

**MINUTES OF MEETING**  
**COUNCIL ON COURT PROCEDURES**  
 Saturday, September 17, 2022, 9:30 a.m.  
 Zoom Meeting Platform

**ATTENDANCE**

Members Present:

Hon. Benjamin Bloom  
 Kenneth C. Crowley  
 Nadia Dahab  
 Hon. Christopher Garrett  
 Barry J. Goehler  
 Hon. Jonathan Hill  
 Hon. Norman R. Hill  
 Meredith Holley  
 Derek Larwick  
 Hon. David E. Leith  
 Hon. Thomas A. McHill  
 Hon. Susie L. Norby  
 Hon. Scott Shorr  
 Tina Stupasky  
 Stephen Voorhees  
 Margurite Weeks

Members Absent:

Kelly L. Andersen  
 Hon. D. Charles Bailey, Jr.  
 Troy S. Bundy  
 Drake Hood  
 Scott O'Donnell  
 Hon. Melvin Oden-Orr  
 Jeffrey S. Young

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 7 ORCP 35 ORCP 39 ORCP 55 ORCP 57 ORCP 58 ORCP 69 ORS 45.400 ORS 46.415	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 35 ORCP 39 ORCP 55 ORCP 57 ORCP 58 ORCP 69		ORCP 54/ORS 36.425

I. Call to Order

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

II. Administrative Matters

Mr. Crowley asked Judge Peterson and Ms. Nilsson to explain the process for today's meeting, since there are some newer Council members who have never been present for a publication meeting before.

Judge Peterson stated that the publication and promulgation meetings tend to be more like coronations than the usual, deliberative Council meetings. He noted that, at the end of the last Council meeting, he asked members to please take a look at the rules up for consideration today to look for either typographical errors or any concerns about amending the wording to make something more clear. He stated that he is very reluctant to make on-the-fly amendments during this publication meeting, simply because that would result in a product that is not the Council's best, most deliberative work. He hoped that Council members are satisfied with the rules up for publication today. He stated that this will be a simple majority vote, and that the draft amendments that get that majority vote will be published to the bench and bar and subject to comment. He stated that Ms. Nilsson will receive those comments and organize and disseminate them to the Council. Any rules that are published will be put on the agenda for the December promulgation meeting, and those amendments require a super majority vote of fifteen to promulgate.

Judge Norby stated that she has been thinking a lot about this meeting. She stated that, in her experience on the Council, this meeting can be characterized as simply a vote about whether to collect comments; a vote to see whether the Council wants to hear what the bar has to say about its work. Judge Peterson agreed with that characterization. He stated that the Council has previously published some draft amendments that were controversial to take the temperature of the bar. In at least two cases, a flood of comments came in, none of which were positive, and those particular amendments were not promulgated. This is an opportunity to run amendments up the flagpole and see how they are received.

Ms. Nilsson agreed that there have been times where a proposed amendment has been unpopular on one side or the other of the bar, and the Council has received comments to that effect. But it has also been the case that the Council has received comments about an unintended consequence that the Council had not considered, and the Council was able to address that concern the following biennium and craft a better rule that was, in fact, promulgated.

Judge Peterson stated that it has been the practice of the Council that, once the rule is published, the Council does not make substantial changes between publication and promulgation. If there is something that has been overlooked that is simply wrong, like a word that was omitted, of course that can be fixed. However, if the rule needs to be substantially retooled, it is probably better to rethink it in the following biennium.

Judge Norby summarized a yes vote as a vote to find out what the rest of the bar thinks, and a no vote as a vote not to let the rest of the bar weigh in on it. Mr. Larwick stated that a no vote could also be re-framed as a vote to rework the language until the Council feels that it is at a place where members can weigh in on it more intelligently. Mr. Crowley stated that, if it is the opinion of a Council member that the rule just is not ready to be published yet and that it needs more work, a no vote would reflect that. As a practical matter, that would mean that the draft would have to be carried over to the next biennium.

Mr. Crowley thanked all Council members for their work over the biennium, and for their presence at the meeting. He stated that there had been a lot of debate throughout the biennium, and that there is a lot of work on the table today as a result.

### III. Old Business

#### A. Discussion of Draft Amendments

##### 1. ORCP 7 (Appendix A)

Mr. Goehler reminded the Council that the Rule 7 committee looked at several suggestions that came from the greater bar, talked through them, and decided that the one issue that warranted further review was the relevance of whether county location was part of business entity service. The committee looked particularly at subsection D(3) and the different business entities there, then retooled the subsection to remove different rules based on whether the business entity was served in the same county where the action was filed. Mr. Goehler explained that this was the main change that was made, and that other changes were made by Council staff and did not affect the meaning or operation of the rule, such as taking out the word upon and replacing it with on.

Judge Peterson stated that Council staff had also added the phrase “if any” in part D(3)(c)(ii)(C) relating to limited liability companies to make it consistent with part D(3)(b)(ii)(C) relating to corporations. Mr. Goehler agreed that this was a good change to make the language parallel and consistent.

##### a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 7

Ms. Holley made a motion to publish the draft amendment to Rule 7. Judge Jon Hill seconded the motion, which was passed unanimously by roll call vote.

## 2. ORCP 39 (Appendix B)

Judge McHill stated that committee was formed, in large part due to Mr. Andersen's efforts, to create a way to handle situations where there is now better technology to either take depositions by remote means or take testimony at trial by remote means. The committee spent a lot of time talking about whether depositions would require a stipulation or an order of the court. Judge McHill stated that the intent of the committee was to liberally allow remote testimony, either at deposition or at trial, depending on the circumstances. As far as taking remote testimony, Judge McHill made special note that the Council had voted to retain the language in paragraph C(2)(a) that pertains to people who are bound on a voyage to sea.

Mr. Crowley stated that he appreciated the suggested changes to Rule 39. He pointed out that remote testimony is something that is currently happening on a regular basis and has been throughout the pandemic, and it has proven to be very useful. Judge Peterson stated that the amendment replaces telephone testimony, and brings the rule into modern, post COVID-19 practice.

### a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 39

Judge Jon Hill made a motion to publish the draft amendment of ORCP 39. Ms. Holley seconded the motion, which passed unanimously by roll call vote.

## 3. ORCP 58 (Appendix C)

Judge McHill stated that the major change to Rule 58 is section F, which allows for testimony by remote means with respect to trial. The committee also recognizes that there is a statute, ORS 45.400, that talks about time limits with respect to requesting remote testimony in a trial situation, and the suggestion of the Council with regard to modifying that statute will be discussed later in the meeting.

Judge Peterson noted that staff had made many changes throughout the rule that were not intended to change its meaning or operation. One of those changes was in subsection B(7) to make the sentence regarding the two hour minimum for closing argument more clear. Another change was in subsection B(9) to clarify that the objection to the jurors' questions should be made outside of the presence of the jury.

Judge Norm Hill noted that the Chief Justice of the Supreme Court and the State Court Administrator are looking at creating a more comprehensive default position on what testimony will be allowed to be remote. He stated that he does not have a problem publishing this amendment, but that he would feel very

uncomfortable with the Council getting ahead of the Chief Justice's effort, because there is a lot more at play than just the civil side of this. It is also an issue in criminal trials, and juvenile delinquency and dependency cases add a new level of complexity to it. Based on the timing, this may be a case where the Council needs to take a step back and let the OJD go first.

Judge McHill stated that the committee had discussed this issue early on, and the intent was to adopt what was at least then the definition of "remote means" because the rule was inconsistent with the present reality, with the realization that there may be other work happening on the issue. Judge Norm Hill stated that he and Judge Bloom were on a conference call the previous day where the OJD's plan of action regarding remote appearances was a major topic of conversation, so he wanted to bring it to the Council's attention that there is a substantial push from the Chief Justice to create some uniformity. He stated that he would hate to have the Council's promulgation make that process more difficult. Having said that, given the nature of this meeting, he believes that the Council should absolutely publish the rule to remain part of that conversation. He cautioned that there may be a need to take a step back before finally adopting the amendment.

Judge Peterson asked whether the OJD's effort would result in a statute or a Chief Justice's Order (CJO). Judge Norm Hill stated that it may take the form of a CJO or it may be changes to the Uniform Trial Court Rules; they are both being looked at. One of the issues right now is whether these things should be looked at on a very granular, hearing-by-hearing basis, like many states have done. Another option would be to have groupings of categories of hearings to decide whether some will be held remotely as a default. Judge Norm Hill stated that he was not saying that the OJD's work would be inconsistent with the Council's work, because that remains to be seen.

Mr. Crowley asked whether Judge Norm Hill was aware of whether the Chief Justice knows that the Council is considering this change to the ORCP. Erin Pettigrew from the OJD stated that the Chief Justice and the Office of the State Court Administrator are carefully, critically looking at how they can help the courts have greater consistency and clarity around where remote proceedings will be encouraged. She stated that she had sent the Council's draft amendments of Rule 39 and Rule 58 to the Chief Justice and her staff, and they have reviewed them. Preliminarily, there are no concerns, and it looks like the Rule 58 proposal might be quite helpful in terms of helping create clarity. Of course, there are many unknown factors, and it is not certain where the process will lead, but for now there are no concerns about conflicts. Ms. Pettigrew agreed with Judge Norm Hill that these amendments are part of a larger process that is just taking flight, but the OJD is aware of and appreciates the Council's work because it does matter for people to have clarity around remote proceedings.

Judge Norm Hill stated that, in terms of the process, as the Chief Justice is developing her position, she has a process that starts with a small group of trial court administrators and regional presiding judge representatives that deliberate, and then her goal will be to rely on input from all of the presiding judges, and that has not happened yet. He pointed out that the Chief Justice is at the beginning of that process and is not yet in a position to know how the Council's work will play into it. Ms. Pettigrew agreed that this is a fair summation of the situation.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 58

Judge Jon Hill made a motion to approve the draft amendment of Rule 58. Judge Norby seconded the motion, which was approved unanimously by roll call vote.

#### 4. ORCP 55 (Appendix D)

Judge Norby reminded the Council that this is an amendment that has pretty limited applicability. The amendment arose from a request from Multnomah County Judge Marilyn Litzenberger, who asked for a process for moving to quash a subpoena for occurrence witnesses. That process was placed in subparagraph A(1)(a)(vi), and a basic form was added to the rule that would be required to be included with a subpoena to allow people who receive subpoenas to move to quash them by providing essential information that would be necessary for that decision.

