**MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, December 10, 2022, 9:30 a.m.
Zoom Meeting Platform

## ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Derek Larwick
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees
Margurite Weeks
Jeffrey S. Young

Members Absent:

Hon. Benjamin Bloom
Troy S. Bundy
Hon. Melvin Oden-Orr

Guests:

Leland Baxter-Neal, Or. Consumer Justice
Kathryn Clarke
Brian Dretke, Dretke Law Firm
Aja Holland, Oregon Judicial Department
Matt Shields, Oregon State Bar
Blair Townsend, Wise & Townsend

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 Promulgated this Biennium | ORCP/Topics to be Reexamined Next Biennium |
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| ORCP 7 | ORCP 1 | ORCP 57 | Lawyer Civility | ORCP 7 | ORCP 54/ORS 36.425 |
| ORCP 35 | ORCP 4 | ORCP 58 | Lis pendens | ORCP 39 | |
| ORCP 39 | ORCP 14 | ORCP 60 | One set of rules | ORCP 55 | |
| ORCP 55 | ORCP 15 | ORCP 68 | Probate/trust | ORCP 57 | |
| ORCP 57 | ORCP 16 | ORCP 69 | litigation | ORCP 58 | |
| ORCP 58 | ORCP 17 | ORCP 71 | Quick hearings | ORCP 69 | |
| ORCP 69 | ORCP 18 | Abatement | Self-represented | | |
| ORS 45.400 | ORCP 21 | Affidaviting judges | litigants | | |
| ORS 46.415 | ORCP 22 | Arbitration/mediation | Standardized forms | | |
| | ORCP 23 | Collaborative practice | Statutory fees | | |
| | ORCP 27 | Expedited trial | Trial judges | | |
| | ORCP 32 | Family law rules | UTCR | | |
| | ORCP 47 | Federalized rules | | | |
| | ORCP 52 | Interpreters | | | |

I. Call to Order

Mr. Crowley called the meeting to order at 9:33 a.m.

Judge Peterson thanked the Council for an interesting biennium. He stated that some of the rule issues that have been addressed may not be noticed by many lawyers if they are promulgated, but the Council has also taken on some big, important ideas. It has also received pushback on some of them. He opined that it is useful for the Council to put some big ideas out there and see whether it is brave enough to promulgate them.

Mr. Crowley stated that he appreciated Council members' patience during the Council's first-ever completely virtual biennium and its adaptation to video conferencing. While it has not always been smooth, the Council has gotten better at it with time, as has the entire bar.

II. Administrative Matters

A. Meeting Minutes

Mr. Crowley explained that the Council has some meeting minutes that still need to be finalized, so he asked to schedule a short follow-up meeting for that purpose. He asked Ms. Nilsson when those drafts might be ready for the Council's review. She stated that late January or early February seemed appropriate. Mr. Crowley suggested a lunch hour meeting.

Judge Norby asked whether the vote could be accomplished by e-mail. Ms. Nilsson stated that, unfortunately, as a public body, the Council is subject to state public meeting laws and is not allowed to vote by e-mail.

The Council agreed to meet on Monday, February 13, 2023, at noon to approve the meeting minutes from May, June, August, September, and December of 2022.

B. Election of Legislative Advisory Committee

Judge Peterson stated that, by statute, the Council is required to elect a Legislative Advisory Committee consisting of five members of the Council. The purpose of this committee is to answer any questions posed by a committee chair of the Oregon Legislature about a promulgation or any legislation that might bear on the Oregon Rules of Civil Procedure (ORCP). Typically, the committee consists of two lawyers, two judge members, and the public member. Judge Peterson asked for volunteers.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Goehler, Judge Norm Hill, Ms. Holley, Judge Norby, and Ms. Weeks volunteered to serve on the committee. Judge Jon Hill made a motion to approve that slate of volunteers. Mr. Andersen seconded the motion, which passed

unanimously by roll call vote. Mr. Crowley stated that he would be willing to be an unofficial member of the committee and that he could be called on if needed, in his capacity as a Council member only, not as a representative of the Department of Justice.

