

MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
 Saturday, March 13, 2010, 9:30 a.m.
 Oregon State Bar Center
 16037 SW Upper Boones Ferry Rd
 Tigard, OR 97224

ATTENDANCE

Members Present:

Hon. Rex Armstrong
 John R. Bachofner
 Michael Brian*
 Brian S. Campf
 Brooks F. Cooper
 Don Corson*
 Kristen David
 Hon. Robert D. Herndon
 Hon. Jerry B. Hodson
 Hon. Lauren S. Holland*
 Maureen Leonard
 Hon. Eve L. Miller
 Leslie W. O'Leary
 Kathryn M. Pratt
 Mark R. Weaver*
 Hon. Locke A. Williams*
 Hon. Charles M. Zennaché*

Members Absent:

Arwen Bird
 Eugene H. Buckle
 Martin E. Hansen
 Hon. Mary Mertens James
 Hon. Rives Kistler
 Hon. David F. Rees

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
<ul style="list-style-type: none"> • ORCP 7D(2)(d)(I) • ORCP 7D(6)(a) • ORCP 9 • ORCP 9F • ORCP 9G • ORCP 36 • ORCP 36B(2) • ORCP 38 • ORCP 39 • ORCP 43 • ORCP 43B(2)(a) • ORCP 46 • ORCP 46A(2) • ORCP 54 • ORCP 54E(1) • ORCP 55 • ORCP 64F • ORCP 68 • ORCP 69 	<ul style="list-style-type: none"> • ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • Moving venue to ORCP 		

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES

Saturday, February 6, 2010, 9:30 a.m.
 Oregon State Bar Center
 16037 SW Upper Boones Ferry Rd
 Tigard, OR 97224

ATTENDANCE

Members Present:

Hon. Rex Armstrong
 John R. Bachofner
 Arwen Bird*
 Michael Brian*
 Eugene H. Buckle
 Brian S. Campf
 Don Corson*
 Kristen David
 Martin E. Hansen
 Hon. Jerry B. Hodson*
 Hon. Lauren S. Holland*
 Hon. Rives Kistler
 Maureen Leonard
 Hon. Eve L. Miller
 Hon. Locke A. Williams*
 Hon. Charles M. Zennaché*

Members Absent:

Brooks F. Cooper
 Hon. Robert D. Herndon
 Hon. Mary Mertens James
 Leslie W. O'Leary
 Kathryn M. Pratt
 Hon. David F. Rees
 Mark R. Weaver

Guests:

David Nebel, Oregon State Bar

Council Staff:

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

*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
<ul style="list-style-type: none"> • ORCP 36 • ORCP 38B • ORCP 38C • ORCP 39 • ORCP 43 • ORCP 46 • ORCP 55 • ORCP 69 • ORCP 71 	<ul style="list-style-type: none"> • ORCP 1E • ORCP 7D(3)(a)(iv) • ORCP 18A • ORCP 19C • ORCP 47 • ORCP 47E • ORCP 55 • ORCP 68 • ORCP 68C(4)(a) • ORCP 69A • Federalizing ORCP • Moving venue to ORCP 		

I. Call to Order (Mr. Buckle)

Mr. Buckle called the meeting to order at 9:35 a.m.

II. Introduction of Guests

There were no guests present that required introduction.

III. Approval of January 9, 2010, Minutes (Mr. Buckle)

Mr. Buckle called for a motion to approve the draft January 9, 2010, minutes (Appendix A) which had been previously circulated to the members. A motion was made and seconded, a voice vote was taken, and the minutes were approved with no amendments or corrections.

IV. Administrative Matters (Mr. Buckle)

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the website report (Appendix B) and noted that the number of visitors and other statistics have remained consistent over the past year. She mentioned the “bounce rate,” and stated that the website’s bounce rate is not quite as low as might be desired. She stated that this may indicate a need for a closer look at the website to make sure that appropriate keywords are included on each page to help users better find what they are seeking. She stated that she and Prof. Peterson will be meeting soon to discuss improvements to the website, and asked Council members to look at the site and to offer their suggestions.

B. Council Funding (Mr. Nebel)

Mr. Nebel gave a brief report on Council funding and stated that funding is likely to be appropriated. He stated that a committee is reviewing all court filing fees and the use of them, and that this committee will recommend how such fees are to be expended. He noted that the Council was previously given authority to spend \$51,000, but no funds were appropriated. He stated that the committee will likely recommend to the budget committee that it enact a bill that authorizes the Council to spend this money, and that this recommendation should happen during the month of February.

C. Council Timeline (Mr. Buckle)

Mr. Buckle noted that, due to the Council’s timeline for publication of proposed amendments, the latest that a first draft of a committee report should be presented to the Council should be at the April meeting. He stated that final drafts of any rule changes need to be presented to the Council by the June meeting.

V. Old Business (Mr. Buckle)

A. Committee Updates/Reports

1. Discovery Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting. Mr. Bachofner indicated that the committee has not met since October. Mr. Buckle asked for a volunteer to be a meeting coordinator for this committee, and Mr. Bachofner volunteered.

2. Uniform Interstate Depositions and Discovery Act Committee (Mr. Corson)

Mr. Corson stated that the committee met by telephone after the last Council meeting regarding the issue of whether self-represented litigants should have access to the out-of-state subpoena process. Mr. Corson stated that he had contacted staff from the Oregon Law Commission (OLC), and the staff indicated that the inclusion of self-represented litigants was intentional. He noted that ORCP 55A allows self-represented litigants to have subpoenas issued by the clerk, and that the committee believes that it is reasonable to allow self-represented litigants to obtain subpoenas from the clerk in the amended ORCP 38.

Mr. Corson stated that the committee did make small formatting changes to the original draft of ORCP 38 (Appendix C). He stated that, until two days before the meeting, the intention was to ask the Council to discuss and move forward to adopt the revised draft in September; however, he received an e-mail from an attorney with concerns about the draft and did not have a chance to talk to the committee about this prior to the current meeting. Mr. Corson asked whether the Council would like to postpone discussion for one more month so that the committee has a chance for further discussion. Judge Holland stated that the new inquiry does warrant review, and Mr. Hansen agreed.

Mr. Buckle noted that the current language of ORCP 38 states that if a mandate, writ, or commission is issued from another court, one can take a deposition. He asked whether the draft rule reduces the ways in which an Oregon deposition in an out-of-state case can be taken, as it states that one can submit a foreign subpoena to the clerk of the court and does not mention a mandate, writ, or commission. Mr. Hansen stated that the revised draft does not eliminate the commission procedure if someone wants to use that procedure, but that the new draft eliminates the need to go before the court and allows one to simply send the subpoena to the clerk of the court in the other state. He stated that it is a new procedure in addition to the old, and is much simpler than the commission process. Prof. Peterson asked what would happen if a party were to use the commission process rather than issuing of a subpoena, as the rule now seems to eliminate the commission process. Mr. Buckle observed that the draft states that the clerk of the Oregon court issues the subpoena, which is different from a lawyer issuing the subpoena. Mr. Hansen stated that the out-of-state lawyer

would issue the subpoena, which would then go to the Oregon clerk, and that the point is to simplify the process by avoiding the need to involve an Oregon attorney or judge.

Mr. Bachofner and Mr. Buckle asked what the procedure would be if a state has not adopted the UIDDA and, therefore, issues a mandate. Mr. Corson noted that ORCP 38C is the only existing authority; therefore, the commission process is eliminated in Oregon. He stated that anyone coming to Oregon would use the new procedure and would no longer have to get a writ or use the commission process in their state. He stated that, when an Oregon lawyer needs to issue a subpoena in another state, he or she uses the other state's process, and that the same principle applies here. Mr. Bachofner observed that the rule, as amended, would mean that, if a party received a writ from another state, there would be no procedure for them to get a subpoena issued. Judge Armstrong stated that the party should not have proceeded in that manner. Mr. Corson noted that the party should have read the Oregon rule before proceeding. Mr. Bachofner questioned whether, if one wants to use the Oregon deposition in another state that says subpoenas must be issued through a commission, that state would accept the deposition. Judge Armstrong stated that, if one takes a deposition in Oregon based on Oregon's rules, an out-of-state court should not reject that deposition based on "improper procedure." Mr. Hansen noted that an attorney wishing to obtain a deposition in a foreign state should read the relevant state's rules to determine the procedure that is required.

Mr. Bachofner stated that the draft rule makes an assumption that other states are consistent with Oregon. Mr. Hansen again stated that an attorney needs to read the Oregon rules. Judge Miller observed that, if the witness is compliant, the procedure is a non-issue. Mr. Hansen stated one must always comply with the jurisdiction of the receiving state. Prof. Peterson asked what would happen if one did not read the Oregon rules and instead issued a commission. Mr. Hansen stated that the draft would repeal the commission process, so there is no need for one. Mr. Bachofner asked whether a procedure should be included in case another state has a requirement that, in order for a deposition to be admissible for trial, it must be duly attained through a commission. Mr. Buckle asked if there was any harm in adding back the mandate language. Prof. Peterson noted that, if time is of the essence, days could be lost if a party uses the commission process and then needs to go back and issue a subpoena. Mr. Hansen stated that, if language about the commission procedure is kept in the rule, confusion may ensue as to whether both a subpoena and a commission are needed. Mr. Bachofner suggested language such as, "nothing in this rule shall prohibit the court from issuing a commission..." Ms. David noted that such language regarding the need to promote uniformity is already contained in section C(6), so a judge might just issue a subpoena in this case anyway. Prof. Peterson asked what the effect would be in states that have not adopted the UIDDA. Mr. Hansen stated that Oregon would adopt the rule, not necessarily a foreign state, and that by adopting the rule Oregon would say "we recognize foreign subpoenas in this fashion." Judge Armstrong observed that the uniformity language is typical for all uniform acts.

Mr. Buckle suggested that the committee discuss these issues more and return to the Council next month with a final recommendation. Mr. Bachofner noted that, as a trial attorney in another state, if his court rules require something, he wants to be sure to comply with his state's rules so that no one can challenge him later. Mr. Corson noted that ORCP 38B gives an attorney different tools to work with, and that the draft does not change ORCP 38B. He stated that he is not familiar with any state that requires a commission or letter rogatory in that state to obtain a deposition in another state.

Prof. Peterson noted that, in the proposed draft language, a judge is not involved in any way. He envisioned a scenario in which an out-of-state attorney obtains a commission in his or her state and presents it to an Oregon clerk. He expressed concern that a clerk may note that the commission is not a subpoena and be unable to issue a subpoena, and that the judge will not be able to issue one either because the commission process has been repealed. Mr. Corson stated that the committee can ask for more input from the OLC regarding this concern and whether it was addressed before the recommended language was drafted.

Mr. Buckle noted that a request to issue a subpoena does not constitute an appearance in an Oregon court, but that a request to quash a subpoena is an appearance. He asked what the effect of the new rule would be on this issue. Mr. Corson stated that an attorney is not appearing on behalf of a party in an Oregon court simply by requesting the issuance of a subpoena here. He stated further that, if an out-of-state attorney asks for an Oregon subpoena and violates Oregon rules, the Oregon court does have jurisdiction to issue sanctions. Mr. Buckle said that, when he sees the word "appearance," he thinks of it as a party appearing rather than an attorney appearing. Mr. Hansen stated that the Oregon court merely has personal jurisdiction over the witness. Since there is no court appearance, an Oregon-licensed attorney is not necessary. He noted that, if another issue arises and an attorney wishes to attempt to quash the subpoena, an Oregon attorney then needs to be involved. Judge Miller asked whether the court would have jurisdiction over the foreign party seeking the subpoena. Mr. Hansen stated that the foreign party is not appearing in Oregon court for any reason, so jurisdiction is only over the witness. Justice Kistler asked whether the draft language would foreclose, in a case where seeking to subpoena an Oregon resident is an abuse of process, an Oregon court from holding accountable the person responsible for the abuse of process. Mr. Hansen stated that a request for a subpoena in Oregon does confer authority for sanctions from an Oregon court.

Mr. Bachofner asked whether, when a motion for a protective order is made, the response would constitute an appearance or would the party be able to respond without appearing *pro hoc vice*? Mr. Corson stated that the party would have to hire an Oregon lawyer to respond. Mr. Hansen reiterated that a motion to enforce from an out-of-state lawyer, or a motion for sanctions or contempt, would constitute an appearance. He noted that the only thing that is not an appearance is

the request to issue a subpoena. Mr. Bachofner suggested adding “or response thereto” to the second line of ORCP 38C(5) to make it clear that any response to a motion constitutes an appearance. Mr. Buckle stated that the committee can take that into consideration during its discussions.

3. Rule 54 Issues Committee (Judge Rees)

Judge Rees was not present at the meeting. Committee members noted that the committee has not met in quite some time. Mr. Buckle asked for a volunteer to be a meeting coordinator for this committee, and Ms. Leonard volunteered.

4. Electronic Discovery & Filing Committee (Ms. David)

Ms. David stated that the committee has met and put together drafts of ORCP 36, 39, 43, 46, and 55 (Appendix D). She noted that the draft of ORCP 43B removed ORCP 43B(1), but that the committee had intended to keep that language in place. Ms. Nilsson stated that slating the section for removal was her mistake and that she will correct the draft of ORCP 43B to keep section B(1) intact.

Ms. David stated that the goal of the committee was to emphasize that, if one is going to request electronically stored information (ESI), there is a duty within 20 days to confer about the issues, including the scope of the request, costs, etc. She stated that this conferral period is not intended to be comprehensive but, rather, to start discussion and to get consensus as to the issues on which the parties do and do not agree. She noted that a new section, ORCP 46E, would add sanctions for failure to comply with the conferral requirement, and that ORCP 43B(1)(b) would state that no motion regarding ESI could be filed until the moving party complies with conferral under this section and under the Uniform Trial Court Rules (UTCRC). Ms. David emphasized that, because every case will be different, and every case will have different types of ESI, conferral is needed. She stated that the committee has spent a lot of time on how to fashion a rule that gives parties direction, yet requires that they identify any problems before turning matters over to the court.

Judge Miller noted that UTCRC 5.010 requires conferral, and wondered why another conferral component or requirement is needed. She asked whether it is the 20 day period that is particular to ESI and wondered why modifying the UTCRC is not more appropriate. Mr. Bachofner stated that the UTCRC addresses motions to compel. Ms. David stated that the committee felt there was a need to help point the parties in the right direction regarding ESI, even before they reach the point of seeking a motion to compel. Mr. Hansen stated that ESI is so unique that it becomes a rule issue rather than a dispute issue, even as to how to make the request. Judge Miller stated that she hoped the change would reduce the need to reach the dispute level.

