MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 11, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Kenneth C. Crowley
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Derek Larwick
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Hon. Scott Shorr
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Nadia Dahab
Hon. Melvin Oden-Orr
Tina Stupasky
Stephen Voorhees
Margurite Weeks

Guests:

Aja Holland, Oregon Judicial Department
Erin Pettigrew, Oregon Judicial Department
Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 35 (Vexatious Litigants) ORCP 39 ORCP 55 ORCP 57 ORCP 58	ORCP 1 ORCP 4 ORCP 14 ORCP 15 ORCP 16 ORCP 17 ORCP 18 ORCP 21 ORCP 22 ORCP 23 ORCP 27 ORCP 32 ORCP 47 ORCP 52 ORCP 55 ORCP 57 ORCP 58 ORCP 60 ORCP 68 ORCP 69	ORCP 71 Abatement Affidaviting judges Arbitration/mediation Collaborative practice Expedited trial Family law rules Federalized rules Interpreters Lawyer Civility Lis pendens One set of rules Probate/trust litigation Quick hearings Self-represented litigants Standardized forms Statutory fees Trial judges UTCR	ORCP 7 ORCP 39 ORCP 55 ORCP 58 ORCP 69		ORCP 54/ORS 36.425

NOTE: The Council did not discuss items of business in the order presented on the agenda.

I. Call to Order

Mr. Crowley called the meeting to order at 9:30 a.m.

II. Approval of May 14, 2022, Minutes

Mr. Crowley explained that the May 14, 2022, minutes were not yet completed and that they would be approved at a later time.

III. Administrative Matters

A. Legislative Counsel's Proposed New Publication

Judge Peterson explained that, for the last few biennia, he had been encouraging the Office of Legislative Counsel (LC) to create a publication that contains the Oregon Rules of Civil Procedure (ORCP), similar to LC's family law, criminal law, and landlord tenant law publications. He noted that Thomson Reuters' publication uses small print so it is not very user friendly, it costs more than $300, and it contains additional rules that are not helpful to most practitioners. Judge Peterson stated that LC has now decided to create a publication containing the ORCP. He stated that his proposal was to include the ORCP, the Oregon Evidence Code, and the Uniform Trial Court Rules (UTCR), with permission from the Oregon Judicial Department (OJD). The benefits will be that it will be a thinner volume that will be easy to take to court, and that it will presumably be less expensive.

Judge Peterson stated that he had also proposed that staff comments be included in the volume, but noted that this may not be workable. Ms. Nilsson had asked whether an electronic version of the book would be available, and suggested that a link to the Council website for comments would then be possible. Judge Peterson stated that he has not received an answer as to whether there would be an electronic version, nor as to what exactly the book would contain. However, he hoped that it would be thinner and less expensive for practitioners, and believed that it will be a real service to the bar to have such a book that can go to counsel table with lawyers at trial.

Mr. Crowley stated that the book sounds like a great idea, and that making the rules more available is better for everyone, particularly if an electronic link is available. He also stated that he promotes the Council website at every opportunity, because there is so much useful information there that many people are not aware even exists. Judge Peterson noted that, before Ms. Nilsson joined Council staff, the website did not exist.

The website is a result of her hard work, and it is still a work in progress, but it is so much more useful than having bound volumes of the Council's work in seven law libraries all located along the Interstate 5 corridor. Mr. Crowley agreed.

B. Court of Appeals Vacancy

Judge Peterson reminded the Council that Judge Roger DeHoog had been appointed to the Oregon Supreme Court and had therefore resigned his position on the Council. Judge Scott Shorr was appointed to the Court of Appeals position on the Council and joined the Council for his first meeting. Judge Peterson welcomed Judge Shorr, who introduced himself and stated that he was pleased to join the Council.

IV. Old Business

A. Committee Reports

1. Rule 55 Committee

Judge Norby stated that, at the last Council meeting, the Council had asked her to add language to the proposed form to invite people who are using the form to explain what their efforts had been to contact the person who subpoenaed them. Ms. Nilsson explained that those changes were highlighted in blue on Appendix A, and that there were a few staff suggestions that were highlighted in green as well.

Judge Peterson stated that the intent of the new language is basically to reduce the number of motions that get filed frivolously by including what is essentially a UTCR 5.010 conferral obligation that states that, if a witness is going to file a motion to quash the subpoena, that witness must make a reasonable effort to contact the attorney issuing the subpoena. He explained that the language that Judge Norby had crafted requires the witness not only to say that they did confer, but to explain how, and also states that the motion will be denied if no reasonable effort was made. He stated that this is an excellent addition.

Judge Bloom suggested using the word "resolve" instead of "solve." Judge Norby explained that she thought that a non-lawyer might understand "solve" better than "resolve," but that she was not committed to that word. Judge Jon Hill noted that the Council had discussed the issue at length at the last meeting and that Judge Norby had come up with good language to resolve the issue. He made a motion to put the proposed amendment on the publication agenda in September, with the change of the word "solve" to "resolve." Judge Leith seconded the

motion.

Mr. Crowley asked Judge Peterson for clarification about what it means to vote to move the proposed amendment to the September publication docket. He asked whether it would be possible to make additional changes at the September meeting. Judge Peterson explained that changes can be made before publication in September. He strongly urged Council members to take a hard look at this draft amendment in the next month or so and, if they see anything of concern, to contact Council staff, who can put the issue before the entire Council to try to work out a solution. He stated that it is preferable not to engage in wordsmithery on the fly at the September meeting.

Judge Peterson also pointed out three minor staff changes, highlighted in green. One change was in subparagraph A(1)(a)(v) to include a missing reference. The second was to include the word "substantially" in supbaraph A(1)(a)(vi). The last was to change the word "upon" to "on" in paragraph B(1)(a).

Mr. Crowley called for a vote on Judge Jon Hill's motion, which was passed unanimously by voice vote.

2. Rule 57 Committee

Ms. Holley referred the Council to Appendix B, which contains 4 versions of draft amendments to Rule 57. Draft 2A uses only the word "unconscious" when referring to bias. Draft 2B uses the word "unconscious" and includes language that states that the totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause. Draft 2C includes the words "unconscious," "implicit," and "institutional." Draft 2D includes the 3 words in Draft 2C as well as the language about totality of the circumstances referred to in draft 2B. Each version also includes changes by staff not intended to affect the operation of the rule.

Ms. Holley walked the Council through draft 2D, the draft with the most proposed changes up for debate. She noted that Council staff had moved the definitions to the top of subsection D(1). She stated that the only potential issue she saw with this change is that "unconscious" bias is only used in subsection D(4) of the current rule, which would become subsection D(5) in the proposed amendment. She did not necessarily see it as a big problem, and Ms. Nilsson had explained it in a way that makes sense to her, but she wanted to explain it for the Council. Ms. Holley pointed out that "implicit" bias is also defined to be a bias of which a

person may be aware, although the person may be unaware of its association with unlawful discrimination. She noted that, to her, that is the distinction between implicit and unconscious bias. She referred to the example of a person who is aware that they do not like people who do not speak English, but who is not aware that this dislike can be associated with race and nationality discrimination. Ms. Holley asked whether the Council wanted to vote on whether to only include unconscious bias in the rule, or to keep implicit and institutional bias there as well.

Judge Oden-Orr asked where the definition of implicit bias was derived from. Ms. Holley stated that she had crafted it herself, as she did not find one in any other rule that made the same kind of distinction. Judge Oden-Orr stated that there is case law that has found that implicit bias supported a claim for unlawful discrimination. He also stated that his reading has suggested that the words "implicit" and "unconscious" are used interchangeably. Ms. Holley agreed that they can be used interchangeably, and that creating this definition would be setting out a new distinction between the two terms. She stated that the reason she feels that the distinction is important is that, for example, a person may know that they have a bias against people who have been arrested, but they may not understand that police contacts are associated with race.

Judge Norm Hill pointed out that having two separate definitions effectively operationalizes them in a way that is actually substantively different. If this is not the intention, what is the reason for adding unconscious bias? Ms. Holley reiterated the example of the person who is prejudiced against non-English speakers, but claims that it is not based on race. She expressed concern that, without the two definitions, no clear link is made to unlawful bias. Judge Norm Hill asked whether that would be an actual bias. Ms Holley stated that it would not necessarily be actual bias. She stated that a person can be biased against people who have yellow shirts, which is not an unlawful bias. However, if everyone living in Multnomah County who is Latinx has been ordered by ordinance to wear yellow shirts, and a person states that they are biased against people with yellow shirts, they could still claim that it is not a bias against people who are Latinx.

Judge Norm Hill stated that his question is whether the proposed amendment would treat unconscious bias differently from implicit bias in the exercise of peremptory challenges. Ms. Holley stated that it is possible that it would not. She noted that the Washington, Connecticut, and California rules all say "unconscious, implicit, and institutional bias." She opined that it is like an overlapping Venn diagram where all three can be related, but not necessarily the same. She expressed concern that removing unconscious bias may give rise to arguments

that the Council is not intending to support. Judge Norm Hill stated that the question is what is being done with the definitions, not the definitions themselves. He stated that he did not know that he could divorce the definition from the operationalization of it. Ms. Holley stated that she did not know that they would need to be divorced. She stated that she thinks that the purpose is to cover all types of bias and not to have a question of whether something is not covered based on a kind of nuanced argument.

Mr. Crowley stated that he would need to see how the definitions are being used in the rest of the rule before voting to keep them in the rule or to take them out. Judge Jon Hill noted that, at a previous Council meeting, there was a good discussion regarding how each definition of bias could be thought about by the court. Ms. Holley stated that the idea of unconscious bias was a situation where a judge feels that exclusion of a juror would reduce confidence in the fairness of the system, and appear discriminatory whether or not that is the intent. Including unconscious bias in the rule would give the court the discretion to deny a peremptory challenge in order to promote justice and and fairness and confidence in the system. Ms. Holley pointed out that, in paragraph D(5)(e), in making the determination on whether to exclude the juror, the court must consider the totality of the circumstances from the perspective of an objective, reasonable person who is aware of implicit, institutional, and unconscious bias. This also means that, even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding a juror would more likely than not contribute to implicit institutional or unconscious bias sufficient to harm a party or the excluded juror, and the reasons given to support the challenge are insufficient to outweigh the risk of that harm.

Judge Norm Hill asked what standards the trial judge would use to make that determination, as opposed to simply imposing their own view of what will advance social justice within the jury system. Ms. Holley stated that, under paragraph D(5)(c), if there is an objection to the exercise of a peremptory challenge, the party exercising the peremptory challenge must articulate the reasons supporting it that are not pretextual or historically associated with discrimination. Then the objecting party may present evidence or argument that the stated reason for the objection is pretextual or is historically associated with discrimination, whether the discrimination is unconscious, implicit, or institutional. The judge would then listen to the argument, consider the totality of the circumstances, and explain their reasoning on the record. Judge Norm Hill stated that it is one thing to look at whether the reasoning given is real or pretextual. He stated that he understands that and is comfortable being able to

ascertain that. He expressed concern about being able to determine how that exercise of the peremptory challenge will be viewed by the community at large with respect to the fairness of the jury. Ms. Holley suggested that the judge would consider the totality of the circumstances. Judge Norm Hill stated that this phrase does not tell him what objective standards he should be looking at. Without such a list, he is left with his own subjective opinion as the trial judge, which is going to look different from courtroom to courtroom and jurisdiction to jurisdiction. He stated that this frightens him, because, if the rule is standardless, confidence in the system is lost.

Ms. Holley stated that she understood Judge Norm Hill's concern. However, the intent of the rule is that the objecting party would always have the burden to prove that the peremptory challenge is more likely than not historically associated with discrimination, and that granting it, regardless of whether or not the judge finds a bad motive on the part of counsel making the peremptory challenge, would contribute to lack of faith in the fairness of the justice syatem. Judge Peterson stated that he prefers this suggested approach to Washington's rule. For one thing, Washington's factors are very substantive. In addition, they may not work and the list may not be sufficiently expansive. He noted that it is the quality of the discussion of the reasons posited by the person making the challenge that will influence the judge's decision. The judge will listen to the arguments of counsel and decide based on who has made a better case.

Judge Jon Hill asked whether the Council should take a vote about keeping all three kinds of bias or just one. Judge Leith stated that he was in favor of including only unconscious bias. He stated that it seems to him that unconscious bias is what the Council is trying to get at, and that including the other definitions turns the rule into a little bit of a word soup, with the need to untangle what those other words mean. He stated that he understood from workgroup discussions that the desire to include institutional bias was to account for situations where, for example, removing the only African American from the jury would send a bad message or potentially harm the jury system. However, it seems to him that it will be a miscarriage of justice to disallow a valid peremptory challenge just because the juror happens to be African American. He stated that he was not certain that is the correct position for the Council to take. He observed that the Council should be trying to prevent parties from exercising peremptory challenges in ways that are actually biased, and he believes that goal is accomplished with just using the word "unconscious."

Judge Norm Hill asked whether "protected status" refers to First Amendment

issues, or is simply from an employment discrimination standpoint. Ms. Holley noted that the phrase "protected characteristic" is more accurate to Oregon's discrimination law. She stated that race, ethnicity, sex, and gender identity are characteristics of a person, but that status could potentially be read to include speech or whistleblower status.

Judge Norm Hill presented the hypothetical situation of a criminal case with a victim who is a person of color and a potential juror with a big confederate flag on his shirt. With the proposed language in the draft amendment, can the prosecutor exercise a peremptory challenge for that potential juror after asking whether they can be fair and getting an affirmative reply? The prosecutor would be basing their peremptory challenge on the conclusions drawn from the shirt. Ms. Holley stated that this speaks to the actual bias issue, because the shirt is potentially an expression of actual bias. However, a party may not exercise a peremptory challenge on the basis of any status protected by Oregon or federal discrimination law. Judge Norm Hill then gave the hypothetical situation of one African American on an otherwise all-white jury panel in a civil action based on police misconduct. A prosecutor might have a conversation with that juror about their interactions with and attitudes toward police, and their response may not rise to the level of a for-cause challenge, but enough to tell the prosecutor that the person's attitudes regarding the police are probably not going to make them a good juror for the state. Would the prosecutor be allowed to exclude that juror under the proposed amendment? Ms. Holley stated that the prosecutor would be able to make a peremptory challenge, the other side would be able to object, and the judge would need to articulate on the record whether the judge believes that exclusion would impact the system. The consideration would be whether exclusion would more likely than not contribute to implicit, institutional, or unconscious bias sufficient to harm a party or the excluded juror, and the reasons given in support of the challenge are insufficient to outweigh the risk of harm.

Judge Norm Hill stated that he was trying to drill down on how to make the determination of whether excluding the juror is going to harm that juror or the system. Ms. Holley stated that a judge would rely on the arguments of both parties. Judge Norm Hill pointed out that a judge would need to have a standard to weigh that against because, at the end of the day, it cannot just be what the judge thinks. Judges need to follow the law. Ms. Holley noted that the question is whether it is more likely than not that excluding the juror would contribute to implicit, institutional, or unconscious bias. She stated that there is case law, including *Batson v. Kentucky*, 476 U.S. 79 (1986), that the parties could use to argue for or against that point. She pointed out that the workgroup did not want

to outline any factors from that case law too explicitly, because case law does change sometimes. There was also concern about creating a path for someone to know the arguments not to make to perpetuate intentional discrimination in disguise.

Judge Oden-Orr asked whether the amendment was intending to capture issues other than race, ethnicity, and sex, more broadly than they already exist in the current rule. Ms. Holley stated that feedback from members of the workgroup indicated that the desire was to capture the characteristics listed in the public accommodation law, ORS 659A.403. As an alternative to referring to that statute in the draft amendment, the language in the amendment was chosen.