C. Set First Council Meeting for September of 2023

Judge Peterson stated that he had checked the calendar for September of 2023 to avoid religious holidays that fall on weekends. He also checked the second Saturdays of each month for the rest of the biennium, which is typically a schedule that the Council follows, and that those dates look relatively clear with the exception of Veterans' Day weekend, the second day of Hanukkah, and Mother's Day weekend.

Mr. Crowley suggested that the Council set its first meeting on September 9, 2023, and allow the new Council to set the remainder of the schedule for the biennium. Mr. Shields asked whether the Council was considering returning to in-person meetings. Mr. Andersen stated that he preferred virtual meetings, since it is far for him to travel from Medford to the Oregon State Bar. Judge Jon Hill agreed that it is much easier for members from throughout the state to participate if the meetings are held virtually. Judge Norby suggested perhaps holding one or two in-person meetings per year and the rest virtually. She stated that she did miss being in the presence of other Council members, and that it is easier to get to know people when you are face to face with them. Judge Bailey asked whether it was possible to conduct hybrid meetings, with some members appearing in person and some appearing virtually. Ms. Nilsson stated that this may be possible if the Bar has the technology that would allow it to happen. Judge Norm Hill noted that it is difficult for those who are not in the room to be part of the conversation. Judge Peterson mentioned that the Council's authorizing statute states that it should endeavor to meet in each of the congressional districts, and that may be something for the Council to consider next biennium. Judge Norm Hill agreed with Judge Norby's suggestion about holding one or two in-person meetings per year, not necessarily in the Portland metro area. Mr. Shields stated that he would reserve a meeting room for the Council for September 9, 2023, just in case it is needed.

III. Old Business

A. Discussion/Voting on Draft Amendments Published September 17, 2022 (Appendix A)

1. ORCP 69

Judge Peterson reminded the Council that the federal government had changed the citation to the Servicemembers Civil Relief Act. There is a citation to that Act in paragraph C(1)(e) of ORCP 69 that must be correspondingly updated. Council staff also made a few grammatical amendments to the rule that are not intended to change the operation of the rule.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 69. Hearing none, he asked for a motion to promulgate the amendment.

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

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 69. Ms. Holley seconded the motion, which was approved unanimously (20-0) by roll call vote.

2. ORCP 7

Mr. Goehler reminded the Council that the operative changes to ORCP 7 are located in subsection D(3). These changes make the service method consistent whether it is a corporation, a limited liability company, or partnership that is served. He explained that there were also a few staff changes for cleanup that were not intended to affect the operation of the rule.

Mr. Crowley thanked Mr. Goehler and the committee for their work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 7. Hearing none, he asked for a motion to promulgate the amendment.

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

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 7. Ms. Holley seconded the motion, which was approved unanimously (20-0) by roll call vote.

3. ORCP 39

Mr. Andersen stated that the amendments to Rule 39 essentially specify the conditions under which testimony may be taken in depositions by remote means, formerly telephone depositions. He stated that the draft has been through a number of iterations and was approved by the Council for publication.

Mr. Crowley thanked Mr. Andersen and the committee for their work. He asked if there were any guests or Council members who wanted to comment on the proposed amendments to Rule 39. Hearing none, he asked for a motion to promulgate the amendment.

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

Mr. Goehler made a motion to promulgate the draft amendment of Rule 39. Judge Jon Hill seconded the motion, which was approved unanimously (20-0) by roll call vote.

4. ORCP 58

Mr. Andersen stated that the amendment to Rule 58, to permit remote testimony in trials, pretty much tracks the changes to Rule 39, and also refers to ORS 45.400(2), which basically wraps around depositions as well as trial testimony. He stated that, again, the amendment has been through multiple iterations, and that he believes that the published language is just right.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 58. For the purposes of the minutes and to ensure his correct understanding, Judge Norm Hill asked Mr. Andersen whether ORCP 58 F simply validates he fact that the parties can stipulate to do things by remote means, but that it is not intended to remove the ability of the judiciary to dictate whether or not a matter is going to be held remotely or in person. Mr. Andersen stated that Judge Norm Hill's understanding is correct, and pointed out that the opening clause of section F states, "subject to court approval."

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

Judge McHill made a motion to promulgate the draft amendment of Rule 58. Judge Norby seconded the motion, which was approved unanimously (20-0) by roll call vote.

