsection.

(g) The number of cases that were never filed as an action resulting in a settlement during the previous two years in each of the subject areas listed in paragraph (c) of this subsection.

(h) The number of administrative claims handled during the previous two years, broken

down by administrative agency.

(i) The number of administrative claims filed and subsequently withdrawn during the previous two years.

(2) The information described in subsection (1)(c) to (g) of this section may not include a miscellaneous category.

SECTION 7. Section 2 of this 2014 Act and the amendments to ORCP 32 M by section 1 of this 2014 Act apply only to class actions commenced on or after the effective date of this 2014 Act.