Justice Garrett asked about the language in paragraph D(5)(3) that states that judges should look at the totality of the circumstances from the perspective of an objective, reasonable person who is aware of unconscious bias. He stated that he was not certain that he fully understands what the phrase "aware of unconscious bias" means. "Unconscious bias" is earlier defined to mean bias that one is not aware of. But what is being expected of the trial judge in this situation in terms of what they are and are not expected to understand? Ms. Holley stated that this language was taken from the Washington rule, and that the Council might want to modify it, but that the basic idea is is acknowledging that these forms of bias exist. Justice Garrett clarified that it is meant to say "an objective reasonable person who understands that unconscious bias exists exists." Ms. Holley agreed.

Judge Jon Hill asked Ms. Nilsson to conduct a poll about whether just unconscious bias should be included in the rule, or whether implicit, institutional, and unconscious bias should be included. Council members voted 11-4 to only include unconscious bias in the rule.

Ms. Holley referred the Council to draft 2B, which includes only unconscious bias and also includes Judge Oden-Orr's language about considering for-cause challenges in the totality of the circumstances. She stated that the language in new paragraph D(2)(b) related to disability had been revised. She asked Aja Holland from the Oregon Judicial Department (OJD) to talk about some language that the OJD is suggesting to replace the language in the draft: "A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue hardship on the courts or the juror."

Ms. Holland explained that Title 1 of the federal Americans With Disabilities Act (ADA) deals generally with employers and employees. The standard that the OJD

applies in courts for jury service is from Title 2 of the ADA, which deals with programs and services of state and local governments, and that standard is a little bit different than the undue hardship standard. There are two parts to it. If the person is requesting a communication-related accommodation, the court has to provide the accommodation unless it would fundamentally alter the nature of the service or program or activity, or create an undue financial and administrative burden. If it is a non-communication related accommodation, the court would have to grant it unless it the modification would fundamentally alter the nature of the service. program, or activity. Ms. Holland stated that the OJD's concern is to ensure that the language in Rule 57 comports with current federal law, and the language as drafted may not do so.

Ms. Holley expressed concern that using language similar to that found in the ADA would limit the court beyond what she thinks the realistic limitations are. Rather than just undue hardship on the operation of the court, which seems to be the same as undue financial and administrative burdens, the modification would have to fundamentally alter the nature of jury service. She also pointed out that the draft language also allows for the possibility that it could be an undue hardship on the juror to try to accommodate them, and allows the juror to say that they do not wish to be accommodated. She stated that she believes that this is consistent with the spirit of the law. Ms. Holland stated that, since the standard is already in federal law, there may be a perceived conflict between the ORCP and the federal law, In that case, she believes that the courts would have to apply the federal law. Ms. Holley stated that she did not believe that there is a conflict, because the federal law is meant to protect people with disabilities. She suggested that the language "undue financial and administrative burden" could be used instead of "undue hardship."

Mr. Crowley stated that this conversation makes him uncomfortable as a lawyer for the Department of Justice (DOJ), because the DOJ would be representing the OJD if they were sued for discrimination based on language like this. He also expressed concern that the Council had not really dug into what the best approach is, and stated that it feels a bit awkward to be considering it at this point. Judge Norm Hill asked what the problem is with the existing language. Ms. Holley stated that she did not think there was a problem, and that she actually thinks that the suggestion from the OJD is problematic because it will invite the opportunity for additional issues. She stated that the draft language provides the protections that the federal law provides, and then does a little bit more to create flexibility for what is going to serve the parties and the juror. She did agree that there is case law around the precise language in Title 2. Ms. Holland explained

that part of OJD's concern is that other states look to that Title 2 wording, and there is a lot of case law that interprets that language. One of her concerns about retaining the undue hardship language in the draft would be that the courts could lose all of the case law that they look to when determining whether to grant an accommodation. Ms. Holley stated that she did not believe that the case law would be lost if the current language in the draft were retained. She stated that undue financial burden can fall within undue hardship.

Judge Norm Hill asked for clarification of OJD's position about why the current language in ORCP 57 would need to be changed. Ms. Holland explained that the OJD had not identified any issue with the existing language. The issue was more that, if the Council feels the need to include the standard for whether an accommodation has to be granted in the amendment, the OJD wanted to make sure that it reflects the federal law that applies. Judge Norm Hill stated that he did not understand the reason for the change to the language in the existing rule. Ms. Holley explained that the reason for the change is that "mental or physical defect" is outdated, offensive language and not appropriate to use. Since that language was being changed, her thought was to track the actual law as well. And now OJD is providing feedback on that change.

Mr. Andersen agreed that the language about mental or physical defects needs to be updated. He expressed concern that the rule seems to have become much longer and more complicated, with a short subsection having been expanded to become much longer, and suggested that it would be better to make amendments to the existing rule rather than making a complete overhaul. That way, the Council would really know what is being changed. Ms. Holley asked for clarification on which area Mr. Andersen was referencing. Mr. Andersen stated that he was referring to subsection D(4). Ms. Holley asked if the conversation about subsection D(1) could be completed before moving on to the rest of the rule. Mr. Andersen stated that his concern is that the Council is laboring with a lot of branches before deciding where the trunk really is.

Judge Norm Hill suggested that, if the problem is the inappropriate language about disability, the Council can just fix that language to be more appropriate to modern ears and do nothing more with it. That would solve OJD's issue. Ms. Holley stated that this is a potential solution, although she expressed concern that it might cause confusion in the way that it comports with the law. She suggested the language, "the existence of a mental or physical impairment, which satisfies the court that the challenged person is unable to perform the essential duties of a juror," which is more consistent with discrimination law. Judge Norm Hill stated

that he would be in favor of that. Judge Jon Hlll stated that he preferred the OJD's language. Ms. Holland stated that she actually preferred the suggestion that Judge Norm Hill and Ms. Holley had crafted.

Ms. Holley suggested examining the new paragraph D(5)(b), which deals with objections to peremptory challenges. She stated that Judge Norm Hill's suggestion about adding standards could be included here, such as, "totality of the circumstances may include argument or evidence from the parties," and just include other factors after that. Judge Jon Hill stated that he liked that idea, but he also liked the idea of considering whether or not the challenging party had requested a for-cause challenge as well. Ms. Holley reminded the Council that the workgroup did not want to set out many different specifics, but argument and evidence from the parties, existing case law, and perhaps two other suggestions work. She asked Judge Norm Hill if this would be acceptable. Judge Norm Hill stated that he thought that it would be better.

Judge Norm Hill asked about the standard in subparagraph D(5)(d)(ii), which states that, even when no subjective intent to exclude is perceived as motivation for the challenge, excluding the juror would more likely than not contribute to unconscious bias. He asked for an explanation of "contribute to unconscious bias." Ms. Holley stated that the complete phrase is, "contribute to unconscious bias harming a party or the excluded juror," and explained that it would be something like the example of a judge having the authority to say that a challenge is suspect because it challenges the only Black or Asian American juror. Judge Norm Hill stated that the phrase hits his ear wrong and he does not understand it. Judge Oden-Orr gave the example of a prosecutor, in response to a challenge, saying that a witness indicated that they had police contact, and that unconscious bias could be reflected in that comment. Judge Norm Hill stated that this is not contributing to bias but, rather, it is the product of unconscious bias on the part of the prosecutor. He stated that this is what he is getting hung up on. Ms. Holley stated that this is not the part that would fall under subparagraph D(5)(d)(i). She noted that subparagraph D(5)(d)(ii) is intended to cover a scenario where the judge says that, even though there is no intent to discriminate, sustaining the peremptory is going to reduce faith in the system and cause harm or deprive people of rights. Ms. Nilsson asked whether the word "unconscious" should be included, since the type of bias Ms. Holley was describing seemed to be more institutional. Ms. Holley stated that the point is that the bias is not intentional. The party does not have to say that the prosecutor is racist. The party can just say that, while the prosecutor is doing the best they can toward antiracism, they have concerns about whether the challenge will create a jury panel that maintains faith

in the system.

Judge Norm Hill stated that this might be the source of his confusion, because he thinks of unconscious bias as a mental process that goes into his decision making as an actor in the system, similar to what Judge Oden-Orr described, but he stated that he does not feel that this is what is being captured here. What is being captured here is a larger impact on the system. Ms. Holley agreed that it is more like institutional bias, which is why including all three words makes sense. Judge Norm Hill stated that this is why he said that it depends on how the language is used. He stated that, if the concept is that it does not necessarily have anything to with the parties or the juror but, rather, is an attempt to protect the system as a whole, the language should just state that.

Judge Jon Hill suggested that stating what can be considered in paragraph D(5)(e) would inform the paragraphs above it. He reiterated that the workgroup did not want to include an exhaustive list, but he opined that there should be some list there, because that will inform what the Council is trying to do. Ms. Holley suggested, "may include, among other factors, argument from the parties, case law, and whether the party challenged the same juror." Judge Jon Hill suggested that the list of guidelines to consider might need some time and consideration to craft.

Judge Norm Hill stated that he has a problem with the language in subparagraph D(5)(d)(ii) that talks about harm to a party, because of course removal of the potential juror is going to harm a party. That is the reason that the lawyer wants them out. Exercising a peremptory, presumably in every case, is harmful to the a party, because that is why the opposing side is exercising it. Ms. Holley opined that it is the opposite: that the peremptory is being exercised to protect against a bias that the lawyer believes exists. Judge Norm Hill stated that sometimes a lawyer is exercising a peremptory challenge simply because there is a better juror sitting in the next seat.

Judge Norm Hill thanked Ms. Holley for the incredible work that has been done on the draft amendment, which will move the ball so much further than its current position. However, he stated that he thinks that there is a fundamental question that has not been answered: does the Council think that it is appropriate for the court to take into consideration the extrajudicial societal effects that the exercise of peremptory challenges will have? Ms. Holley reiterated that the workgroup's answer to that question was a resounding yes, that the court should consider

these institutional impacts. Judge Norm Hill asked whether this is a consensus within the Council as well. Ms. Holley stated that, at the last Council meeting, there was no fundamental disagreement with the concept.

Judge Peterson stated that it was his understanding that the idea was to say that it would not contribute to the public's perception of fundamental fairness, rather than harm to the parties. Ms. Holley stated that the word “harming” was intended to refer to whether whether the peremptory challenge is discriminatory based on a protected class. Judge Norm Hill stated that it appears that there is an attempt to bring in a de facto discrimination concept into it, as in, “even though you did not intend it to be discriminatory, it had that effect.” He suggested that, if that is what the Council is trying to capture, perhaps it needs to be stated in a more direct way than the proposed language. Ms. Holley asked whether “more likely than not have discriminatory effect” would work. Judge Oden-Orr suggested, “Even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would more likely than not harm a party or the excluded juror.”

Justice Garrett stated that he has some of the same questions that Judge Norm Hill does. He stated that, if the idea is to ask the trial judge to look past pretext and past the question of whether there was a subjective intent to discriminate, and to look more deeply into issues of unconscious bias, it might be sufficient to say, “if the court determines that unconscious bias was at work, the challenge should be rejected.” He noted that this would place the focus on what was going on as opposed to what the broader systemic effects might be. He pointed out that this is not because of a lack of concern about the systemic effects but, rather, if systemic effects are the focus, all of the questions that Judge Norm Hill raises arise. Ms. Holley stated that this is a fair point, because there does not necessarily have to be a party to accusing another party; it is more about what the impact would be. Judge Norm Hill reiterated that his primary concern is how to determine this in a principled way as a trial judge without simply substituting his own values for those of the lawyer making the challenge, because unconscious bias is necessarily subjective. Judge Oden-Orr stated that the Washington rule addresses that precise issue, with the statute doing the work for the judge. Ms. Holley pointed out that the list in Washington’s statute was derived from case law and that there is much case law to guide judges. Judge Norm Hill pointed out that the workgroup’s concern was that including such a list would lead to attorneys not making those arguments but, rather, coming up witih new pretextual arguments.

Ms. Nilsson conducted three polls as an attempt to guide the Council in further

drafting, although the meeting was coming to a close and there were no longer enough members to constitute a quorum. The first poll was whether to include factors to be considered along with the totality of the circumstances. Council members voted 6-3 to include factors. The second poll was whether one of those factors should be the previous exercise of a for-cause challenge. Council members voted 6-3 to include this as a factor. The third poll was whether to include argument from the parties and case law as factors. The Council voted 4-2 to include those factors.

Judge Norm Hill expressed concern that the draft amendment is going beyond *Batson* and that, the way it is set up, there may be no parameters. He stated that the thing that causes him the greatest concern is that a judge will need to make the determination as to whether or not the exercise of a peremptory in a case will have an injurious effect on the jury system or the community outside of the courtroom, and the only standard that judge will have is their own personal opinion. That makes him uncomfortable, and he thinks that is a dangerous place to be. Ms. Holley stated that, if that is the only standard that the judge has, the judge would sustain the challenge. Judge Norm Hill asked on what basis the challenge would be sustained. Ms. Holley stated that it would not have been proven more likely than not that there is harm. Judge Norm Hill asked what evidence a party would be able present to be able to carry that burden.

Judge Jon Hill suggested that the committee attempt to develop a list of more than one or two factors, perhaps not as detailed as Washington's statute, but more detailed than just a couple of things. He stated that bringing a new draft to the next Council meeting might help inform the discussion. Judge Norm Hill approved of that idea. He stated that he was having a hard time envisioning what evidence a party would present and how the judge would efficiently make a decision with a jury panel sitting in the other room ready to go. Ms. Holley opined that part of the evidence people would put on is all of the research about diverse jury pools making better and more fair decisions, as well as evidence about other discrimination cases and what has been found to be discriminatory. She did not think that the evidence would have to be super involved, and the burden would be on the party to show it to the judge.

Judge Peterson stated that, in *State v. Curry*, 298 Or App 377 (2019), the reasons that were provided for peremptory challenges to the jurors in question were not persuasive because they were factual observations that could also be said of other jurors, but these two jurors happened to be Black. Judge Norm Hill stated that this is a different question, a *Batson* question. Ms. Holley stated that it is not

necessarily a different question, just a different way to get at it. She stated that part of the reason for amending the rule is trying to bypass the problem that arose in that case, where one attorney was offended at being called racist. The amendment can bypass that in that an attorney does not have to call the opposing attorney consciously or unconsciously racist but, rather, just say that these two jurors are the same and that excluding this particular one runs the risk of the appearance of discrimination. Judge Norm Hill stated that the last piece is a significant change in what has been understood to be the rule. Judges would now be asked to consider not what is going on in their own courtrooms, but how their decisions will impact the community at large. He noted that he was not suggesting a debate on whether this is a good or bad thing, but it is different. In *Curry*, it was just a *Batson* question, and *Batson* does not tell the court to look at the community as a whole. Ms. Holley agreed.

Judge Norby noted that judges are always using their discretion, and that this discretion is often unguided. She stated that part of moving things forward is just teeing up the question. Judge Norm Hill pointed out that, ethically, judges make decisions in their courtrooms based on the facts and the law without regard to public opinion. One of the core functions of judges is not to be influenced. Ms. Holley stated that the rule does not say public opinion but, rather, harm to a party or juror.