Judge Peterson stated that Judge Litzenberger had noted that it does not occur very frequently that occurrence witnesses ask to be excused from complying with a subpoena but, every time it does come up, no one feels comfortable about how to handle it. What this amendment is trying to avoid is the occurrence witness ignoring the subpoena, which is not desired by anyone. The amendment provides a procedure that also tells the recipient that, if they do not appear, there can be adverse consequences. It states in the proposed motion and declaration that the witness must basically perform the equivalent of UTCR 5.010 conferral and talk to the attorney that issued the subpoena, as well as stating the reasons for being unable to appear and why the subpoena request should be modified or quashed. Judge Peterson reminded the Council that an attempt was made to modify Rule 55 last biennium, and it was pulled back after publication. He stated that the committee had done a lot of research and come up with a blend of three different jurisdictions' methods. He reached out to the courts in Utah, which has a much more troublesome form, and discovered that their form does not seem to be causing mischief there. Judge Peterson stated that this is the committee's best effort at this concept.

Ms. Stupasky stated that she has been hearing that there will be a lot of pushback from some very well-respected plaintiffs' attorneys about this draft amendment if it is published. She anticipated many comments that the change is not necessary given the fact that the ability to move to quash a subpoena already exists. She stated that many people are troubled about providing the form with the subpoena and inviting witnesses that are already difficult to get to come to trial to fight the process. Ms. Stupasky stated that she has also heard that some people feel like the form is giving legal advice, but she did not know the specifics of that. Ms. Holley stated that she had heard that the pushback is in regard to the form, and not to the language added to the rule itself. Ms. Stupasky agreed. Ms. Holley stated that she thought it was a good form, but heard that there will be objection to it.

Judge Peterson noted that one of the judges he spoke to in Utah had suggested that service of the subpoena should not be the first communication a lawyer has with a witness. Of course, occasionally, things come up unexpectedly, but there typically should be some kind of communication beforehand. He stated that he likes the fact that the form states what existing subpoenas do not – that, if you do not comply, you might be in big trouble and receive a fine or jail time. He noted that this may make it easier to enforce contempt.

Mr. Goehler stated that he appreciated Judge Peterson's comments about the warning. He likes the language and feels that it is good to include it. The Washington form is very ominous and threatening, stating, "Disobey at your peril." He appreciated the neutrality of the language here.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 55

Judge Jon Hill made a motion to publish the draft amendment of Rule 55. Judge Bloom seconded the motion, which was approved by roll call vote with twelve affirmative votes and two negative votes.

## 5. ORCP 57 (Appendix E)

Ms. Holley stated that the Council had made a number of changes at the last meeting that simplified the overall amendment. Some of those changes were in subsection D(1), the for-cause challenge area. The previous change to paragraph D(1)(g) was removed. Paragraph D(1)(b) was changed to use the language "impairment" instead of "defect" and "essential functions" instead of "duties" to comport with general disability law terms. There is language in subsection D(1) that says that an individual juror does not have the right to sit on a particular jury, but they do have the right to be free from discrimination in jury service, and that is to reflect case law.

Ms. Holley reminded the Council that the main changes start in subsection D(4). At the last Council meeting there was a vote to expand the protected characteristics from race, ethnicity, or sex to comply with Oregon's public accommodation statute, ORS 659A.403. Those characteristics now include race, color, religion, sex, sexual orientation, gender identity, and national origin. The Council chose not to include age and marital status. The biggest change removes the presumption of non discrimination and allows the adverse party to make an objection regarding bias in jury selection. The person exercising the peremptory challenge must state a non-discriminatory reason, then an objecting party must provide argument and evidence that the reason is discriminatory or is a pretext for discrimination. The objection to the peremptory challenge must be sustained if the court finds more likely than not that a protected characteristic was a factor in invoking the challenge. The amendment also adds factors for the court to consider, including whether the juror was questioned and the nature of the questions, the extent to which the non-discriminatory reason could arguably be a proxy for a protected status, whether the party challenged the same juror for cause, and any other factors. The explanation is to be made on the record. Ms. Holley stated that she feels that the draft before the Council is the best so far, and that the changes made at the last meeting simplified the rule in a way that judges will be able to more practically implement. She also stated that she believes that this amendment is probably the best option for preventing elimination of peremptory challenges through the Legislature.

Judge Shorr suggested changing "a juror does not have a right to sit on any particular jury..." to "a juror does not have a right to sit on a particular jury..." to avoid ambiguity. Ms. Holley stated that she agreed with this suggestion. Judge Peterson stated that this is the type of change that is appropriate at the publication meeting.

Mr. Crowley asked whether the intent is to also publish the memo from the committee that is attached to the draft (Appendix F). He stated that he feels that there is an advantage to publishing the memo with the rule, because it shows the amount of work that was done to arrive at the final amendment, as well as contains a link to all of the materials that the workgroup reviewed. Ms. Holley stated that she is open to suggestions for changes to the memo as well.

Judge Norm Hill stated that he would like to raise a few issues with the memo. The first is an error when referring to the makeup of the Council; it refers to the two courts of appeal where it should say the two appellate courts, or the Court of Appeals and the Supreme Court. Another issue is that the memo is a communication to the Legislature, and he would like to have the Council take a firm position about how the Legislature should be addressing the problem of the disparate impact of the jury system on people of color by improving jury composition through improving jury compensation. Because of low jury pay, the only people who can participate are on the high end of the economic spectrum,



not people who cannot afford a day off of work. If the system is truly going to be fair, giving people a jury of their peers, there must be a way to bring more, and more diverse, people into the system. Ms. Holley noted that there was some language in the last draft of the memo that supported the OJD's changes to ORS chapter 10 regarding juror compensation. She removed that language in this version because the Council had discussed just focusing on the crucial changes to Rule 57 so as not to distract from them. Judge Norm Hill stated that he believes that the message cannot be overstated because it is so important.

Judge Norm Hill stated that some judges and members of the bar had expressed concern to him about the burden shift making jury selection much more difficult for prosecutors, almost putting a target on them. He stated that he had sold the change to these people by pointing out that the burden is not that high to begin with. He noted that the memo seems to say that the burden is very high. He pointed out that the burden really is not high, but that the rule change has simply changed the conversation. He asked that this language in the memo be changed to reflect this reality. He also stated that he thought that it is important to state that the Council wants to address the issue of implicit bias by having everyone who is engaged in jury selection consciously challenge themselves as a matter of course about whether the choices they are making are based on implicit bias. The amendment simply creates an environment where that can happen automatically. Judge Norm Hill suggested emphasizing that a bit more in the memo. Ms. Holley stated that she could make these changes and let Judge Norm Hill review them before the publication meeting. Judge Peterson suggested allowing Ms. Pettigrew and Ms. Holland with the OJD to review the language as well.

Mr. Crowley asked Ms. Holley to remove the reference to him as a representative of the Department of Justice (DOJ) in the report, as he was not representing the DOJ in that capacity. Ms. Holley stated that she would refer to him as a Council member. Judge Peterson stated that Mr. Shields was erroneously listed as a Council member, when he should be listed as the Council's liaison from the Oregon State Bar.

Mr. Larwick stated that he could understand publishing proposed rule changes, but that he was not sure that understood the mechanism by which it is publishing commentary (i.e., the memo). Ms. Holley stated that the reason the Council is publishing the memo is that the Council voted last biennium that this may be a substantive change, and she believes that this is outside of the Council's purview as a rule. She stated that Judge Peterson disagrees with her, but the reason to publish the memo is to say that the Council recognizes that it has been asked to make this change, but it may have serious, substantive implications. Typically, when the Council makes a recommendation to the Legislature, Judge Peterson sends a letter with the recommendation attached. Because there is a little bit of a disagreement as to whether this change is substantive or procedural, this is sort of the middle ground.

Judge Peterson noted that the third paragraph of the memo states rather strongly that jury selection inherently implicates the substantive rights of both litigants and jurors. Ms. Holley stated that this is because the Council voted last biennium that it does. Judge Peterson pointed out that last biennium's discussion was about what questions were on the "naughty and nice" list, and that has been changed, so the proposed amendment before the Council now is much more procedural. He simply suggested toning down that language to "may implicate." Ms. Holley agreed. Judge Peterson did agree that it is a concern, if the change is determined to be substantive, that the Council should flag that for the Legislature. If the Legislature wants to hold hearings on it, they certainly can, and should. However, Judge Peterson did not want to cede the Council's procedural territory to the Legislature. Judge Norm Hill echoed Judge Peterson's belief that, given the current state of the proposed changes in the draft amendment, this is squarely a procedural question that is within the Council's purview.

Judge Peterson reminded the Council that the memo will not become a part of the rule; rather, it is intended to be an attachment to show the Legislature the amount of work that was involved in crafting the rule. He noted that Council staff does write legislative comments to the rules, but that this is a separate process and that these comments will not be as detailed as the memo.

Ms. Pettigrew updated the Council on the OJD's juror compensation bill. This standalone bill will be introduced by the Chief Justice in the next legislative session and would do two things. First, it would tie the rate of compensation for mileage to the federal rate, as opposed to the current statutory rate of 20 cents per mile. Second, and more importantly, it would raise the per diem rates of jury service from \$10 a day to \$50, and from \$25 per day to \$60 on the third and subsequent days. Ms. Pettigrew stated that the OJD would appreciate all support that could be brought to the ears of legislators, as it is a \$21 million proposal. She thanked Judge Hill for raising the issue of juror pay today, and Ms. Holley for working this access to justice issue through the workgroup.

Judge Norm Hill specifically acknowledged Ms. Holley. He stated that, during his time on the Council, he did not believe that there had been a more impactful and difficult issue, and that Ms. Holley had been incredibly gracious and patient with Council members as they worked through it. He stated that the Council would not be at this point without her hard work, and the Council owes her a debt of gratitude.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 57

Judge Jon Hill made a motion to publish the draft amendment of Rule 57, along with the committee memo, amended pursuant to today's discussion.

Judge Norby seconded the motion, which passed unanimously by roll call vote.

6. ORCP 35 (Appendix G)

Judge Jon Hill reminded the Council that the committee had first discussed recommending legislation about vexatious litigants based on a Senate bill from 2013 but, after further discussion, had decided to see whether an ORCP could work. Through case law research, the committee discovered that presiding judges have this authority now. In subsections D(3) and D(4) of the draft amendment, criteria from that case law is listed. He stated that he believes that the most recent draft of the rule addresses all of the relation back issues. The rule gives structure to what presiding judges can already do now.

