

**Oregon Rules of Civil Procedure  
HIPAA Preemption**

Gwen Dayton  
Oregon Association of Hospitals & Health Systems

<b>ORCP Rule 44</b>	<b>Substance</b>	<b>Preempted?</b>	<b>Policy Issues</b>
44A	Provides for order for examination when physical or mental condition, or blood relationship of a party is in controversy	No. HIPAA not implicated; does not provide for release of PHI	
44B	Provides for receipt of a copy of the examination report upon request	No. Because the rule provides for release of PHI, however, HIPAA is implicated. HIPAA will require patient authorization for release of examination report. HIPAA and 44B run parallel, they do not conflict.	This presents the basic question if a statute should be amended to reflect HIPAA requirements, even if the statute is not preempted by HIPAA.
44C	Provides for delivery of a copy of all written reports of any examinations relating to injuries for which recovery is sought.	No. HIPAA is implicated because the rule calls for release of PHI. The rule and HIPAA run parallel, with HIPAA requiring an authorization to release the records.	Same as above
44D(1)	Provides for preparation of written report if obligation to furnish report has arisen under sections B or C of the rule	No. HIPAA not implicated.	None
44D(2)	Court may require physician or psychologist to appear	No. Does raise the question, however, about how HIPAA changes	None

	for deposition, or exclude their testimony, if they refuse to prepare written report.	evidentiary privileges. Would patient authorization be required for the physician to testify at deposition or has the privilege been waived?	
44E	Allows party against whom claim is filed to obtain "all" hospital records of injured person, pursuant to ORCP 55H subpoena, within the scope of discovery allowed under ORCP 36B	No. Provides for access to PHI, but only pursuant to subpoena. See HIPAA preemption analysis of ORCP 55. Minimum necessity requirement is dealt with by reference to relevance requirement in ORCP 36B.	The Council on Court Procedures may want to recommend replacing the term "hospital record" with either "protected health information" or "individually identifiable health information."
<b>ORCP 55</b>	<b>Substance</b>	<b>Preempted?</b>	<b>Policy Issues</b>
55A	Subpoena form	No.	No confidentiality issues presented.
55B	Production of books, papers, documents, or tangible things and to permit inspection	No.	<p>Unclear if a party would use this rule to subpoena PHI. ORCPs 55H and 55I specifically address subpoenaing of hospital records and medical records. ORCP 55B simply refers to "books, papers, documents, or tangible things..." and provides for deposition.</p> <p>If ORCP 55B can be used to subpoena PHI, it should be amended to provide for satisfactory assurance of either qualified protective order or sufficient notice to the subject</p>

			of the PHI to allow the subject to object, as required in sec. 164.512(e).
55C	Issuance of a subpoena; by whom	No. HIPAA not implicated	None
55D(1)	Method of service of subpoena	No. HIPAA not implicated	None
55D(2)	Method of service on Law Enforcement	No. HIPAA not implicated	None
55D(3)	Service by mail	No. HIPAA not implicated	None
55D(4)	Service by mail; exception	No. HIPAA not implicated	None
55D(5)	Proof of service	No. HIPAA not implicated	None
55E	Subpoena for hearing or trial; prisoners	No. Not clear that HIPAA is implicated. In any event, service of a subpoena on a prisoner requires court order, satisfying any HIPAA privacy concerns.	The section uses the term “hospital records.” The Council on Court Procedures may want to consider replacing that term with either “protected health information” or “individually identifiable health information.”
55F(1)	Notice of subpoena for deposition	No. HIPAA not implicated. Deals just with proof of service of a notice to take deposition.	None
55F(2)	Place of examination	No. HIPAA not implicated	None
55F(3)	Production without examination or deposition	No. HIPAA not implicated. Merely allows a party who issues a subpoena to command the person to whom it is issued to produce books, papers,	None

		documents or tangible things at a time and place specified in the subpoena, without commanding inspection of originals or a deposition.	
55G	Disobedience of subpoena	No. HIPAA not implicated	None
55H	Subpoena of hospital records	No. This ORCP is not inconsistent with HIPAA. It does not, however, include all HIPAA subpoena requirements.	<p><b>General policy questions about ORCP 55:</b></p> <p>1. Even though ORCP 55H likely survives HIPAA preemption, the Council should consider recommending amendments to conform its language to HIPAA and add HIPAA subpoena requirements. Examples include:</p> <ul style="list-style-type: none"> <li>• Discontinue use of term "hospital records" and substitute "protected health information" or "individually identifiable health information."</li> </ul> <p>"Hospital records" includes records that are not PHI, such as records about internal hospital operations. If we amend ORCP to use the term PHI instead of "hospital record", how are these other records</p>