Judge Jon Hill opined that, until a list of factors has been set out, there will be a lot of uncertainty. Judge Norby asked if the factors from Washington's statute could be borrowed. Ms. Holley stated that the workgroup had already recommended that Washington's list not be used. Judge Peterson stated that the list has issues, one of which is that it is incomplete. Ms. Holley noted that the list is also changeable, and that it is a different list from the one that is being discussed here. Washington's list is a list of presumptively invalid reasons, not factors for a judge to consider. Judge Norm Hill stated that they sort of plug the hole that *Batson* leaves open. Ms. Holley stated that her proposal for a list of factors would simply be, argument from the parties, case and statutory law, and whether the for-cause challenge was previously made. Judge Norby opined that those are not really factors in themselves, just how a person argues. She stated that this is an evolving area of understanding, with people's eyes being opened by the month to new and different ways of seeing, and that it is not simple to articulate. Ms. Holley stated that it boils down treating a person differently than how another person is treated in a way that creates harm, and the party making the objection to the challenge explaining how it creates harm. Judge Norby stated that developing factors that could be a guide to what creates harm would be helpful to judges.

Judge Norm Hlll stated that he was on board with the concept of the totality of the circumstances as the scope, but was still struggling with the target, or the goal line for the parties to get across. The concept of "harm to society" is very broad. Ms. Holley stated that it is not harm to society but, rather, a discriminatory component that will cause harm to a party or to a juror. Judge Norm Hill stated that, if someone intentionally discriminates against someone, that is harm by definition, and that is easy. The struggle is how to articulate the unintentional discrimination based on a perception that is inextricably linked to a person's race. Ms. Holley stated that it is similar to disparate impact. Judge Norm Hill stated that this was his point, that it has disparate impact. He understands and has no problem with the concept, but does not think that the rule includes something to show him when that threshold is met like one finds in disparate impact cases. Ms. Holley noted that disparate impact is a jury question, and it would similarly be a fact finding issue here. Judge Norm Hill agreed. He stated that another problem is that judges will have to be able to do this on the fly, to stop jury selection to have a separate factual determination as to whether or not the peremptory challenge is valid. That will not work in terms of court efficiency. It has to be a cleaner process, or it will collapse. Mr. Crowley asked the judges how often this issue arises, because he has not had it arise in the many jury trials in which he has been involved. Judge Jon Hill opined that it probably will not come up much but, when it does come up, it will be helpful for judges to have a roadmap, even if it is just a non-exclusive list of factors to consider.

Judge Norby pointed out that judges also have unconscious bias, and are being asked to recognize unconscious bias. She stated that, if people cannot always articulate their own unconscious bias, it will be difficult to articulate how to identify someone else's unconscious bias. Judge Norm Hill stated that this was the reason that the committee shifted away from trying to discern unconscious bias on behalf of the party exercising the peremptory and moved to looking at the impact instead.

Mr. Andersen stated that he would imagine that any judge conducting jury selection has to make some pretty quick decisions, and suggested that the rule should be easy to reference. He opined that fixing the language relating to disability, adding unconscious bias, adding protected status, and adding totality of the circumstances are the only changes necessary. Making these changes would retain the simplicity of the existing rule and make it easier for judges. Mr. Andersen stated that he appreciated the laudable and commendable efforts of the workgroup, but thinks that these changes are overkill. Judge Norm Hill stated that he would like to gently and respectfully push back a little bit. He stated that

his fear is that, if the Council does not act, the Legislature would act during the upcoming session to eliminate peremptory challenges as had happened in Arizona. And he believes that this would be a disservice to the justice system.

Ms. Holley agreed with Judge Norm Hill. She stated that she believes that the Council should work with the version that received support from the workgroup. One of the things that the Council tried to do was to include in the workgroup criminal lawyers and interest groups who experienced these disputed challenges more than civil lawyers do, and who may be more impacted. Ms. Nilsson pointed out that the rule is not actually much longer than the original rule, but the draft includes the deleted text from the current rule, which makes it look much longer. Judge Norm Hill stated that his primary motivation is to create a rule that, while it may not be perfect, does the very best to make improvements and preserve peremptory challenges as a general concept. Ms. Holley agreed. She stated that the current, workgroup-approved drafts have the best chance at addressing the majority of the concerns. There are still some disagreements, but the consenus is to move forward.

Ms. Holley suggested having Ms. Nilsson create a new draft incorporating the changes discussed today into draft 2B. Ms. Holley would then send that to the Council with a poll and an opportunity for comments. Judge Norm Hill suggested instead having a small group of no more than three or four people get together over the next month and work on crafting language to present to the Council at the August meeting. He stated that he would be happy to be a part of that group. Judge Jon Hill agreed. Judge Norm Hill suggested including Judge Oden-Orr in the group. Ms. Holley suggested including Judge Bronson James, because he had some good suggestions for language in past drafts of the rule.

Mr. Crowley and Judge Norby thanked Ms. Holley for her dedication and hard work.

3. Remote Hearings Committee

Mr. Andersen shared his screen and presented the latest draft amendment of Rule 39 (Appendix C). He explained that this draft reflected the changes discussed at the last Council meeting. Council members did not have any questions or comments. Ms. Holley made a motion to place the draft on the agenda for the September publication meeting. Mr. O'Donnell seconded the motion, which passed unanimously by voice vote.

Mr. Andersen then shared his screen and presented the latest draft amendment of Rule 58 (Appendix C) and asked if Council members had questions or comments. Judge Leith stated that he had no issues with the changes in regard to testimony by remote means part of the changes. However, he stated that he was troubled by the provision in subsection B(7) to preclude a judge from limiting argument unless it is at least two hours per party. He apologized if this change has been in previous drafts, but he just noticed it. Ms. Holley stated that this is not a change intended to affect the operation of the rule but, rather, a rewording of existing text. Judge Peterson agreed that the sentence was reworded to make it more clear. He stated that Judge Tom Ryan in Multnomah County had let the Council know last biennium that he had presided over a criminal trial where the defendant was self represented and had insisted on using the entire two hours to address the jury in closing argument. Judge Ryan felt that the time should be discretionary with the court. However, the Council felt fairly strongly that parties should be allowed the full two hours if they want them. He pointed out that most parties would be bright enough to start winding down when they see the jurors glaring at them. However, this biennium, Council staff saw that the existing language is unclear and written in the negative, and attempted to rewrite it so that it is easier to understand. Judge Leith stated that two hours would be unreasonable in a one-day trial, but he understood that this is not a change that affects the operation of the rule. Mr. Crowley stated that this may be a change that the Council would like to address at a later time.

Judge Norby stated that, based on what she has seen about the forthcoming Chief Justice Order (CJO) about expanding the need to provide remote opportunities, this change is really timely. She congratulated Mr. Andersen for promoting this change at the beginning of the biennium, because it looks like it will be even more important with the new CJO. Judge Bloom agreed. Judge Peterson also agreed and thanked Mr. Andersen.

Judge Norm Hill asked whether the minutes are clear that language in this amendment does not require a stipulation. He expressed concern that the amendment implies that remote testimony can only occur if there is a stipulation between the parties subject to the court's approval. However, there are times when one party wants remote testimony, the other party objects, and the court can still go through the factors and make that determination. He stated that he just wants it to be clear that the Council is not not changing that. He noted that it may be enough that minutes or the staff comments reflect that, but he thinks that it is important to point out that the intention is not to give a veto to one of the parties and to the court. Judge Leith suggested that a clarification might be “the

parties may stipulate or the court may order...” Ms. Holley stated that the words “the parties may stipulate” could be removed. Judge Peterson pointed out that ORS 45.400 gives the parties the right to move for remote testimony without a stipulation, so the ability of the parties to stipulate gives a little enhancement to their ability to get the judge to go along with it. Mr. Andersen asked whether, “subject to court approval, the parties may stipulate, or the court may order that testimony be taken by remote means” would solve the problem. Ms. Nilsson pointed out that the court’s order would not be subject to court approval. Ms. Holley agreed. She stated that it may make more sense to say, “subject to court approval, testimony may be taken by remote means.” Ms. Nilsson stated that this would leave it up to the court whether or not the parties stipulated to it.

Mr. Larwick stated that his understanding for including the language about stipulation in the first place was to encourage the court to honor the stipulations of the parties and to try to encourage the parties to work it out among themselves. So, even though it might not be a requirement, it encourages cooperation. Mr. Goehler suggested changing the language to read, “The court may order that testimony be taken by remote means. Additionally, subject to court approval, the parties may stipulate that testimony be taken by remote means.” Mr. Larwick suggested, “The court may order that testimony be taken by remote means or approve a stipulation by the parties that testimony be taken by remote means." Judge Norby suggested, “The court may consider whether the parties stipulated to remote testimony when deciding whether to allow it.” Ms. Holley suggested, “The court may order or approve a stipulation of the parties that testimony be taken by remote means.”

Mr. Andersen stated that the point is well taken, and that he could make one more run at the language. Judge Norm Hill stated that there may not be a need to change the language if the Council feels that a note in the staff comments saying that the change is not intended to modify the Court's authority to order and to resolve disputes about remote testimony is enough. Mr. Andersen stated that he could see a judge saying that they would love to allow the remote testimony but, according to this rule, both parties have to stipulate to it and they do not have an alternative. Ms. Holley stated that she liked Mr. Goehler’s language. Judge Jon Hill made a motion to approve the draft of Rule 59 with Mr. Goehler’s language change. Ms. Holley seconded the motion.

Mr. Andersen stated that the second sentence seemed a bit redundant. Judge Bloom agreed, although he liked the concept. Mr. O’Donnell stated that he would rather have some redundancy than to have a judge be in the position of not being

able to feel they had the discretion to allow remote testimony. He also stated that he was not certain how many judges or litigants would be eager to go through the Council's minutes to find the intent behind the rule. Mr. Hood stated that he liked Mr. Goehler's first sentence, but he was not certain that the second sentence was necessary. Judge Bloom agreed. Ms. Holley agreed with Mr. Larwick that it encourages people to stipulate if it is suggested in the rule. Mr. O'Donnell stated that this may be true; however, if the tenor from the Chief Justice is going to encourage remote access, he does not envision a scenario where a judge is going to deny it. And, if the judge wants to deny it, the judge can deny it anyway.

Judge Peterson noted that this is the kind of discussion that should be taking place at this point in the biennium. He agreed that the language is a bit redundant, and suggested keeping the first sentence and inserting a sentence encouraging the parties to stipulate if that is the desire. Judge Norm Hill stated that he does not feel that it is the proper role of the rules to encourage the parties to do anything. Judge Bloom agreed, and stated that the Council is making rules, not telling people how to act. Mr. Young pointed out that the rule references ORS 45.400, which requires filing a motion 30 days beforehand if agreement cannot be reached. He believes that the reference to the statute encourages that kind of discussion and possibly stipulation. He stated the rule should just authorize the ability to order testimony by remote means.

Judge Jon Hill asked what the Council's thoughts were about Mr. Larwick's suggested language. Ms. Holley stated that her only issue with that language is what an approval looks like versus an order, and whether it will cause logistical confusion with the courts. Judge Norby pointed out that it is logistically messy already. She explained that, on a daily basis, there are some cases in which she is told that there has been an order signed to allow remote appearances, there are other cases in which no one asked but everyone is expecting it and the court allows it, and there are other cases where nobody asked but somebody expected them to ask. She opined that any guidance would be helpful, and that it will necessarily be a sort of fluid guidance as the process is worked out in the courts. Ms. Holley stated that Mr. Larwick's language solves the redundancy problem. Judge Leith agreed.

Mr. Andersen suggested going back to, "Subject to court approval, testimony may be taken by remote means." Mr. Crowley agreed. Judge Norby agreed. Judge Norm Hill stated that this language is most elegant and operationally accomplishes the goal, but it does not include the stipulation language that was desired. Mr. Crowley pointed out that lawyers probably know that they are more likely to get

court approval if they get a stipulation from the other side. Mr. Andersen stated that he thinks that it is implied that parties can file a motion or stipulate, and he thinks that the role of an attorney would require conferring before filing a motion. Judge Peterson stated that the statute gives factors the court needs to consider, so a lawyer filing a motion for remote testimony would want to take those factors into consideration and attempt to avoid any pushback from the other side. This encourages people to check with the other side and work it out.

Judge Leith suggested, "Subject to court approval under ORS 45.400(2), testimony may be taken by remote means." Mr. Andersen stated that he liked this language. Mr. O'Donnell stated that he liked this language better, because it directs people who are not familiar with ORS 45.400 to it right away, rather than just relying on the reference at the end of the new language that people may not think means anything. Mr. O'Donnell pointed out that, in this day and age, everyone knows that the person who objects to remote testimony would be well advised to have a bag over their head when they come into the courtroom.

Mr. Hood wondered why there should be a rule at all if it just references the statute. He stated that he liked the idea of being more up front and saying that testimony will be allowed by remote means subject to court approval if that is what the goal is. If the rule is going to simply say that remote testimony may be taken pursuant to the statute, he is not sure what amending the rule is going to do that the statute does not already do. Keeping the reference to the statute might also cause issues if there is any future conflict with the statute. He suggested removing the reference to the statute. Strengthening the ability of the court and the parties to be able to present remote testimony might just require a simple statement to that effect. Ms. Holley agreed that, if the intent is to say generally that it is at the court's discretion whether testimony is taken by remote means, the reference to the statute is not needed. She expressed concern that it may unintentionally impose some sort of limitation.

Mr. Andersen noted that ORS 45.400 is not as accessible in the minds of attorneys getting ready for trial as is ORCP 58. Having this information front and center in trial preparation and for judges to make rulings on remote testimony rather than having to go find what is in that statute is very valuable. Mr. Crowley noted that the Council will also be discussing a proposed modification to the statute that will make the time frame a little more flexible.

Judge Norm Hill asked about the timing of the rule. He stated that the Chief Justice of the Supreme Court was going to issue a CJO and he expressed concern

that the Council might do something that would not make sense depending on that order. He feared that the Council was spending a lot of time grappling in the dark, and wondered whether taking the best, most simple language now and moving it to the September agenda was the best idea, knowing that the issue might need to be addressed again after the issuance of the CJO. He stated that he would hate to see the Council spend time and energy coming up with something that becomes obsolete or is contradicted by what the Chief Justice is instructing judges to do in the courtroom.

Erin Pettigrew from the OJD stated that the Chief Justice is taking feedback now for a new CJO, in light of authority that was given by the Legislature to allow her to direct or permit any appearance to be by remote means notwithstanding any other statute. She stated that she was not in a position to say what the contents of that CJO will be. However, if there is a circumstance in which there are case types that are presumptively available to be remote, under the current statute the decision to override that is delegated to the presiding judge, who could in turn delegate that power to the judge of record for that case. Nevertheless, Ms. Pettigrew agreed with Judge Norm Hill that it is important to make sure that the Council and the Chief Justice are in alignment as the Council thinks about this rule. She stated that the need for clarity for litigants is important, and the Chief Justice shares that goal. Making sure that this rule clearly states that there is the availability of remote testimony is helpful.

Mr. Larwick stated that ORS 45.500 does not seem to suggest that stipulation of the parties alone is sufficient to allow the court to grant a motion for remote testimony. It has a number of factors listed that would constitute good cause. He stated that this is why he is reluctant to take out Mr. Andersen's original proposed language about stipulation of the parties. Otherwise, he worries that a court would look only to the factors in the statute and could potentially say that a motion was not made 30 days before trial and that it does not have the ability to allow the case to go forward. Alternatively, a court might only consider the factors of good cause that are shown in the statute and not give any weight at all to the stipulation between the parties. Since that is not particularly enumerated in the statute, perhaps it should be included in the proposed rule language.