Ms. David stated that the committee was not set on the 20 day period, but that they felt that 20 days gave a little more time and was still within 30 day window to respond. Mr. Hansen stated that the rule should make it clear that, even if the parties have spent the first 20 days on conferral, the total period still consists of 30 days (i.e., that the 30 day clock is still running). Mr. Bachofner suggested that a 15-day period might be better. Mr. Hansen asked whether the 30 day rule must stay fixed if the parties are conferring in good faith to determine the procedure for receiving ESI. Judge Miller asked if one could ask the opposing counsel to waive the 30 day period if one is making a good faith effort to comply. Mr. Hansen stated that, in a perfect world, that type of request would happen. He noted that we are recognizing the complexity of ESI by building in a 20 day time period, but that there is no other rule in discovery that says that the 30 day clock has a 20 day sub-period. Ms. David noted that the draft of ORCP 43B(2) states that, within 30 days of the service of the request, a party shall serve a response. She stated that the need to respond is still there and that no exception is created, but that one must commence conferring within 20 days. Mr. Hansen stated that the draft rule only states that one must *begin* conferring within 20 days, and feels that 20 days is too long. Mr. Bachofner concurred that, in an ideal world, the conferral would begin immediately when the request is received, but that it is not an ideal world.

Judge Miller asked whether, if one begins conferral within 10 days and still has time remaining in the 30 day period, one can respond by saying “I’m working on it?” Mr. Hansen noted that the response rule the Council amended last biennium states with certainty that a “response” means to provide the requesting party with the materials asked for. Prof. Peterson wondered whether the material is clearly within a party’s custody or control if it is not in the desired format. Mr. Buckle stated that a 10 day period might be better than 20. Mr. Hansen noted that the intent of the draft rule is to make sure that parties reach an agreement through conferral, and asked whether the 30 day period can begin running for ESI (as opposed to other documents) at the point during which the parties reach an agreement on format, costs, etc. Mr. Buckle stated that, 90% of the time, the parties agree to extend the time, and in the other 10%, one party files a motion for a protective order and takes the issue to the court.

Prof. Peterson wondered whether a party could file an objection stating one’s inability to produce the material within 30 days and stating that one needs more time. He stated that, if the requesting party were unhappy about the requested extension, he or she could confer as required by UTCR 5.010 and file a motion, and most judges would allow more time. Judge Miller stated that no judge will punish someone making a good faith effort, and the time it takes to docket and set the motion would give more time to produce in any case. Ms. David noted that the draft provides for filing an objection, and that the committee considered 10 days but was concerned that, by the time the request is received by an attorney, sent to the client, etc., the 10 days may have already passed. She noted that, since the Council might eventually consider moving to a “multiples of seven” rule model, 14 days might be an appropriate time period. Ms. David stated that the

committee would like to circulate the draft rules to OLTA and OADC for comment. Judge Miller also suggested sending them to the Oregon State Bar corporate counsel and other business attorneys. Ms. David suggested tabling the issue for 30 to 60 days to get feedback from the bench and bar.

Mr. Corson asked whether ORCP 43B(2)(e) is necessary, as ORCP 43B(2)(d) already provides for objections. He stated that he sees the draft changes as a dramatic change in Oregon law because electronic documents are currently assumed to be in the concept of documents, and under the draft language, ESI would be seen as something different. Mr. Corson noted that most of what he receives now when he requests “documents” are electronic documents. Judge Zennaché stated that the committee clarified the issue by listing ESI in the general discovery rule, because the OSB Procedure and Practice Committee wanted clarification that ESI was covered by the discovery rule (ORCP 36). He noted that the Sedona Conference and subsequently adopted *Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* put emphasis on the parties conferring early in the process. He stated that these suggested changes create a mechanism by which the parties can confer early in the process. Mr. Corson stated that he does not necessarily disagree with this concept but that, definitionally under ORCP 36A(1), documents include ESI. He suggested a language change to “documents, including ESI” rather than defining ESI separately. He stated that he has no quarrel with the conferral concept. Judge Hodson agreed and stated that he does not feel it hurts the intent of the rule change to state it in this way. He stated that he would like the legislative history to reflect that the Council believed that ESI is already included in the rules, but that this change was an attempt to clarify it.

Judge Miller noted that ORCP 43's title is “Production of Documents and Things,” and can remain such as long as it is clear that ESI is included. Mr. Hansen noted that he had a client who was convinced that ESI was not included in “documents” and believed that “documents” only referred to printed material. Judge Miller asked whether the “documents” and “tangible things” referred to in ORCP 43's title clearly include ESI. She asked whether “documents” encompass ESI or whether “things” encompass ESI. Mr. Campf agreed that, looking at “documents” in the title, one may not see right away that it includes ESI. Judge Miller stated that, if the draft is adding a third category of ESI, the title should perhaps reflect this. Mr. Buckle stated that ORCP 43 always referred to production of documents, which used to refer to traditional documents. He noted that “documents” are now stored in different manners and that defining “documents” as including ESI may be sufficient. Judge Miller asked why the draft would give ESI a separate category instead of defining it. Ms. David noted that the draft of ORCP 43B(1)(a) states that, unless ESI is requested specifically, a request does not include it. She stated that the committee was attempting to protect the person who responds in good faith and believes they have provided all information, but the other side then says “I wanted ESI too.” She noted that the purpose of clarifying the rule is to let practitioners know that, if they want

something specifically, they need to state clearly their request and to confer. Mr. Buckle observed that many attorneys will ask as broadly as possible for everything and then decide what is relevant; these attorneys will always request paper documents and ESI.

Judge Holland observed that it appears that some of the issues have to do with how to receive the information, as opposed to what is being requested. She stated that, most of the time, the person who has the stored information has more knowledge of what information is held and in what form than the person who is seeking that information. She stated that requesting ESI is different from a broad brush request because the person requesting does not know what the other side has, yet wants everything that may be relevant. She stated that putting the onus on the requesting party shifts what was done previously, and wondered whether this is the goal of the proposed rule change. Judge Holland stated that conferring about how to get information might be more properly addressed in the UTCR. She expressed concern that the proposed ORCP 46E may be getting into substantive issues by making a specific exception since, if a sanction is requested and a good faith effort has been made, it is already covered. Judge Zennaché stated that ESI comes in a variety of forms (a contract can be printed, in PDF format, or in a Word file where changes in metadata can be tracked). He stated that, since there is such a variety, the change is not trying to prohibit a party from asking, but is requiring that party to specify the format and to discuss the request. He noted that the committee wanted to create a safe harbor with ORCP 46E for those acting in good faith, but that the committee could go either way on keeping that section.

Mr. Bachofner stated that it is a reality of a practice that people will include “everything” in a stock request for production, and that there could be a huge expense if a broad request is made. He stated that the proposed rule attempts to get to the reality of the situation and require the parties to discuss and determine what is really needed. Mr. Buckle stated that a request for ESI may specify the form or forms in which ESI is to be produced, and wondered who pays to put the ESI into the requested form if the other side does not keep it in that form. Judge Zennaché noted that this is the reason for the conferral process. Mr. Campf agreed that a rule cannot address this question, but that the conferral process can. He stated that the conferral process is the most important part of the change, so that disputes can be headed off early. He noted that the committee chose not to define ESI because it will change over time. Prof. Peterson wondered why the committee had deleted “phono-records.” Mr. Campf stated that the committee had interpreted it as “sound recordings” and therefore replaced it with that term.

Ms. David stated that the committee will meet again and discuss and redraft if necessary. She noted that there is benefit to getting the drafts to the bench and bar early because it would be such a large rule change. Mr. Hansen stated that he sees no disadvantage to circulating the drafts in their current form, and that he would like to hear what people think early. Prof. Peterson noted that the Council’s

timeline is to have rules essentially approved in June to publish in September. Judge Zennaché suggested circulating for comment for 30 days and seeing what people think. Prof. Peterson asked whether the Council would like to change the time period to 14 days. Council members agreed. Mr. Corson stated that he would like to think about his position for a bit before deciding whether he would like to define ESI separately or change the draft language to “documents, including ESI.” Judge Zennaché suggested giving Council members a chance to respond to the committee first before circulating a draft to the bench and bar. It was agreed that the committee will circulate the drafts for comment after giving Council members 14 days to comment to the committee.

5. Service and Filing Committee (Mr. Cooper)

Mr. Cooper was not present at the meeting. Committee members noted that the committee has not met in quite some time. Mr. Buckle appointed himself as meeting coordinator for this committee.

6. Counterclaims in Domestic Relations Motions Committee (Judge Miller)

Judge Miller discussed her committee’s report to the Council (Appendix E). She stated that the committee believes that the requested change is a good idea but has not yet determined whether the best way to make such a change is through modifying the ORCP or the UTCR. She stated that, while subsection 1 of UTCR 8.050 states that modification proceedings must be initiated by an order to show cause, UTCR 8.040 does not state that an order to show cause is necessary. However, in practice, an order to show cause is necessary in order to get the matter heard. Judge Miller noted that Judge Williams recommended a joint UTCR-Council work group to look at the issue. Judge Miller stated that she has been in contact with Bruce Miller of the UTCR Committee, who will do further research and let the committee know whether the UTCR Committee has addressed this issue in the past. Unfortunately, the UTCR Committee’s legislative history is not as accessible as is the Council’s.

Judge Miller noted that the Council should be looking for economical and efficient ways to make modifications of family law judgments, and that making a change that would require a party to pay an additional filing fee to file a cross-motion may not be in the spirit of the Council’s mission. She stated that, since the cross-motion does not put further burden on the court, the additional fee may not be necessary. Mr. Buckle noted that, in the domestic relations area, minimizing fees is a good thing. Judge Miller stated that she did some research and found that orders to show cause come up in a variety of other areas besides family law, but that the family law prejudgment relief and post judgment modification areas are the only two areas that the Council would want to impact, not orders to show cause in a wholesale fashion. She stated that Ms. Pratt will do more research to see whether there are any other contexts that the committee should look at, but that it seems that, if a modification can be drafted, only the ORCP and/or UTCR

would be impacted and that nothing would have to be changed in the statutes.

7. Default Judgment Committee (Ms. David)

Ms. David noted that the committee has met and is working on a draft of changes to ORCP 69 which should be presented at the next Council meeting. She stated that the committee is also working on a memo regarding its recommended changes to ORCP 71, which will include legislative history and why the committee recommends abolishing the extrinsic v. intrinsic distinction.

Ms. David stated that Ms. Nilsson is researching the occurrence of the word “appear” in the ORCP, and that the committee is looking at past Council legislative history regarding defining motions and appearances in the ORCP. She noted that, when she has spoken with members of the bar and bench regarding this issue, some see it as an Oregon Judicial Information Network problem but others say it is simply an education problem in the courts. The committee is still attempting to determine whether it is a rule change or education issue. Judge Miller stated that a related issue occurs when a self-represented party files some type of document (a letter, etc.) with the court as a response. The clerk accepts the document and a filing fee, but the plaintiff objects, stating that the document is not a motion or an appearance.

Ms. David reiterated that the main problem is arising, for example, when a UTCR 7.020 notice is issued stating that the case will be dismissed unless an appearance is filed, but the parties are currently arguing Rule 21 motions, which by that rule are required to be raised before an answer is filed. Judge Miller stated that, to her, it is clear that a Rule 21 motion or change of venue motion counts as an appearance, but Ms. David replied that this is not so clear to certain judges in the state. Ms. David noted that, if the committee attempts to define the term “appearance,” this may help address the issue relating to self-represented litigants that Judge Miller identified. Judge Miller noted that the UTCR notice of dismissal was not designed to weed out the good cases from the bad, but merely to remind people that they have a lawsuit pending and need to take action. Ms. David observed that certain counties seem to believe that a defendant must file an answer to put the case at issue to set a trial date, but that UTCR 7.020(4) already provides that, if all defendants have made an appearance, the case will be deemed at issue 91 days after the filing of the complaint or when the pleadings are complete, whichever is earlier. She noted that the committee is attempting to fix a flaw in the system. Mr. Buckle suggested that any Council members who would like to provide input on the issue should contact the committee.

8. Time Issues (Ms. Pratt)

Ms. Pratt was not present at the meeting and, therefore, did not provide a report.

9. Incorporating Underlying Agreement in Complaint (Judge Herndon)

Prof. Peterson noted that the committee had decided that this is likely a substantive issue and an issue for the legislature to address, but that Sen. Suzanne Bonamici had wanted to appear before the Council and take part in the discussion. Prof. Peterson will contact Sen. Bonamici to see when she may be available to attend a Council meeting or to meet with the committee to discuss the matter.

10. “Must” v “Shall” in the ORCP (Mr. Buckle)

Mr. Hansen stated that the committee had spoken briefly on this issue. He stated that he is doing research and that the usage of these words in the ORCP is inconsistent (sometimes “shall” is the only grammatically correct choice, sometimes “must” is used when “shall” could be, and vice versa). He noted that no global change can be made. Mr. Buckle stated that Mr. Nebel had made a good point about “must” typically being used when there is no actor and the passive voice is used. Ms. David stated that she has been looking at statutory construction and case law, and found that sometimes the word “may” has been construed as “must.” She stated that she is hesitant to make too many changes because case law has been based upon these distinctions in the rules. Mr. Buckle noted that the Council’s mission is to repair problems and make things run efficiently, and that he is not aware of a particular problem with this issue at the moment. Mr. Corson reminded the Council that the issue was brought up by the Oregon Law Commission during discussion of the UIDDA, and that he is not sure that it is an urgent issue but, rather, merely an issue brought up for consideration. Mr. Buckle asked whether there was a sense of a problem that the OLC had identified. Mr. Corson replied that there was split of opinion and that the OLC staff person did not think it was an urgent issue but acknowledged that it had been brought up by others who were trying to make the usage of “shall” and “must” more uniform.

Mr. Buckle noted that the UIDDA committee had decided to use the word “shall” because it found more instances of the word “shall” than the word “must” in the rules. Prof. Peterson stated that it may be a good idea to change those rules that include both “must” and “shall” in the same rule to all “shall” to show that there was no distinction intended between the two terms. Mr. Hansen stated that the Council could purge all occurrences of the word “must” from the rules to eliminate the issue, but that not all instances of “shall” can be replaced with “must.” Mr. Buckle stated that this is not an issue specific to any one rule, and wondered whether the Council can include in its legislative history that the Council intends that “shall” and “must” in the ORCP are synonymous. Mr. Corson noted that he does not believe the Council can create a legislative history

for rules after they have been adopted. Mr. Hansen stated that use of the word “must” (other than in passive voice instances) seems to have begun in recent years and that he is not certain why. Prof. Peterson asked whether having a discussion of, for example, why the Council decided not to change an instance of “must” to “shall” or vice versa, and having that discussion included in the Council’s legislative history, would be helpful to show the Council’s intent. Justice Kistler noted that courts typically say that a failure to change a statute or rule does not provide any insight into the original meaning of the rule. Mr. Buckle stated that the committee will continue to look into the issue and report back to the Council next month.