Judge Norby stated that, after the last Council meeting, she looked at the definitions in section A. She believes that the three categories there that this rule would apply to are: 1) litigants who refuse to accept their past losses and try to re-litigate them; 2) litigants who file frivolous or harassing claims; and 3) litigants who have already been designated vexatious by another jurisdiction. That is who this rule is aimed at. As Judge Jon Hill said, there are criteria that need to be applied in order to take any further action on a member of those three groups.

Judge Norm Hill stated that he is aware that the draft rule is going to generate controversy and that, even on the Council, there is some question about whether this rule is a good idea. He opined, however, that the rule should be published exactly for that reason. He stated that the members of the committee and the Council have wordsmithed the rule to where it is the best expression of the concept, and he did not believe any further discussion was going to significantly improve it. The real question is whether it is a good or bad idea, and that is exactly the kind of thing that the Council should publish to the bar. He urged all Council members to vote to publish the draft rule so that a conversation can be had at the publication meeting about whether it is ultimately a good or bad idea.

Judge Bloom appreciated Judge Norm Hill's comments, the work of the committee, and the reason behind the creation of the rule. However, he opined that it is a profound overreach on the part of the Council. For that reason, he respectfully disagreed with its publication. He stated that, when he was a lawyer on the Council and there was a suggestion to put forward two versions and see what bar members thought, he did not think that was appropriate. He stated that the Council is a quasi-deliberative body set up to for rulemaking recommendations to the Legislature, and it is the Council's job to come up with rules. He stated that, whether work has been put in on a rule or not, if it is not a good idea, it should not be published. Judge Bloom stated that his concerns are on several grounds: 1) the draft rule is legislative; 2) it sends a wrong signal to people; and 3) it invites unnecessary litigation for power that the courts already

have. He recognized that the federal courts are designating litigants as vexatious, but asked Mr. Crowley whether there is actually a federal rule. Mr. Crowley stated that there is no rule in the Federal Rules of Civil Procedure; it is more or less a local process that is somewhat easier for the federal court to apply consistently because there is only a handful of federal judges. Nevertheless, Mr. Crowley stated that the process that the committee has come up with is intended to provide consistency within state courts for the same reasons.

Ms. Dahab expressed appreciation for the work of the committee, but shared the same concerns that Judge Bloom articulated. She stated that she believes that the rule turned out to be more substantive than procedural. Her bigger concern is the access to justice concerns that she reads the rule to have. The first category of people to whom the rule potentially applies, those who may be unwilling to accept the result from a prior lawsuit, may capture more people than the Council is intending to capture. The Council may not appreciate how aggressive litigants can be in many contexts. Ms. Dahab stated that she does a lot of consumer protection work, and that this strikes her as something that could come up quite frequently for debt collectors against debtors. In addition, the security requirement poses access to justice concerns. The idea that a litigant must apply for leave to file a lawsuit that is not exactly the same, but may be similar or substantially related, may have remedy clause problems or policy-based access to justice concerns. She worried that there might be unintentional blocking of access to the courts. She would therefore vote not to publish the rule.

Ms. Stupasky agreed with Judge Bloom and Ms. Dahab for the reasons they stated. She also expressed concern about including persons who have previously been declared to be a vexatious litigant by any state or federal court of record. That language is very broad and, if a judge in another state got carried away and found someone to be vexatious who was not, having Oregon rely on that ruling could be problematic. While she appreciated the work of the committee, she would also vote against publication.

Mr. Larwick stated that he was unable to attend the last Council meeting, and apologized if he had missed some discussion. He stated that he is mostly concerned about the second category, which is a person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary, expensive delay. He stated that this language seems so broad that it could almost apply in pretty much all of the cases where the defendants file affirmative defenses with no basis in law or fact. For example, he has a few uninsured motorist cases against the same insurance company. In each case, there is an attempt to change existing law. In one case, the plaintiff lost in summary judgment; in the other case the defendant lost in summary judgment, because the case law was against the position each was taking. He expressed concern that, during the summary judgment hearing, a party might file a motion asking for the other party to be deemed vexatious and a trial

court might buy into it. In that situation, how would a carrier who is a repeat litigant that gets branded with a scarlet letter of being a vexatious litigant get that scarlet letter taken away? The rule does not address how someone who is tagged a vexatious litigant can get that designation removed, because it looks like, each time they file something with the court, they have to go through the process of an ex parte motion. Mr. Larwick wondered how the rule can be constitutional.

Judge Peterson pointed out that the creation of this rule was a suggestion from the poll of bench and bar. He noted that there are some bad suggestions, and that this does not automatically mean that the Council should follow all suggestions it receives. But that suggestion, and the experience of some of the judges on the Council, shows that the problem is occurring throughout the state, without any procedure whatsoever and any remedy being imposed, by the whim of individual judges. These cases take an incredible amount of time from court staff, and inflict pain on people. In terms of whether it is substantive or not, this is really very much like Rule 47 – we are putting a party in the express lane. Rather than simply not being allowed to litigate, the party simply has to show that there is some basis for the litigation, or that it is somehow a little different from the last one. He opined that these cases are kind of like what the late Justice Potter Stewart said about pornography – you know them when you see them. They are rare, but fairly obvious. Judge Peterson stated that it seems to him that having some uniformity is not a bad idea. He did not think that the rule is substantive, but publishing it would allow the Council to find out what the bench and bar think. Mr. Crowley stated that he thinks that it is fair to say that most lawyers do not see these cases, but they still have a real impact on justice across the board because they clog the courts.

Judge Jon Hill reminded the Council that the discussion thus far has not included the list of factors that the presiding judge may consider in determining whether a litigant is vexatious. These factors are taken from case law and are found in subsection D(1). This is what presiding judges should already be doing now, but this formalizes the process.

Ms. Holley stated that she has trouble voting yes to publish if she ultimately knows that she will vote no on promulgation. She stated that she wanted to be up front about that. She understood Judge Jon Hill's point about the factors, but the definitions in subsection A(1) are so different that she does not quite understand how they are supposed to interact with one another.

Ms. Nilsson stated that it is possible that publishing the draft rule could potentially give good feedback, even if the rule is not ultimately promulgated, for the matter to be potentially revisited and the work product improved the following biennium.

a. ACTION ITEM: Vote on Whether to Publish Draft ORCP 35

Mr. Goehler made a motion to publish the draft ORCP 35. Judge Norm Hill seconded the motion, which was approved by roll call vote with eight votes in favor and seven in opposition.

7. ORCP 69 (Appendix H)

Judge Peterson reminded the Council that the citation to the Servicemembers Civil Relief Act, found in the United States Code, had been changed by Congress. There is a citation to that Act in ORCP 69 that must be correspondingly updated. This is the main change to ORCP 69. Ms. Nilsson noted that there are also a few grammatical changes by staff that are not intended to affect the operation of the rule.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 69

Ms. Holley made a motion to publish the draft amendment to Rule 69. Judge Jon Hill seconded the motion, which was passed unanimously by roll call vote.

B. Review of Recommendations to Legislature

1. ORS 45.400 (Appendix I)

Judge Peterson stated that, if the draft amendment to Rule 58 is ultimately promulgated, the Council would likely make a recommendation to the Legislature for amendment of ORS 45.400. In section 2, the statute currently requires 30 days' written notice of remote testimony before trial, and that just does not happen any more. Judge Peterson stated that the significant change is in section 2, and it simply says that there must be notice sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow the non movant to challenge those favorable factors specified in the statute, or to advance those unfavorable factors that are also in the statute. It boils down to basically giving the other side a reasonable opportunity to object.

Judge Peterson stated that there is also a suggested change to 3(c)(E) based on the Council's rather rich discussion about the logistics of remote testimony. He stated that the change is an improvement because it makes clear that the attorney, the court, the parties, and the witnesses must have functioning technology to make remote testimony work. Judge Peterson stated that he believes that the amended language reflects the Council's discussion. Finally, in section 6, there is a suggestion for a correction of a typographical error in the existing statute.

2. ORS 46.415 (Appendix J)

Judge Peterson stated that, if the draft of Rule 35 is ultimately promulgated, the Council would likely make a recommendation to the Legislature for amendment of ORS 46.415 to add a new section 3 to make it explicit that Rule 35 will apply to cases in the small claims department. This is because Rule 1 states that the ORCP do not apply in the small claims department unless otherwise stated. Since many vexatious litigants file small claims cases, the committee feels that it is important that Rule 35 should apply there.

IV. New Business

A. Internal Reference to ORCP 55 in ORS 136.600 (Appendix K)

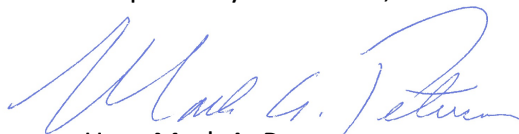
Judge Peterson explained that, for some reason, ORS 136.600 has several references to sections in Rule 55 that no longer exist after the reorganization of Rule 55 two biennia ago. It was his understanding that Legislative Counsel was going to take care of this in a reviser's bill; however, he has now been informed that any correction may get sent to the Ways and Means Committee and languish there. He stated that he has contacted Legislative Counsel and asked whether they would like the Council to suggest an amendment to the statute, and Council staff has prepared one in case the answer is yes. In that case, the suggested amendment will be on the December agenda.

Ms. Pettigrew stated that the Chief Justice had offered to include this suggestion in OJD's omnibus bill, but that bill will have fiscal impacts so will also go to the Ways and Means Committee. If the Council would like to include this amendment in the OJD's bill, the edits are due on Wednesday, September 21. Judge Peterson stated that he would be in contact with Legislative Counsel and get back to Ms. Pettigrew if there was a desire to include the suggested fix in the OJD's bill.

V. Adjournment

Mr. Crowley adjourned the meeting at 11:02 a.m.

Respectfully submitted,



Hon. Mark A. Peterson  
Executive Director

1 **SUMMONS**

2 **RULE 7**

3 **A Definitions.** For purposes of this rule, "plaintiff" shall include any party issuing summons  
4 and "defendant" shall include any party [upon] on whom service of summons is sought. For  
5 purposes of this rule, a "true copy" of a summons and complaint means an exact and complete  
6 copy of the original summons and complaint.

7 **B Issuance.** Any time after the action is commenced, plaintiff or plaintiffs attorney may  
8 issue as many original summonses as either may elect and deliver such summonses to a person  
9 authorized to serve summonses under section E of this rule. A summons is issued when  
10 subscribed by plaintiff or an active member of the Oregon State Bar.