Judge Peterson stated that he preferred Mr. Larwick's language because it does something more than the statute; it tells the parties that a stipulation is a good thing, and it allows the courts to consent with the stipulation. Mr. Goehler stated that he likes the idea of pushing forward simple language at this meeting, with the goal of maximum flexibility and maximum discretion with the court. He stated

that, if he is reading ORS 45.400 correctly, he is thinking of it narrowly as not limiting other ways that remote testimony can come in, but only addressing the motion component of it. What he thinks the Council should be clear about is that the ORCP are not a roadblock. If the ORCP say that the court has the authority to do this, and there are no restrictions, his view is that the statute only applies to motion situations.

Justice Garrett suggested a slight modification of Mr. Larwick's language: "The court may order, or approve a stipulation, that testimony be taken by remote means." Judge Jon Hill made a motion to strike the current first sentence in subsection F(1) of the draft amendment and substitute Justice Garrett's language, and to move the amended draft rule to the September publication agenda. Ms. Holley seconded the motion, which carried unanimously by voice vote.

Mr. Crowley asked the about the committee's recommendation to the Legislature to amend ORS 45.400. Judge Peterson explained that the suggestion is to change the 30-day notice requirement to, sufficiently in advance of the trial or hearing at which the remote testimony will be offered, allow the non-movant to challenge those factors specified in 3(b) and to advance those factors specified 3(c). He explained that this will give the court maximum discretion to let the other side be heard and to focus on the factors that are in the statute. Judge Peterson noted that a change in existing language in 3(c)(E) is proposed in light of a very robust discussion within the Council. The change is to lay out a little more clearly that the facilities and technology must cover the court, counsel, parties, and the witness. Based on the Council's discussion about bandwidth and other technological issues, the goal is to be sure that everyone can participate.

Judge Leith made a motion to approve recommending the change to ORS 45.400 to the Legislature. Judge Norby seconded the motion, which was approved unanimously by voice vote.

4. Vexatious Litigants Committee

Judge Jon Hill thanked Judge Norby, who has been the drafter of the proposed Rule 35 (Appendix D). He stated that Aja Holland and Erin Pettigrew from the OJD had expressed some concerns about the statute of limitations and relation back and with regard to the proposed rule, and that he wanted to give them the opportunity to discuss those concerns.

Ms. Holland explained that the OJD's concern about the statute of limitations is

that, if a litigant has to request leave to file from the presiding judge and they are close to the statute of limitations when they file that motion, there could be a circumstance where that person misses the statute of limitations. She stated that Judge Norby had graciously accepted suggestions from the OJD in this new draft to make it clear that, if the presiding judge accepts the motion and allows the litigant to file, the date of filing relates back to the date that the original motion was filed, and makes clear that the litigant will not miss the statute of limitations in that case. She noted that this change is in section C. She also explained that there was a change in new section F from the last draft, in which a clerk would reject a filing from a vexatious litigant if they had not sought leave to file from the presiding judge. The new draft removes the rejection by the clerk, because there were concerns about potential unintended consequences in civil case filings. For example, the only way that the court can identify who is filing a case is by their name, so it would be possible that a litigant could be misidentified as vexatious if they have the same name as a vexatious litigant. In the current draft, the person would still be allowed to file the case, and either the court or another party who identified the person as a vexatious litigant would send a notice and serve it on everyone else in the case, with a 10 day window for the judge to dismiss the case. This would eliminate potential unintended consequences as well as save support staff time. Ms. Holland explained that there was also a language change so that, if the case has already been filed, the motion would be called a motion for leave to proceed instead of a motion for leave to file, to avoid confusion about two filing dates.

Judge Norby thanked Ms. Holland for the OJD's insights. She stated that these changes improved the draft and likely precluded the Council's need to address a lot of concerns after the bar weighs in. She stated that there was one issue remaining from the last meeting, which was the need to change the definition of "finally decided" and how that is expressed. She stated that the language had been moved and some numbering had been changed in an effort to keep definitions together, and that she had attempted to write a better definition of "finally decided." The definition now reads, "For purposes of this rule, an action is deemed to be 'finally decided' or to have reached a 'final decision' after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed."

Judge Peterson stated that he was present at the meeting with Ms. Holland, Ms. Pettigrew, Judge Jon Hill, and Judge Norby regarding the statute of limitations and that meeting was very helpful. He explained that he was initially worried that problems with relation back would not be able to be resolved. He recalled that, when the Council amended Rule 27 regarding guardians ad litem, there were

some real concerns among the plaintiffs' bar about statutes of limitations that also needed to be resolved. He stated that he believes that the OJD's suggestions solve the problem in this instance. Judge Peterson also pointed out that a change was made to solve the issue of a court moving very quickly on the vexatious litigant issue and suddenly the the non-vexatious opposing party would have to respond within 10 days, but they should get a full 30 days. He stated that language from Rule 15 has now been used so that the non-vexatious party has 10 days or the amount of time that was left to respond to the previously-thought-to-be-vexatious-litigation complaint, whichever is longer.

Mr. Crowley stated that section C(3) seems to cover the same issue as paragraph C(1)(b), and wondered whether paragraph C(1)(b) is redundant. Judge Norby stated that paragraph C(1)(b) pertains to factors that the presiding judge can consider, so that is helping the judge decide the motion and telling the judge what needs to be shown in order to get that relief. Section C(3) is separate from that, and happens after a judge has issued an order. She stated that paragraph C(1)(b) was her suggestion and section C(3) was OJD's suggestion, and opined that both are necessary. She agreed that section C(3) might be redundant if the judge had just issued an order; however, if the order had been issued in the past in a different scenario, there would be no current challenge and no new order and section C(3) would be needed to cover that situation. Mr. Crowley stated that he was reading it differently, and that the relation back language in section C(3) removes the need for paragraph C(1)(b). Judge Norby recalled that she had written paragraph C(1)(b) before the OJD had proposed section C(3), and that it might be possible that both are not necessary.

Judge Peterson stated that he was not necessarily defending retaining the language, but it seems to him that it the court has two ways of looking at it. Looking to see whether a claim is frivolous might be a little more involved, and it could be less involved to say that one is bumping up against the statute of limitations or ultimate repose. It would give the court the opportunity to allow the filing and either require security or say that someone will be filing a motion on this case to get it stopped. It seems like it could be a shortcut for busy courts. Ms. Holley stated that, to her, paragraph C(1)(b) runs the risk of implying that the statute does not toll during the motion. Section C(3) implies that the statute does toll. Mr. Crowley agreed. Judge Norby posed a hypothetical situation where she is a presiding judge and a litigant is designated vexatious or is about to become so in a hearing. One of the things that would be important to know and might change her analysis is whether a statute of limitations would be missed. If leave to file is granted, the litigant may have just missed the statute anyway, because of the

need to appear before her, so section C(3) may be needed to relate it back even just for a few days during the time that she was making the decision. Ms. Holley asked whether Judge Norby meant that section C(3) relates to granting and paragraph C(1)(b) relates to denial. Judge Norby explained that section C(3) makes the relation back happen. Paragraph C(1)(b) is for those rare cases where time is so much of the essence that a judge should probably lean in favor of allowing a case to proceed even though the litigant is vexatious because, if they do not, the litigant could miss the statute of limitations and lose their claim.

Judge Norm Hill stated that subsection C(3) only has a relation back effect if the order is granted. He asked what would happen if a vexatious litigant were to be denied the right to file the case and sought a review or mandamus and, during that time, the statute of limitations had expired. He asked what the implication would be if the language were that simply filing the request tolls the statute of limitations on all of them, granted or not granted. Ms. Holley stated that the litigant would still have the same amount of time and it would not put the pressure on the judge to feel like they could not deny the filing of the case. Judge Norm Hill stated that, if the filing tolls the statute of limitations, then that factor is irrelevant. Judge Norby asked Judge Peterson his opinion on whether that is something that the Council can do. She recalled that, when she was concerned about relation back, Judge Peterson stated that, because the Council cannot affect the substantive rights of any party, it is almost obligated to do that. She wondered whether that argument also applies to making a statement about tolling the statute of limitations. Judge Peterson stated that the Council did that in Rule 23. He noted that he had a concern from the start with this proposed rule about how to document when the filing reached the court because, if the judge refuses to allow the filing, the filing will be dismissed with prejudice. If it is dismissed with prejudice, he assumes that is an appealable result from the court. Judge Norby stated that it is not appealable but that one could seek a writ of mandamus. She noted that there is law that says that a designation of vexatious litigant is not appealable, and that one can probably not even seek a writ of mandamus, but one could seek a writ of mandamus about an order saying a case cannot be filed. Judge Peterson stated that the effort here gets awfully close to preserving the statute limitations, and he could see the Council getting pushback otherwise.

Judge Norm Hill asked whether the definition of commencing an action is statutory or just in the rules. Judge Peterson stated that Rule 3 states that an action is commenced by filing a complaint. Judge Norm Hill stated that, since that rule defines commencement as the filing of a complaint, once the case is commenced, tolling is not really a thing. Judge Peterson pointed out that the

vexatious litigant cannot file the complaint but, consistent with Rule 71, they have to attach the proposed complaint as an exhibit to the petition that they are trying to file.

Mr. Crowley wondered whether, if the judge's decision to not allow the vexatious litigant to go forward is mandamused and overturned, the relation back privilege would apply. Judge Norm Hill stated that he believed it would. Mr. Crowley thought that it would as well. Judge Norm Hill stated that, for a person who has already been designated a vexatious litigant and who must therefore file a petition with a copy of the proposed filing, the date that the petition is received would be the equivalent of commencement. He stated that he believes that judges already have the authority to designate somebody vexatious under case law, and all this rule is doing is to create some concrete, predictable procedures in order to exercise that authority. Judge Norby stated that the memo that the committee had previously sent to the Council included a reference to *Heritage Properties LLC v. Wells Fargo Bank*, 318 Or App 470 (2022), which discusses what the Council's authority is and what is substantive versus procedural.

Judge Peterson stated that, if someone is precluded from filing a complaint because they have been designated vexatious litigant, they can file a petition that has attached to it a copy of the complaint that they would like to file. He proposed that the language in the rule could say that, in addition to Rule 3, an action is commenced for the purposes of the statute of limitations when the petition is filed attaching the complaint that the vexatious litigant would like to file.

Ms. Holley opined that the proposed rule seems substantive to her. She expressed concern that the rule could have unintended consequences. For example, there are instances where a party would need to file multiple motions in order to preserve an issue for appeal, and she feared that could lead to a designation of vexatious litigant. The rule also feels to her like it would have a tendency to impact vulnerable people and put an additional burden on the court. Judge Norby stated that it would not be a burden on the court. She pointed out that courts statewide are hoping for a standardized practice to deal with this problem, as opposed to trying to figure it out case by case as is happening now. She predicted that the Council would receive pushback from people who mistrust the courts to not use the rule well, and people who are fearful that they may be interpreted as vexatious when they are not. Judge Norby expressed faith in the courts to not do anything that impedes good people who are doing the right thing from proceeding.

Judge Peterson summarized that there are two kinds of vexatious litigant issues. One is where someone who is previously an unknown vexatious litigant files a case and then gets called out on that by either the court or by one of the parties. In this case, a case has been filed and the action has been commenced. The other is where someone is known as a vexatious litigant and would like to file a case, but does not want to be found in contempt of court so they they have to file a petition. He stated that it seems to him that, for the latter category, the case can be commenced by the filing of the petition with a copy of the complaint attached as an exhibit to protect the statute of limitations in that instance. That was his hope with the most recent changes to the draft rule. Mr. Crowley stated that this makes sense to him.

Judge Norm Hill asked whether there had been a consensus on whether to retain or eliminate paragraph C(1)(b). Judge Norby stated that she was fine with leaving it but would defer to the Council's wishes. Ms. Holland opined that both paragraph C(1)(b) and section C(3) may not be needed. Section C(3) accomplishes relation back and paragraph C(1)(b) is something for the presiding judge to consider. Judge Norby stated that she hoped that Ms. Holland might weigh in on the question of whether, instead of having a relation back provision, the rule should create an equivalency to commencement of an action. Ms. Holland stated that she thought that at least one of the relation back provisions are needed. She stated that this is similar to a situation that the OJD has dealt with in the UTCR where there is a motion for fee waiver or deferral. The motion for fee waiver or deferral is not counted as satisfying the statute of limitations, and there is a relation back provision that is very similar to this. She stated that something else beyond just the motion filing date is needed to satisfy the statute of limitations.

Judge Norm Hill stated that he agreed with Ms. Holland based on the language of Rule 3. However, if Rule 3 were changed, or it was made clear that the filing of this motion is essentially the functional equivalent of commencement of an action for the purposes of the statute of limitations, he did not think a relation back was needed. The effect would be not letting the case be filed yet, but having it be presented and file-stamped for the limited purpose of the statute of limitations. He stated that a presiding judge would no longer need to be concerned about the statute of limitations as a factor because it has already been complied with. Judge Norm Hill stated that he feels that Judge Peterson's suggestion makes the process much easier and that the relation back issue just makes things muddy.

Judge Norby stated that relation back is what people are used to, and part of the idea behind the rule is to proactively address what attorneys are going to be

concerned about. She stated that one of the things she likes about the relation back is that it is familiar, whereas the rest of this rule is not. She opined that trying to solve a problem that lawyers are going to be particularly concerned about and doing it in a way that only judges can fully appreciate may not be the best solution.

Ms. Holley asked what would happen if the motion was denied. Would the action still be commenced and would the person have 30 days to refile? Judge Norm Hill stated that the case would be dismissed and the litigant would appeal. However, the statute of limitations as to that filing would still be preserved, just as if the person had filed the case. The vexatious litigant got to their process without the need to involve the other side. That is the purpose of the rule, not bothering other people with vexatious claims that are not going to get through. Judge Norm Hill stated that just changing the definition of commencement would preserve all rights to appeal and preserve the statute of limitations. He stated that he understands and respects Judge Norby's concern about making people comfortable; however, his concern is about not creating something that has a redundancy that leads to an ambiguity. Because if a case is commenced, there is nothing to relate back, and it will not make any sense.

Judge Norby stated that she appreciated this solution; however, it does involve a few additional steps and would involve working on another rule late in the biennium to define commencement. She suggested doing the simpler thing and getting the rule adtoped this biennium and adjusting it later if that seems appropriate. Judge Norm Hill stated that his only comment on that is that the relation back can only relate to those motions that are approved, but he suggested that it has to be broader than that, because otherwise the statute of limitations could expire while the review process was going on. He stated that there has to be some level of review or there is a risk of a due process problem. Judge Norby stated that she believed that relation back would still apply if someone was either denied or granted mandamus. Judge Norm Hill stated that, based on the language in the draft rule, there is an open question, because the relation back language only applies if the judge, after review, grants it. He suggested tweaking that language.

Judge Peterson suggested language in Rule 35 that would avoid the need to amend Rule 3: "The filing of a petition as provided in subsection C(1) of this rule shall be deemed a commencement as provided in Rule 3." He stated that, whether it is denied or granted, a petition has been filed that must include a copy of the complaint or other case-initiating document attached as an exhibit, and there

would therefore be a court document that shows the date it was filed. Judge Norby stated that she liked this idea, and asked whether both paragraph C(1)(b) and the language in subsection C(3) could be eliminated if this language were to be added. Judge Peterson agreed. After some wordsmithery, it was agreed to retain the lead line "Relation back" in subsection C(3) and the following language: "The filing of a petition as provided in subsection C(1) of this rule will be deemed the commencement of an action under Rule 3." Paragraph C(1)(a) would also be eliminated.