B. Communication with Legislators (Ms. David)

Ms. David stated that she has not yet sent a draft e-mail to the listserv but will do so shortly.

VI. New Business (Mr. Buckle)

No new business was raised for discussion.

VII. Adjournment

Mr. Buckle adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

**Council on Court Procedures
Website/Inquiries Update
Reporting Period: 2/6/10 - 3/11/10**

I. Inquires

The Council received several inquiries and suggestions during this reporting period, including:

- ▶ An e-mail inquiry regarding the legislative history of ORCP 5 and ORCP 20J. The inquirer was referred to the website.
- ▶ An e-mail request for help with a criminal law/constitutional law issue. The inquirer was sent the Council's standard reply letter with information about resources and statutes of limitation.
- ▶ A proposal submitted via the website asking the Council to update ORCP 7 to correct the outdated reference to ORS 646.221. The inquirer was informed that the Council had done this last biennium and was referred to the website.
- ▶ A request via the website to join the Council's automatic notification list.
- ▶ A telephone call to Prof. Peterson regarding legislative history of ORCP 18A. The caller was referred to the Council website and told Prof. Peterson that he was going to tell his friends about this "great new tool."
- ▶ A telephone call to Prof. Peterson from a sophisticated *pro se* litigant confirming that the ORCP do not apply to the Marion County Municipal Court.

II. Updates to Website

Prof. Peterson and I have been studying the website and have made the following organizational changes:

- ▶ Creating a separate page which contains links to the current ORCP, both at the Legislature's site and the Council's PDF file with bookmarks to each rule. This should help eliminate confusion on the part of those seeking only the rules that are currently in effect.
- ▶ Creating a page for the *current biennium* which includes agendas and minutes, and will include drafts of each rule as they are considered by committees, and the rules published and promulgated by the Council as this happens.
- ▶ Creating a separate *legislative history* page which includes past agendas and minutes, as well as a history of all drafts created for each rule during each biennium.
- ▶ Retaining but more clearly labeling the legislative history page which contains a history of *amendments for each rule* since the inception of the Council. These histories are fully updated and include the amendments from last biennium.
- ▶ Including a link to the detailed Council timeline for the biennium.
- ▶ Reordering the link buttons on the left side of the page for ease of navigation.

I have attached copies of pertinent web pages for the Council's review. I was pleased to

note that the *Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure* report actually cited the Council's website – another sign that it is a useful tool. However, the website is a fluid instrument and we are continually striving for improvement. Please feel free to make any suggestions.

III. Website Statistics

Attached are analytical reports detailing website visitors and traffic sources. The website had 198 visits from 157 unique visitors, and 643 page views in this period. The number of visitors was down slightly from the last reporting period, but the number of page views was actually higher. The average number of pages viewed was 3.25 and the average time spent on the site was 3 minutes, 28 seconds. These numbers are also higher than last period. Visitors spent a significant amount of time on the *Legislative History of Rules* page. The bounce rate was 46.46%. Hopefully, with the organizational changes we have made and changes to keywords on each page, the bounce rate will continue to decrease.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant



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Oregon Council on Court Procedures

Where do the [Oregon Rules of Civil Procedure](#) come from and how are they changed? If a particular rule is not effective or has been rendered obsolete by technology, or by practice, how may it be amended?

The Council on Court Procedures is the Oregon public body that is most directly involved in creating, reviewing, and amending the Oregon Rules of Civil Procedure, which govern procedure and practice in all Oregon circuit courts (except for the small claims department).

Membership and Meetings

Members of the Council are drawn from appellate and circuit court judges, practicing attorneys who represent both those who bring civil cases and those who defend them, and a public member. All Council members serve without pay. The work of the Council is supported by a professional staff, the Oregon State Bar, and by Northwestern School of Law of Lewis & Clark College. All meetings of the Council are open to the public.

Suggestions for Amendments

The Council considers proposed rule changes from a wide variety of sources. Council members also consider the potential need for amendments that may arise because of developments in case law, changes in technology, new Oregon statutes or federal legislation, or changes in legal practice. The Council strives to make sure that the rules remain practical and up to date, and promote the fair and efficient administration of justice and welcomes [comments and suggestions](#) regarding the Oregon Rules of Civil Procedure.

Timeline and Procedures

The Council has a [two year cycle](#) for considering amendments to the Oregon Rules of Civil Procedure. It tries to have workable rules that are written clearly, and also tries to make sure that ill-advised proposals are screened out. In December of each even-numbered year, the Council promulgates proposed rules or amended rules. Proposals that receive a "super majority" vote of the Council become law about a year later, unless the Legislature decides otherwise. In addition, the Council is available as a resource to the Legislature during each session.

What the Council Does Not Do

The Oregon Council on Court Procedures is a public rule-making body. It is not a law firm, and does not provide legal advice or services. It also does not decide cases, discipline attorneys or judges, write substantive laws, modify the rules of evidence, or modify the rules of appellate procedure; those responsibilities are carried out by other institutions (see Resources button on left).



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Oregon Rules of Civil Procedure

The Oregon Rules of Civil Procedure govern procedure and practice in all Oregon circuit courts (except for the small claims department).

CURRENT OREGON RULES OF CIVIL PROCEDURE Effective January 1, 2010

Link to Current Rules on Or Legislature Website (HTML File)

Link to PDF File with Bookmarks for Each Rule



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Current Biennium (2009-2011)

Publication and Promulgation

ORCP amendments are promulgated (sent to the Legislature) at the beginning of each legislative session. They become effective as law on the January 1 following adjournment of a session unless the Legislature, by statute, rescinds or modifies them. This biennium, the Council will publish amendments for comment at its September 11, 2010, meeting, and will promulgate amendments at its December 11, 2010, meeting. A detailed timeline for this biennium can be found [here](#).

Agendas, Minutes, and Other Documents

Documents for the current biennium are found below. This page will be updated regularly throughout the biennium so that it remains current.

Agendas	Minutes
3/13/10 Agenda	2/6/10 Minutes*
2/6/10 Agenda	1/9/10 Minutes
1/9/10 Agenda	12/12/09 MEETING CANCELLED
12/12/09 Agenda	11/21/09 Minutes
11/21/09 Agenda	10/10/09 Minutes
10/10/09 Agenda	9/12/09 Minutes
9/12/09 Agenda	

*Coming soon



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Legislative History

This page contains links to documents from past biennia, beginning with the 1995-1997 biennium and not including the current biennium. An electronic archiving project is in process which will put all past Council history into PDF format and make it available online. This is an extensive project that will take some time. If you need to look at earlier materials, you may contact one of the law libraries located on our [Resources](#) page to look at hard copies.

2007 – 2009 Biennium

Agendas	Minutes
12/13/08 Agenda	12/13/08 Minutes
09/13/08 Agenda	09/13/08 Minutes
06/07/08 Agenda	06/07/08 Minutes
05/03/08 Agenda	05/03/08 Minutes with Appendices
04/12/08 Agenda	04/12/08 Minutes with Appendices
03/08/08 Agenda	03/08/08 Minutes with Appendices
02/09/08 Agenda	02/09/08 Minutes with Appendices
01/12/08 Agenda	01/12/08 Minutes with Appendices
12/08/07 Agenda	12/08/07 Minutes with Appendices
11/10/07 Agenda	11/10/07 Minutes with Appendices
10/13/07 Agenda	10/13/07 Minutes with Appendices
09/15/07 Agenda	09/15/07 Minutes with Appendices

2007-2009 Draft History of Each Amended Rule

Coming Soon

2005 – 2007 Biennium

Agendas	Minutes
12/09/06 Agenda	12/09/06 Minutes
09/09/06 Agenda	09/09/06 Minutes
06/10/06 Agenda	06/10/06 Minutes
05/13/06 Agenda	05/13/06 Minutes
04/08/06 Agenda	04/08/06 Minutes
03/11/06 Agenda	03/11/06 Minutes
02/11/06 Agenda	02/11/06 Minutes
01/14/06 Agenda	01/14/06 Minutes
11/12/05 Agenda	11/12/05 Minutes
10/08/05 Agenda	10/08/05 Minutes

2005-2007 Draft History of Each Amended Rule

ORCP 7 ORCP 8 ORCP 9 ORCP 32 ORCP 43	ORCP 55 ORCP 63 ORCP 64 ORCP 69
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2003 – 2005 Biennium

Agendas	Minutes
12/11/04 Agenda with Attachments	12/11/04 Minutes
09/11/04 Agenda with Attachments	09/11/04 Minutes
06/12/04 Agenda with Attachments	06/12/04 Minutes
05/08/04 Agenda with Attachments	05/08/04 Minutes
04/10/04 Agenda with Attachments	04/10/04 Minutes
03/13/04 Agenda with Attachments	03/13/04 Minutes
02/14/04 Agenda with Attachments	02/14/04 Minutes
01/10/04 Agenda with Attachments	01/10/04 Minutes
10/11/03 Agenda with Attachments	10/11/03 Minutes

2001 – 2003 Biennium

Agendas	Minutes
12/14/02 Agenda with Attachments	12/14/02 Minutes
09/14/02 Agenda with Attachments	09/14/02 Minutes
06/08/02 Agenda with Attachments	06/08/02 Minutes
05/11/02 Agenda with Attachments	05/11/02 Minutes
04/13/02 Agenda with Attachments	04/13/02 Minutes
03/09/02 Agenda with Attachments	03/09/02 Minutes
02/09/02 Agenda with Attachments	02/09/02 Minutes
01/12/02 Agenda with Attachments	01/12/02 Minutes
10/13/01 Agenda with Attachments	10/13/01 Minutes

1999 - 2001 Biennium

Agendas	Minutes
12/09/00 Agenda with Attachments	12/09/00 Minutes
09/09/00 Agenda with Attachments	09/09/00 Minutes
08/12/00 Agenda with Attachments	08/12/00 Minutes
07/15/00 Agenda with Attachments	07/15/00 Minutes
06/10/00 Agenda with Attachments	06/10/00 Minutes
05/20/00 Agenda with Attachments	05/20/00 Minutes
04/08/00 Agenda with Attachments	04/08/00 Minutes
02/12/00 Agenda with Attachments	02/12/00 Minutes
01/08/00 Agenda with Attachments	01/08/00 Minutes
10/30/99 Agenda with Attachments	10/30/99 Minutes

1997 - 1999 Biennium

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12/12/98 Agenda with Attachments	12/12/98 Minutes
09/12/98 Agenda with Attachments	09/12/98 Minutes
08/15/98 Agenda with Attachments	08/15/98 Minutes
07/11/98 Agenda with Attachments	07/11/98 Minutes
06/13/98 Agenda with Attachments	06/13/98 Minutes
05/16/98 Cancellation Notice	03/14/98 Minutes
03/14/98 Agenda with Attachments	02/14/98 Minutes
02/14/98 Agenda with Attachments	01/10/98 Minutes
01/10/98 Agenda with Attachments	11/15/98 Minutes
11/15/97 Agenda with Attachments	

1995 - 1997 Biennium

Agendas	Minutes

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12/14/96 Agenda with Attachments	12/14/96 Minutes
09/14/96 Agenda with Attachments	09/14/96 Minutes
07/13/96 Agenda with Attachments	07/13/96 Minutes
06/08/96 Agenda with Attachments	06/08/96 Minutes
05/11/96 Agenda with Attachments	05/11/96 Minutes
04/13/96 Agenda with Attachments	04/13/96 Minutes
03/09/96 Agenda with Attachments	03/09/96 Minutes
01/13/96 Agenda with Attachments	01/13/96 Minutes
12/09/95 Agenda with Attachments	12/09/95 Minutes
10/14/95 Agenda with Attachments	10/14/95 Minutes


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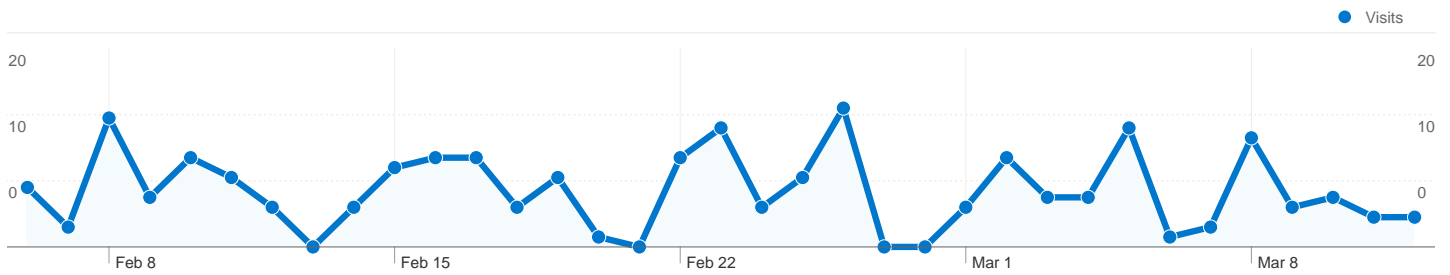
Legislative History (Amendments by Rule)

The following documents contain the rule changes promulgated by the Council on Court Procedures for each rule that the Council has amended since its inception (1982) to the present. **If a rule is not listed, it has never been modified by the Council.** Please note that the Oregon Rules of Civil Procedure may also be amended by the legislature; those amendments are **not** included here.

