

## COUNCIL ON COURT PROCEDURES AMENDMENTS TO ORCP

### 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.

### PHYSICAL AND MENTAL

EXAMINATION OF PERSONS;  
REPORTS OF EXAMINATIONS

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 shall] **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.**

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.

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 at the hospital] **an individual**, 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 persons] **entity or person** 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:

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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.

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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 Award of and entry of judgment for attorney fees and costs and disbursements.

C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless

of the source of the right to recovery of such fees, except where:

C(1)(a) Such items are claimed as damages arising prior to the action; or

C(1)(b) Such items are granted by order, rather than entered as part of a judgment.

C(2)(a) Alleging right to attorney fees. A party seeking attorney fees shall allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in this subsection.

C(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be alleged in such motion, in similar form to the allegations required in a pleading.

C(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to “reasonable attorney fees” is sufficient.

C(2)(d) Any allegation of a right to attorney fees in a pleading or motion shall be deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing.

C(3) Proof. The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

C(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

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.

C(4)(d) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement.

C(4)(e) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B(1).

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in more than one such judgment.

C(6)(b) Separate judgments for the same claim. When there are separate judgments Approved by the Governor entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B Filed in the office of Secretary of State separate final judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each such judgment as provided in this rule, but Effective date satisfaction of one such judgment shall bar recovery of attorney fees or costs and disbursements included in all other judgments.

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