11 **C Contents, time for response, and required notices.**

12 **C(1) Contents.** The summons shall contain:

13 **C(1)(a) Title.** The title of the cause, specifying the name of the court in which the  
14 complaint is filed and the names of the parties to the action.

15 **C(1)(b) Direction to defendant.** A direction to the defendant requiring defendant to  
16 appear and defend within the time required by subsection C(2) of this rule and a notification to  
17 defendant that, in case of failure to do so, the plaintiff will apply to the court for the relief  
18 demanded in the complaint.

19 **C(1)(c) Subscription; post office address.** A subscription by the plaintiff or by an active  
20 member of the Oregon State Bar, with the addition of the post office address at which papers in  
21 the action may be served by mail.

22 **C(2) Time for response.** If the summons is served by any manner other than publication,  
23 the defendant shall appear and defend within 30 days from the date of service. If the summons  
24 is served by publication pursuant to subparagraph D(6)(a)(i) of this rule, the defendant shall  
25 appear and defend within 30 days from the date stated in the summons. The date so stated in  
26 the summons shall be the date of the first publication.





1 the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a  
2 cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or  
3 administrator within 30 days along with the required filing fee. It must be in proper form and  
4 have proof of service on the defendant's attorney or, if the defendant does not have an  
5 attorney, proof of service on the defendant.

6 If you have questions, you should see an attorney immediately. If you need help in finding  
7 an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at  
8 [www.oregonstatebar.org](http://www.oregonstatebar.org) or by calling (503) 684-3763 (in the Portland metropolitan area) or  
9 toll-free elsewhere in Oregon at (800) 452-7636.

10 \_\_\_\_\_  
11 **C(3)(c) Service on persons liable for attorney fees.** A summons to join a party pursuant  
12 to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type that may  
13 be substantially in the following form:

14 \_\_\_\_\_  
15 NOTICE TO DEFENDANT:

16 READ THESE PAPERS

17 CAREFULLY!

18 You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a  
19 judgment for reasonable attorney fees may be entered against you, as provided by the  
20 agreement to which defendant alleges you are a party.

21 You must "appear" to protect your rights in this matter. To "appear" you must file with  
22 the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given  
23 to the court clerk or administrator within 30 days along with the required filing fee. It must be  
24 in proper form and have proof of service on the defendant's attorney or, if the defendant does  
25 not have an attorney, proof of service on the defendant.

26 If you have questions, you should see an attorney immediately. If you need help in finding

1 an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at  
2 www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or  
3 toll-free elsewhere in Oregon at (800) 452-7636.

---

4  
5 **D Manner of service.**

6 **D(1) Notice required.** Summons shall be served, either within or without this state, in any  
7 manner reasonably calculated, under all the circumstances, to apprise the defendant of the  
8 existence and pendency of the action and to afford a reasonable opportunity to appear and  
9 defend. Summons may be served in a manner specified in this rule or by any other rule or  
10 statute on the defendant or [upon] **on** an agent authorized by appointment or law to accept  
11 service of summons for the defendant. Service may be made, subject to the restrictions and  
12 requirements of this rule, by the following methods: personal service of true copies of the  
13 summons and the complaint [upon] **on** defendant or an agent of defendant authorized to  
14 receive process; substituted service by leaving true copies of the summons and the complaint  
15 at a person's dwelling house or usual place of abode; office service by leaving true copies of the  
16 summons and the complaint with a person who is apparently in charge of an office; service by  
17 mail; or service by publication.

18 **D(2) Service methods.**

19 **D(2)(a) Personal service.** Personal service may be made by delivery of a true copy of the  
20 summons and a true copy of the complaint to the person to be served.

21 **D(2)(b) Substituted service.** Substituted service may be made by delivering true copies of  
22 the summons and the complaint at the dwelling house or usual place of abode of the person to  
23 be served to any person 14 years of age or older residing in the dwelling house or usual place of  
24 abode of the person to be served. Where substituted service is used, the plaintiff, as soon as  
25 reasonably possible, shall cause to be mailed by first class mail true copies of the summons and  
26 the complaint to the defendant at defendant's dwelling house or usual place of abode, together

1 with a statement of the date, time, and place at which substituted service was made. For the  
2 purpose of computing any period of time prescribed or allowed by these rules or by statute,  
3 substituted service shall be complete [upon] on the mailing.

4 D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of  
5 business, office service may be made by leaving true copies of the summons and the complaint  
6 at that office during normal working hours with the person who is apparently in charge. Where  
7 office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by  
8 first class mail true copies of the summons and the complaint to the defendant at defendant's  
9 dwelling house or usual place of abode or defendant's place of business or any other place  
10 under the circumstances that is most reasonably calculated to apprise the defendant of the  
11 existence and pendency of the action, together with a statement of the date, time, and place at  
12 which office service was made. For the purpose of computing any period of time prescribed or  
13 allowed by these rules or by statute, office service shall be complete [upon] on the mailing.

14 D(2)(d) **Service by mail.**

15 D(2)(d)(i) **Generally.** When service by mail is required or allowed by this rule or by  
16 statute, except as otherwise permitted, service by mail shall be made by mailing true copies of  
17 the summons and the complaint to the defendant by first class mail and by any of the following:  
18 certified, registered, or express mail with return receipt requested. For purposes of this  
19 paragraph, "first class mail" does not include certified, registered, or express mail, return  
20 receipt requested, or any other form of mail that may delay or hinder actual delivery of mail to  
21 the addressee.

22 D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided  
23 by these rules or by statute, service by mail, except as otherwise provided, shall be complete on  
24 the day the defendant, or other person authorized by appointment or law, signs a receipt for  
25 the mailing, or 3 days after the mailing if mailed to an address within the state, or 7 days after  
26 the mailing if mailed to an address outside the state whichever first occurs.

1 D(3) **Particular defendants.** Service may be made [*upon*] **on** specified defendants as  
2 follows:

3 D(3)(a) **Individuals.**

4 D(3)(a)(i) **Generally.** [*Upon*] **On** an individual defendant, by personal delivery of true  
5 copies of the summons and the complaint to the defendant or other person authorized by  
6 appointment or law to receive service of summons on behalf of the defendant, by substituted  
7 service, or by office service. Service may also be made [*upon*] **on** an individual defendant or  
8 other person authorized to receive service to whom neither subparagraph D(3)(a)(ii) nor  
9 D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this  
10 rule provided the defendant or other person authorized to receive service signs a receipt for  
11 the certified, registered, or express mailing, in which case service shall be complete on the date  
12 on which the defendant signs a receipt for the mailing.

13 D(3)(a)(ii) **Minors.** [*Upon*] **On** a minor under 14 years of age, by service in the manner  
14 specified in subparagraph D(3)(a)(i) of this rule [*upon*] **on** the minor; and additionally [*upon*] **on**  
15 the minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none,  
16 then [*upon*] **on** any person having the care or control of the minor, or with whom the minor  
17 resides, or in whose service the minor is employed, or [*upon*] **on** a guardian ad litem appointed  
18 pursuant to Rule 27 B.

19 D(3)(a)(iii) **Incapacitated persons.** [*Upon*] **On** a person who is incapacitated or is  
20 financially incapable, as both terms are defined by ORS 125.005, by service in the manner  
21 specified in subparagraph D(3)(a)(i) of this rule [*upon*] **on** the person and, also, [*upon*] **on** the  
22 conservator of the person's estate or guardian or, if there be none, [*upon*] **on** a guardian ad  
23 litem appointed pursuant to Rule 27 B.

24 D(3)(a)(iv) **Tenant of a mail agent.** [*Upon*] **On** an individual defendant who is a "tenant"  
25 of a "mail agent" within the meaning of ORS 646A.340, by delivering true copies of the  
26 summons and the complaint to any person apparently in charge of the place where the mail

1 agent receives mail for the tenant, provided that:

2 D(3)(a)(iv)(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

3 D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true  
4 copies of the summons and the complaint to be mailed by first class mail to the defendant at  
5 the address at which the mail agent receives mail for the defendant and to any other mailing  
6 address of the defendant then known to the plaintiff, together with a statement of the date,  
7 time, and place at which the plaintiff delivered the copies of the summons and the complaint.  
8 Service shall be complete on the latest date resulting from the application of subparagraph  
9 D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a  
10 receipt for the mailing, in which case service is complete on the day the defendant signs the  
11 receipt.

12 D(3)(b) **Corporations including, but not limited to, professional corporations and**  
13 **cooperatives.** [*Upon*] **On** a domestic or foreign corporation:

14 D(3)(b)(i) **Primary service method.** By personal service or office service [*upon*] **on** a  
15 registered agent, officer, or director of the corporation; or by personal service [*upon*] **on** any  
16 clerk on duty in the office of a registered agent.

17 D(3)(b)(ii) **Alternatives.** [*If a registered agent, officer, or director cannot be found in the*  
18 *county where the action is filed, true*] **True** copies of the summons and the complaint may be  
19 served:

20 D(3)(b)(ii)(A) by substituted service [*upon*] **on** the registered agent, officer, or director;

21 D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation; [*who may be*  
22 *found in the county where the action is filed;*]

23 D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true  
24 copies of the summons and the complaint to: the office of the registered agent or to the last  
25 registered office of the corporation, if any, as shown by the records on file in the office of the  
26 Secretary of State; or, if the corporation is not authorized to transact business in this state at

1 the time of the transaction, event, or occurrence [upon] **on** which the action is based occurred,  
2 to the principal office or place of business of the corporation; and, in any case, to any address  
3 the use of which the plaintiff knows or has reason to believe is most likely to result in actual  
4 notice; or

5 D(3)(b)(ii)(D) [Upon] **On** the Secretary of State in the manner provided in ORS 60.121 or  
6 60.731.

7 D(3)(c) **Limited liability companies.** [Upon] **On** a limited liability company:

8 D(3)(c)(i) **Primary service method.** By personal service or office service [upon] **on** a  
9 registered agent, manager, or (for a member-managed limited liability company) member of a  
10 limited liability company; or by personal service [upon] **on** any clerk on duty in the office of a  
11 registered agent.