ORCP 1	Scope; Construction; Application; Rule; Citation
ORCP 4	Jurisdiction (Personal)
ORCP 7	Summons
ORCP 8	Process
ORCP 9	Service and Filing of Pleadings and Other Papers
ORCP 10	Time
ORCP 15	Time for Filing Pleadings or Motions
ORCP 16	Form of Pleadings
ORCP 17	Signing of Pleadings, Motions, and Other Papers; Sanctions
ORCP 18	Claims for Relief
ORCP 21	Defenses and Objections; How Presented; By Pleading or Motion; Motion for Judgment on the Pleadings
ORCP 22	Counterclaims, Cross-Claims, and Third Party Claims
ORCP 27	Minor or Incapacitated Persons
ORCP 32	Class Actions
ORCP 34	Substitution of Parties
ORCP 38	Persons Who May Administer Oaths for Depositions; Foreign Depositions
ORCP 39	Depositions Upon Oral Examination
ORCP 40	Depositions Upon Written Questions
ORCP 43	Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
ORCP 44	Physical and Mental Examination of Persons; Reports of Examination
ORCP 46	Failure to Make Discovery; Sanctions
ORCP 47	Summary Judgment
ORCP 52	Postponement of Cases
ORCP 54	Dismissal of Actions; Compromise
ORCP 55	Subpoena
ORCP 57	Jurors
ORCP 58	Trial Procedure

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ORCP 59	Instructions to Jury and Deliberation
ORCP 62	Findings of Fact
ORCP 63	Judgment Notwithstanding the Verdict
ORCP 64	New Trials
ORCP 67	Judgments
ORCP 68	Allowance and Taxation of Attorney Fees and Costs and Disbursements
ORCP 69	Default Orders and Judgments
ORCP 70	Form and Entry of Judgment
ORCP 71	Relief from Judgment or Order
ORCP 72	Stay of Proceedings to Enforce Judgment
ORCP 78	Order or Judgment for Specific Acts
ORCP 80	Receivers
ORCP 83	Provisional Process



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198 Visits

46.46% Bounce Rate

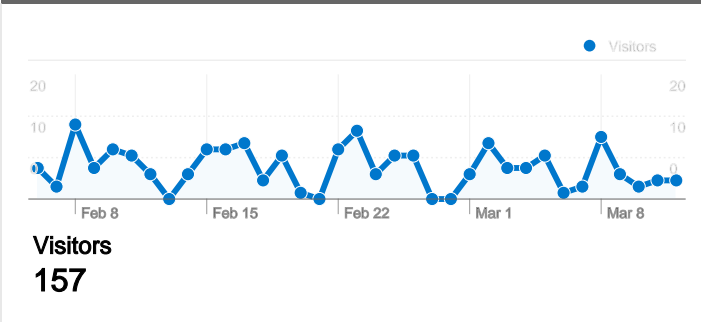
643 Pageviews

00:03:28 Avg. Time on Site

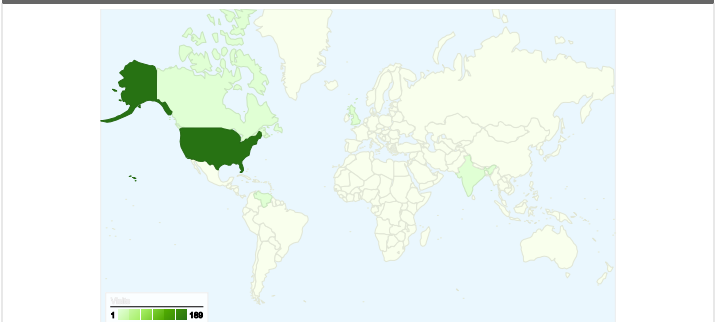
3.25 Pages/Visit

67.68% % New Visits

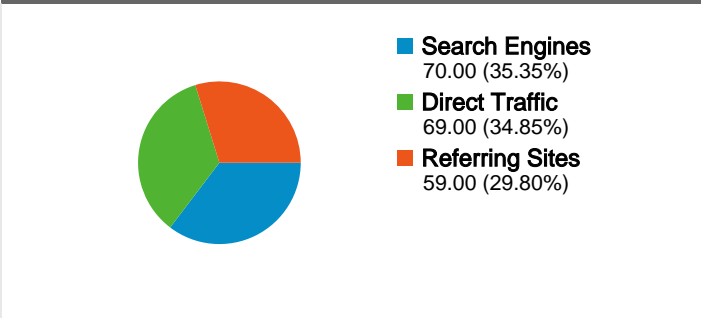
Visitors Overview



Map Overlay

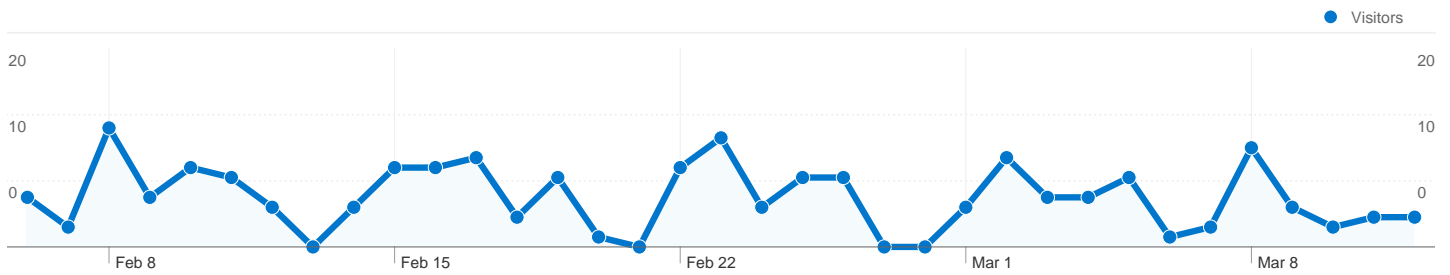


Traffic Sources Overview



Content Overview

Pages	Pageviews	% Pageviews
/~ccp/index.htm	266	41.37%
/~ccp/LegislativeHistoryofRules	76	11.82%
/~ccp/resources.htm	50	7.78%
/~ccp/minutes.htm	37	5.75%
/~ccp/Council_Membership.htm	37	5.75%



157 people visited this site

198 Visits

157 Absolute Unique Visitors

643 Pageviews

3.25 Average Pageviews

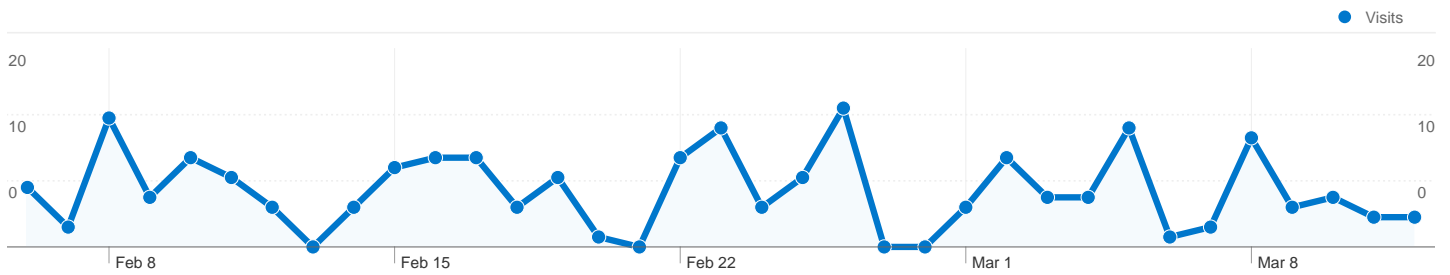
00:03:28 Time on Site

46.46% Bounce Rate




67.68% New Visits

Technical Profile

Browser	Visits	% visits	Connection Speed	Visits	% visits
Internet Explorer	118	59.60%	T1	65	32.83%
Firefox	62	31.31%	Cable	50	25.25%
Safari	10	5.05%	Unknown	45	22.73%
Chrome	8	4.04%	DSL	33	16.67%
			Dialup	5	2.53%



All traffic sources sent a total of 198 visits

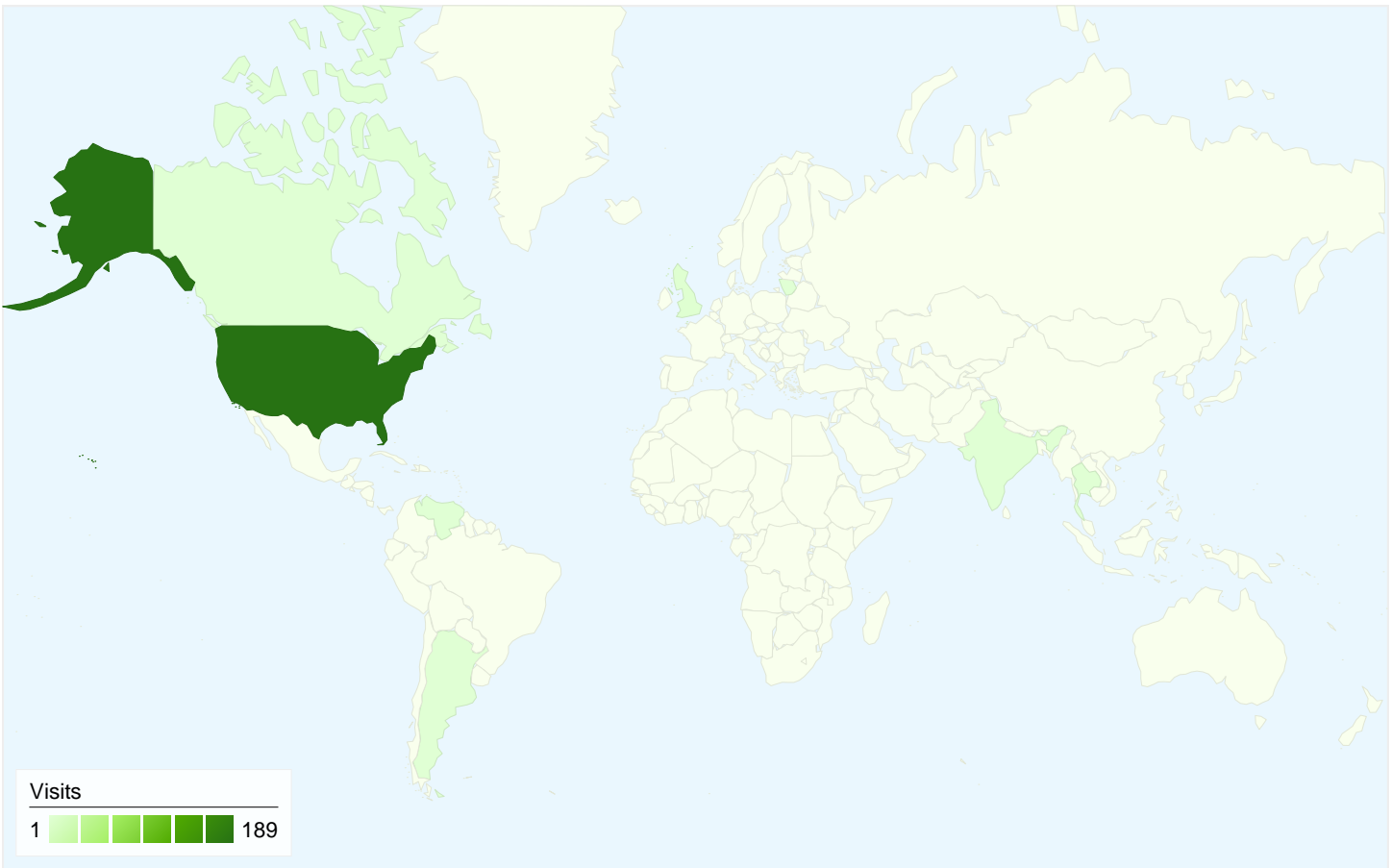
-  34.85% Direct Traffic
-  29.80% Referring Sites
-  35.35% Search Engines



- Search Engines
70.00 (35.35%)
- Direct Traffic
69.00 (34.85%)
- Referring Sites
59.00 (29.80%)

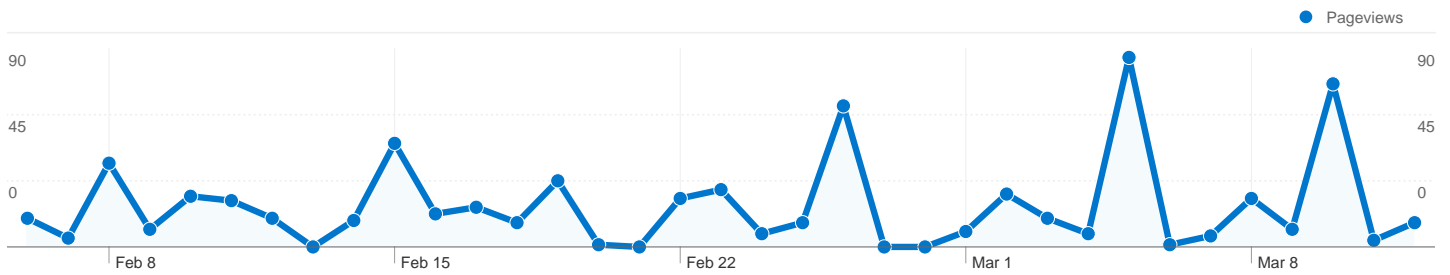
Top Traffic Sources

Sources	Visits	% visits	Keywords	Visits	% visits
(direct) ((none))	69	34.85%	oregon council on court	21	30.00%
google (organic)	61	30.81%	council on court procedures	9	12.86%
courts.oregon.gov (referral)	24	12.12%	council on court procedures	4	5.71%
counciloncourtprocedures.org	19	9.60%	court procedure	2	2.86%
bing (organic)	6	3.03%	court procedures	2	2.86%



198 visits came from 8 countries/territories


Site Usage						
Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate		
198 % of Site Total: 100.00%	3.25 Site Avg: 3.25 (0.00%)	00:03:28 Site Avg: 00:03:28 (0.00%)	67.68% Site Avg: 67.68% (0.00%)	46.46% Site Avg: 46.46% (0.00%)		
Country/Territory	Visits	Pages/Visit	Avg. Time on Site	% New Visits	Bounce Rate	
United States	189	3.34	00:03:38	66.67%	44.44%	
United Kingdom	3	1.00	00:00:00	100.00%	100.00%	
India	1	1.00	00:00:00	100.00%	100.00%	
Canada	1	1.00	00:00:00	100.00%	100.00%	
Venezuela	1	3.00	00:00:25	100.00%	0.00%	
Lithuania	1	1.00	00:00:00	100.00%	100.00%	
Argentina	1	1.00	00:00:00	0.00%	100.00%	
Thailand	1	1.00	00:00:00	100.00%	100.00%	
						1 - 8 of 8



Pages on this site were viewed a total of 643 times

 **643** Pageviews

 **378** Unique Views

 **46.46%** Bounce Rate

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/~ccp/resources.htm	50	7.78%
/~ccp/minutes.htm	37	5.75%
/~ccp/Council_Membership.htm	37	5.75%

1 **ORCP 38**

2 **PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN**
3 **DEPOSITIONS**

4 **A Within Oregon.**

5 A(1) Within this state, depositions shall be preceded by an oath or affirmation
6 administered to the deponent by an officer authorized to administer oaths by the laws of this state
7 or by a person specially appointed by the court in which the action is pending. A person so
8 appointed has the power to administer oaths for the purpose of the deposition.

9 A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken
10 within this state if either the deponent or the person administering the oath is located in this state.