			<p>subpoenaed?</p> <ul style="list-style-type: none"><li>• Amend ORCP 55H to state that the 14 days notice required in the rule satisfies the HIPAA requirement of sufficient notice to the subject of the records.</li><li>• Amend ORCP 55H to include the HIPAA concept of a qualified protective order.</li></ul> <p>2. Should we merge ORCP 55I into ORCP 55H, calling everything "protected health information"?</p> <ul style="list-style-type: none"><li>- Doing so may expand the scope of ORCP 55. The rule currently does not necessarily cover all PHI. For example, PHI held by health plans currently would not necessarily be subpoenaed through ORCP 55. 55H applies to hospital records and 55I applies only to medical records held by practitioners,</li></ul>
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			health care service contractors, home health agencies and hospice programs.
55H(1)	Defines "hospital"	No	The definition section provides the opportunity to insert HIPAA terms.
55H(2)	Mode of compliance	No, but see the policy discussion.	<p>55H provides the opportunity to expressly impose HIPAA subpoena requirements in state law.</p> <p>55H(2) contains language stating that if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records may not be disclosed unless the requirements of the pertinent law have been complied with, and compliance is demonstrated through an appropriate court order or appropriate consent.</p> <p>The question is whether HIPAA would be considered a law further restricting release of records and thus trigger the need for a court order.</p> <p>This provision may be one reason to include HIPAA requirements in</p>

			state law, so HIPAA does not impose restrictions above and beyond state law and trigger a court order.
55H(2)(a)	Custodian response to subpoena	No. HIPAA not implicated	None
55H(2)(b)	Delivery of records/notice to person whose records are sought	<p>No, but the section should be amended to reflect an additional HIPAA requirement.</p> <p>Sec. 164.512(e) requires a covered entity responding to a subpoena to receive satisfactory assurance of efforts to obtain either a qualified protective order or to provide sufficient notice to the subject of the records to allow the subject to object. If the party chooses to provide notice to the subject of the records, the party must demonstrate that:</p> <p>The written notice included sufficient information about the proceeding to permit the subject to raise an objection;</p> <p>That the time for the subject to raise objections has elapsed and no objections were filed, or that any objections filed have been resolved.</p> <p>It is likely the 14-days</p>	<p>Do we want to recommend an amendment to this section stating that the 14-days notice is deemed adequate notice to permit the subject of the records to object? (Author's note: The Council did decide to make this recommendation, but included it in a completely revised ORCP 55H(2)(a).</p>

		<p>notice required in the ORCP satisfies the requirement for satisfactory assurance of adequate notice to the subject of the records.</p> <p><i>What is missing from the current version of the rule, however, is a requirement that the subpoena contain sufficient information to allow the subject to object, and documentation that the time for the subject to raise objection has lapsed with no objection filed or any objections have been resolved.</i></p>	
55H(2)(c)	Inspection of records	No. HIPAA not implicated	None
55H(2)(d)	Method of service of subpoena duces tecum	No. HIPAA not implicated	None
55H(3)(a)	Affidavit of custodian of records	No. HIPAA not implicated	None
55H(3)(b)	Response to subpoena duces tecum if hospital has none, or only part of records requested	No. HIPAA not implicated	None
55H(3)(c)	When more than one person has knowledge of the facts	No. HIPAA not implicated	None
55H(4)(a)	Personal attendance of custodian	No. HIPAA not implicated	None
55(4)(b)	More than one subpoena duces tecum	No. HIPAA not implicated	None
55H(5)	Payment of fees	No. HIPAA not implicated	None

55(I)	Medical Records	No. Same analysis as for 55H, subpoena of hospital records	Same policy question expressed above: Should we merge 55I with 55H and call it all protected health information? Are we sacrificing any individual rights or in any way expanding the scope of the ORCPs if we do so? (Author's note: The Council decided to recommend merger of these two sections)
55I(1)	Service on patient or health care recipient	No. Does not contain the requirement of 14 days notice, but that requirement is found in 55I(2) and applies to 55I(1).	None
55I(2)	Manner of service	No, but the same amendment discussed under ORCP 55H(2)(b) should be considered here.	Should we recommend amending 55I(2) similar to 55H(s)(b) to make it clear that the 14 days provides adequate opportunity to object?
55I(3)	Affidavit of attorney	No. Deals with when copy of subpoena cannot be served on patient. Requirement to attach affidavit indicating that reasonable efforts were made to serve copy of subpoena on patient likely satisfies HIPAA adequate assurance requirement	Do we want to recommend amendments indicating affidavit qualifies as satisfactory assurance?
55I(4)	Application	No. HIPAA not implicated	None
36B(1)	Scope of discovery	No. Requires that requested information be	None

		relevant to the claim or defense of the party seeking discovery. Is unclear whether HIPAA minimum necessity requirement applies to subpoenas. This relevance requirement mirrors the minimum necessity doctrine.	
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