Judge Leith expressed concern about relying on the Council's authority to amend ORCP 3 with respect to commencement of actions, because when an action is deemed begun is also statutory under ORS 12.020. So, if a statute defines when an action is deemed begun, the Council might be doing something substantive purporting to change that statute. Judge Peterson pointed out that Rule 3 is the Council's purview, and his concern all along has been not to expand or diminish a potential right in any way. He sees this draft rule as not abridging the rights of a potential litigant. Judge Leith pointed out that the statute does not say that an action is commenced by filing a notice of request to be allowed to file a complaint. Judge Peterson noted that the complaint would be filed as part of the petition. Judge Norm Hill pointed out that filing and service are required by the statute, and service will not happen under this rule. He stated that he had now come full circle and believes that Judge Peterson's suggestion would represent a substantive change because it functionally would amend ORS 12.020. Judge Norby asked whether that would put the original language back on the table. Judge Norm Hill stated that the original language has the same problem, because the action would still not be commenced for the purpose of the statute of limitations under ORS 12.020. He stated that, by relating it back, it would effectively be expanding the statute of limitations for people who were deemed vexatious litigants.

Ms. Holley stated that there is also the problem of creating an entirely new process for commencing an action. Judge Norm Hill stated that he is fine with the new process, because it is consistent with the case law that states that judges have the authority to deal with vexatious litigants now. This rule is just building a process to do that. He stated that his issue is with the process effectively expanding the statute of limitations in contravention to a statute. That would exceed the Council's authority. Judge Norby asked whether tolling the same thing is expanding, because the intent is to toll. Judge Norm Hill stated that he believes that it is the same thing.

Ms. Holland mentioned a provision in the UTCR that allows relation back in the

case of a rejection of an electronic filing. She stated that there was a relevant Supreme Court case, *Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800 (2021), that allowed relation back, but that dealt with a motion for new trial rather than a case-initiating document, so it may not be helpful in this instance. She noted that section C and section G are very similar, but section G deals with a situation where the litigant files without leave of the presiding judge, and creates sort of a procedure on the back end where all the parties are notified that a vexatious litigant filed the proceeding. She wondered whether taking out section C and using the procedure in section G would eliminate the relation back problem, as the complaint would be designated as filed on the day it was filed. Judge Norby stated that the point of having a vexatious litigant designated as such is to prevent them from filing without permission, so eliminating the section on how to get permission would make the rule not work very well. She noted that this situation is virtually never going to come up, partly because vexatious litigants rarely wait until the last minute to file litigation. She stated that it is good that these issues are coming up now and being well discussed, and that she shares the concerns about the statute of limitations.

Judge Norm Hill asked whether this is something the Council should consider taking a left turn on and shifting to a legislative recommendation. Judge Jon Hill stated that this was where the committee had started its discussions but, after research, it had discovered that the courts have inherent authority to designate litigants vexatious under case law. The only issue seems to be relation back. Judge Norby stated that perhaps the Council should pass the rule without the relation back piece and ask the Legislature to deal with that issue. Judge Norm Hill stated that he had thought about that; however, removing that piece makes the rule not as good. He thought that having the Legislature pass the entire rule would be better than breaking it in half, because the rule as it stands is helpful in not letting vexatious litigants file and bother people and waste court time. It also does a good job in protecting people's rights.

Mr. Crowley stated that the DOJ deals with this issue frequently, in federal court as much as in state court. He stated that the federal courts have a process where the initial filing is allowed, and the court jumps in immediately and deals with it. He wondered whether the Council might want to mirror the way the federal court handles it to avoid this issue. Judge Peterson stated that he does not think that the Council can necessarily count on the Legislature to pass this rule. He expressed concern that the pursuit of the perfect is getting in the way of pursuing the good. He stated that Judge Norby had determined that there is a way to flag the case in the court's electronic filing system as being filed by a vexatious litigant so, if the

vexatious plaintiff wants to serve documents, they would be served along with the order from the judge saying that a response is not needed because, at this time, the case is stayed. He noted that it is not a perfect solution, because it does not keep the vexatious litigant from filing things, but it does allow them to create a little less havoc for for the defendants that they are suing.

Mr. Andersen noted that the proposed rule requires that the petition be accompanied by a proposed complaint. He stated that both documents would be file stamped by the court, which would indicate the filing date. He opined that a relation back would not be necessary. Judge Norby suggested a requirement that that the petition with the complaint be served, as a complaint would otherwise have to be served. Ms. Holley agreed with Mr. Crowley that the complaint should still have to be filed and treated normally, and then there would be a process after that in order for the rule not to affect substantive rights. She also expressed concern that mandamus would be required in order to get an appellate review of the order, because only final judgments can be appealed, not orders. Judge Norby agreed that an order denying the ability to file a case would require mandamus. Ms. Holley opined that this has some substantive implications.

Judge Norm Hill stated that one solution, although not perfect, might be to treat the situation like a SLAPP case, where it would be filed but with the ability to very quickly get in front of the court, and the court can dismiss it with prejudice and then move on from there. He agreed that this was not what was envisioned, but that it may be what is truly needed to fit within the court's authority and to preserve everyone's rights. Judge Norby pointed out that this can already be done with Rule 21 motions, so there is not really a need for a rule to create an opportunity to move early to try to get a case dismissed. She stated that Rule 35 is intended to deal with perpetually vexatious litigants.

Judge Peterson stated that it seems to him that it would be necessary for the Council to reconvene and try to work out the issue, as it is not just a matter of slight wordsmithery. Judge Leith agreed that the work product is good and should not be abandoned. He stated that the solution may be to just incorporate filing and service as part of the rule. Mr. Crowley stated that he really likes the rule and feels that the problem can be addressed. Judge Jon Hill stated that the committee would meet again, but asked about the process for getting the rule back before the Council before the September meeting, since no other Council meetings were scheduled prior to that meeting. Judge Peterson stated that, while it is the custom of the Council to not meet in July or August, there is no rule stating that it cannot do so. He asked the committee to meet as soon as possible and circulate its work

product to the entire Council for review. He reminded the Council that two weeks' public notice is required for each Council meeting, and that it would be important to have a quorum to discuss the new rule draft and vote whether to pass it on to the September publication agenda. Ms. Nilsson stated that the date for a July or August meeting would likely be the second Saturday of either month, and that she would be in touch with members to set up the meeting depending on when the committee completed its work.

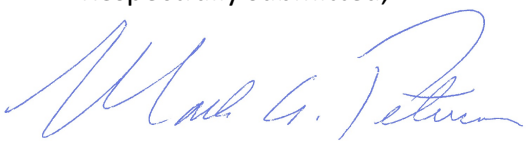
5. Proposed Bill by Consumer Law Section [ORCP 54 / ORS 36.425(6)]

The Council decided to move this agenda item (Appendix E) to the next biennium.

V. Adjournment

Mr. Crowley adjourned the meeting at 12:50 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

SUBPOENA

RULE 55

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number;

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this rule; [*and*]

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraph A(6)(b), B(2)(a), B(2)(b), **B(2)(c)(ii),** B(2)(d), B(3)(a), or B(3)(b) of this rule[.]**; and**

A(1)(a)(vi) state the following in substantially similar terms:

A(1)(a)(vi)(A) that the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a

right not to testify;

A(1)(a)(vi)(B) that compliance with a subpoena is mandatory unless a judge orders otherwise, and

A(1)(a)(vi)(C) that disobedience of a subpoena is punishable by a fine or jail time.

A(1)(a)(vii) A motion to quash must be included with the subpoena in substantially the following form:

_____

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

	)	
	)	Case No. _____
(Case Caption to be Inserted	)	MOTION AND DECLARATION
by Party Issuing Subpoena)	)	TO QUASH SUBPOENA
	)	

MOTION

The subpoenaed witness whose signature appears below respectfully asks this court to issue an order quashing the subpoena received on this date: _____ for the reasons given in the DECLARATION included below. (Attach a copy of your subpoena.) Before filing this motion, I tried to solve this issue by contacting the attorney (or person) who sent the subpoena. The dates, times, and methods of outreach that I tried are:

_____

(If no reasonable effort was made to solve the issue before filing, the motion will be denied.)

DECLARATION

The subpoena creates an unjustifiable burden or violates a right not to testify because: (subpoenaed witness MUST fill in a specific explanation here.)_____

_____.

Council on Court Procedures
June 11, 2022, Meeting
Appendix A-2

I declare that the statements above are true and are intended to be used as evidence in court, under penalty of perjury. I understand that making a motion that is not supported by facts and law may result in a judgment against me for any attorney fees paid to oppose my motion.

DATED: _____ **SIGNATURE:** _____

PRINTED NAME(S): _____

ADDRESS: _____

PHONE NUMBER: _____ **EMAIL ADDRESS:** _____

[Court Name and Address to be Inserted by Party Issuing Subpoena]

NOTICE: IF YOU FILE THIS MOTION WITH THE COURT, YOU MUST ALSO GIVE A COPY OF THE FILED MOTION TO THE PERSON WHO INITIATED THE SUBPOENA.

_____

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or to produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is

required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Nonresidents. A nonresident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by the court or by the judge who issued the subpoena or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

A(7) Recipient's option to object, to move to quash, or to move to modify subpoena for production. A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, may object, or move to quash or move to modify the subpoena, as follows.

A(7)(a) Written objection; timing. A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

A(7)(a)(i) Scope. The written objection may be to all or to only part of the command to produce.

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of production.

A(8) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, prisoners, and parties.

B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or out of court, including:

B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or [*upon*] **on** the taking of a deposition in an action pending therein.

B(1)(b) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or by any officer empowered by the laws of the United States to take testimony; or

B(1)(c) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of nonparty individuals or nonparty organizations; payment of fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place specified in the subpoena.

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one

day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed to the witness, but mail service is valid only if all of the following circumstances exist:

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; and

B(2)(c)(iii) Signed mail receipt. The subpoena was mailed more than 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered, along with fees for one day's attendance and mileage, in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with fees for one day's attendance and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with fees for one day's attendance and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location specified in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

B(5) Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations. A subpoena directed to a party who has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this rule.

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must comply with the following:

C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the

court orders less time;

C(3)(b) Time for production. The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) Originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective orders. A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) Compliance with state and federal law. A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that demonstrates:

D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficiency. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) Information regarding objections. The party must certify that either no written objection was made within 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) Statement to secure personal attendance and production. The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

_____

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil

Procedure 55 D(8) is insufficient for this subpoena.

_____

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the

subpoena on the custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense. Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the subpoena at the expense of the party who requested the copies.

D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. The declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI

responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) Declaration of custodian of records when not all CHI produced. When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.

OREGON COUNCIL ON COURT PROCEDURES
DRAFT RECOMMENDATION REGARDING ORCP 57 D(1) – FOR-CAUSE CHALLENGES

Background. In 2019, the Oregon Court of Appeals asked the Council on Court Procedures to consider updating Oregon's rules regarding bias in jury selection, which largely fall under Oregon Rule of Civil Procedure 57 D. This rule applies to both civil and criminal cases. ORS 136.230(4).

The Council offers this Recommendation regarding ORCP 57 D's rule regarding challenges to jurors. The Council's priority is this recommendation to amend ORCP 57 D(4).

In the 2019-2021 biennium, the Council on Court Procedures initiated the process of considering amendments to ORCP 57 D. The Council's enabling statute, ORS 1.735(1) makes it clear the it is not within the purview of the Council to make any amendments that would "abridge, enlarge or modify the substantive rights of any litigant." The Council believes that discrimination in jury selection inherently implicates substantive rights of both litigants and jurors, and that it is the role of the legislature to determine whether any amendment is appropriate.

However, because the Council is made up of both plaintiffs' and defense lawyers, as well as judges from around the state and both courts of appeals, the Council makes these recommendations to assist the legislature. The Council does not include attorneys who practice criminal law, though, and there are strong implications for criminal litigants, as well as other interest groups, in any amendment to ORCP 57 D. With that in mind, in the 2021-2023 biennium, the Council put together a workgroup comprised of the representatives listed below, including members of the criminal defense bar and other stakeholder groups:

Oregon Supreme Court	Justice Christopher Garrett (Council Member)
Oregon Supreme Court Council on Inclusion and Fairness	Justice Adrienne Nelson (Workgroup Contributor) (Justice Lynn Nakamoto substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Oregon Court of Appeals	Judge Bronson James (Workgroup Contributor) (Judge Douglas Tookey substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Multnomah County Circuit Court	Judge Melvin Oden-Orr (Council Member) Judge Mark Peterson, *pro tem* (Council Staff) (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)

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Clackamas County Circuit Court	Judge Susie Norby (Council Member)
Washington County Circuit Court	Judge Charles Bailey (Council Member)
Polk County Circuit Court	Judge Norm Hill (Council Member)
Tillamook County Circuit Court	Judge Jon Hill (Council Member)
Marion County Circuit Court	Judge David Leith (Council Member)
Wasco County Circuit Court	(Judge John Wolf substantively contributed in the 2019-2020 biennium)
Linn County Circuit Court	Judge Thomas McHill (Council Member)
Oregon State Bar	Matt Shields, Oregon State Bar Public Affairs Staff Attorney (Council Member)
Oregon District Attorneys Association	Kevin Barton, Washington County District Attorney (Workgroup Contributor) Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor)
Oregon Public Defender Services	Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor) Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor) Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor) Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor) Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor)
Oregon Department of Justice	Kenneth Crowley, Sr. Assistant Attorney General (Council Member)
Oregon Trial Lawyers Association	Meredith Holley, Employment Discrimination Attorney (Committee Chair) Kelly Anderson, Personal Injury Attorney (Council Member) Nadia Dahab, Civil Rights Appellate Attorney (Council Member) Michelle Burrows, Civil Rights Attorney (Workgroup Contributor)

	J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) Juan Chavez, Civil Rights Attorney (Workgroup Contributor) Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor)
Oregon Association of Defense Counsel	Drake Hood, Civil Defense Attorney (Council Member) Iván Resendiz Gutierrez, Civil Defense Attorney (Workgroup Contributor)
Oregon State Bar Advisory Committee on Diversity and Inclusion; South Asian Bar Association	Aruna Masih, Employment Discrimination Attorney (Workgroup Contributor)
Willamette University College of Law	Brian Gallini, Law School Dean Taylor Hurwitz, Trademark Attorney (Workgroup Contributor)
American Civil Liberties Union	(Eliza Dozono substantively contributed in the 2019-2020 biennium.)
Oregon Hispanic Bar Association	(Stanton Gallegos substantively contributed in the 2019-2020 biennium.)
Oregon State Bar Diversity Section	(Lorelai Craig substantively contributed in the 2019-2020 biennium.)

In addition, in the 2019-2021 biennium, the Council sought comment from the Oregon Justice Resource Center, the Oregon Asian Pacific American Bar Association, the Oregon Chinese Lawyers Association, the Oregon Chapter of the National Bar Association, the Oregon Filipino American Lawyers Association, OGALLA – The LGBT Bar Association of Oregon, the Oregon Minority Lawyers Association, Oregon Women Lawyers, the South Asian Bar Association Oregon Chapter, the Oregon State Bar Disability Law Section, the Oregon State Bar Indian Law Section, and the Northwest Indian Bar Association.

The workgroup's meetings, as well as the primary materials it considered, are available here: https://www.dropbox.com/sh/iwpf4frhincz64i/AAC06s9FF2twfx2z-amL24vYa?dl=0

This recommendation relates to "for cause" and "peremptory challenges," which are the two ways a juror may be excluded from participation on a jury panel. Basically, a court may exclude a juror for one of the listed "for cause" reasons in ORCP 57 D(1). Additionally, in any civil or criminal case, each party gets a designated number of "peremptory challenges," allowing them to exclude a juror from participation for any reason. The parties usually pass slips of paper to the judge with a juror's number on the paper, and then that juror is excluded with

no further questions asked. The one exception is that, consistent with Supreme Court decisions, under Oregon's current ORCP 57 D(4), a party may not exclude a juror because of race or sex.