11 **B Outside the state.** Within another state, or within a territory or insular possession
12 subject to the dominion of the United States, or in a foreign country, depositions may be taken
13 (1) on notice before a person authorized to administer oaths in the place in which the
14 examination is held, either by the law thereof or by the law of the United States, or (2) before a
15 person appointed or commissioned by the court in which the action is pending, and such a person
16 shall have the power by virtue of such person's appointment or commission to administer any
17 necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter
18 rogatory shall be issued on application and notice and on terms that are just and appropriate. It is
19 not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition
20 in any other manner is impracticable or inconvenient; and both a commission and a letter
21 rogatory may be issued in proper cases. A notice or commission may designate the person before
22 whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be
23 addressed "To the Appropriate Authority in (here name the state, territory, or country)."
24 Evidence obtained in a foreign country in response to a letter rogatory need not be excluded
25 merely for the reason that it is not a verbatim transcript or that the testimony was not taken under
26 oath or for any similar departure from the requirements for depositions taken within the United

1 States under these rules.

2 **C Foreign depositions.**

3 *[C(1) Whenever any mandate, writ, or commission is issued out of any court of record in*
4 *any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement*
5 *it is required to take the testimony of a witness or witnesses in this state, witnesses may be*
6 *compelled to appear and testify in the same manner and by the same process and proceeding as*
7 *may be employed for the purpose of taking testimony in proceedings pending in this state.*

8 *C(2) This section shall be so interpreted and construed as to effectuate its general*
9 *purposes to make uniform the laws of those states which have similar rules or statutes.]*

10 **C(1) Definitions. For the purpose of this rule:**

11 **C(1)(a) “Foreign subpoena” means a subpoena issued under authority of a court of**
12 **record of any state other than Oregon.**

13 **C(1)(b) “State” means a state of the United States, the District of Columbia, Puerto**
14 **Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory**
15 **or insular possession subject to the jurisdiction of the United States.**

16 **C(2) Issuance of Subpoena.**

17 **C(2)(a) To request issuance of a subpoena under this rule, a party or attorney shall**
18 **submit a foreign subpoena to a clerk of court in the county in which discovery is sought to**
19 **be conducted in this state.**

20 **C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in**
21 **this state, the clerk, in accordance with that court’s procedure and requirements, shall**
22 **assign a case number and promptly issue a subpoena for service upon the person to which**
23 **the foreign subpoena is directed.**

24 **C(2)(c) A subpoena under subsection (2) shall:**

25 **(i) conform to the requirements of the Oregon Rules of Civil Procedure, including**
26 **Rule 55, and conform substantially to the form provided in Rule 55A but may otherwise**

1 incorporate the terms used in the foreign subpoena as long as they conform to the Oregon
2 Rules of Civil Procedure; and

3 (ii) contain or be accompanied by the names, addresses, and telephone numbers
4 of all counsel of record in the proceeding to which the subpoena relates and of any party
5 not represented by counsel.

6 C(3) Service of Subpoena. A subpoena issued by a clerk of court
7 under subsection (2) of this rule shall be served in compliance with ORCP 55.

8 C(4) Effects of Request for Subpoena. A request for issuance of a subpoena under
9 this rule does not constitute an appearance in the court. A request does confer jurisdiction
10 on the court to impose sanctions for any action in connection with the subpoena that is a
11 violation of the Oregon Rules of Civil Procedure.

12 C(5) Motion to Court. A motion to the court for a protective order or to enforce,
13 quash, or modify a subpoena issued by a clerk of court pursuant to this rule is an
14 appearance before the court and shall comply with the rules and statutes of this state. The
15 motion shall be submitted to the court in the county in which discovery is to be conducted.

16 C(6) Uniformity of Application and Construction. In applying and construing this
17 rule, consideration shall be given to the need to promote the uniformity of the law with
18 respect to its subject matter among states that enact it.

1 **SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS**

2 **RULE 9**

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

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

24 C Filing; proof of service. Except as provided by section D of this rule, all papers
25 required to be served upon a party by section A of this rule shall be filed with the court within a
26 reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of

1 service of all papers required or permitted to be served may be by written acknowledgment of
2 service, by affidavit or declaration of the person making service, or by certificate of an attorney.
3 Such proof of service may be made upon the papers served or as a separate document attached to
4 the papers. Where service is made by telephonic facsimile communication device or e-mail,
5 proof of service shall be made by affidavit or declaration of the person making service, or by
6 certificate of an attorney or sheriff. Attached to such affidavit, declaration, or certificate shall be
7 the printed confirmation of receipt of the message generated by the transmitting machine, if
8 facsimile communication is used. If service is made by e-mail under section G of this rule, the
9 person making service must certify that he or she received confirmation that the message was
10 received, either by return e-mail, automatically generated message, telephonic facsimile, or
11 orally.

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

16 E Filing with the court defined. The filing of pleadings and other documents with the
17 court as required by these rules shall be made by filing them with the clerk of the court or the
18 person exercising the duties of that office. The clerk or the person exercising the duties of that
19 office shall endorse upon such pleading or document the time of day, the day of the month, the
20 month, and the year. The clerk or person exercising the duties of that office is not required to
21 receive for filing any document unless the name of the court, the title of the cause and the
22 document, the names of the parties, and the attorney for the party requesting filing, if there be
23 one, are legibly endorsed on the front of the document, nor unless the contents thereof are
24 legible.

25 F Service by telephonic facsimile communication device. Whenever under these rules
26 service is required or permitted to be made upon a party, and that party is represented by an

1 attorney, the service may be made upon the attorney by means of a telephonic facsimile
2 communication device if the attorney maintains such a device at the attorney's office and the
3 device is operating at the time service is made. Service in this manner shall be equivalent to
4 service by mail for purposes of Rule 10 C.

5 G Service by e-mail. Service by e-mail is prohibited unless attorneys agree in writing to
6 e-mail service. This agreement must provide the names and e-mail addresses of all attorneys and
7 the attorneys' designees, if any, to be served. Any attorney may withdraw his or her agreement at
8 any time, upon proper notice via e-mail and any one of the other methods authorized by this rule.
9 Service is effective under this method when the sender has received confirmation that the
10 attachment has been received by the designated recipient. Confirmation of receipt does not
11 include an automatically generated message that the recipient is out of the office or otherwise
12 unavailable.

DISMISSAL OF ACTIONS; COMPROMISE

RULE 54

A Voluntary dismissal; effect thereof.

A(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants [*may be dismissed by the plaintiff*] without order of court (a) by filing a notice of dismissal with the court and serving such notice on [*the*] all defendants not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, the parties shall submit a form of judgment and the court shall enter a judgment of dismissal.

A(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

A(3) Costs and disbursements. When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

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1 B Involuntary dismissal.

2 B(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to
3 comply with these rules or any order of court, a defendant may move for a judgment of dismissal
4 of an action or of any claim against such defendant.

5 B(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without
6 a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the
7 right to offer evidence in the event the motion is not granted, may move for a judgment of
8 dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
9 The court as trier of the facts may then determine them and render judgment of dismissal against
10 the plaintiff or may decline to render any judgment until the close of all the evidence. If the court
11 renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings
12 as provided in Rule 62.

13 B(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first
14 regular motion day in each calendar year, unless the court has sent an earlier notice on its own
15 initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case
16 in which no action has been taken for one year immediately prior to the mailing of such notice,
17 that a judgment of dismissal will be entered in each such case by the court for want of
18 prosecution[,] unless, on or before such first regular[,] motion day, application, either oral or
19 written, is made to the court and good cause shown why it should be continued as a pending
20 case. If such application is not made or good cause shown, the court shall enter a judgment of
21 dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by
22 the court at any time[,] for want of prosecution of any action upon motion of any party thereto.

23 B(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal
24 otherwise specifies, a dismissal under this section operates as an adjudication without prejudice.

25 C Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this
26 rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

1 D Costs of previously dismissed action.

2 D(1) If a plaintiff who has once dismissed an action in any court commences an action
3 based upon or including the same claim against the same defendant, the court may make such
4 order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the
5 action previously dismissed as it may deem proper and may stay the proceedings in the action
6 until the plaintiff has complied with the order.

7 D(2) If a party who previously asserted a claim, counterclaim, cross-claim, or third party
8 claim that was dismissed with prejudice subsequently [*makes*] **files** the same claim,
9 counterclaim, cross-claim, or third party claim against the same party, the court shall enter a
10 judgment dismissing the claim, counterclaim, cross-claim, or third party claim and may enter a
11 judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining
12 the dismissal.

13 E Offer to allow judgment; effect of acceptance or rejection.

14 E(1) Except as provided in ORS 17.065 through 17.085, [*the*] **any** party [*against whom a*
15 *claim is asserted*] may, at any time up to [*10*] **14** days prior to trial, serve upon [*the*] **any other**
16 party [*asserting the claim*] an offer to allow judgment to be [*given against the party making the*
17 *offer*] **entered** for the sum, or the property, or to the effect therein specified. **Notwithstanding**
18 **Rule 9C**, [*T*]the offer shall not be filed with the court clerk or provided to any assigned judge,
19 except as set forth in subsections E(2) and E(3) below.

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

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

10 F Settlement conferences. A settlement conference may be ordered by the court at any
11 time at the request of any party or upon the court's own motion. Unless otherwise stipulated to
12 by the parties, a judge other than the judge who will preside at trial shall conduct the settlement
13 conference.

1 **ORCP 36**

2 **GENERAL PROVISIONS GOVERNING DISCOVERY**

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

7 **B Scope of discovery.** Unless otherwise limited by order of the court in accordance with
8 these rules, the scope of discovery is as follows:

9 B(1) In general. For all forms of discovery, parties may inquire regarding any matter, not
10 privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim
11 or defense of any other party, including the existence, description, nature, custody, condition, and
12 location of any books, documents, **electronically stored information**, or other tangible things,
13 and the identity and location of persons having knowledge of any discoverable matter. It is not
14 ground for objection that the information sought will be inadmissible at the trial if the
15 information sought appears reasonably calculated to lead to the discovery of admissible evidence.

16 B(2) Insurance agreements or policies. B(2)(a) A party, upon the request of an adverse
17 party, shall disclose the existence and contents of any insurance agreement or policy under which
18 a person transacting insurance may be liable to satisfy part or all of a judgment which may be
19 entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

20 B(2)(b) The obligation to disclose under this subsection shall be performed as soon as
21 practicable following the filing of the complaint and the request to disclose. The court may
22 supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and
23 expeditiously. However, the court may limit the extent of disclosure under this subsection as
24 provided in section C of this rule.

25 B(2)(c) Information concerning the insurance agreement or policy is not by reason of
26 disclosure admissible in evidence at trial. For purposes of this subsection, an application for

1 insurance shall not be treated as part of an insurance agreement or policy.

2 B(2)(d) As used in this subsection, “disclose” means to afford the adverse party an
3 opportunity to inspect or copy the insurance agreement or policy.

4 B(3) Trial preparation materials. Subject to the provisions of Rule 44, a party may obtain
5 discovery of documents, **electronically stored information**, and tangible things otherwise
6 discoverable under subsection B(1) of this rule and prepared in anticipation of litigation or for
7 trial by or for another party or by or for that other party’s representative (including an attorney,
8 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking
9 discovery has substantial need of the materials in the preparation of such party’s case and is
10 unable without undue hardship to obtain the substantial equivalent of the materials by other
11 means. In ordering discovery of such materials when the required showing has been made, the
12 court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal
13 theories of an attorney or other representative of a party concerning the litigation.

14 A party may obtain, without the required showing, a statement concerning the action or
15 its subject matter previously made by that party. Upon request, a person who is not a party may
16 obtain, without the required showing, a statement concerning the action or its subject matter
17 previously made by that person. If the request is refused, the person or party requesting the
18 statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of
19 expenses incurred in relation to the motion. For purposes of this subsection, a statement
20 previously made is (a) a written statement signed or otherwise adopted or approved by the person
21 making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription
22 thereof, which is a substantially verbatim recital of an oral statement by the person making it and
23 contemporaneously recorded.

24 **C Court order limiting extent of disclosure.** Upon motion by a party or by the person
25 from whom discovery is sought, and for good cause shown, the court in which the action is
26 pending may make any order which justice requires to protect a party or person from annoyance,

1 | embarrassment, oppression, or undue burden or expense, including one or more of the following:

2 | (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and
3 | conditions, including a designation of the time or place; (3) that the discovery may be had only
4 | by a method of discovery other than that selected by the party seeking discovery; (4) that certain
5 | matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5)
6 | that discovery be conducted with no one present except persons designated by the court; (6) that
7 | a deposition after being sealed be opened only by order of the court; (7) that a trade secret or
8 | other confidential research, development, or commercial information not be disclosed or be
9 | disclosed only in a designated way; (8) that the parties simultaneously file specified documents
10 | or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to
11 | prevent hardship the party requesting discovery pay to the other party reasonable expenses
12 | incurred in attending the deposition or otherwise responding to the request for discovery.

13 | If the motion for a protective order is denied in whole or in part, the court may, on such
14 | terms and conditions as are just, order that any party or person provide or permit discovery. The
15 | provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

1 **ORCP 39**

2 **DEPOSITIONS UPON ORAL EXAMINATION**

3 **A When deposition may be taken.** After the service of summons or the appearance of
4 the defendant in any action, or in a special proceeding at any time after a question of fact has
5 arisen, any party may take the testimony of any person, including a party, by deposition upon oral
6 examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks
7 to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and
8 answer after service of summons on any defendant, except that leave is not required (1) if a
9 defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special
10 notice is given as provided in subsection C(2) of this Rule. The attendance of a witness may be
11 compelled by subpoena as provided in Rule 55.

12 **B Order for deposition or production of prisoner.** The deposition of a person confined
13 in a prison or jail may only be taken by leave of court. The deposition shall be taken on such
14 terms as the court prescribes, and the court may order that the deposition be taken at the place of
15 confinement or, when the prisoner is confined in this state, may order temporary removal and
16 production of the prisoner for purposes of the deposition.

17 **C Notice of examination.**

18 **C(1) General requirements.** A party desiring to take the deposition of any person upon
19 oral examination shall give reasonable notice in writing to every other party to the action. The
20 notice shall state the time and place for taking the deposition and the name and address of each
21 person to be examined, if known, and, if the name is not known, a general description sufficient
22 to identify such person or the particular class or group to which such person belongs. If a
23 subpoena duces tecum is to be served on the person to be examined, the designation of the
24 materials to be produced as set forth in the subpoena shall be attached to or included in the
25 notice.

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1 **C(2) Special notice.** Leave of court is not required for the taking of a deposition by
2 plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is
3 bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken
4 before the expiration of the period of time specified in Rule 7 to appear and answer after service
5 of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's
6 attorney shall sign the notice, and such signature constitutes a certification by the attorney that to
7 the best of such attorney's knowledge, information, and belief the statement and supporting facts
8 are true.

9 If a party shows that when served with notice under this subsection, the party was unable
10 through the exercise of diligence to obtain counsel to represent such party at the taking of the
11 deposition, the deposition may not be used against such party.

12 **C(3) Shorter or longer time.** The court may for cause shown enlarge or shorten the time
13 for taking the deposition.

