

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

Ralph C. Spooner
Chair

Kathryn H. Clarke
Vice Chair

Nicolette D. Johnston
Treasurer

1221 University of Oregon
School of Law
Eugene, OR 97403-1221
Telephone: (541) 346-3990
Facsimile: (541) 346-1564

Maurice J. Holland
Executive Director

Gilma J. Henthorne
Executive Assistant

January 15, 2003

HAND DELIVERED

The Honorable Peter Courtney, President
Senate of the State of Oregon
State Capitol
Salem, Oregon 97310

The Honorable Karen Minnis, Speaker
House of Representatives of the State of Oregon
State Capitol
Salem, Oregon 97310

Dear President Courtney and Speaker Minnis:

I am the current chair of the Oregon Council on Court Procedures. Peter, congratulations on your new position. I sent an identical letter to Senator Bev Clarno and Senator Kate Brown on January 10, 2003, because the president of the Senate had not yet been selected.

I am forwarding AMENDMENTS TO THE OREGON RULES OF CIVIL PROCEDURE (ORCP), which were promulgated by the Council at its meeting on December 14, 2002. This action is taken pursuant to ORS 1.735, which provides that these amendments will become law effective January 1, 2004 unless, and to the extent that, the Legislative Assembly by statute disallows or amends them. The ORCP comprise the rules of civil procedure that govern the trial of civil actions in Oregon's circuit courts. The enclosed amendments to the ORCP are respectfully submitted through your good offices to the 2003 Legislative Assembly by enclosure with this letter.

Lisa A. Arnato, Esq.
Judge Richard L. Barron
Benjamin M. Bloom, Esq.
Bruce J. Brothers, Esq.
Eugene H. Buckle, Esq.
Judge Ted Carp
Kathryn H. Clarke, Esq.
Judge Allan H. Coon
Judge Don A. Dickey
Justice Robert D. Durham
Judge Daniel L. Harris
Judge Rodger J. Isaacson
Judge Nely Johnson
Nicolette D. Johnston
Alexander D. Libmann, Esq.
Connie E. McKelvey, Esq.
Jeffrey S. Merrick, Esq.
Judge Karsten Rasmussen
Shelley D. Russell, Esq.
Judge David Schuman
Ralph C. Spooner, Esq.
David F. Sugarman, Esq.
John L. Svoboda, Esq.

The Chairs of the respective Judiciary Committees will receive copies of this letter with the enclosure. I would be happy to meet, at their request, with the appropriate committee members or staff, or with the leadership of the 2003 Legislative Assembly, to explain the work of the Council on Court Procedures or any of the enclosed promulgated ORCP amendments.

The following background information might be helpful. Tentatively adopted versions of the enclosed amendments, together with one proposed amendment not finally promulgated, were published for comment by the bench, the bar, and the public in the 2002 Oregon Appellate Court Advance Sheets as required by statute. Comments received in response to this publication were carefully considered by the Council prior to its voting to promulgate the enclosed amendments.

The ORCP amendments submitted herewith represent the culmination of efforts by the twenty-two members of the Council who are either judges or trial lawyers, together with our one invaluable public member. These efforts began shortly after adjournment of the 2001 Legislative Assembly. All Council members donate the considerable time and effort required on a pro bono basis. Much of the Council's work, including all of its decision-making, takes place at its monthly public meetings at the Oregon State Bar in Lake Oswego. In accordance with Oregon's public meeting law, advance notice of each monthly meeting, together with an agenda, is published well in advance of each meeting.

In addition to the discussions and debate which occur in the course of its meetings, a great deal of the Council's most demanding and time-consuming work takes place between these meetings, especially in gatherings of the various committees charged with drafting and refining the text of particular proposed amendments. Most suggestions for proposed amendments come from Council members themselves, based on their almost daily experience working with the ORCP, but the Council also regularly receives valuable suggestions from judges, practicing lawyers, and from various organizations having an interest in civil litigation, all of which are accorded careful consideration.

I believe that the enclosed ORCP amendments aptly illustrate the Council's ability to respond to the ever-changing challenges which confront Oregon's civil justice system as a result of substantial and rapid modifications in substantive law and modifications in the technological and social environment in which civil litigation is conducted. Below are brief summaries of the currently promulgated ORCP amendments as herewith submitted to the Legislative Assembly:

ORCP 34 B is amended to remove a potential trap for claimants against decedents' estates which could unfairly bar meritorious claims if personal

representatives or successors in interest fail to give a claimant the required notice within one year of a decedent's death.

ORCP 43 B is amended to impose a duty of supplementation on litigants who, in the course of discovery, are requested to provide opposing parties with documents or other tangible things for inspection and copying. This duty would be to provide, without further request, documents or things responsive to an original request which a litigant discovers or obtains after the date of response to such request. An important purpose of this amendment is to obviate the need for a succession of multiple document requests.