If a party believes that the other party has made a "peremptory challenge" for a discriminatory reason, that party may object to the challenge. The current rule has a high presumption against the objecting party, with a presumption that challenges are non-discriminatory. That presumption is not consistent with current research, and these recommendations seek to correct that.

Court of Appeals Request. The Oregon Court of Appeals asked the Council on Court Procedures to revisit ORCP 57 D(4) through the case *State v. Curry*, 298 Or App 377 (2019). In that case, the Court of Appeals reversed a trial court for allowing a party to exclude a juror through a peremptory challenge. The appeals court determined that the trial court had improperly evaluated what is called a *Batson*[1] objection, referring to an objection that the party was excluding the juror for discriminatory reasons.

Specifically, the Oregon Court of Appeals has asked the Council to consider Washington State's amendment to its rule regarding bias in jury selection, Rule 37. During the Council's consideration, California, Connecticut, and Arizona also amended their rules. The Council and its workgroup considered each of these amendments.

In addition, the Council considered research offered by the Willamette University College of Law Racial Justice Task Force, research from Connecticut's Jury Selection Task Force, and research from the Pound Civil Justice Institute regarding jury selection and fairness in jury trials.

The research concludes that diversity of representation on jury panels contributes to the fairness of a jury's verdict.[2] The Council strongly recommends that the legislature adopt the proposed amendments in order to promote diversity on jury panels and provide protection against bias.

One of the purposes of allowing parties or the court to exclude jurors from service is to prevent litigants from being harmed by a juror's unfair bias. Current research shows, however, that bias on the part of the parties or the court may perpetuate unlawful discrimination through the process of jury selection, even where the person perpetuating the bias may be unaware of the bias.

Because of the dangers of implicit, institutional, and unconscious bias impacting litigants and jurors without any of the parties being aware of the bias, the Council received strong recommendations to eliminate peremptory challenges entirely. The United Kingdom, Canada, and Arizona have eliminated peremptory challenges. Some experienced trial attorneys were reluctant to do this, however, because peremptory challenges allow attorneys to exclude a juror they fear will be unfavorable to a client without embarrassing that juror or confronting

[1] Objections to excluding jurors for discriminatory reasons are commonly called *Batson* objections. This refers to the Supreme Court case *Batson v. Kentucky*, 476 US 79 (1986), ruling it unconstitutional to exclude a juror on the basis of race.

[2] Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*, POUND CIVIL JUSTICE INSTITUTE 2021 FORUM FOR STATE APPELLATE COURT JUDGES.

that juror regarding potential bias. Peremptory challenges offer some control to the parties that is otherwise not available through the jury trial process. Ultimately, the Council concluded that amendments may be made to ORCP 57 D(4) to promote fairness without eliminating peremptory challenges.

Priorities. (1) Changes to subsection D(4). The Council's priorities in amending this rule were to change the burden shifting issue that put a very high burden on the person making the objection in the current version of the rule. The Council also wanted to recognize that unconscious bias, not just explicit bias, plays a part in the lack of representation on jury panels.

Within those priorities, it became important to create a clear standard for judges in evaluating an objection. Some judges felt that it is difficult to look into the "heart of hearts" of a party making an objection to determine whether unconscious bias may be motivating a challenge. They felt that if the bias is unconscious to the party, it may also not be clear to the judge. The proposed amendments attempt to create a standard that does not require a party or a judge to accuse a challenging party of subjective discrimination, but still works to prevent biases from creating injustice.

The recommendation also reflects that jurors have protections based on protected statuses under Oregon and federal law that go beyond race and sex.

(2) Changes to subsection D(1). The primary change in subsection D(1) is to the language in existing paragraph D(1)(g). Many lawyers, both criminal and civil, expressed concerns during this process regarding the experience of judges rehabilitating jurors in a manner that may tend to prejudice the rest of the jury panel. For example, after a juror has expressed, "I cannot be fair in this case" for a reason of bias, many attorneys have had the experience of a judge then repeating to the juror many times, "But, if I instruct you to be fair, can you be fair?" which asks the juror to repeat and elaborate on their bias in front of the other jurors and can create an antagonistic atmosphere. Many judges on the Council have expressed that this is not the favored way to encounter a juror who expresses bias, but have sympathized that judges may fear that they will lose too many jurors to for-cause challenges if they do not pressure jurors to be fair. These changes attempt to strike a balance that allows rehabilitation, but protects the rest of the jury panel if rehabilitation needs to happen.

The other central change to subsection D(1) is to bring the rule current with disability law in paragraph D(1)(b). The word "defect" in the current rule is outdated and offensive. The language in paragraph D(1)(b) is intended to reflect the state of disability law in Oregon as it applies to public accommodations like courts.

(3) Amendments to ORS 10. Many judges and attorneys have expressed that it is difficult to have a representative jury panel if we do not fairly compensate jurors from marginalized communities in a way that allows them to serve. The Council supports OJD's analysis into juror pay, and we recommend additionally allowing reimbursement for child and elder care.

The Council recommends amendment of ORCP 57D as shown in the attached draft.

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. [*Upon motion filed*] **A party may file a motion** under subsection [*(1) of this section*] **A(1) of this rule** containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the [*jury, the*] **jury. The** moving party is entitled to present in support of the motion[*:*] the testimony of the clerk or court administrator; any relevant records and papers not public or otherwise available used by the clerk or court administrator; and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court [*shall*] **must** stay the proceedings pending the selection of a jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk [*shall*] **must** draw names at random from the names of jurors in attendance [*upon the court*] until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, [*shall*] **must** summon from the bystanders, or from the body of the county, so many qualified

persons as may be necessary to complete the jury. Whenever the sheriff [*shall summon*] **summons** more than one person at a time from the bystanders, or from the body of the county, the sheriff [*shall*] **must** return a list of the persons so summoned to the clerk. The clerk [*shall*] **must** draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they [*shall*] **will** be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court [*shall*] **may** regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Definitions. For purposes of this rule the following definitions apply:

D(1)(a) "Actual bias" is the state of mind on the part of a juror that the juror cannot try the issue impartially.

D(1)(b) "Unconscious bias" refers to a bias of which a person is unaware.

[***D(1)***] **D(2) Challenges for cause; grounds. An individual juror does not have a right to sit on any particular jury. Jurors have the right to be free from discrimination in jury service as provided by law. Any juror may be excused for cause, including for a juror's actual bias as provided herein.** Challenges for cause may be taken on any one or more of the following grounds:

[*D(1)(a)*] **D(2)(a)** The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

[*D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.*] **D(2)(b) The inability of a juror to perform the essential functions of jury service, with or without accommodation, because of a mental or physical impairment. A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue**

hardship on the operation of the courts or the juror.

[*D(1)(c)*] **D(2)(c)** Consanguinity or affinity within the fourth degree to any party.

[*D(1)(d)*] **D(2)(d)** Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

[*D(1)(e)*] **D(2)(e)** Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, [*upon*] **on** substantially the same facts or transaction.

[*D(1)(f)*] **D(2)(f)** Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

[*D(1)(g)*] **D(2)(g)** Actual bias on the part of a juror. [*Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.*] **Actual bias may be in reference to the action; either party to the action; or a protected status of the party, the party's attorney, a victim, or a witness, or a perception of a protected status. If the parties agree that a juror has**

expressed actual bias, the court must excuse that juror without further inquiry. If the parties disagree as to whether a juror has expressed actual bias, further inquiry by the judge and the parties and argument must be held on the record, outside of the presence of the other jurors. A judge may defer ruling on challenges for cause until the end of voir dire.

[*D(2)*] D(3) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but [*upon*] **on** which the court [*shall*] **must** exclude [*such*] **the** juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

[*D(3)*] D(4) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges [*shall*] **must** be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges [*shall be*] **are** exhausted. After each challenge, the panel [*shall*] **must** be filled and the additional juror passed for cause before another peremptory challenge [*shall*] **may** be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation [*shall*] **will** not defeat the adverse party of [*such*] **the** adverse party's full number of challenges, [*and such*] **but the** refusal by a party to exercise a challenge in proper turn [*shall*] **will** conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges [*shall*] **will** be confined, in that party's proper turn, to [*such*]

additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection [*shall*] **will** be construed to increase the number of peremptory challenges allowed.

[*D(4) Challenge of*] D(5) Objection to peremptory challenge exercised on basis of [*race, ethnicity, or sex.*] protected status.

[*D(4)(a)*] **D(5)(a)** A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **any status protected by Oregon or federal discrimination law.** [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

[*D(4)(b)*] **D(5)(b)** If a party believes that the adverse party is exercising a peremptory challenge on. a basis prohibited under paragraph [*(a) of this subsection, the*] **D(5)(a) of this rule, that** party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Any objection must be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled. Discussion of the objection must be made outside of the presence of the jurors.**

[*D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.*] **D(5)(c) If there is an objection to the exercise of a**

peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional or unconscious.

[*D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **D(5)(d) An objection to a peremptory challenge must be sustained if the court finds:**

D(5)(d)(i) A protected status under Oregon or federal discrimination law was a factor in the subjective intent of the person invoking the peremptory challenge; or

D(5)(d)(ii) Even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would more likely than not contribute to unconscious bias harming a party or the excluded juror, and the reasons given to support the challenge are insufficient to outweigh the risk of harm.

D(5)(e) In making the determination under subparagraph D(5)(d)(ii) of this rule, the court must consider the totality of the circumstances from the perspective of an objective, reasonable person who is aware of unconscious bias. The court must explain on the record the reasons for its ruling.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation [*shall*] **must** be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors.

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) Decision to allow alternate jurors. The court has discretion over whether alternate jurors [*may*] **will** be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to[*:*] one peremptory challenge if one or two alternate jurors are to be empanelled; two peremptory challenges if three or four alternate jurors are to be empanelled; and three peremptory challenges if five or six alternate jurors are to be empanelled. The court [*shall*] **will** have discretion as to when and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors [*shall*] **will** be drawn in the same manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror [*shall*] **may** not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors [*shall*] **will** be installed to replace any jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury [*shall*] **must** be instructed to begin deliberations anew.

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. [*Upon motion filed*] **A party may file a motion** under subsection [*(1) of this section*] **A(1) of this rule** containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the [*jury, the*] **jury. The** moving party is entitled to present in support of the motion[*:*] the testimony of the clerk or court administrator; any relevant records and papers not public or otherwise available used by the clerk or court administrator; and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court [*shall*] **must** stay the proceedings pending the selection of a jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk [*shall*] **must** draw names at random from the names of jurors in attendance [*upon the court*] until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, [*shall*] **must** summon from the bystanders, or from the body of the county, so many qualified

persons as may be necessary to complete the jury. Whenever the sheriff [*shall summon*] **summons** more than one person at a time from the bystanders, or from the body of the county, the sheriff [*shall*] **must** return a list of the persons so summoned to the clerk. The clerk [*shall*] **must** draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they [*shall*] **will** be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court [*shall*] **may** regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Definitions. For purposes of this rule the following definitions apply:

D(1)(a) "Actual bias" is the state of mind on the part of a juror that the juror cannot try the issue impartially.

D(1)(b) "Unconscious bias" refers to a bias of which a person is unaware.

[***D(1)***] **D(2) Challenges for cause; grounds. An individual juror does not have a right to sit on any particular jury. Jurors have the right to be free from discrimination in jury service as provided by law. Any juror may be excused for cause, including for a juror's actual bias as provided herein.** Challenges for cause may be taken on any one or more of the following grounds:

[*D(1)(a)*] **D(2)(a)** The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

[*D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.*] **D(2)(b) The inability of a juror to perform the essential functions of jury service, with or without accommodation, because of a mental or physical impairment. A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue**

hardship on the operation of the courts or the juror.

[*D(1)(c)*] **D(2)(c)** Consanguinity or affinity within the fourth degree to any party.

[*D(1)(d)*] **D(2)(d)** Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

[*D(1)(e)*] **D(2)(e)** Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, [*upon*] **on** substantially the same facts or transaction.

[*D(1)(f)*] **D(2)(f)** Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

[*D(1)(g)*] **D(2)(g)** Actual bias on the part of a juror. [*Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.*] **Actual bias may be in reference to the action; either party to the action; or a protected status of the party, the party's attorney, a victim, or a witness, or a perception of a protected status. If the parties agree that a juror has**

expressed actual bias, the court must excuse that juror without further inquiry. If the parties disagree as to whether a juror has expressed actual bias, further inquiry by the judge and the parties and argument must be held on the record, outside of the presence of the other jurors. A judge may defer ruling on challenges for cause until the end of voir dire.

[*D(2)*] D(3) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but [*upon*] **on** which the court [*shall*] **must** exclude [*such*] **the** juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

[*D(3)*] D(4) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges [*shall*] **must** be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges [*shall be*] **are** exhausted. After each challenge, the panel [*shall*] **must** be filled and the additional juror passed for cause before another peremptory challenge [*shall*] **may** be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation [*shall*] **will** not defeat the adverse party of [*such*] **the** adverse party's full number of challenges, [*and such*] **but the** refusal by a party to exercise a challenge in proper turn [*shall*] **will** conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges [*shall*] **will** be confined, in that party's proper turn, to [*such*]

additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection [*shall*] **will** be construed to increase the number of peremptory challenges allowed.

[*D(4) Challenge of*] D(5) Objection to peremptory challenge exercised on basis of [*race, ethnicity, or sex.*] protected status.

[*D(4)(a)*] **D(5)(a)** A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **any status protected by Oregon or federal discrimination law.** [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

[*D(4)(b)*] **D(5)(b)** If a party believes that the adverse party is exercising a peremptory challenge on. a basis prohibited under paragraph [*(a) of this subsection*] **D(5)(a) of this rule, that** party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Any objection must be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled. Discussion of the objection must be made outside of the presence of the jurors.**

[*D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.*] **D(5)(c) If there is an objection to the exercise of a**

peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional or unconscious.

[*D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **An objection to a peremptory challenge must be sustained if the court finds:**

D(5)(d)(i) A protected status under Oregon or federal discrimination law was a factor in the subjective intent of the person invoking the peremptory challenge; or

D(5)(d)(ii) Even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would more likely than not contribute to unconscious bias harming a party or the excluded juror, and the reasons given to support the challenge are insufficient to outweigh the risk of harm.

D(5)(e) In making the determination under subparagraph D(5)(d)(ii) of this rule, the court must consider the totality of the circumstances from the perspective of an objective, reasonable person who is aware of unconscious bias. The totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause. The court must explain on the record the reasons for its ruling.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation [*shall*] **must** be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors.

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is

decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) Decision to allow alternate jurors. The court has discretion over whether alternate jurors [*may*] **will** be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to[*:*] one peremptory challenge if one or two alternate jurors are to be empanelled; two peremptory challenges if three or four alternate jurors are to be empanelled; and three peremptory challenges if five or six alternate jurors are to be empanelled. The court [*shall*] **will** have discretion as to when and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors [*shall*] **will** be drawn in the same manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror [*shall*] **may** not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors [*shall*] **will** be installed to replace any jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury [*shall*] **must** be instructed to begin deliberations anew.