12 D(3)(c)(ii) **Alternatives.** *[If a registered agent, manager, or (for a member-managed*  
13 *limited liability company) member of a limited liability company cannot be found in the county*  
14 *where the action is filed, true]* **True** copies of the summons and the complaint may be served:

15 D(3)(c)(ii)(A) by substituted service [upon] **on** the registered agent, manager, or (for a  
16 member-managed limited liability company) member of a limited liability company;

17 D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company;  
18 *[who may be found in the county where the action is filed;]*

19 D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true  
20 copies of the summons and the complaint to: the office of the registered agent or to the last  
21 registered office of the limited liability company, **if any,** as shown by the records on file in the  
22 office of the Secretary of State; or, if the limited liability company is not authorized to transact  
23 business in this state at the time of the transaction, event, or occurrence [upon] **on** which the  
24 action is based occurred, to the principal office or place of business of the limited liability  
25 company; and, in any case, to any address the use of which the plaintiff knows or has reason to  
26 believe is most likely to result in actual notice; or

1 D(3)(c)(ii)(D) [Upon] **On** the Secretary of State in the manner provided in ORS 63.121.

2 D(3)(d) **Limited partnerships.** [Upon] **On** a domestic or foreign limited partnership:

3 D(3)(d)(i) **Primary service method.** By personal service or office service [upon] **on** a  
4 registered agent or a general partner of a limited partnership; or by personal service [upon] **on**  
5 any clerk on duty in the office of a registered agent.

6 D(3)(d)(ii) **Alternatives.** [If a registered agent or a general partner of a limited partnership  
7 cannot be found in the county where the action is filed, true] **True** copies of the summons and  
8 the complaint may be served:

9 D(3)(d)(ii)(A) by substituted service [upon] **on** the registered agent or general partner of a  
10 limited partnership;

11 [D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who  
12 may be found in the county where the action is filed;]

13 [D(3)(d)(ii)(C)] **D(3)(d)(ii)(B)** by mailing in the manner specified in paragraph D(2)(d) of  
14 this rule true copies of the summons and the complaint to: the office of the registered agent or  
15 to the last registered office of the limited partnership, **if any**, as shown by the records on file in  
16 the office of the Secretary of State; or, if the limited partnership is not authorized to transact  
17 business in this state at the time of the transaction, event, or occurrence [upon] **on** which the  
18 action is based occurred, to the principal office or place of business of the limited partnership;  
19 and, in any case, to any address the use of which the plaintiff knows or has reason to believe is  
20 most likely to result in actual notice; or

21 [D(3)(d)(ii)(D)] **D(3)(d)(ii)(C)** [Upon] **On** the Secretary of State in the manner provided in  
22 ORS 70.040 or 70.045.

23 D(3)(e) **General partnerships and limited liability partnerships.** [Upon] **On** any general  
24 partnership or limited liability partnership by personal service [upon] **on** a partner or any agent  
25 authorized by appointment or law to receive service of summons for the partnership or limited  
26 liability partnership.



1           D(3)(f) **Other unincorporated associations subject to suit under a common name.**

2 [Upon] **On** any other unincorporated association subject to suit under a common name by  
3 personal service [upon] **on** an officer, managing agent, or agent authorized by appointment or  
4 law to receive service of summons for the unincorporated association.

5           D(3)(g) **State.** [Upon] **On** the state, by personal service [upon] **on** the Attorney General or  
6 by leaving true copies of the summons and the complaint at the Attorney General's office with  
7 a deputy, assistant, or clerk.

8           D(3)(h) **Public bodies.** [Upon] **On** any county; incorporated city; school district; or other  
9 public corporation, commission, board, or agency by personal service or office service [upon]  
10 **on** an officer, director, managing agent, or attorney thereof.

11           D(3)(i) **Vessel owners and charterers.** [Upon] **On** any foreign steamship owner or  
12 steamship charterer by personal service [upon] **on** a vessel master in the owner's or charterer's  
13 employment or any agent authorized by the owner or charterer to provide services to a vessel  
14 calling at a port in the State of Oregon, or a port in the State of Washington on that portion of  
15 the Columbia River forming a common boundary with Oregon.

16           D(4) **Particular actions involving motor vehicles.**

17           D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the**  
18 **public; service by mail.**

19           D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to  
20 liability in which a motor vehicle may be involved while being operated [upon] **on** the roads,  
21 highways, streets, or premises open to the public as defined by law of this state if the plaintiff  
22 makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it  
23 to be operated on the defendant's behalf, by a method authorized by subsection D(3) of this  
24 rule except service by mail pursuant to subparagraph D(3)(a)(i) of this rule and, as shown by its  
25 return, did not effect service, the plaintiff may then serve that defendant by mailings made in  
26 accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

1 D(4)(a)(i)(A) any residence address provided by that defendant at the scene of the  
2 accident;

3 D(4)(a)(i)(B) the current residence address, if any, of that defendant shown in the driver  
4 records of the Department of Transportation; and

5 D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of  
6 making the mailings required by parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably  
7 might result in actual notice to that defendant. Sufficient service pursuant to this subparagraph  
8 may be shown if the proof of service includes a true copy of the envelope in which each of the  
9 certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and  
10 D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or  
11 that the defendant did not sign the receipt. For the purpose of computing any period of time  
12 prescribed or allowed by these rules or by statute, service under this subparagraph shall be  
13 complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A),  
14 D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of  
15 this rule is omitted because the plaintiff did not know of any address other than those specified  
16 in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.

17 D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address  
18 information concerning a party served pursuant to subparagraph D(4)(a)(i) of this rule may be  
19 recovered as provided in Rule 68.

20 D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served  
21 pursuant to subparagraph D(4)(a)(i) of this rule are as provided in Rule 69 E.

22 D(4)(b) **Notification of change of address.** Any person who; while operating a motor  
23 vehicle [upon] **on** the roads, highways, streets, or premises open to the public as defined by law  
24 of this state; is involved in any accident, collision, or other event giving rise to liability shall  
25 forthwith notify the Department of Transportation of any change of the person's address  
26 occurring within 3 years after the accident, collision, or event.

1           D(5) **Service in foreign country.** When service is to be effected [upon] on a party in a  
2 foreign country, it is also sufficient if service of true copies of the summons and the complaint is  
3 made in the manner prescribed by the law of the foreign country for service in that country in  
4 its courts of general jurisdiction, or as directed by the foreign authority in response to letters  
5 rogatory, or as directed by order of the court. However, in all cases service shall be reasonably  
6 calculated to give actual notice.

7           D(6) **Court order for service by other method.** When it appears that service is not  
8 possible under any method otherwise specified in these rules or other rule or statute, then a  
9 motion supported by affidavit or declaration may be filed to request a discretionary court order  
10 to allow alternative service by any method or combination of methods that, under the  
11 circumstances, is most reasonably calculated to apprise the defendant of the existence and  
12 pendency of the action. If the court orders alternative service and the plaintiff knows or with  
13 reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true  
14 copies of the summons and the complaint to the defendant at that address by first class mail  
15 and any of the following: certified, registered, or express mail, return receipt requested. If the  
16 plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of  
17 any defendant, the plaintiff must mail true copies of the summons and the complaint by the  
18 methods specified above to the defendant at the defendant's last known address. If the plaintiff  
19 does not know, and with reasonable diligence cannot ascertain, the defendant's current and  
20 last known addresses, a mailing of copies of the summons and the complaint is not required.

21           D(6)(a) **Non-electronic alternative service.** Non-electronic forms of alternative service  
22 may include, but are not limited to, publication of summons; mailing without publication to a  
23 specified post office address of the defendant by first class mail as well as either by certified,  
24 registered, or express mail with return receipt requested; or posting at specified locations. The  
25 court may specify a response time in accordance with subsection C(2) of this rule.

26           D(6)(a)(i) **Alternative service by publication.** In addition to the contents of a summons as

1 described in section C of this rule, a published summons must also contain a summary  
2 statement of the object of the complaint and the demand for relief, and the notice required in  
3 subsection C(3) of this rule must state: "The motion or answer or reply must be given to the  
4 court clerk or administrator within 30 days of the date of first publication specified herein along  
5 with the required filing fee." The published summons must also contain the date of the first  
6 publication of the summons.

7       D(6)(a)(i)(A) **Where published.** An order for publication must direct publication to be  
8 made in a newspaper of general circulation in the county where the action is commenced or, if  
9 there is no such newspaper, then in a newspaper to be designated as most likely to give notice  
10 to the person to be served. The summons must be published four times in successive calendar  
11 weeks. If the plaintiff knows of a specific location other than the county in which the action is  
12 commenced where publication might reasonably result in actual notice to the defendant, the  
13 plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and  
14 the court may order publication in a comparable manner at that location in addition to, or in  
15 lieu of, publication in the county in which the action is commenced.

16       D(6)(a)(ii) **Alternative service by posting.** The court may order service by posting true  
17 copies of the summons and complaint at a designated location in the courthouse where the  
18 action is commenced and at any other location that the affidavit or declaration required by  
19 subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to  
20 the defendant.

21       D(6)(b) **Electronic alternative service.** Electronic forms of alternative service may include,  
22 but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or  
23 posting to a social media account. The affidavit or declaration filed with a motion for electronic  
24 alternative service must include: verification that diligent inquiry revealed that the defendant's  
25 residence address, mailing address, and place of employment are unlikely to accomplish  
26 service; the reason that plaintiff believes the defendant has recently sent and received

1 transmissions from the specific e-mail address or telephone or facsimile number, or maintains  
2 an active social media account on the specific platform the plaintiff asks to use; and facts that  
3 indicate the intended recipient is likely to personally receive the electronic transmission. The  
4 certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph  
5 D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes  
6 evident that the intended recipient did not personally receive the electronic transmission.

7       D(6)(b)(i) **Content of electronic transmissions.** If the court allows service by a specific  
8 electronic method, the case name, case number, and name of the court in which the action is  
9 pending must be prominently positioned where it is most likely to be read first. For e-mail  
10 service, those details must appear in the subject line. For text message service, they must  
11 appear in the first line of the first text. For facsimile service, they must appear at the top of the  
12 first page. For posting to a social media account, they must appear in the top lines of the  
13 posting.

14       D(6)(b)(ii) **Format of electronic transmissions.** If the court allows alternative service by an  
15 electronic method, the summons, complaint, and any other documents must be attached in a  
16 file format that is capable of showing a true copy of the original document. When an electronic  
17 method is incapable of transferring transmissions that exceed a certain size, the plaintiff must  
18 not exceed those express size limitations. If the size of the attachments exceeds the limitations  
19 of any electronic method allowed, then multiple sequential transmissions may be sent  
20 immediately after the initial transmission to complete service.