14 **C(4) Non-stenographic recording.** The notice of deposition required under subsection
15 (1) of this section may provide that the testimony be recorded by other than stenographic means,
16 in which event the notice shall designate the manner of recording and preserving the deposition.
17 A court may require that the deposition be taken by stenographic means if necessary to assure
18 that the recording be accurate.

19 **C(5) Production of documents and things.** The notice to a party deponent may be
20 accompanied by a request made in compliance with Rule 43 for the production of documents,
21 **electronically stored information**, and tangible things at the taking of the deposition. The
22 procedure of Rule 43 shall apply to the request.

23 **C(6) Deposition of organization.** A party may in the notice and in a subpoena name as
24 the deponent a public or private corporation or a partnership or association or governmental
25 agency and describe with reasonable particularity the matters on which examination is requested.
26 In that event, the organization so named shall designate one or more officers, directors, managing

1 agents, or other persons who consent to testify on its behalf, and shall set forth, for each person
2 designated, the matters on which such person will testify. A subpoena shall advise a nonparty
3 organization of its duty to make such a designation. The persons so designated shall testify as to
4 matters known or reasonably available to the organization. This subsection does not preclude
5 taking a deposition by any other procedure authorized in these rules.

6 **C(7) Deposition by telephone.** Parties may agree by stipulation or the court may order
7 that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by
8 telephone pursuant to court order, the order shall designate the conditions of taking testimony,
9 the manner of recording the deposition, and may include other provisions to assure that the
10 recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by
11 telephone other than pursuant to court order or stipulation made a part of the record, then
12 objections as to the taking of testimony by telephone, the manner of giving the oath or
13 affirmation, and the manner of recording the deposition are waived unless seasonable objection
14 thereto is made at the taking of the deposition. The oath or affirmation may be administered to
15 the deponent, either in the presence of the person administering the oath or over the telephone, at
16 the election of the party taking the deposition.

17 * * * * *

1 **ORCP 43**

2 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**

3 **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

4 **A Scope.** Any party may serve on any other party a request: (1) to produce and permit the
5 party making the request, or someone acting on behalf of the party making the request, to inspect
6 and copy, any designated documents **or electronically stored information** (including writings,
7 drawings, graphs, charts, photographs, *[phono-records]*, **sound recordings, images,** and other
8 **data or** data compilations from which information can be obtained, and translated, if necessary,
9 by the respondent through detection devices into reasonably usable form), **stored in any**
10 **medium from which information can be obtained either directly or, if necessary, after**
11 **translation by the responding party into a reasonably usable form,** or to inspect and copy,
12 test, or sample any tangible things which constitute or contain matters within the scope of Rule
13 36 B and which are in the possession, custody, or control of the party upon whom the request is
14 served; or (2) to permit entry upon designated land or other property in the possession or control
15 of the party upon whom the request is served for the purpose of inspection and measuring,
16 surveying, photographing, testing, or sampling the property or any designated object or operation
17 thereon, within the scope of Rule 36 B.

18 **B Procedure.**

19 B(1) A party may serve a request on the plaintiff after commencement of the action and
20 on any other party with or after service of the summons on that party. The request shall identify
21 any items requested for inspection, copying, or related acts by individual item or by category
22 described with reasonable particularity, designate any land or other property upon which entry is
23 requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and
24 related acts.

25 **B(1)(a) Unless discovery in the action requests electronically stored information, a**
26 **request for production of documents pursuant to this rule does not encompass, and the**

1 response is not required to include, electronically stored information. The request may
2 specify the form or forms in which electronically stored information is to be produced. If a
3 request does not specify a form for producing electronically stored information, a party
4 shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably
5 usable form or forms. A party need not produce the same electronically stored information
6 in more than one form.

7 B(1)(b) Within fourteen (14) days of service of a request for production that
8 requests electronically stored information (“ESI”), the requesting and producing parties
9 shall in good faith begin conferring about the request for ESI with respect to the scope of
10 the production of ESI; data sources of the requested ESI; form of the production of ESI;
11 cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of
12 ESI; issues of privilege pertaining to ESI; and any other issue a requesting or producing
13 party deems relevant to the request for ESI. No motion regarding ESI can be filed unless
14 the moving party, before filing such motion, complies with this section and any other duty
15 to confer required by the Uniform Trial Court Rules.

16 B(2) A request shall not require a defendant to produce or allow inspection, copying,
17 entry, or other related acts before the expiration of 45 days after service of summons, unless the
18 court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance
19 with subsection B(1) of this rule, or such other time as the court may order or the parties may
20 agree upon in writing, a party shall serve a response that includes the following:

21 B(2)(a) a statement that, except as specifically objected to, any requested item within the
22 party’s possession or custody is provided, or will be provided or made available within the time
23 allowed and at the place and in the manner specified in the request, which items shall be
24 organized and labeled to correspond with the categories in the request;

25 B(2)(b) as to any requested item not in the party’s possession or custody, a statement that
26 reasonable effort has been made to obtain it, unless specifically objected to, or that no such item

1 is within the party's control;

2 B(2)(c) as to any land or other property, a statement that entry will be permitted as
3 requested unless specifically objected to; and

4 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

5 **B(2)(e) The response may state an objection to a request for producing**
6 **electronically stored information.**

7 B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived.
8 Any objection to only a part of a request shall clearly state the part objected to. An objection does
9 not relieve the requested party of the duty to comply with any request or part thereof not
10 specifically objected to.

11 B(4) A party served in accordance with subsection B(1) of this rule is under a continuing
12 duty during the pendency of the action to produce promptly any item responsive to the request
13 and not objected to which comes into the party's possession, custody, or control.

14 B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or other
15 failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so
16 within a reasonable time.

17 **C Writing called for need not be offered.** Though a writing called for by one party is
18 produced by the other, and is inspected by the party calling for it, the party requesting production
19 is not obliged to offer it in evidence.

20 **D Persons not parties.** A person not a party to the action may be compelled to produce
21 books, papers, documents, **electronically stored information**, or tangible things and to submit
22 to an inspection thereof as provided in Rule 55. This rule does not preclude an independent
23 action against a person not a party for permission to enter upon land.

1 ORCP 46

2 FAILURE TO MAKE DISCOVERY; SANCTIONS

3 * * * * *

4 E Failure to Provide Electronically Stored Information. Absent exceptional
5 circumstances, a court may not impose sanctions under these rules on a party for failing
6 to provide electronically stored information lost as a result of the routine, good-faith
7 operation of an electronic information system.

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1 **ORCP 55**

2 **SUBPOENA**

3 **A Defined; form.** A subpoena is a writ or order directed to a person and may require the
4 attendance of such person at a particular time and place to testify as a witness on behalf of a
5 particular party therein mentioned or may require such person to produce books, papers,
6 documents, **electronically stored information**, or tangible things and permit inspection thereof
7 at a particular time and place. A subpoena requiring attendance to testify as a witness requires
8 that the witness remain until the testimony is closed unless sooner discharged, but at the end of
9 each day's attendance a witness may demand of the party, or the party's attorney, the payment of
10 legal witness fees for the next following day and if not then paid, the witness is not obliged to
11 remain longer in attendance. Every subpoena shall state the name of the court and the title of the
12 action.

13 **B(1) For production of books, papers, documents, electronically stored information,**
14 **or tangible things and to permit inspection.** A subpoena may command the person to whom it
15 is directed to produce and permit inspection and copying of designated books, papers,
16 documents, **electronically stored information**, or tangible things in the possession, custody or
17 control of that person at the time and place specified therein. **Unless discovery in the action**
18 **specifically requests electronically stored information, a request for production of**
19 **documents pursuant to this rule does not encompass, and the response is not required to**
20 **include, electronically stored information.** A command to produce books, papers, documents,
21 **electronically stored information**, or tangible things and permit inspection thereof may be
22 joined with a command to appear at trial or hearing or at deposition or, before trial, may be
23 issued separately. A person commanded to produce and permit inspection and copying of
24 designated books, papers, documents, **electronically stored information**, or tangible things but
25 not commanded to also appear for deposition, hearing or trial may, within 14 days after service of
26 the subpoena or before the time specified for compliance if such time is less than 14 days after

1 service, serve upon the party or attorney designated in the subpoena written objection to
2 inspection or copying of any or all of the designated materials. If objection is made, the party
3 serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an
4 order of the court in whose name the subpoena was issued. If objection has been made, the party
5 serving the subpoena may, upon notice to the person commanded to produce, move for an order
6 at any time to compel production. In any case, where a subpoena commands production of books,
7 papers, documents, **electronically stored information**, or tangible things the court, upon motion
8 made promptly and in any event at or before the time specified in the subpoena for compliance
9 therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2)
10 condition denial of the motion upon the advancement by the person in whose behalf the subpoena
11 is issued of the reasonable cost of producing the books, papers, documents, **electronically stored**
12 **information**, or tangible things.

13 **B(2) Electronically stored information; form of production. The subpoena may**
14 **specify the form or forms in which electronically stored information is to be produced. The**
15 **responding party may serve a written objection to a requested form pursuant to subsection**
16 **B(1) of this rule. If such an objection is made, the parties shall confer as required by Rule**
17 **43E. If a subpoena does not specify a form for producing electronically stored information,**
18 **a party shall produce it in a form or forms in which it is ordinarily maintained or in a**
19 **reasonably usable form or forms. A responding party need not produce the same**
20 **electronically stored information in more than one form.**

21 **C Issuance.**

22 **C(1) By whom issued.** A subpoena is issued as follows: (a) to require attendance before a
23 court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending
24 therein or, if separate from a subpoena commanding the attendance of a person, to produce
25 books, papers, documents, **electronically stored information**, or tangible things and to permit
26 inspection thereof: (I) it may be issued in blank by the clerk of the court in which the action is

1 pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by
2 an attorney of record of the party to the action in whose behalf the witness is required to appear,
3 subscribed by the signature of such attorney; (b) to require attendance before any person
4 authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer
5 empowered by the laws of the United States to take testimony, it may be issued by the clerk of a
6 circuit court in the county in which the witness is to be examined; (c) to require attendance out of
7 court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other
8 officer authorized to administer oaths or take testimony in any matter under the laws of this state,
9 it may be issued by the judge, justice, or other officer before whom the attendance is required.

10 **C(2) By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a
11 clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who
12 shall fill it in before service.

13 **D Service; service on law enforcement agency; service by mail; proof of service.**

14 **D(1) Service.** Except as provided in subsection (2) of this section, a subpoena may be
15 served by the party or any other person 18 years of age or older. The service shall be made by
16 delivering a copy to the witness personally and giving or offering to the witness at the same time
17 the fees to which the witness is entitled for travel to and from the place designated and, whether
18 or not personal attendance is required, one day's attendance fees. If the witness is under 14 years
19 of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent,
20 guardian or guardian ad litem. The service must be made so as to allow the witness a reasonable
21 time for preparation and travel to the place of attendance. A subpoena for taking of a deposition,
22 served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as
23 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
24 D(3)(h). Copies of each subpoena commanding production of books, papers, documents,
25 electronically stored information, or tangible things and inspection thereof before trial, not
26 accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is

1 | served personally or by mail, shall be served on each party at least seven days before the
2 | subpoena is served on the person required to produce and permit inspection, unless the court
3 | orders a shorter period. In addition, a subpoena shall not require production less than 14 days
4 | from the date of service upon the person required to produce and permit inspection, unless the
5 | court orders a shorter period.

6 | **D(2) Service on law enforcement agency.**

7 | D(2)(a) Every law enforcement agency shall designate individual or individuals upon
8 | whom service of subpoena may be made. At least one of the designated individuals shall be
9 | available during normal business hours. In the absence of the designated individuals, service of
10 | subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of
11 | the law enforcement agency.

12 | D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a
13 | peace officer, a subpoena may be served on such officer by delivering a copy personally to the
14 | officer or to one of the individuals designated by the agency that employs the officer. A subpoena
15 | may be served by delivery to one of the individuals designated by the agency that employs the
16 | officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is
17 | required, the officer is currently employed as a peace officer by the agency, and the officer is
18 | present within the state at the time of service.

19 | D(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection,
20 | the law enforcement agency shall make a good faith effort to give actual notice to the officer
21 | whose attendance is sought of the date, time, and location of the court appearance. If the officer
22 | cannot be notified, the law enforcement agency shall promptly notify the court and a
23 | postponement or continuance may be granted to allow the officer to be personally served.

24 | D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State
25 | Police, a county sheriff's department, or a municipal police department.

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1 **D(3) Service by mail.**

2 Under the following circumstances, service of a subpoena to a witness by mail shall be of
3 the same legal force and effect as personal service otherwise authorized by this section:

4 D(3)(a) The attorney certifies in connection with or upon the return of service that the
5 attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the
6 witness indicated a willingness to appear at trial if subpoenaed;

7 D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the
8 witness of fees and mileage satisfactory to the witness; and

9 D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by
10 certified mail or some other designation of mail that provides a receipt for the mail signed by the
11 recipient, and the attorney received a return receipt signed by the witness more than three days
12 prior to trial.

13 **D(4) Service by mail; exception.** Service of subpoena by mail may be used for a
14 subpoena commanding production of books, papers, documents, **electronically stored**
15 **information**, or tangible things, not accompanied by a command to appear at trial or hearing or
16 at deposition.

17 **D(5) Proof of service.** Proof of service of a subpoena is made in the same manner as
18 proof of service of a summons except that the server need not certify that the server is not a party
19 in the action, an attorney for a party in the action or an officer, director or employee of a party in
20 the action.

21 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail
22 in this state, a subpoena may be served on such person only upon leave of court, and attendance
23 of the witness may be compelled only upon such terms as the court prescribes. The court may
24 order temporary removal and production of the prisoner for the purpose of giving testimony or
25 may order that testimony only be taken upon deposition at the place of confinement. The
26 subpoena and court order shall be served upon the custodian of the prisoner.

1 **F Subpoena for taking depositions or requiring production of books, papers,**
2 **documents, electronically stored information, or tangible things; place of production and**
3 **examination.**

4 **F(1) Subpoena for taking deposition.** Proof of service of a notice to take a deposition as
5 provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books,
6 papers, documents, electronically stored information, or tangible things before trial as provided
7 in subsection D(1) of this rule or a certificate that such notice will be served if the subpoena can
8 be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas
9 for the persons named or described therein.

10 **F(2) Place of examination.** A resident of this state who is not a party to the action may
11 be required by subpoena to attend an examination or to produce books, papers, documents,
12 electronically stored information, or tangible things only in the county wherein such person
13 resides, is employed or transacts business in person, or at such other convenient place as is fixed
14 by an order of court. A nonresident of this state who is not a party to the action may be required
15 by subpoena to attend an examination or to produce books, papers, documents, electronically
16 stored information, or tangible things only in the county wherein such person is served with a
17 subpoena, or at such other convenient place as is fixed by an order of court.