A similar duty to supplement discovery responses exists in many other jurisdictions and in some instances, extends to all discovery modes. However, it was the Council's judgment that a duty to supplement answers to deposition questions in light of subsequently acquired information would be unduly time-consuming and burdensome, and hence would run some risk of driving up litigation costs. It was therefore decided to limit this supplementation duty, which would be new to Oregon discovery practice, to document requests pursuant to ORCP 43.

ORCP 47 C is amended to increase from 45 to 60 the number of days before the date set for trial by which motions for summary judgment, with supporting documents, must be filed and served. The Council heard from several circuit court judges that this increase in time is needed to afford them sufficient opportunity to study the often voluminous documents filed in support of, and in opposition to, summary judgment motions in light of the fact that any particular judge is likely to have several such motions pending decision at any given time.

ORCP 44 E is amended for consistency with the extensive amendments to ORCP 55 described immediately below.

ORCP 55, which concerns subpoenas of health care records, is extensively amended in order to make it compliant with federal regulations recently promulgated under the Health Insurance Portability/Accountability Act of 1996, which impose some new requirements for compelled disclosure of "individually identifiable health information." Among other things, these regulations abolish the distinction formerly drawn between "medical records" and "hospital records," which is the reason for the deletion of former section I of this rule.

Preparing these amendments has proved to be a very challenging and time-consuming undertaking, both because of the complexity of the issues they concern and because of the contentiousness with which some of those issues tend to be viewed by the plaintiffs and defense bars. Special commendation is therefore owed the committee of the Council, chaired by Mr. Jeff Merrick, which labored so

diligently and persistently to resolve successfully the many difficult issues by which it was confronted. That success culminates efforts by the Council extending over three successive biennia.

ORCP 59 B is amended to provide greater impetus to something which many circuit court judges regularly do when feasible and appropriate, which is to provide trial jurors with individual copies of the judge's instructions on the pertinent law to take with them for consultation during their deliberations. Recent studies of juries indicate that jurors find having written copies of the judges' instructions to be significantly helpful to their deliberations. The council also believes that this method of proceeding is likely to reduce the occasions when juries feel constrained to ask that the court be reconvened for the judge to elucidate his or her instructions, thereby avoiding the diversion of time on the part of busy judges and counsel this necessitates.

ORCP 62 F is amended to update the statutory reference.

ORCP 6 C is amended to provide a statutory reference.

All the foregoing amendments are intended to reinforce the long-established and well-deserved reputation of Oregon courts for conducting civil litigation in a manner that is fair to all parties, expeditious, and also cost-effective, both to the taxpayers and to litigants. In that vein, one of the most constructive things done by the Council during the 2001-03 biennium did not involve promulgation of ORCP amendments, but collaboration with the Procedure & Practice Committee of the Oregon State Bar on proposed legislation which should lead to considerable litigation cost savings.

This proposed legislation, which was approved by the Oregon State Bar Board of Governors for forwarding to the Legislative Counsel for pre-session filing, would authorize the optional use of sworn declarations in lieu of traditional affidavits wherever the latter are currently required throughout the ORCP. The requirement that affidavits be notarized, which declarations need not be, frequently entails some needless delay and added expense in the final preparation of documents filed in the course of civil litigation. Authorizing optional use of declarations could not be done by the Council's simply promulgating appropriate ORCP amendments since it also required coordinated amendments to Oregon's statutes concerning perjury. The necessary statutory amendments were prepared by the Council in collaboration with the Procedure & Practice Committee of the Bar.

In accordance with its Rules of Procedure, and as called for by ORS 1.760, I wish to report that the Council members listed below have been elected to comprise the 2003 legislative Advisory Committee: Ms. Kathryn H. Clarke, Hon. Don A.

dickey, Hon. Daniel L. Harris, Ms. Nicolette D. Johnston, and Mr. Ralph C. Spooner.

The purpose of this committee is to provide, upon request, advice and consultation to the Legislative Assembly, its members, or staff, regarding any questions or issues regarding the ORCP or the Council that might arise during the course of the 2003 session. Should any such questions or issues arise, I suggest that Prof. Maury Holland, our executive director, be contacted to notify the members of the Legislative Advisory Committee. (Prof. Holland's phone number at the University Of Oregon School Of Law is (541)346-3834, his fax number is (541)346-1564, and his e-mail address is mholland@law.uoregon.edu.)