21       D(6)(c) **Unknown heirs or persons.** If service cannot be made by another method  
22 described in this section because defendants are unknown heirs or persons as described in Rule  
23 20 I and J, the action will proceed against the unknown heirs or persons in the same manner as  
24 against named defendants served by publication and with like effect; and any unknown heirs or  
25 persons who have or claim any right, estate, lien, or interest in the property in controversy at  
26 the time of the commencement of the action, and who are served by publication, will be bound

1 and concluded by the judgment in the action, if the same is in favor of the plaintiff, as  
2 effectively as if the action had been brought against those defendants by name.

3 **D(6)(d) Defending before or after judgment.** A defendant against whom service pursuant  
4 to this subsection is ordered or that defendant's representatives, on application and sufficient  
5 cause shown, at any time before judgment will be allowed to defend the action. A defendant  
6 against whom service pursuant to this subsection is ordered or that defendant's  
7 representatives may, [upon] on good cause shown and [upon] on any terms that may be  
8 proper, be allowed to defend after judgment and within one year after entry of judgment. If the  
9 defense is successful, and the judgment or any part thereof has been collected or otherwise  
10 enforced, restitution may be ordered by the court, but the title to property sold [upon] on  
11 execution issued on that judgment, to a purchaser in good faith, will not be affected thereby.

12 **D(6)(e) Defendant who cannot be served.** Within the meaning of this subsection, a  
13 defendant cannot be served with summons by any method authorized by subsection D(3) of  
14 this rule if service pursuant to subparagraph D(4)(a)(i) of this rule is not applicable, the plaintiff  
15 attempted service of summons by all of the methods authorized by subsection D(3) of this rule,  
16 and the plaintiff was unable to complete service; or if the plaintiff knew that service by these  
17 methods could not be accomplished.

18 **E By whom served; compensation.** A summons may be served by any competent person  
19 18 years of age or older who is a resident of the state where service is made or of this state and  
20 is neither a party to the action, corporate or otherwise, nor any party's officer, director,  
21 employee, or attorney, except as provided in ORS 180.260. However, service pursuant to  
22 subparagraph D(2)(d)(i), as well as the mailings specified in paragraphs D(2)(b) and D(2)(c) and  
23 part D(3)(a)(iv)(B) of this rule, may be made by an attorney for any party. Compensation to a  
24 sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or  
25 rule. If any other person serves the summons, a reasonable fee may be paid for service. This  
26 compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

1       **F Return; proof of service.**

2       **F(1) Return of summons.** The summons shall be promptly returned to the clerk with  
3 whom the complaint is filed with proof of service or mailing, or that defendant cannot be  
4 found. The summons may be returned by first class mail.

5       **F(2) Proof of service.** Proof of service of summons or mailing may be made as follows:

6       **F(2)(a) Service other than publication.** Service other than publication shall be proved by:

7       **F(2)(a)(i) Certificate of service when summons not served by sheriff or deputy.** If the  
8 summons is not served by a sheriff or a sheriffs deputy, the certificate of the server indicating:  
9 the specific documents that were served; the time, place, and manner of service; that the  
10 server is a competent person 18 years of age or older and a resident of the state of service or  
11 this state and is not a party to nor an officer, director, or employee of, nor attorney for any  
12 party, corporate or otherwise; and that the server knew that the person, firm, or corporation  
13 served is the identical one named in the action. If the defendant is not personally served, the  
14 server shall state in the certificate when, where, and with whom true copies of the summons  
15 and the complaint were left or describe in detail the manner and circumstances of service. If  
16 true copies of the summons and the complaint were mailed, the certificate may be made by the  
17 person completing the mailing or the attorney for any party and shall state the circumstances  
18 of mailing and the return receipt, if any, shall be attached.

19       **F(2)(a)(ii) Certificate of service by sheriff or deputy.** If the summons is served by a sheriff  
20 or a sheriffs deputy, the sheriffs or deputy's certificate of service indicating: the specific  
21 documents that were served; the time, place, and manner of service; and, if defendant is not  
22 personally served, when, where, and with whom true copies of the summons and the complaint  
23 were left or describing in detail the manner and circumstances of service. If true copies of the  
24 summons and the complaint were mailed, the certificate shall state the circumstances of  
25 mailing and the return receipt, if any, shall be attached.

26       **F(2)(b) Publication.** Service by publication shall be proved by an affidavit or by a

1 | declaration.

2 | F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

3 | \_\_\_\_\_

4 | Affidavit of Publication

5 | State of Oregon )

6 | ) ss.

7 | County of )

8 | I, \_\_\_\_\_ being first duly sworn, depose and say that I am the (here set forth the title or  
9 | job description of the person making the affidavit), of the a newspaper of general circulation  
10 | published at \_\_\_\_\_ in the aforesaid county and state; that I know from my personal knowledge  
11 | that the a printed copy of which is hereto annexed, was published in the entire issue of said  
12 | newspaper four times in the following issues: (here set forth dates of issues in which the same  
13 | was published).

14 | Subscribed and sworn to before me this \_\_\_\_ day of----- . &.,2 \_ \_

15 | \_\_\_\_\_

16 | Notary Public for Oregon

17 | My commission expires

18 | -- day of----- . 2-

19 | \_\_\_\_\_

20 | F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

21 | \_\_\_\_\_

22 | Declaration of Publication

23 | State of Oregon )

24 | ) ss.

25 | County of )

26 | I, ----- . say that I am the \_\_\_\_\_ (here set forth the title or job description of the person



1 making the declaration), of the ----- a newspaper of general circulation published at \_\_\_\_\_ in  
2 the aforesaid county and state; that I know from my personal knowledge that the ----- a  
3 printed copy of which is hereto annexed, was published in the entire issue of said newspaper  
4 four times in the following issues: (here set forth dates of issues in which the same was  
5 published). I hereby declare that the above statement is true to the best of my knowledge and  
6 belief, and that I understand it is made for use as evidence in court and is subject to penalty  
7 for perjury.

8 \_\_\_\_\_  
9 \_\_ day of----- 2 \_  
10 \_\_\_\_\_

11 **F(2)(c) Making and certifying affidavit.** The affidavit of service may be made and certified  
12 before a notary public, or other official authorized to administer oaths and acting in that  
13 capacity by authority of the United States, or any state or territory of the United States, or the  
14 District of Columbia, and the official seal, if any, of that person shall be affixed to the affidavit.  
15 The signature of the notary or other official, when so attested by the affixing of the official seal,  
16 if any, of that person, shall be prima facie evidence of authority to make and certify the  
17 affidavit.

18 **F(2)(d) Form of certificate, affidavit, or declaration.** A certificate, affidavit, or declaration  
19 containing proof of service may be made [upon] on the summons or as a separate document  
20 attached to the summons.

21 **F(3) Written admission.** In any case proof may be made by written admission of the  
22 defendant.

23 **F(4) Failure to make proof; validity of service.** If summons has been properly served,  
24 failure to make or file a proper proof of service shall not affect the validity of the service.

25 **G Disregard of error; actual notice.** Failure to comply with provisions of this rule relating  
26 to the form of a summons, issuance of a summons, or who may serve a summons shall not

1 affect the validity of service of that summons or the existence of jurisdiction over the person if  
2 the court determines that the defendant received actual notice of the substance and pendency  
3 of the action. The court may allow amendment to a summons, affidavit, declaration, or  
4 certificate of service of summons. The court shall disregard any error in the content of a  
5 summons that does not materially prejudice the substantive rights of the party against whom  
6 the summons was issued. If service is made in any manner complying with subsection D(1) of  
7 this rule, the court shall also disregard any error in the service of a summons that does not  
8 violate the due process rights of the party against whom the summons was issued.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26



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

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

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

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

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

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

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

26 **C(4) Non-stenographic recording.** The notice of deposition required under [*subsection (1)*]

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

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

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

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

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

6 **C(7) Deposition by remote means.**

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

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

21 **D Examination; record; oath; objections.**

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

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

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

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

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

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

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

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

17 **E Motion for court assistance; expenses.**

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

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

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

6 **F Submission to witness; changes; statement.**

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

13 **F(2) Procedure after examination.** Any changes [which] **that** the witness desires to make  
14 [shall] **will** be entered [upon] **on** the transcription or stated in a writing to accompany the  
15 recording by the party taking the deposition, together with a statement of the reasons given by  
16 the witness for making them. Notice of such changes and reasons [shall] **must** promptly be  
17 served [upon] **on** all parties by the party taking the deposition. The witness [shall] **must** then  
18 state in writing that the transcription or recording is correct subject to the changes, if any,  
19 made by the witness, unless the parties waive the statement or the witness is physically unable  
20 to make such statement or cannot be found. If the statement is not made by the witness within  
21 30 days, or within a lesser time [upon court order] **if so ordered by the court**, after the  
22 deposition is submitted to the witness, the party taking the deposition [shall] **must** state on the  
23 transcription or in a writing to accompany the recording the fact of waiver, or the physical  
24 incapacity or absence of the witness, or the fact of refusal of the witness to make the  
25 statement, together with the reasons, if any, given therefor; and the deposition may then be  
26 used as fully as though the statement had been made unless, on a motion to suppress under



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

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

5 **G Certification; filing; exhibits; copies.**

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

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

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

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

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

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

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

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

4 **I Perpetuation of testimony after commencement of action.**

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

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

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

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

12 I(3) Prior to the time set for the deposition, any other party may object to the  
13 perpetuation deposition. [Such] **Any** objection [shall] **will** be governed by the standards of Rule  
14 36 C. **If no objection is filed, or if perpetuation is allowed, the testimony taken shall be**  
15 **admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence**  
16 **Code.** At any hearing on such an objection, the burden [shall] **will** be on the party seeking  
17 perpetuation to show that: [(a) the witness may be unavailable as defined in ORS 40.465 (1)(d)  
18 or (e) or 45.250 (2)(a) through (c); or (b) it would be an undue hardship on the witness to appear  
19 at the trial or hearing; or (c) other good cause exists for allowing the perpetuation. If no  
20 objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any  
21 subsequent trial or hearing in the action, subject to the Oregon Evidence Code.]

22 **I(3)(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (1)(e) or ORS**  
23 **45.250 (2)(a) through (2)(c);**

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

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

26 I(4) Any perpetuation deposition [shall] **must** be taken not less than [seven] **7** days before

1 | the trial or hearing on not less than 14 days' notice. However, the court in which the action is  
2 | pending may allow a shorter period for a perpetuation deposition before or during trial [*upon*]  
3 | **on** a showing of good cause.