18 **F(3) Production without examination or deposition.** A party who issues a subpoena
19 may command the person to whom it is issued to produce books, papers, documents,
20 electronically stored information, or tangible things, other than individually identifiable health
21 information as described in section H, by mail or otherwise, at a time and place specified in the
22 subpoena, without commanding inspection of the originals or a deposition. In such instances, the
23 person to whom the subpoena is directed complies if the person produces copies of the specified
24 items in the specified manner and certifies that the copies are true copies of all the items
25 responsive to the subpoena or, if all items are not included, why they are not.

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1 **G Disobedience of subpoena; refusal to be sworn or answer as a witness.**

2 Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as
3 contempt by a court before whom the action is pending or by the judge or justice issuing the
4 subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be
5 sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.

6 **H Individually identifiable health information.**

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

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

15 H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the
16 parties to the litigation or otherwise, that prohibits the parties from using or disclosing
17 individually identifiable health information for any purpose other than the litigation for which
18 such information was requested and which requires the return to the original custodian of such
19 information or destruction of the individually identifiable health information (including all copies
20 made) at the end of the litigation.

21 **H(2) Mode of Compliance.** Individually identifiable health information may be obtained
22 by subpoena only as provided in this section. However, if disclosure of any requested records is
23 restricted or otherwise limited by state or federal law, then the protected records shall not be
24 disclosed in response to the subpoena unless the requesting party has complied with the
25 applicable law.

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

13 H(2)(b) Except as provided in subsection (4) of this section, when a subpoena is served
14 upon a custodian of individually identifiable health information in an action in which the entity
15 or person is not a party, and the subpoena requires the production of all or part of the records of
16 the entity or person relating to the care or treatment of an individual, it is sufficient compliance
17 therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records
18 responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied
19 by an affidavit or a declaration as described in subsection (3) of this section.

20 H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or
21 wrapper on which the title and number of the action, name of the witness, and date of the
22 subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer
23 envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (I)
24 if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if
25 there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the
26 officer administering the oath for the deposition, at the place designated in the subpoena for the

1 taking of the deposition or at the officer's place of business; (iii) in other cases involving a
2 hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no
3 hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs
4 delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed
5 subpoena shall be served on the person whose records are sought and on all other parties to the
6 litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party
7 to the proceeding may inspect the records provided and/or request a complete copy of the
8 records. Upon request, the records must be promptly provided by the party who issued the
9 subpoena at the requesting party's expense.

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

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

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

22 H(3)(a) The records described in subsection (2) of this section shall be accompanied by
23 the affidavit or declaration of a custodian of the records, stating in substance each of the
24 following: (I) that the affiant or declarant is a duly authorized custodian of the records and has
25 authority to certify records; (ii) that the copy is a true copy of all the records responsive to the
26 subpoena; (iii) that the records were prepared by the personnel of the entity or person acting

1 | under the control of either, in the ordinary course of the entity's or person's business, at or near
2 | the time of the act, condition, or event described or referred to therein.

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

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

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

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

11 | The personal attendance of a custodian of records and the production of original
12 | records is required by this subpoena. The procedure authorized pursuant to Oregon Rule
13 | of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

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

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

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

22 | **I Within fourteen (14) days of service of a subpoena that requests electronically**
23 | **stored information ("ESI"), the party issuing the subpoena and the person to whom it is**
24 | **issues shall in good faith begin conferring about the request for ESI with respect to the**
25 | **scope of the production of ESI; data sources of the requested ESI; form of the production**
26 | **of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI;**

1 preservation of ESI; issues of privilege pertaining to ESI; and any other issue a requesting
2 or producing party deems relevant to the request for ESI. No motion regarding ESI can be
3 filed unless the moving party, before filing the motion, complies with this section.
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1 **ORCP 43**

2 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**

3 **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

4 **A Scope.** Any party may serve on any other party a request: (1) to produce and permit the
5 party making the request, or someone acting on behalf of the party making the request, to inspect
6 and copy, any designated documents (including **electronically stored information**, writings,
7 drawings, graphs, charts, photographs, [*phono-records*], **sound recordings, images**, and other
8 **data or** data compilations from which information can be obtained, and translated, if necessary,
9 by the respondent through detection devices into reasonably usable form), or to inspect and copy,
10 test, or sample any tangible things which constitute or contain matters within the scope of Rule
11 36 B and which are in the possession, custody, or control of the party upon whom the request is
12 served; or (2) to permit entry upon designated land or other property in the possession or control
13 of the party upon whom the request is served for the purpose of inspection and measuring,
14 surveying, photographing, testing, or sampling the property or any designated object or operation
15 thereon, within the scope of Rule 36 B.

16 **B Procedure.**

17 B(1) A party may serve a request on the plaintiff after commencement of the action and
18 on any other party with or after service of the summons on that party. The request shall identify
19 any items requested for inspection, copying, or related acts by individual item or by category
20 described with reasonable particularity, designate any land or other property upon which entry is
21 requested, and shall specify a reasonable place and manner for the inspection, copying, entry,
22 and related acts. **If documents consisting of electronically stored information are requested**
23 **to be produced in electronic form, the request may specify the form or forms in which such**
24 **documents are to be produced.**

25 B(2) A request shall not require a defendant to produce or allow inspection, copying,
26 entry, or other related acts before the expiration of 45 days after service of summons, unless the

1 court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance
2 with subsection B(1) of this rule, or such other time as the court may order or the parties may
3 agree upon in writing, a party shall serve a response that includes the following:

4 B(2)(a) a statement that, except as specifically objected to, any requested item within the
5 party's possession or custody is provided, or will be provided or made available within the time
6 allowed and at the place and in the manner specified in the request, which items shall be
7 organized and labeled to correspond with the categories in the request;

8 B(2)(b) as to any requested item not in the party's possession or custody, a statement that
9 reasonable effort has been made to obtain it, unless specifically objected to, or that no such item
10 is within the party's control;

11 B(2)(c) as to any land or other property, a statement that entry will be permitted
12 as requested unless specifically objected to; and

13 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

14 B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived. Any
15 objection to only a part of a request shall clearly state the part objected to. An objection does not
16 relieve the requested party of the duty to comply with any request or part thereof not specifically
17 objected to. **If documents consisting of electronically stored information are requested to be**
18 **produced in electronic form, before the response is due the parties must begin conferring**
19 **in good faith about such request. The conferral may address the scope, data sources, cost,**
20 **search strategies, and other matters concerning such production. A party must make a**
21 **good faith effort to confer before bringing a motion concerning the discovery of**
22 **electronically stored information pursuant to ORCP 36C or 46A.**

23 B(4) A party served in accordance with subsection B(1) of this rule is under a continuing
24 duty during the pendency of the action to produce promptly any item responsive to the request
25 and not objected to which comes into the party's possession, custody, or control.

26 B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or

1 other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall
2 do so within a reasonable time.

3 **C Writing called for need not be offered.** Though a writing called for by one party is
4 produced by the other, and is inspected by the party calling for it, the party requesting production
5 is not obliged to offer it in evidence.

6 **D Persons not parties.** A person not a party to the action may be compelled to produce
7 books, papers, documents, or tangible things and to submit to an inspection thereof as provided
8 in Rule 55. This rule does not preclude an independent action against a person not a party for
9 permission to enter upon land.

1 **ORCP 55**

2 **SUBPOENA**

3 **A Defined; form.** A subpoena is a writ or order directed to a person and may require the
4 attendance of such person at a particular time and place to testify as a witness on behalf of a
5 particular party therein mentioned or may require such person to produce books, papers,
6 documents, or tangible things and permit inspection thereof at a particular time and place. **A**
7 **subpoena may specify that documents consisting of electronically stored information are to**
8 **be produced in electronic form; in such case, the subpoena must specify the form or forms**
9 **in which such documents are to be produced.** A subpoena requiring attendance to testify as a
10 witness requires that the witness remain until the testimony is closed unless sooner discharged,
11 but at the end of each day's attendance a witness may demand of the party, or the party's
12 attorney, the payment of legal witness fees for the next following day and if not then paid, the
13 witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the
14 court and the title of the action.

15 **B(1) For production of books, papers, documents, or tangible things and to permit**
16 **inspection.** A subpoena may command the person to whom it is directed to produce and permit
17 inspection and copying of designated books, papers, documents, or tangible things in the
18 possession, custody or control of that person at the time and place specified therein. A command
19 to produce books, papers, documents, or tangible things and permit inspection thereof may be
20 joined with a command to appear at trial or hearing or at deposition or, before trial, may be
21 issued separately. A person commanded to produce and permit inspection and copying of
22 designated books, papers, documents, or tangible things but not commanded to also appear for
23 deposition, hearing or trial may, within 14 days after service of the subpoena or before the time
24 specified for compliance if such time is less than 14 days after service, serve upon the party or
25 attorney designated in the subpoena written objection to inspection or copying of any or all of
26 the designated materials. If objection is made, the party serving the subpoena shall not be

1 | entitled to inspect and copy the materials except pursuant to an order of the court in whose name
2 | the subpoena was issued. If objection has been made, the party serving the subpoena may, upon
3 | notice to the person commanded to produce, move for an order at any time to compel production.
4 | In any case, where a subpoena commands production of books, papers, documents, or tangible
5 | things the court, upon motion made promptly and in any event at or before the time specified in
6 | the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is
7 | unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the
8 | person in whose behalf the subpoena is issued of the reasonable cost of producing the books,
9 | papers, documents, or tangible things.

10 | **C Issuance.**

11 | **C(1) By whom issued.** A subpoena is issued as follows: (a) to require attendance before
12 | a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending
13 | therein or, if separate from a subpoena commanding the attendance of a person, to produce
14 | books, papers, documents, or tangible things and to permit inspection thereof: (I) it may be
15 | issued in blank by the clerk of the court in which the action is pending, or if there is no clerk,
16 | then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the
17 | party to the action in whose behalf the witness is required to appear, subscribed by the signature
18 | of such attorney; (b) to require attendance before any person authorized to take the testimony of
19 | a witness in this state under Rule 38 C, or before any officer empowered by the laws of the
20 | United States to take testimony, it may be issued by the clerk of a circuit court in the county in
21 | which the witness is to be examined; (c) to require attendance out of court in cases not provided
22 | for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to
23 | administer oaths or take testimony in any matter under the laws of this state, it may be issued by
24 | the judge, justice, or other officer before whom the attendance is required.

25 | **C(2) By clerk in blank.** Upon request of a party or attorney, any subpoena issued by a
26 | clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who

1 shall fill it in before service.

2 **D Service; service on law enforcement agency; service by mail; proof of service.**

3 **D(1) Service.** Except as provided in subsection (2) of this section, a subpoena may be served by
4 the party or any other person 18 years of age or older. The service shall be made by delivering a
5 copy to the witness personally and giving or offering to the witness at the same time the fees to
6 which the witness is entitled for travel to and from the place designated and, whether or not
7 personal attendance is required, one day's attendance fees. If the witness is under 14 years of
8 age, the subpoena may be served by delivering a copy to the witness or to the witness's parent,
9 guardian or guardian ad litem. The service must be made so as to allow the witness a reasonable
10 time for preparation and travel to the place of attendance. A subpoena for taking of a deposition,
11 served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as
12 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
13 D(3)(h). Copies of each subpoena commanding production of books, papers, documents, or
14 tangible things and inspection thereof before trial, not accompanied by command to appear at
15 trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be
16 served on each party at least seven days before the subpoena is served on the person required to
17 produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena
18 shall not require production less than 14 days from the date of service upon the person required
19 to produce and permit inspection, unless the court orders a shorter period.

20 **D(2) Service on law enforcement agency.**

21 D(2)(a) Every law enforcement agency shall designate individual or individuals upon
22 whom service of subpoena may be made. At least one of the designated individuals shall be
23 available during normal business hours. In the absence of the designated individuals, service of
24 subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of
25 the law enforcement agency.

26 D(2)(b) If a peace officer's attendance at trial is required as a result of employment as a

1 peace officer, a subpoena may be served on such officer by delivering a copy personally to the
2 officer or to one of the individuals designated by the agency that employs the officer. A
3 subpoena may be served by delivery to one of the individuals designated by the agency that
4 employs the officer only if the subpoena is delivered at least 10 days before the date the officer's
5 attendance is required, the officer is currently employed as a peace officer by the agency, and the
6 officer is present within the state at the time of service.

7 D(2)(c) When a subpoena has been served as provided in paragraph (b) of this
8 subsection, the law enforcement agency shall make a good faith effort to give actual notice to the
9 officer whose attendance is sought of the date, time, and location of the court appearance. If the
10 officer cannot be notified, the law enforcement agency shall promptly notify the court and a
11 postponement or continuance may be granted to allow the officer to be personally served.

12 D(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a
13 county sheriff's department, or a municipal police department. /////

14 D(3) Service by mail.

15 Under the following circumstances, service of a subpoena to a witness by mail shall be of
16 the same legal force and effect as personal service otherwise authorized by this section:

17 D(3)(a) The attorney certifies in connection with or upon the return of service that the attorney,
18 or the attorney's agent, has had personal or telephone contact with the witness, and the witness
19 indicated a willingness to appear at trial if subpoenaed;

20 D(3)(b) The attorney, or the attorney's agent, made arrangements for payment to the
21 witness of fees and mileage satisfactory to the witness; and

22 D(3)(c) The subpoena was mailed to the witness more than 10 days before trial by
23 certified mail or some other designation of mail that provides a receipt for the mail signed by the
24 recipient, and the attorney received a return receipt signed by the witness more than three days
25 prior to trial.

26 **D(4) Service by mail; exception.** Service of subpoena by mail may be used for a

1 subpoena commanding production of books, papers, documents, or tangible things, not
2 accompanied by a command to appear at trial or hearing or at deposition.

3 **D(5) Proof of service.** Proof of service of a subpoena is made in the same manner as
4 proof of service of a summons except that the server need not certify that the server is not a party
5 in the action, an attorney for a party in the action or an officer, director or employee of a party in
6 the action.

7 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail
8 in this state, a subpoena may be served on such person only upon leave of court, and attendance
9 of the witness may be compelled only upon such terms as the court prescribes. The court may
10 order temporary removal and production of the prisoner for the purpose of giving testimony or
11 may order that testimony only be taken upon deposition at the place of confinement. The
12 subpoena and court order shall be served upon the custodian of the prisoner.