In closing I wish to acknowledge significant contributions by several organizations and individuals to the continuing work of the Council apart from that of the hardworking members themselves. First, among these is the continued support the Council has enjoyed from the Oregon State Bar, in particular Ms. Susan Evans Grabe, its Public Affairs Attorney, and Mr. Bob Oleson, its Public Affairs Director. Much credit for the Council's successful collaboration with the Oregon State Bar Procedure & Practice Committee is owed to the Chair of that committee, Mr. Jeff Johnson, as well as its members. The efficiency with which the Council is able to carry on its work is due, in significant measure, to the fine efforts of its staff, consisting of Prof. Maury Holland, our executive director, and Ms. Gilma Henthorne, our executive assistant. Finally, but by no means least, I wish to express the Council's deep appreciation to the Legislative Assembly, both for the continuing trust and confidence it reposes in the Council and for the modest, but important, budgetary support it provides.

Respectfully submitted,

Ralph C. Spooner

Ralph C. Spooner, Chair
Oregon Council on Court Procedures

cc: (Sent on January 10, 2003)
Chair, Senate Judiciary Committee (w/enc.)
The Honorable Max Williams, Chair, House Judiciary Committee—Civil Law (w/enc.)
Members, Council on Court Procedures (w/o enc.)
Mr. Gregory A. Chaimov, Legislative Counsel (w/enc.)
Mr. Bob Oleson, Oregon State Bar Public Affairs Director (w/enc.)
Ms. Susan Evans Grabe, Oregon State Bar Public Affairs Attorney (w/enc.)
Mr. William E. Taylor, Judiciary Counsel (w/enc.)
Prof. Maury Holland, Executive Director, Council on Court Procedures (w/o encl.)

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 14, 2002

COUNCIL ON COURT PROCEDURES

Members

Ralph C. Spooner, Esq., Salem (Chair)
Kathryn H. Clarke, Esq., Portland (Vice Chair)
Nicolette D. Johnston, Portland (Treasurer)
Lisa A. Amato, Esq., Portland
Hon. Richard L. Barron, Coquille
Benjamin M. Bloom, Esq., Medford
Bruce J. Brothers, Esq., Bend
Eugene H. Buckle, Esq., Portland
Hon. Ted Carp, Eugene
Hon. Allan H. Coon, Grants Pass
Hon. Don A. Dickey, Salem
Hon. Robert D. Durham, Salem
Hon. Daniel L. Harris, Medford
Hon. Rodger J. Isaacson, Klamath Falls
Hon. Nely L. Johnson, Portland
Alexander D. Libmann, Esq., Lake Oswego
Connie E. McKelvey, Esq., Portland
Jeffrey S. Merrick, Esq., Portland
Hon. Karsten H. Rasmussen, Eugene
Shelley D. Russell, Esq., Portland
Hon. David Schuman, Eugene
David F. Sugerman, Esq., Portland
John L. Svoboda, Esq., Eugene

Staff

Maurice J. Holland, Executive Director
Gilma J. Henthorne, Executive Assistant

Mailing Address:

1221 University of Oregon
School of Law
Eugene, OR 97403-1221

Telephone: (541) 346-3834
(541) 346-3990
FAX: (541) 346-1564

INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 2003 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2004, unless the Legislative Assembly by statute modifies the action of the Council.

During the 2001-2003 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. New language is shown in boldface with underlining, and language to be deleted is italicized and bracketed.

The Council held public meetings at the Oregon State Bar Center in Lake Oswego, Oregon, on October 13, 2001 and on the following dates in the year 2002: January 12, February 9, March 9, April 13, May 11, June 8, September 14, and December 14.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

Amendments to
Oregon Rules of Civil Procedure

TABLE OF CONTENTS

| | | |
|---------|---|----|
| Rule 34 | SUBSTITUTION OF PARTIES..... | 1 |
| Rule 43 | PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES..... | 2 |
| Rule 47 | SUMMARY JUDGMENT..... | 3 |
| Rule 44 | PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATION..... | 4 |
| Rule 55 | SUBPOENA..... | 5 |
| Rule 59 | INSTRUCTIONS TO JURY AND DELIBERATION..... | 12 |
| Rule 62 | FINDINGS OF FACT..... | 13 |
| Rule 68 | ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS..... | 14 |

SUBSTITUTION OF PARTIES
RULE 34

* * * * *

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

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

B(2) Against such party's personal representative or successors in interest [at any time within four months after the date of the first publication of notice to interested persons, but not more than one year after such party's death] unless the personal representative or successors in interest mail or deliver notice including the information required by ORS 115.003(3) to the claimant or to the claimant's attorney if the claimant is known to be represented, and the claimant or his attorney fails to move the court to substitute the personal representative or successors in interest within 30 days of mailing or delivery.

* * * * *

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

* * * * *

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

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

SUMMARY JUDGMENT
RULE 47

* * * * *

C Motion and proceedings thereon. The motion and all supporting documents shall be served and filed at least [45] 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall enter judgment for the moving party if the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of

the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

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

* * * * *

E Access to [hospital records] individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of [all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person] individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. [Hospital records] Individually identifiable health information [shall] may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

SUBPOENA
RULE 55

* * * * *

[H Hospital records.