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

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

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 TRIAL PROCEDURE

2 RULE 58

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **F Testimony by Remote Means**

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

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

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

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





1 right not to testify;

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

3 otherwise, and

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

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

7 \_\_\_\_\_  
8 IN THE CIRCUIT COURT OF THE STATE OF OREGON

9 FOR THE COUNTY OF \_\_\_\_\_

10 )

11 ) Case No. \_\_\_\_\_

12 (Case Caption to be Inserted

) MOTION AND DECLARATION

13 by Party Issuing Subpoena)

) TO QUASH SUBPOENA

14 )

15 MOTION

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

21 \_\_\_\_\_  
22 (If no reasonable effort was made to resolve the issue before filing, the motion will be  
23 denied.)

24 DECLARATION

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

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

6 **DATED:** \_\_\_\_\_ **SIGNATURE:** \_\_\_\_\_

7 **PRINTED NAME(S):** \_\_\_\_\_

8 **ADDRESS:** \_\_\_\_\_

9 **PHONE NUMBER:** \_\_\_\_\_ **EMAIL ADDRESS:** \_\_\_\_\_

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

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

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

17 **A(3) Who may issue.**

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

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

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

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

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

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

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

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

15           **A(6) Recipient obligations.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 **B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule**  
21 **39 C(6).** A subpoena naming a nonparty organization as a deponent must be delivered, along  
22 with fees for one day's attendance and mileage, in the same manner as provided for service of  
23 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  
24 Rule 7 D(3)(h).

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

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

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

11           **B(3)(b)(i) “Law enforcement agency” defined.** For purposes of this subsection, a law  
12 enforcement agency means the Oregon State Police, a county sheriff’s department, a city police  
13 department, or a municipal police department.

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

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

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

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

26           **B(4)(a) Court preauthorization.** Leave of the court must be obtained before serving a

1 subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a  
2 prisoner's attendance;

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

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

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

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

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

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

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

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

26 **C(3)(b) Time for production.** The subpoena must allow at least 14 days for production of



1 | the required documents or things, unless the court orders less time; and

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

4 |       **D Subpoenas for documents and things containing confidential health information**  
5 | **(“CHI”).**

6 |       **D(1) Application of this section; “confidential health information” defined.** This section  
7 | creates protections for production of CHI, which includes both individually identifiable health  
8 | information as defined in ORS 192.556 (8) and protected health information as defined in ORS  
9 | 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by  
10 | a health care provider, health care facility, state health plan, health care clearinghouse, health  
11 | insurer, employer, or school or university that identifies the person or could be used to identify  
12 | the person and that includes records that:

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

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

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

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

25 |       **D(4) Conditions on service of subpoena.**

26 |       **D(4)(a) Qualified protective order; declaration or affidavit; contents.** The party serving a

1 subpoena for CHI must serve the custodian or other record keeper with either a qualified  
2 protective order or a declaration or affidavit together with supporting documentation that  
3 demonstrates:

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

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

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

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

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

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

22 \_\_\_\_\_

23 This subpoena requires a custodian of confidential health information to personally attend and  
24 produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil  
25 Procedure 55 D(8) is insufficient for this subpoena.

26 \_\_\_\_\_

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

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

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

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

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

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

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

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

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

26 **D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense.** Any party to

1 the proceeding may inspect the CHI provided and may request a complete copy of the  
2 information. On request, the CHI must be promptly provided by the party who served the  
3 subpoena at the expense of the party who requested the copies.

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

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

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

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

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

24 **D(8)(b)(ii) True and complete copy.** The copy produced is a true copy of all of the CHI  
25 responsive to the subpoena; and

26 **D(8)(b)(iii) Proper preparation practices.** Preparation of the copy of the CHI being

1 produced was done:

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

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

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

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

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

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

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

21  
22  
23  
24  
25  
26

1 JURORS

2 RULE 57

3 **A Challenging compliance with selection procedures.**

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

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

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

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

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

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

9 **D Challenges.**

10 D(1) Challenges for cause; grounds. **An individual juror does not have a right to sit on**  
11 **any particular jury. Jurors have the right to be free from discrimination in jury service as**  
12 **provided by law. Any juror may be excused for cause, including for a juror's inability to try the**  
13 **issue impartially as provided herein.** Challenges for cause may be taken on any one or more of  
14 the following grounds:

15 D(1)(a) The want of any qualification prescribed by ORS 10.030 for a person eligible to act  
16 as a juror.

17 D(1)(b) The existence of a mental or physical [*defect which*] **impairment that** satisfies the  
18 court that the challenged person is incapable of performing the [*duties*] **essential functions** of a  
19 juror in the particular action without prejudice to the substantial rights of the challenging party.

20 D(1)(c) Consanguinity or affinity within the fourth degree to any party.

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

26 D(1)(e) Having served as a juror on a previous trial in the same action, or in another

1 | action between the same parties for the same cause of action, [upon] **on** substantially the same  
2 | facts or transaction.

3 | D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal  
4 | question involved therein.

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

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



1 D(3) Conduct of peremptory challenges. After the full number of jurors has been passed  
2 for cause, peremptory challenges [shall] **must** be conducted by written ballot or outside of the  
3 presence of the jury as follows: the plaintiff may challenge one and then the defendant may  
4 challenge one, and so alternating until the peremptory challenges [shall be] **are** exhausted.  
5 After each challenge, the panel [shall] **must** be filled and the additional juror passed for cause  
6 before another peremptory challenge [shall] **may** be exercised, and neither party is required to  
7 exercise a peremptory challenge unless the full number of jurors is in the jury box at the time.  
8 The refusal to challenge by either party in the order of alternation [shall] **will** not defeat the  
9 adverse party of [such] **the** adverse party's full number of challenges, [and such] **but the** refusal  
10 by a party to exercise a challenge in proper turn [shall] **will** conclude that party as to the jurors  
11 once accepted by that party and, if that party's right of peremptory challenge is not exhausted,  
12 that party's further challenges [shall] **will** be confined, in that party's proper turn, to [such] **any**  
13 additional jurors as may be called. The court may, for good cause shown, permit a challenge to  
14 be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror  
15 challenged may have been previously accepted, but nothing in this subsection [shall] **will** be  
16 construed to increase the number of peremptory challenges allowed.

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

19 D(4)(a) A party may not exercise a peremptory challenge on the basis of [*race, ethnicity,*  
20 *or sex.*] **race, color, religion, sex, sexual orientation, gender identity, or national origin.** [*Courts*  
21 *shall presume that a peremptory challenge does not violate this paragraph, but the*  
22 *presumption may be rebutted in the manner provided by this section.*]

23 D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on  
24 a basis prohibited under paragraph [(a) of this subsection] **D(4)(a) of this rule, that** party may  
25 object to the exercise of the challenge. [*The objection must be made before the court excuses*  
26 *the juror. The objection must be made outside of the presence of the jurors. The party making*

1 *the objection has the burden of establishing a prima facie case that the adverse party*  
2 *challenged the juror on the basis of race, ethnicity, or sex.] **The basis for the objection must be***  
3 **stated outside of the presence of the jury and must identify the protected status that forms**  
4 **the basis of the objection. The court may also raise this objection on its own. The objection**  
5 **must be made before the court excuses the juror, unless new information is discovered that**  
6 **could not have been reasonably known before the jury was empaneled.**

7 D(4)(c) [*If the court finds that the party making the objection has established a prima*  
8 *facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity,*  
9 *or sex, the burden shifts to the adverse party to show that the peremptory challenge was not*  
10 *exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of*  
11 *justification as to the questioned challenge, the presumption that the challenge does not violate*  
12 *paragraph (a) of this subsection is rebutted.] **If there is an objection to the exercise of a***  
13 **peremptory challenge under this rule, the party exercising the peremptory challenge must**  
14 **articulate reasons supporting the peremptory challenge that are not discriminatory. The**  
15 **objecting party may then provide argument and evidence that the given reason is**  
16 **discriminatory or pretext for discrimination. An objection to a peremptory challenge must be**  
17 **sustained if the court finds that it is more likely than not that a protected status under**  
18 **paragraph D(4)(a) of this rule was a factor in invoking the peremptory challenge.**

19 D(4)(d) [*D(4)(d) If the court finds that the adverse party challenged a prospective juror on*  
20 *the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.] **In making***  
21 **the determination under paragraph D(4)(c) of this rule, the court must consider the totality of**  
22 **the circumstances. The totality of the circumstances may include:**

23 **D(4)(d)(i) whether the challenged prospective juror was questioned and the nature of**  
24 **those questions;**

25 **D(4)(d)(ii) the extent to which the nondiscriminatory reason given could arguably be**  
26 **considered a proxy for a protected status or might be disproportionately associated with a**

1 **protected status;**

2 **D(4)(d)(iii) whether the party challenged the same juror for cause; and**

3 **D(4)(d)(iv) any other factors, information, or circumstances considered by the court.**

4 **D(4)(e) The court must explain on the record the reasons for its determination under**  
5 **paragraph D(4)(c) of this rule.**

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

10 **F Alternate jurors.**

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

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

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

24 **F(4) Duties and responsibilities.** Alternate jurors [*shall*] **will** be drawn in the same  
25 manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same  
26 examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same

1 functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is  
2 submitted for deliberations. An alternate juror who does not replace a juror [shall] **may** not  
3 attend or otherwise participate in deliberations.

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

**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, <i>pro tem</i> (Council Staff)  (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)

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/iwpcf4frhincz64i/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 meet outside of the jury’s presence or 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*<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> 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.

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



juror they fear will be unfavorable to a client without embarrassing that juror or confronting 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.** 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.

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

**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, <i>pro tem</i> (Council Staff)  (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)

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/iwpcf4frhincz64i/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 meet outside of the jury’s presence or 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*<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> 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.

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

juror they fear will be unfavorable to a client without embarrassing that juror or confronting 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.** 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.

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

1 VEXATIOUS LITIGANTS

2 RULE 35

3 A Definitions.

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

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

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

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

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

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

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

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

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

26 B Issuance of pre-filing order. The court in any judicial district may, on its own motion

1 or on the petition of any interested person, initiate an expedited administrative process to  
2 determine whether to enter a pre-filing order prohibiting a vexatious litigant from  
3 commencing any new action or claim in the courts of that district without first obtaining  
4 leave of the presiding judge, as follows:

5 B(1) If the litigant meets the definition in paragraph A(1)(c) of this rule, then the  
6 process is limited to judicial notice of the existence of a prior state or federal court order  
7 designating the litigant to be vexatious.