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. [*Upon motion filed*] **A party may file a motion** under subsection [*(1) of this section*] **A(1) of this rule** containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the [*jury, the*] **jury. The** moving party is entitled to present in support of the motion[*:*] the testimony of the clerk or court administrator; any relevant records and papers not public or otherwise available used by the clerk or court administrator; and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court [*shall*] **must** stay the proceedings pending the selection of a jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk [*shall*] **must** draw names at random from the names of jurors in attendance [*upon the court*] until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, [*shall*] **must** summon from the bystanders, or from the body of the county, so many qualified

persons as may be necessary to complete the jury. Whenever the sheriff [*shall summon*] **summons** more than one person at a time from the bystanders, or from the body of the county, the sheriff [*shall*] **must** return a list of the persons so summoned to the clerk. The clerk [*shall*] **must** draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they [*shall*] **will** be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court [*shall*] **may** regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Definitions. For purposes of this rule the following definitions apply:

D(1)(a) "Actual bias" is the state of mind on the part of a juror that the juror cannot try the issue impartially.

D(1)(b) "Unconscious bias" refers to a bias of which a person is unaware.

D(1)(c) "Implicit bias" refers to a bias a person of which a person may be aware, although the person may be unaware of its association with unlawful discrimination.

D(1)(d) "Institutional bias" refers to a bias that favors one group over another within a system, whether or not intentional discrimination is implicated.

[***D(1)***] **D(2) Challenges for cause; grounds. An individual juror does not have a right to sit on any particular jury. Jurors have the right to be free from discrimination in jury service as provided by law. Any juror may be excused for cause, including for a juror's actual bias as provided herein.** Challenges for cause may be taken on any one or more of the following grounds:

[*D(1)(a)*] **D(2)(a)** The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

[*D(1)(B) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action*

without prejudice to the substantial rights of the challenging party.] **D(2)(b) The inability of a juror to perform the essential functions of jury service, with or without accommodation, because of a mental or physical impairment. A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue hardship on the operation of the courts or the juror.**

[*D(1)(c)*] **D(2)(c)** Consanguinity or affinity within the fourth degree to any party.

[*D(1)(d)*] **D(2)(d)** Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

[*D(1)(e)*] **D(2)(e)** Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, [*upon*] **on** substantially the same facts or transaction.

[*D(1)(f)*] **D(2)(f)** Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

[*D(1)(g)*] **D(2)(g)** Actual bias on the part of a juror. [*Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the*

challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.] **Actual bias may be in reference to the action; either party to the action; or a protected status of the party, the party's attorney, a victim, or a witness, or a perception of a protected status. If the parties agree that a juror has expressed actual bias, the court must excuse that juror without further inquiry. If the parties disagree as to whether a juror has expressed actual bias, further inquiry by the judge and the parties and argument must be held on the record, outside of the presence of the other jurors. A judge may defer ruling on challenges for cause until the end of voir dire.**

[*D(2)*] D(3) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but [*upon*] **on** which the court [*shall*] **must** exclude [*such*] **the** juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

[*D(3)*] D(4) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges [*shall*] **must** be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges [*shall be*] **are** exhausted. After each challenge, the panel [*shall*] **must** be filled and the additional juror passed for cause before another peremptory challenge [*shall*] **may** be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation [*shall*] **will** not defeat the

adverse party of [*such*] **the** adverse party's full number of challenges, [*and such*] **but the** refusal by a party to exercise a challenge in proper turn [*shall*] **will** conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges [*shall*] **will** be confined, in that party's proper turn, to [*such*] additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection [*shall*] **will** be construed to increase the number of peremptory challenges allowed.

[*D(4) Challenge of*] D(5) Objection to peremptory challenge exercised on basis of [*race, ethnicity, or sex.*] protected status.

[*D(4)(a)*] **D(5)(a)** A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **any status protected by Oregon or federal discrimination law.** [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

[*D(4)(b)*] **D(5)(b)** If a party believes that the adverse party is exercising a peremptory challenge on. a basis prohibited under paragraph [*(a) of this subsection, the*] **D(5)(a) of this rule, that** party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Any objection must be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled. Discussion of the objection must be made outside of the presence of the jurors.**

[*D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity,*

or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.] **D(5)(c) If there is an objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional, implicit, institutional, or unconscious.**

[*D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **D(5)(d) An objection to a peremptory challenge must be sustained if the court finds:**

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D(5)(e) In making the determination under subparagraph D(5)(d)(ii) of this rule, the court must consider the totality of the circumstances from the perspective of an objective, reasonable person who is aware of implicit, institutional, and unconscious bias. The court must explain on the record the reasons for its ruling.

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JURORS

RULE 57

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persons as may be necessary to complete the jury. Whenever the sheriff [*shall summon*] **summons** more than one person at a time from the bystanders, or from the body of the county, the sheriff [*shall*] **must** return a list of the persons so summoned to the clerk. The clerk [*shall*] **must** draw names at random from the list until the jury is completed.

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[*D(1)(a)*] **D(2)(a)** The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

[*D(1)(B) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action*

without prejudice to the substantial rights of the challenging party.] **D(2)(b) The inability of a juror to perform the essential functions of jury service, with or without accommodation, because of a mental or physical impairment. A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue hardship on the operation of the court or the juror.**

[*D(1)(c)*] **D(2)(c)** Consanguinity or affinity within the fourth degree to any party.

[*D(1)(d)*] **D(2)(d)** Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

[*D(1)(e)*] **D(2)(e)** Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, [*upon*] **on** substantially the same facts or transaction.

[*D(1)(f)*] **D(2)(f)** Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

[*D(1)(g)*] **D(2)(g)** Actual bias on the part of a juror. [*Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the*

challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially.] **Actual bias may be in reference to the action; either party to the action; or a protected status of the party, the party's attorney, a victim, or a witness, or a perception of a protected status. If the parties agree that a juror has expressed actual bias, the court must excuse that juror without further inquiry. If the parties disagree as to whether a juror has expressed actual bias, further inquiry by the judge and the parties and argument must be held on the record, outside of the presence of the other jurors. A judge may defer ruling on challenges for cause until the end of voir dire.**

[*D(2)*] D(3) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but [*upon*] **on** which the court [*shall*] **must** exclude [*such*] **the** juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

[*D(3)*] D(4) Conduct of peremptory challenges. After the full number of jurors has been passed for cause, peremptory challenges [*shall*] **must** be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges [*shall be*] **are** exhausted. After each challenge, the panel [*shall*] **must** be filled and the additional juror passed for cause before another peremptory challenge [*shall*] **may** be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation [*shall*] **will** not defeat the

adverse party of [*such*] **the** adverse party's full number of challenges, [*and such*] **but the** refusal by a party to exercise a challenge in proper turn [*shall*] **will** conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges [*shall*] **will** be confined, in that party's proper turn, to [*such*] additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection [*shall*] **will** be construed to increase the number of peremptory challenges allowed.

[*D(4) Challenge of*] D(5) Objection to peremptory challenge exercised on basis of [*race, ethnicity, or sex.*] protected status.

[*D(4)(a)*] **D(5)(a)** A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **any status protected by Oregon or federal discrimination law.** [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

[*D(4)(b)*] **D(5)(b)** If a party believes that the adverse party is exercising a peremptory challenge on. a basis prohibited under paragraph [*(a) of this subsection, the*] **D(5)(a) of this rule, that** the party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Any objection must be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empanelled. Discussion of the objection must be made outside of the presence of the jurors.**

[*D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity,*

or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.] **D(5)(c) If there is an objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional, implicit, institutional, or unconscious.**

[*D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **D(5)(d) An objection to a peremptory challenge must be sustained if the court finds:**

D(5)(d)(i) a protected status under Oregon or federal discrimination law was a factor in the subjective intent of the person invoking the peremptory challenge; or

D(5)(d)(ii) even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would more likely than not contribute to implicit, institutional, or unconscious bias sufficient to harm a party or the excluded juror, and the reasons given to support the challenge are insufficient to outweigh the risk of harm.

D(5)(e) In making the determination under subparagraph D(5)(d)(ii) of this rule, the court must consider the totality of the circumstances from the perspective of an objective, reasonable person who is aware of implicit, institutional, and unconscious bias. The totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause. The court must explain on the record the reasons for its ruling.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation [*shall*] **must** be administered to the jurors, in substance that they and each of them

will well and truly try the matter in issue between the plaintiff and defendant and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors.

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) Decision to allow alternate jurors. The court has discretion over whether alternate jurors [*may*] **will** be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to[*:*] one peremptory challenge if one or two alternate jurors are to be empanelled; two peremptory challenges if three or four alternate jurors are to be empanelled; and three peremptory challenges if five or six alternate jurors are to be empanelled. The court [*shall*] **will** have discretion as to when and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors [*shall*] **will** be drawn in the same manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror [*shall*] **may** not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors [*shall*] **will** be installed to replace any jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who

become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury [*shall*] **must** be instructed to begin deliberations anew.

DEPOSITIONS [*UPON*] ON ORAL EXAMINATION

RULE 39

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

A(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

A(2) a special notice is given as provided in subsection C(2) of this rule.

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

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person [*upon*] **on** oral examination [*shall*] **must** give reasonable notice in writing to every other party to the action. The notice [*shall*] **must** state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such

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person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena [*shall*] **must** be attached to or included in the notice.

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

C(2)(a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant; and

C(2)(b) sets forth facts to support the statement.

C(2)(c) The plaintiff's attorney must sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

C(2)(d) If a party shows that**,** when served with notice under [*this subsection,*] **subsection C(2) of this rule,** the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C(4) **Non-stenographic recording.** The notice of deposition required under [*subsection*

(1) of this section] **subsection C(1) of this rule** may provide that the testimony will be recorded by other than stenographic means, in which event the notice [*shall*] **must** designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedures of Rule 43 [*shall*] apply to the request.

C(6) **Deposition of organization.** A party may in the notice and in a subpoena name as the deponent a public or private corporation**,** [*or a partnership or association or governmental agency*] **or a partnership, association, or governmental agency,** and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named [*shall*] **must** provide notice of no fewer than three (3) days before the scheduled deposition, absent good cause or agreement of the parties and the deponent, designating the name(s) of one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and setting forth, for each person designated, the matters on which such person will testify. A subpoena [*shall*] **must** advise a nonparty organization of its duty to make such a designation. The persons so designated [*shall*] **will** testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

[*C(7) **Deposition by telephone.** Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then*

objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.]

C(7) Deposition by remote means.

C(7)(a) Parties may agree or the court may order that testimony at a deposition be taken by remote means. If such testimony is taken by remote means pursuant to court order, the order must designate the conditions of taking and the manner of recording the testimony and may include other provisions to ensure that the testimony will be accurately recorded and preserved. If testimony at a deposition is taken by remote means other than pursuant to a court order or a stipulation that is made a part of the record, then objections as to the taking of testimony by remote means, the manner of giving the oath or affirmation, and the manner of recording are waived unless objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath or by remote means, at the election of the party taking the deposition.

C(7)(b) "Remote means" is defined as any form of real-time electronic communication that permits all participants to hear and speak with each other simultaneously and allows official court reporting when requested.

D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 [*shall*] **will** put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent [*shall*] **must** be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded

pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. [*Upon*] **On** request of a party or deponent and payment of the reasonable charges therefor, the testimony [*shall*] **will** be transcribed.

D(3) **Objections.** All objections made at the time of the examination [*shall*] **must** be noted on the record. A party or deponent [*shall*] **must** state objections concisely and in a non-argumentative and non-suggestive manner. Evidence [*shall*] **will** be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

[*(a)*] **D(3)(a)** when necessary to present or preserve a motion under section E of this rule;

[*(b)*] **D(3)(b)** to enforce a limitation on examination ordered by the court; or

[*(c)*] **D(3)(c)** to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who [*shall*] **will** propound them to the deponent on the record.

E Motion for court assistance; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, [*upon*] **on** motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion [*shall*] **must** be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it [*shall*] **will** be

resumed thereafter only on order of the court in which the action is pending. [*Upon*] **On** demand of the moving party or deponent, the parties [*shall*] **will** suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) **Allowance of expenses.** Subsection A(4) of Rule 46 [*shall apply*] **applies** to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription [*shall*] **will** be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes [*which*] **that** the witness desires to make [*shall*] **will** be entered [*upon*] **on** the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons [*shall*] **must** promptly be served [*upon*] **on** all parties by the party taking the deposition. The witness [*shall*] **must** then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time [*upon court order*] **if so ordered by the court**, after the deposition is submitted to the witness, the party taking the deposition [*shall*] **must** state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under

Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter [*shall*] **must** certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it [*shall*] **must** certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, [*shall*] **must** certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition [*shall*] **must** be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may by writing be agreed [*upon*] **on**, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed [*upon*] **on** request of any party under such terms and conditions as the court may direct.

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G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness [*shall*] **will**, [*upon*] **on** the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they [*shall*] **will** be marked for identification and the person producing them [*shall*] **must** afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials [*shall*] **will** also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** [*Upon*] **On** payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses [*upon*] on failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable [*attorney's*] **attorney** fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena [*upon*] **on** the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may

order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable [*attorney's*] **attorney** fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I(2) The notice is subject to [*subsections C(1) through (7)*] **subsection C(1) through subsection C(7)** of this rule and [*shall*] **must** additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. [*Such*] **Any** objection [*shall*] **will** be governed by the standards of Rule 36 C. **If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.** At any hearing on such an objection, the burden [*shall*] **will** be on the party seeking perpetuation to show that: [*(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (e) or 45.250 (2)(a) through (c); or (b) it would be an undue hardship on the witness to appear at the trial or hearing; or (c) other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.*]

I(3)(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (1)(e) or ORS 45.250 (2)(a) through (2)(c);

I(3)(b) it would be an undue hardship on the witness to appear at the trial or hearing; or

I(3)(c) other good cause exists for allowing the perpetuation.

I(4) Any perpetuation deposition [*shall*] **must** be taken not less than seven **(7)** days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial [*upon*] **on** a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination [*shall*] **will** proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition [*shall*] **must** be made at the time and noted [*upon*] **on** the record. The court before which the testimony is offered [*shall*] **will** rule on any objections before the testimony is offered. Any objections not made at the deposition [*shall*] **will** be deemed waived.

TRIAL PROCEDURE

RULE 58

A Manner of proceedings on trial by the court. Trial by the court shall proceed in the manner prescribed in [*subsections (3) through (6) of section B*] **subsection B(3) through subsection B(6)** of this rule, unless the court, for good cause stated in the record, otherwise directs.

B Manner of proceedings on jury trial. Trial by a jury shall proceed in the following manner unless the court, for good cause stated in the record, otherwise directs:

B(1) The jury [*shall*] **must** be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a short statement of the facts to the entire jury panel.

B(2) After the jury is sworn, the court [*shall*] **will** instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witnesses if permitted, and the legal principles that will govern the proceedings.

B(3) The plaintiff [*shall*] **may** concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, [*shall*] **may** state defendant's case based upon any defense or counterclaim or both.

B(4) The plaintiff [*shall*] **will** introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant [*shall*] **may** do likewise.

B(5) The parties respectively may introduce rebutting evidence only[,] unless the court**,** in furtherance of justice**,** permits them to introduce evidence [*upon*] **on** the original cause of action, defense, or counterclaim.

B(6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff [*shall*] **may** commence and conclude the argument to the jury. The plaintiff may **initially** waive [*the opening*] argument[,] and**,** if the defendant then argues the case to the jury, the plaintiff [*shall*] **will** have the right to reply to the argument of the defendant, but not otherwise.