H(1) Hospital. As used in this rule, unless the context requires otherwise, "hospital" means a hospital, as defined in ORS 442.015(19), or a long term care facility or an ambulatory surgical center, as those terms are defined in ORS 442.015, that is licensed under ORS 441.015 through 441.097 and community health programs established under ORS 430.610 through 430.695.]

H Individually identifiable health information.

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

H(1)(a) "Individually identifiable health information" means information which identifies an individual or which could be used to identify an individual; which has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and which relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

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

individually identifiable health information for any purpose other than the litigation for which such information was requested and which requires the return to the original custodian of such information or destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

[H(2) *Mode of compliance.* Hospital records may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent. Absent such consent or court order, production of the requested records not so protected shall be considered production of the records responsive to the subpoena. If an appropriate consent or court order does accompany the subpoena, then production of all records requested shall be considered production of the records responsive to the subpoena.]

H(2) *Mode of Compliance.* Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the

subpoena unless the requesting party has complied with the applicable law.

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

[H(2)(a)] H(2)(b) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of [hospital records] individually identifiable health information in an action in which the [hospital] entity or person is not a party, and the subpoena requires the production of all or part of the records of the [hospital] entity or person relating to the care or

treatment of [a patient] an individual [at the hospital], it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. [The copy may be photographic or microphotographic reproduction.]

[H(2)(b)] H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph [H(2)(b)(iv)] H(2)(c)(iv), then a copy of the proposed subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than

14 days prior to service of the subpoena on the [hospital] entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.

[H(2)(c)] H(2)(d) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

[H(2)(d)] H(2)(e) For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of [section D(3) of this rule] subsection (3) of section D.

H(3) Affidavit or declaration of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit or declaration of a custodian of the [hospital] records, stating in substance each of

the following: (i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the records were prepared by the personnel of the [hospital, staff physicians, or] entity or person[s] acting under the control of either, in the ordinary course of [hospital] the entity's or person's business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the [hospital] entity or person has none of the records described in the subpoena, or only a part thereof, the affiant or declarant shall so state in the affidavit or declaration[,] and shall send only those records of which the affiant or declarant has custody.

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

H(4) Personal attendance of custodian of records may be required.

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

The personal attendance of a custodian of [hospital] records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of

Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

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

H(5) **Tender and payment of fees.** Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

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

[I Medical records.]

I(1) **Service on patient or health care recipient required.** Except as provided in subsection (3) of this section, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is not valid unless proof of service of a copy of the subpoena on the patient or health care recipient, or upon the attorney for the patient or health care recipient, made in the same manner as proof of service of a summons, is attached to the subpoena served on the custodian or other keeper of medical records.

I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient not less than 14 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on

the patient or health care recipient not less than 14 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 14-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3) (a) for service on individuals.

I(3) **Affidavit of attorney.** If a true copy of a subpoena duces tecum for medical records of a patient or health care recipient cannot be served on the patient or health care recipient in the manner required by subsection (2) of this section, and the patient or health care recipient is not represented by counsel, a subpoena duces tecum for medical records served on a custodian or other keeper of medical records is valid if the attorney for the person serving the subpoena attaches to the subpoena the affidavit of the attorney attesting to the following: (a) That reasonable efforts were made to serve the copy of the subpoena on the patient or health care recipient, but that the patient or health care recipient could not be served; (b) That the party subpoenaing the records is unaware of any attorney who is representing the patient or health care recipient; and (c) That to the best knowledge of the party subpoenaing the records, the patient or health care recipient does not know that the records are being subpoenaed.

I(4) **Application.** The requirements of this section apply only to subpoenas duces tecum for patient care and health care records kept by a licensed, registered or certified health practitioner as described in ORS 18.550, a health care service contractor as defined in ORS 750.005, a home health agency licensed under ORS chapter 443 or a hospice program licensed, certified or accredited under ORS chapter 443.]

**INSTRUCTIONS TO JURY
AND DELIBERATION
RULE 59**

* * * * *

B Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such

knowledge to the jury, who are bound to accept it as conclusive. [If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or if in the opinion of the court it is desirable, the charge shall either be reduced to writing, and then read to the jury by the court or recorded electronically during the charging of the jury.] The court shall reduce, or require a party to reduce, the charge to writing. However, if the preparation of written instructions is not feasible, the court may record the instructions electronically during the charging of the jury. The jury shall take such written instructions or recording with it while deliberating upon the verdict and then return the written instructions or recording to the clerk immediately upon conclusion of its deliberations. The clerk shall file the written instructions or recording in the court file of the case.

* * * * *

**FINDINGS OF FACT
RULE 62**

* * * * *

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

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

* * * * *

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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

* * * * *