8 B(2) If the litigant appears to meet the definition in paragraph A(1)(a) or paragraph  
9 A(1)(b) of this rule, then the process must include notice to the litigant and an opportunity for  
10 the litigant to be heard at an expedited hearing on the question of whether the litigant meets  
11 the definition. At the hearing, the presiding judge will consider the factors listed in subsection  
12 D(1) of this rule to determine whether the pre-filing order is just and proper. If the court  
13 concludes that the litigant is a vexatious litigant, the court will identify its reason or reasons  
14 in the pre-filing order.

15 B(3) On entry, a copy of the pre-filing order, signed by the presiding judge, will be sent  
16 by the court to the person designated to be a vexatious litigant at the last known address  
17 listed in court records, and to the opposing parties, if any, in any pending litigation in which  
18 the litigant is a party. Disobedience of such an order may be punished as a contempt of court.

19 B(4) A determination made by the presiding judge is not admissible on the merits of  
20 any subsequent action filed by the vexatious litigant, nor deemed to be a decision in any  
21 subsequent action that the vexatious litigant receives permission to file under section C of  
22 this rule.

23 C Applications to commence new actions. A vexatious litigant's request to commence  
24 a new action or claim may be made by an ex parte application accompanied by an affidavit or  
25 a declaration and must include as an exhibit a copy of the complaint or other case-initiating  
26 document that the litigant proposes to file. Applications are not subject to a filing fee.



1 C(1) The application for leave to file the action will only be granted on a showing that  
2 the proposed action or claim is not frivolous and is not for the purpose of unnecessary  
3 expense or delay, or harassment. A determination made by the presiding judge is not  
4 admissible on the merits of the action, nor deemed to be a decision in any issue in the action.

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

7 C(3) If the application for leave to file the action is allowed, whether by the presiding  
8 judge or an appellate court, then the applicant must submit the complaint or other case-  
9 initiating document to the court anew with the appropriate filing fee. The filing date of the  
10 complaint or other case-initiating document relates back to the filing of the application  
11 requesting leave to file.

12 C(4) The pre-filing order granting or denying the application must be in writing, signed  
13 by the presiding judge.

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

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

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

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

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

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

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

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

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

10 E Failure to deposit security; judgment of dismissal. If the vexatious litigant fails to post  
11 security in the time required by an order of the court under subsection C(2) or subsection D(2)  
12 of this rule, the court will promptly issue a judgment dismissing the action or claim as to any  
13 party for whose benefit the security was ordered.

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

16 F(1) If the motion is denied, the moving party must plead or otherwise respond within  
17 the time remaining for response to the original pleading or within 10 days after service of the  
18 order that rules on the motion, whichever period may be longer, unless the court directs  
19 otherwise; or

20 F(2) If the motion is granted, the moving party must plead or otherwise respond within  
21 the time remaining for response to the original pleading or within 10 days after the required  
22 security has been deposited, whichever period may be longer, unless the court directs  
23 otherwise.

24 G Cases filed without leave of the presiding judge. A vexatious litigant may not file any  
25 new action or claim unless the vexatious litigant has obtained an order granting leave to file  
26 the action or claim from the presiding judge. If the vexatious litigant files an action or claim

1 without obtaining leave of the presiding judge, then any party to the action or claim, or the  
2 court on its own motion, may file a notice stating that the vexatious litigant is subject to a  
3 pre-filing order. The notice must be served on all parties who have been served or who have  
4 appeared in the action or claim. The filing of such a notice stays the litigation against all  
5 opposing parties. The presiding judge must dismiss the action or claim within 10 days after  
6 the filing of such a notice unless the vexatious litigant files an application for leave to file  
7 under subsection C(1) of this rule. If the presiding judge issues an order granting leave to file,  
8 then the vexatious litigant must serve a copy of that order on all other parties. Each party  
9 must plead or otherwise respond to the action or claim within the time remaining for  
10 response to the original pleading or within 10 days after the date of service of that order,  
11 whichever period may be longer, unless the court directs otherwise. If the presiding judge  
12 issues an order denying the application for leave to file, then the case filed without leave will  
13 be promptly dismissed.



1 | be accompanied by an affidavit or declaration to support that default is appropriate, and **must**  
2 | contain facts sufficient to establish the following:

3 |       C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7  
4 | or is otherwise subject to the jurisdiction of the court;

5 |       C(1)(b) that the party against whom the order of default is sought has failed to appear by  
6 | filing a motion or answer, or otherwise to defend as provided by these rules or applicable  
7 | statute;

8 |       C(1)(c) whether written notice of intent to appear has been received by the movant and,  
9 | if so, whether written notice of intent to apply for an order of default was filed and served at  
10 | least 10 days, or any shortened period of time ordered by the court, prior to filing the motion;

11 |       C(1)(d) whether, to the best knowledge and belief of the party seeking an order of  
12 | default, the party against whom judgment is sought is or is not incapacitated as defined in ORS  
13 | 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in  
14 | ORS 125.005; and

15 |       C(1)(e) whether the party against whom the order is sought is or is not a person in the  
16 | military service, or stating that the movant is unable to determine whether or not the party  
17 | against whom the order is sought is in the military service as required by [section 201(b)(1) of]  
18 | the Servicemembers Civil Relief Act, [50 U.S.C. 3931, as amended.] **50 U.S.C. section 3901, et.**  
19 | **seq.**

20 |       C(2) If the party seeking default states in the affidavit or declaration that the party  
21 | against whom the order is sought:

22 |       C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined  
23 | in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered  
24 | against the party against whom the order is sought only if a guardian ad litem has been  
25 | appointed or the party is represented by another person as described in Rule 27; or

26 |       C(2)(b) is a person in the military service, an order of default may be entered against the

1 party against whom the order is sought only in accordance with the Servicemembers Civil Relief  
2 Act.

3 C(3) The court may grant an order of default if it appears **that** the motion and affidavit or  
4 declaration have been filed in good faith and **that** good cause is shown that entry of [*such an*]  
5 **the** order is proper.

6 **D Motion for judgment by default.**

7 D(1) A party seeking a judgment by default must file a motion, supported by affidavit or  
8 declaration. Specifically, the moving party must show:

9 D(1)(a) that an order of default has been granted or is being applied for  
10 contemporaneously;

11 D(1)(b) what relief is sought, including any amounts due as claimed in the pleadings;

12 D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a  
13 contract, statute, rule, or other legal provision, in which case a party may include costs,  
14 disbursements, and attorney fees to be awarded pursuant to Rule 68.

15 D(2) The form of judgment submitted [*shall*] **must** comply with all applicable rules and  
16 statutes.

17 D(3) The court, acting in its discretion, may conduct a hearing, make an order of  
18 reference, or **make an** order that issues be tried by a jury, as it deems necessary and proper, in  
19 order to enable the court to determine the amount of damages, [*or*] to establish the truth of  
20 any averment by evidence, or to make an investigation of any other matter. The court may  
21 determine the truth of any matter upon affidavits or declarations.

22 **E Certain motor vehicle cases.** No order of default [*shall*] **may** be entered against a  
23 defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the  
24 requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

25 E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i);

26 E(2) whether the identity of the defendant's insurance carrier is known to the plaintiff or

1 | could be determined from any records of the Department of Transportation accessible to the  
2 | plaintiff; and

3 |       E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less  
4 | than 30 days prior to the application for an order of default mailed a copy of the summons and  
5 | the complaint, together with notice of intent to apply for an order of default, to the insurance  
6 | carrier by first class mail and by any of the following: certified, registered, or express mail,  
7 | return receipt requested; or that the identity of the defendant's insurance carrier is unknown to  
8 | the plaintiff.

9 |       **F Setting aside an order of default or judgment by default.** For good cause shown, the  
10 | court may set aside an order of default. If a judgment by default has been entered, the court  
11 | may set it aside in accordance with Rule 71 B and **Rule 71 C**.

1       **45.400 Remote location testimony; when authorized; notice; payment of costs.** (1) A

2 party to any civil proceeding or any proceeding under ORS chapter 419B may move that the  
3 party or any witness for the moving party may give remote location testimony.

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

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

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

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

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

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

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

26       (E) Any other circumstances that constitute good cause.



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

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

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

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

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

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

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

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

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

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

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

3 (8) As used in this section:

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

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

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

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

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

1           **46.415 Circuit judges to sit in department; procedure.** (1) The judges of a circuit court  
2 shall sit as judges of the small claims department.

3           (2) No formal pleadings other than the claim shall be necessary.

4           **(3) The provisions of ORCP 35 apply to cases filed in the small claims department.**

5           [(3)] **(4)** The hearing and disposition of all cases shall be informal, the sole object being to  
6 dispense justice promptly and economically between the litigants. The parties shall have the  
7 privilege of offering evidence and testimony of witnesses at the hearing. The judge may  
8 informally consult witnesses or otherwise investigate the controversy and give judgment or  
9 make such orders as the judge deems to be right, just and equitable for the disposition of the  
10 controversy.

11           [(4)] **(5)** No attorney at law or person other than the plaintiff and defendant and their  
12 witnesses shall appear on behalf of any party in litigation in the small claims department  
13 without the consent of the judge of the court.

14           [(5)] **(6)** Notwithstanding the provisions of ORS 9.320, a party that is not a natural person,  
15 the state or any city, county, district or other political subdivision or public corporation in this  
16 state, without appearance by attorney, may appear as a party to any action in the small claims  
17 department and in any supplementary proceeding in aid of execution after entry of a small  
18 claims judgment.

19           [(6)] **(7)** Assigned claims may be prosecuted by an assignee in **the** small claims  
20 department to the same extent they may be prosecuted in any other state court.

21           [(7)] **(8)** When spouses are both parties to a case, one spouse may appear on behalf of  
22 both spouses in mediation or litigation in the small claims department:

23           (a) With the written consent of the other spouse; or

24           (b) If the appearing spouse declares under penalty of perjury that the other spouse  
25 consents.

26

1           **136.600 Certain civil procedures applicable in criminal context.** The provisions of ORS  
2 44.150 and [*ORCP 39 B and 55 E and G*] **ORCP 39 B, 55 A(6)(d), and B(4)** apply in criminal  
3 actions, examinations and proceedings.  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26