13 **F Subpoena for taking depositions or requiring production of books, papers,**
14 **documents, or tangible things; place of production and examination.**

15 **F(1) Subpoena for taking deposition.** Proof of service of a notice to take a deposition as
16 provided in Rules 39 C and 40 A, or of notice of subpoena to command production of books,
17 papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a
18 certificate that such notice will be served if the subpoena can be served, constitutes a sufficient
19 authorization for the issuance by a clerk of court of subpoenas for the persons named or
20 described therein.

21 **F(2) Place of examination.** A resident of this state who is not a party to the action may
22 be required by subpoena to attend an examination or to produce books, papers, documents, or
23 tangible things only in the county wherein such person resides, is employed or transacts business
24 in person, or at such other convenient place as is fixed by an order of court. A nonresident of this
25 state who is not a party to the action may be required by subpoena to attend an examination or to
26 produce books, papers, documents, or tangible things only in the county wherein such person is

1 served with a subpoena, or at such other convenient place as is fixed by an order of court.

2 **F(3) Production without examination or deposition.** A party who issues a subpoena
3 may command the person to whom it is issued to produce books, papers, documents, or tangible
4 things, other than individually identifiable health information as described in section H, by mail
5 or otherwise, at a time and place specified in the subpoena, without commanding inspection of
6 the originals or a deposition. In such instances, the person to whom the subpoena is directed
7 complies if the person produces copies of the specified items in the specified manner and
8 certifies that the copies are true copies of all the items responsive to the subpoena or, if all items
9 are not included, why they are not.

10 **G Disobedience of subpoena; refusal to be sworn or answer as a witness.**

11 Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be
12 punished as contempt by a court before whom the action is pending or by the judge or justice
13 issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or
14 refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be
15 stricken.

16 **H Individually identifiable health information.**

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

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

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

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

5 **H(2) Mode of Compliance.** Individually identifiable health information may be obtained
6 by subpoena only as provided in this section. However, if disclosure of any requested records is
7 restricted or otherwise limited by state or federal law, then the protected records shall not be
8 disclosed in response to the subpoena unless the requesting party has complied with the
9 applicable law.

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

22 H(2)(b) Except as provided in subsection (4) of this section, when a subpoena is served
23 upon a custodian of individually identifiable health information in an action in which the entity
24 or person is not a party, and the subpoena requires the production of all or part of the records of
25 the entity or person relating to the care or treatment of an individual, it is sufficient compliance
26 therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records

1 responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied
2 by an affidavit or a declaration as described in subsection (3) of this section.

3 H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or
4 wrapper on which the title and number of the action, name of the witness, and date of the
5 subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer
6 envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (I)
7 if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if
8 there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the
9 officer administering the oath for the deposition, at the place designated in the subpoena for the
10 taking of the deposition or at the officer's place of business; (iii) in other cases involving a
11 hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no
12 hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs
13 delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed
14 subpoena shall be served on the person whose records are sought and on all other parties to the
15 litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any
16 party to the proceeding may inspect the records provided and/or request a complete copy of the
17 records. Upon request, the records must be promptly provided by the party who issued the
18 subpoena at the requesting party's expense.

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

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

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

5 H(3)(a) The records described in subsection (2) of this section shall be accompanied by the
6 affidavit or declaration of a custodian of the records, stating in substance each of the following: (I)
7 that the affiant or declarant is a duly authorized custodian of the records and has authority to certify
8 records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (iii) that the
9 records were prepared by the personnel of the entity or person acting under the control of either, in
10 the ordinary course of the entity's or person's business, at or near the time of the act, condition, or
11 event described or referred to therein.

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

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

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

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

20 The personal attendance of a custodian of records and the production of original records is
21 required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure
22 55 H(2) shall not be deemed sufficient compliance with this subpoena. H(4)(b) If more than one
23 subpoena duces tecum is served on a custodian of records and personal attendance is required under
24 each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness
25 of the party serving the first such subpoena.

26 **H(5) Tender and payment of fees.** Nothing in this section requires the tender or payment

1 | of more than one witness and mileage fee or other charge unless there has been agreement to the
2 | contrary.

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

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1 | *express mail with return receipt requested; or that the identity of the defendant's insurance*
2 | *carrier is unknown to the plaintiff.]*

3 | **B Intent to appear; notice of intent to take default.**

4 | **B(1) For the purposes of avoiding a default, a party may provide written notice of**
5 | **intent to file an appearance to a plaintiff, counterclaimant, or cross-claimant.**

6 | **B(2) If the party against whom an order of default is sought has filed an**
7 | **appearance in the action or has provided written notice of intent to file an appearance,**
8 | **then formal notice of the intent to take to default must be filed and served at least 10 days,**
9 | **unless shortened by the court, prior to entry of the order of default. The notice of intent to**
10 | **take default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must**
11 | **be filed with the court and served on the party against whom an order of default is sought.**

12 | *[B Entry of judgment by default.*

13 | *B(1) By the court or the clerk. The court or the clerk upon written application of the*
14 | *party seeking judgment shall enter judgment when:*

15 | *B(1)(a) The action arises upon contract;*

16 | *B(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for*
17 | *a sum which can by computation be made certain;*

18 | *B(1)(c) The party against whom judgment is sought has been defaulted for failure to*
19 | *appear;*

20 | *B(1)(d) The party seeking judgment submits an affidavit or a declaration stating that, to*
21 | *the best knowledge and belief of the party seeking judgment, the party against whom judgment is*
22 | *sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in*
23 | *ORS 125.005, or a respondent as defined in ORS 125.005;*

24 | *B(1)(e) The party seeking judgment submits an affidavit or a declaration of the amount*
25 | *due;*

26 | *B(1)(f) An affidavit or a declaration pursuant to subsection B(4) of this rule has been*

1 | *submitted; and*

2 | *B(1)(g) Summons was personally served within the State of Oregon upon the party, or an*
3 | *agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule*
4 | *7 D(3)(a)(I), 7 D(3)(b)(I), 7 D(3)(c)(I), 7 D(3)(d)(I), 7 D(3)(e), or 7 D(3)(f).*

5 | *B(2) By the court.] **C Motion for order of judgment by default.***

6 | **C(1)** *In cases other than those cases described in subsection F(1) of this section, the party*
7 | *seeking judgment must [apply to the court for] **make a motion for order of judgment by***
8 | *default. **That motion must be accompanied by an affidavit or declaration by [T]the party***
9 | *seeking judgment **establishing the following:** [must submit the affidavit or declaration required*
10 | *by subsection (1)(d) of this section if, to the best knowledge and belief of the party seeking*
11 | *judgment, the party against whom judgment is sought is not incapacitated as defined in ORS*
12 | *125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in*
13 | *ORS 125.005. If the party seeking judgment cannot submit an affidavit or a declaration under*
14 | *this subsection, a default judgment may be entered against the other party only if a guardian ad*
15 | *litem has been appointed or the party is represented by another person as described in Rule 27.*
16 | *If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take*
17 | *an account or to determine the amount of damages or to establish the truth of any averment by*
18 | *evidence or to make an investigation of any other matter, the court may conduct such hearing, or*
19 | *make an order of reference, or order that issues be tried by a jury, as it deems necessary and*
20 | *proper. The court may determine the truth of any matter upon affidavits or declarations.*

21 | *B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by*
22 | *the affidavit or declaration, and may include costs and disbursements and attorney fees entered*
23 | *pursuant to Rule 68.*

24 | *B(4) Non-military affidavit or declaration required. No judgment by default shall be*
25 | *entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the*
26 | *defendant is or is not a person in the military service, or stating that plaintiff is unable to*

1 *determine whether or not the defendant is in the military service as required by Section 201(b)(1)*
2 *of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended, except upon order*
3 *of the court in accordance with that Act.]*

4 **C(1)(a) service has been accomplished in accordance with Rule 7 or other court**
5 **order;**

6 **C(1)(b) whether the party has appeared or notice of intent to appear has been**
7 **received, and if so whether notice of intent to take default has been filed and served 10 days**
8 **prior to the motion or verification that the court shortened the time;**

9 **C(1)(c) the amount due as claimed in the pleadings, together with a statement as to**
10 **whether costs, disbursements or attorneys fees are claimed pursuant to ORCP 68;**

11 **C(1)(d) the fact that the party against whom the order of default is sought has**
12 **failed to plead or otherwise defend as provided in these rules;**

13 **C(1)(e) to the best knowledge and belief of the party seeking judgment, the party**
14 **against whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor,**
15 **a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005.**

16 **If the party seeking judgment cannot submit an affidavit or a declaration under this**
17 **subsection, a default judgment may be entered against the other party only if a guardian ad**
18 **litem has been appointed or the party is represented by another person as described in**
19 **Rule 27; and**

20 **C(1)(f) the defendant is or is not a person in the military service, or stating that**
21 **plaintiff is unable to determine whether or not the defendant is in the military service as**
22 **required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. §**
23 **521, as amended, except upon order of the court in accordance with that Act.**

24 **C(2) An order of default may be granted by the court if it appears the motion and**
25 **affidavit or declaration has been filed in good faith and good cause is shown that such an**
26 **order is proper.**

1 **D Default judgment**

2 **D(1) Amount of judgment. The judgment entered shall be for the amount due as**
3 **shown by the affidavit or declaration, and may include costs and disbursements and**
4 **attorney fees entered pursuant to Rule 68. If, in order to enable the court to enter judgment**
5 **or to carry it into effect, it is necessary to take an account or to determine the amount of**
6 **damages or to establish the truth of any averment by evidence or to make an investigation**
7 **of any other matter, the court may conduct such hearing, or make an order of reference, or**
8 **order that issues be tried by a jury, as it deems necessary and proper. The court may**
9 **determine the truth of any matter upon affidavits or declarations.**

10 **D(2) Costs, disbursements & attorney fees. If costs, disbursements, and/or attorney**
11 **fees are allowable based on a contract, statute or other legal provision, then application**
12 **shall be made pursuant to ORCP 68.**

13 **[First Draft: If attorney fees are allowable based on a contract, statute or other legal**
14 **provision, then application for attorney fees shall be made by motion for a**
15 **supplemental judgment within 14 days of judgment. The motion for a supplemental**
16 **judgment shall contain the legal basis on which the attorney fees are sought, an**
17 **affidavit containing a detailed description of the legal services which form the basis**
18 **of the request for attorney fees.]**

19 **[C Setting aside default.] E Setting aside a default order or judgment.** For good cause
20 shown, the court may set aside an order of default and, if a judgment by default has been entered,
21 may likewise set it aside in accordance with Rule 71 B and C.

22 *[D Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply*
23 *whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a*
24 *party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is*
25 *subject to the provisions of Rule 67 B.*

26 *E "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or*

1 *any person performing the duties of that office.]*

2 **F Special cases.**

3 **F(1) Certain contract cases. The court, upon written application of the party**
4 **seeking judgment shall enter a default judgment after an order of default supported by**
5 **motion and order substantiating the following has been obtained:**

6 **F(1)(a) The action arises upon contract;**

7 **F(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or**
8 **for a sum which can by computation be made certain; and**

9 **F(1)(c) Summons was personally served within the State of Oregon upon the party,**
10 **or an agent, officer, director, or partner of a party, against whom judgment is sought**
11 **pursuant to Rule 7 D(3)(a)(I), 7 D(3)(b)(I), 7 D(3)(e), or 7 D(3)(f); and**

12 **F(1)(d) compliance with the provisions set forth in Subsection C (b)-(f) of this rule.**

13 **(2) Certain motor vehicle cases. No default shall be entered against a defendant**
14 **served with summons pursuant to subparagraph D(4)(a)(I) of Rule 7 unless the plaintiff**
15 **submits an affidavit or a declaration showing:**

16 **F(2)(a) that the plaintiff has complied with subparagraph D(4)(a)(I) of Rule 7; and**

17 **F(2)(b) either, if the identity of the defendant's insurance carrier is known to the**
18 **plaintiff or could be determined from any records of the Department of Transportation**
19 **accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for**
20 **default mailed a copy of the summons and the complaint, together with notice of intent to**
21 **apply for an order of default, to the insurance carrier by first class mail and by any of the**
22 **following: certified or registered mail, return receipt requested, or express mail; or that the**
23 **identity of the defendant's insurance carrier is unknown to the plaintiff.**

McCollum v. Kmart Corporation
Case No.: S057609
<http://www.publications.ojd.state.or.us/S057609.htm>

AREA OF LAW: CIVIL PROCEDURE

HOLDING: (Opinion by Linder, J.) * A trial court opinion letter that refers to an attached order granting a motion for a new trial and which is entered into the court register 54 days after the original judgment, is not timely filed and is deemed denied by operation of law when the order itself is not formally entered into the register of the court until 59 days after the original judgment.

The circuit court entered a judgment for defendant Kmart Corporation. Plaintiff McCollum moved for a new trial which the circuit court granted by issuing an opinion letter and attached order 52 days later. The order was not entered into the registry until 59 days after the original judgment. The Court of Appeals held the order timely because the opinion letter, which was entered into the registry 54 days after the judgment, incorporated the order by reference. The Supreme Court reversed, holding that ORCP 64 F(1) requires that an order for a new trial be formally entered into the register of the court within 55 days after the original judgment. Additionally, the court held the opinion letter was not an order and did not incorporate the order by reference because it referred to the order as a distinct and separate document. Because the order was not formally entered into the register of the court until 59 days after original judgment, the order was deemed denied by operation of law. Order for new trial vacated and original judgment reinstated.

[Summarized by Kathleen Thomas]

(3 Liberty Northwest Insurance v. Watkins
Case No.: S057190
<http://www.publications.ojd.state.or.us/S057190.htm>

AREA OF LAW: WORKERS' COMPENSATION

HOLDING: (Opinion by DE MUNIZ, C. J.) A claimant cannot release the right to derivative attorney fees from a successful medical services dispute, even if claimant unambiguously releases rights to all attorney fees potentially arising out of a claim in a contractual Claim Disposition Agreement entered in conformity with ORS 656.236.

The Department of Consumer and Business Services (Department) awarded attorney fees for resolving a medical services dispute. The Court of Appeals reversed because a Claim Disposition Agreement (CDA) released all rights pertaining to claimant's right to attorney fees, including potential attorney fees arising out of a medical services dispute. The Supreme Court held that claimant could not have released the right to derivative attorney fees from a successful medical services dispute even where claimant unambiguously released rights to all attorney fees potentially arising out of the claim in a contractual CDA entered in conformity with ORS 656.236. Using statutory interpretation, the Supreme Court reasoned that; the phrase "except medical services" in ORS 656.236(1), modifies all of the preceding phrases. Therefore, per 656.236, the CDA did not resolve derivative rights to attorney fees stemming from the claim for medical services. The decision of the Court of Appeals is reversed. The order of the Director of the Department of Consumer and Business Services is affirmed.

[Summarized by Manuel Bravo]