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B(7) Not more than two counsel [*shall*] **may** address the jury on behalf of the plaintiff or defendant[*; the whole time occupied on behalf of either shall not be limited to less than two hours.*] **Plaintiff and defendant shall each be afforded a minimum of two hours to address the jury, irrespective of how that time is allocated among that side's counsel.**

B(8) After the evidence is concluded, the court [*shall*] **will** instruct the jury. The court may instruct the jury before or after the closing arguments.

B(9) With the court's consent, jurors [*shall*] **may** be permitted to submit to the court written questions directed to witnesses or to the court. [*The court shall afford the parties an opportunity to object to such questions outside the presence of the jury.*] **The court must afford the parties an opportunity, outside of the presence of the jury, to object to questions submitted by jurors.**

C Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, [*they*] **the jurors** may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial **may** begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

E Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

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F Testimony by Remote Means

F(1) Subject to court approval, the parties may stipulate that testimony be taken by remote means. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath, or by remote means, at the discretion of the court.

F(2) "Remote means" is defined as any form of real-time electronic communication that permits all participants to hear and speak with each other simultaneously.

F(3) Testimony by remote means must be recorded using the court's official recording system, if suitable equipment is available; otherwise, such testimony must be recorded at the expense of and by the party requesting the testimony. Any alternative method and manner of recording is subject to the approval of the court.

F(4) A request for testimony by remote means must be made within the time allowed by ORS 45.400(2).

45.400 Remote location testimony; when authorized; notice; payment of costs. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

(2) A party filing a motion under this section must give written notice to all other parties to the proceeding [*at least 30 days before the trial or hearing at which the remote location testimony will be offered.*] **sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those factors specified in (3)(b) and to advance those factors specified in (3)(c).** [*The court may allow written notice less than 30 days before the trial or hearing for good cause shown.*]

(3)(a) Except as provided under subsection (5) of this section, the court may allow remote location testimony under this section upon a showing of good cause by the moving party, unless the court determines that the use of remote location testimony would result in prejudice to the nonmoving party and that prejudice outweighs the good cause for allowing the remote location testimony.

(b) Factors that a court may consider that would support a finding of good cause for the purpose of a motion under this subsection include:

(A) Whether the witness or party might be unavailable because of age, infirmity or mental or physical illness.

(B) Whether the party filing the motion seeks to take the remote location testimony of a witness whose attendance the party has been unable to secure by process or other reasonable means.

(C) Whether a personal appearance by the witness or party would be an undue hardship on the witness or party.

(D) Whether a perpetuation deposition under ORCP 39 I, or another alternative, provides a more practical means of presenting the testimony.

(E) Any other circumstances that constitute good cause.

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(c) Factors that a court may consider that would support a finding of prejudice under this subsection include:

(A) Whether the ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding.

(B) Whether the nonmoving party demonstrates that face-to-face cross-examination is necessary because the issue or issues the witness or party will testify about may be determinative of the outcome.

(C) Whether the exhibits or documents the witness or party will testify about are too voluminous to make remote location testimony practical.

(D) The nature of the proceeding, with due consideration for a person's liberty or parental interests.

(E) [*Whether facilities that would permit the taking of remote location testimony are readily available.*] **Whether reliable facilities and technology that would permit the taking of remote location testimony are readily available to the court, counsel, parties and the witness.**

(F) Whether the nonmoving party demonstrates that other circumstances exist that require the personal appearance of a witness or party.

(4) In exercising its discretion to allow remote location testimony under this section, a court may authorize telephone or other nonvisual transmission only upon finding that video transmission is not readily available.

(5) The court may not allow use of remote location testimony in a jury trial unless good cause is shown and there is a compelling need for the use of remote location testimony.

(6) A party filing a motion for remote location testimony under this section must pay all costs of the remote location testimony, including the costs of alternative procedures or technologies used for the taking of remote location testimony. No part of those costs may be recovered by the party filing the [*motions*] **motion** as costs and disbursements in the

proceeding.

(7) This section does not apply to a workers' compensation hearing or to any other administrative proceeding.

(8) As used in this section:

(a) "Remote location testimony" means live testimony given by a witness or party from a physical location outside of the courtroom of record via simultaneous electronic transmission.

(b) "Simultaneous electronic transmission" means television, telephone or any other form of electronic communication transmission if the form of transmission allows:

(A) The court, the attorneys and the person testifying from a remote location to communicate with each other during the proceeding;

(B) A witness or party who is represented by counsel at the hearing to be able to consult privately with counsel during the proceeding; and

(C) The public to hear and, if the transmission includes a visual image, to see the witness or party if the public would otherwise have the right to hear and see the witness or party testifying in the courtroom of record.

VEXATIOUS LITIGANTS

RULE 35

A Definitions.

A(1) For purposes of this rule, "vexatious litigant" includes:

A(1)(a) A person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, relitigates, or attempts to relitigate, either:

A(1)(a)(i) The validity of the decision against the same party or parties who prevailed in the litigation; or

A(1)(a)(ii) The cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final decision against the same party or parties who prevailed in the litigation;

A(1)(b) A person who files frivolous motions, pleadings, or other documents, or engages in **discovery or** other tactics that are intended to cause **unnecessary expense or** delay; or

A(1)(c) A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence.

A(2) For purposes of this rule, an action is deemed to be "finally decided" or to have reached a "final decision" after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed.

A(3) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

A(4) For purposes of this rule, "security" means an undertaking by a vexatious litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

B Issuance of pre-filing order. The court [*in any judicial circuit*] may, on its own motion

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or on the petition of any interested person, enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that [*circuit*] **judicial district** without first obtaining leave of the presiding judge. On entry, a copy of the pre-filing order will be sent by the court to the person designated to be a vexatious litigant at the last known address listed in court records, and to the opposing parties, if any. Disobedience of such an order may be punished as a contempt of court.

C Challenge to pre-filing order.

C(1) Procedure. A vexatious litigant's request to commence a new action or claim [*may*] **must** be made by a petition accompanied by an affidavit or a declaration and **must include as an exhibit a copy of the complaint or other case-initiating document that the litigant proposes to file. The motion** will only be granted on a showing that:

C(1)(a) the proposed action or claim is not frivolous and is not for the purpose of **unnecessary expense or** delay**,** or harassment**; or**

C(1)(b) that a statute of limitations or ultimate repose deadline is so imminent that denial of the request to commence the new action could foreclose the litigant's right to bring a potentially valid claim.

C(2) Deposit of security. The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

C(3) Relation back. If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file.

[*C*] D Designation and security hearing. In any case pending in any court of this state, including [*small claims cases*] **a case filed in the small claims department**, a litigant may move the court for an order to recognize an opposing party as a vexatious litigant and to require posting of security. At the hearing on the motion, the court may consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant

to the **motion**.

[*C*] D(1) **Determining whether a litigant is vexatious.** To determine whether a litigant is vexatious, the court may consider:

[*C*] D(1)(a) the litigant's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;

[*C*] D(1)(b) the litigant's motive in pursuing the litigation;

[*C*] D(1)(c) whether the litigant is represented by counsel;

[*C*] D(1)(d) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

[*C*] D(1)(e) whether other sanctions would be adequate to protect the courts and other parties; and

[*C*] D(1)(f) any other considerations that are relevant to the circumstances of the litigation.

[*C*] D(2) If, after considering all of the evidence, the court determines that the litigant is vexatious and not reasonably likely to prevail on the merits against the moving party, then the court must order the vexatious litigant to post security in an amount and within such time as the court deems appropriate. A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

[*D*] E Failure to deposit security; judgment of dismissal. If the vexatious litigant fails to post security in the time required by an order of the court under section C of this rule, the court will promptly issue a judgment dismissing the action or claim with prejudice as to the party for whose benefit the security was ordered.

[*E*] F Motion for hearing stays pleading or response deadline. If a motion for an order to designate a vexatious litigant and to deposit security is filed in an action[,]**:**

F(1) if security is required to be deposited, [*If the motion is granted,*] the moving party

must plead or respond *[not later than ten (10) days after the required security has been deposited.]* **within the time remaining for response to the original pleading or within 10 days after the deposit of security, whichever period may be the longer, unless the court otherwise directs; or**

F(2) if no security is required to be deposited, then the moving party [*need not*] **must** plead or otherwise respond [*until ten (10) days after service of the order that rules on the motion, unless the order directs otherwise*] **within the time remaining for response to the original pleading or within 10 days after service of the order allowing the case to proceed, whichever period may be the longer, unless the court otherwise directs.**

[*F*] G Cases filed [*in error after a pre-filing order is entered.*] without leave of the presiding judge. [*The clerk of the court must reject for filing any new action or claim by a vexatious litigant,*] **A vexatious litigant may not file any new action or claim** unless the vexatious litigant has obtained an order from the presiding judge allowing the action or claim to be filed. [*If the clerk of the court mistakenly permits a vexatious litigant to file an action or claim after a pre-filing order has been entered,*] **If a vexatious litigant files an action or claim without obtaining leave of the presiding judge,** then any party to the action or claim**, or the court on its own motion,** [*mistakenly filed*] may file a notice stating that the vexatious litigant is subject to a pre-filing order. The notice must be served on all parties who have been served or who have appeared in the action or claim. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim with prejudice within [*ten (10)*] **10** days after the filing of such a notice unless the vexatious litigant files a motion for leave to [*file the action*] **proceed**. If the presiding judge issues an order allowing the action to [*be filed*] **proceed**, then the vexatious litigant must serve a copy of **that** order [*granting leave to file the action*] on all other parties. Each party must plead or otherwise respond to the action or claim *[within ten (10) days after the date of service of the presiding judge order.]* **within the time remaining for response to the original pleading or within 10**

days after service of that order, whichever period may be the longer, unless the court otherwise directs.

VEXATIOUS LITIGANTS

RULE 35

A Definitions.

A(1) For purposes of this rule, "vexatious litigant" includes:

A(1)(a) a person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, relitigates, or attempts to relitigate, either:

A(1)(a)(i) the validity of the decision against the same party or parties who prevailed in the litigation; or

A(1)(a)(ii) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final decision against the same party or parties who prevailed in the litigation;

A(1)(b) a person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary expense or delay; or

A(1)(c) A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence.

A(2) For purposes of this rule, an action is deemed to be “finally decided” or to have reached a “final decision” after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed.

A(3) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

A(4) For purposes of this rule, "security" means an undertaking by a vexatious litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

B **Issuance of pre-filing order.** The court may, on its own motion or on the petition of any

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interested person, enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that judicial district without first obtaining leave of the presiding judge. On entry, a copy of the pre-filing order will be sent by the court to the person designated to be a vexatious litigant at the last known address listed in court records, and to the opposing parties, if any. Disobedience of such an order may be punished as a contempt of court.

C Challenge to pre-filing order.

C(1) **Procedure.** A vexatious litigant's request to commence a new action or claim must be made by a petition accompanied by an affidavit or a declaration and must include as an exhibit a copy of the complaint or other case-initiating document that the litigant proposes to file. The motion will only be granted on a showing that:

C(1)(a) the proposed action or claim is not frivolous and is not for the purpose of unnecessary expense or delay, or harassment; or

C(1)(b) that a statute of limitations or ultimate repose deadline is so imminent that denial of the request to commence the new action could foreclose the litigant's right to bring a potentially valid claim.

C(2) **Deposit of security.** The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

C(3) **Relation back.** If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file.

D Designation and security hearing. In any case pending in any court of this state, including a case filed in the small claims department, a litigant may move the court for an order to recognize an opposing party as a vexatious litigant and to require posting of security. At the hearing on the motion, the court may consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant to the motion.

D(1) **Determining whether a litigant is vexatious.** To determine whether a litigant is vexatious, the court may consider:

D(1)(a) the litigant's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;

D(1)(b) the litigant's motive in pursuing the litigation;

D(1)(c) whether the litigant is represented by counsel;

D(1)(d) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

D(1)(e) whether other sanctions would be adequate to protect the courts and other parties; and

D(1)(f) any other considerations that are relevant to the circumstances of the litigation.

D(2) If, after considering all of the evidence, the court determines that the litigant is vexatious and not reasonably likely to prevail on the merits against the moving party, then the court must order the vexatious litigant to post security in an amount and within such time as the court deems appropriate. A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

E Failure to deposit security; judgment of dismissal. If the vexatious litigant fails to post security in the time required by an order of the court under section C of this rule, the court will promptly issue a judgment dismissing the action or claim with prejudice as to the party for whose benefit the security was ordered.

F Motion for hearing stays pleading or response deadline. If a motion for an order to designate a vexatious litigant and to deposit security is filed in an action:

F(1) if security is required to be deposited, the moving party must plead or respond within the time remaining for response to the original pleading or within 10 days after the deposit of security, whichever period may be the longer, unless the court otherwise directs; or

F(2) if no security is required to be deposited, then the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within ten (10) days after service of the order allowing the case to proceed, whichever period may be the longer, unless the court otherwise directs.

G Cases filed without leave of the presiding judge. A vexatious litigant may not file any new action or claim unless the vexatious litigant has obtained an order from the presiding judge allowing the action or claim to be filed. If a vexatious litigant files an action or claim without obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the vexatious litigant is subject to a pre-filing order. The notice must be served on all parties who have been served or who have appeared in the action or claim. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim with prejudice within 10 days after the filing of such a notice unless the vexatious litigant files a motion for leave to proceed. If the presiding judge issues an order allowing the action to proceed, then the vexatious litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading or within 10 days after service of that order, whichever period may be the longer, unless the court otherwise directs.

<u>SITUATION</u>: Conflict between Court Rules and Arbitration Statute

The purpose of court-annexed arbitration is to promote speedy resolution of disputes and reduce the burdens on court by deciding smaller civil disputes where only money through arbitration with reduced court involvement. But a conflict exists between the arbitration statute and the court rules for certain cases heard in arbitration and are not appealed to trial de novo.

In *Mendoza v Xtreme Truck Sales LLC*, 314 Or App 87 (2021), the Court of Appeals held that, based on the language of ORCP 54(E), when a dispute over entitlement to attorney fees or costs arises from an offer of judgment, the arbitrator's final award—including the attorney fees and costs award, which the arbitrator now makes without knowing about the offer of judgment—must become a final judgment before the offer of judgment is disclosed and the effect of the offer of judgment on the attorney fees and costs award is determined.

This creates a conflict with ORS 36.425(3), which states that "If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed."

So the statute on arbitrations dictates that final judgments are not subject to appeal, but the *Mendoza* holding directs litigants to wait until the judgment (including the award of attorney fees and costs) becomes final before disclosing the offer of judgment to the court so it can decide the effect on the attorney fees and costs. And there is no procedure in statute or rule for raising this issue, so each trial court who encounters it must create an ad-hoc procedure to consider the issue.

<u>TARGET</u>: A simple, clear procedure for litigants to follow during arbitration when an ORCP 54 offer of judgment might affect fees and costs.

Litigants, arbitrators, and courts should have a simple process for cases when an offer of judgment may affect the attorney fees and costs after an arbitration and the case is not appealed to trial de novo.

<u>PROPOSAL</u>: Revise ORS 36.425(6) to have the arbitrator consider and determine the effect of any ORCP 54 offers of judgments on the attorney fees and costs after submitting the arbitration award to the court.

ORS 36.425
Filing of decision and award

(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. **Any claim or defense pursuant to ORCP 54E offer to allow judgment must be filed as exceptions under this subsection.** Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. [*If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed.*] The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.