5. ORCP 55

Judge Peterson reminded the Council that Judge Norby had authored a reorganization of Rule 55 a few biennia ago and made it a much more usable rule. At that time, the decision was made not to make any changes to the operation of the rule but, rather, to wait and make sure that the reorganization did not have any unintended consequences. Last biennium, the rule was examined again and modified to add the requirement that the subpoena should indicate that a witness does not need to appear if they are not offered the witness fee and mileage reimbursement. That was because there was a judge who was encountering a problem with inmates who were serving multiple subpoenas without those fees, and the witnesses did not know what to do. Judge Peterson stated that, this biennium, the Council had received a request from Multnomah County Judge

Marilyn Litzenberger, now retired, who had occasionally encountered the problem of witnesses who were unable to appear because of scheduling conflicts and who were uncertain of how to handle the problem. The amendment to Rule 55 before the Council today is the Council's best effort to try to solve that problem.

Judge Peterson explained that the committee had looked at rules in several jurisdictions, and had taken language for the amendment primarily from the state of Utah, with some significant changes. He stated that he had checked with several judges and the trial court administrator in the largest county in Utah. The judges said that they have had just a handful of requests over the years from people who wanted a hearing about whether they had to appear. The trial court administrator stated that it did not seem to be an issue there, despite the fact that Utah's form lays out a checklist of just about every possible reason under the sun why the witness might not have to appear. Judge Peterson stated that the committee decided that was not a good idea, and chose to require that the witness must instead write succinctly the reason that they should not have to appear. The amendment to Rule 55 also includes a duty to confer or attempt to confer, akin to that in UTCR 5.010, or the motion to have the subpoena quashed will be denied. Judge Peterson pointed out that one of the judges in Utah suggested to him that, as a general rule, the first time that a lawyer has contact with a witness should not be when the subpoena is is served on the witness.

Judge Peterson stated that the committee and the Council have spent a fair amount of time crafting this amendment to give a procedure for those rare times when someone who is going to be seriously inconvenienced by having to appear on a certain date does not know what to do. Judge Peterson noted that a few of the comments the Council received from the bar (Appendix B) suggest that the amendment provides legal advice. He stated that this is not true; the rule is a rule that provides information on its face and does not provide legal advice, nor would any subpoena that was issued with the new motion to quash. Judge Peterson pointed out lawyers are already having conversations with witnesses about subpoenas now, and that is not legal advice.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 55.

Brian Dretke from Dretke Law Firm introduced himself. He stated that he had submitted one of the comments in opposition to the amendment to Rule 55. He stated that, for the reasons contained in his comments, he believes that the amendment is a solution in search of a problem. Mr. Dretke noted that his experience has been that this is not something that occurs very commonly. In fact, it has never occurred personally for him as a lawyer or when he was on the bench. He stated that, the way the amendment is structured, it just provides a motion to quash and it is not very well defined in terms of the burden. He opined that the

amendment would lead to more problems than it would solve.

Blair Townsend introduced herself and thanked the Council for doing the brain trust work that benefits her practice all of the time. She stated that she has a law firm in Lake Oswego but that she was appearing today in her position as President of the Oregon Trial Lawyers Association (OTLA). She stated that several OTLA members had submitted comments on Rule 55 as well as on Rule 35, and she asked to submit comments on both rules, as she had another commitment at 10:30 a.m. She stated that she would not pretend to speak for every OTLA member, but that many members are having huge issues with the proposed amendments to both rules. As Mr. Dretke mentioned, there are a lot of thoughts that these are solutions in search of problems and that there will be unintended consequences to plaintiffs. OTLA, as an organization, asked the Council to vote no on the amendments to Rule 55 and Rule 35.

Judge Norby pointed out that a theme of the Council's work in the last few biennia has been trying to consider how many fewer people have access to lawyers and the higher number of self-represented litigants or, in this case, witnesses. She stated that the Council has been trying to find ways to strike a balance between keeping a set of rules that originally contemplated only lawyers ever reading and implementing them with a world that has evolved into a place where the general public is required more and more to navigate the court system on its own. Judge Norby stated that she thinks that one of the things that both Judge Litzenberger and Judge Peterson were concerned about in contemplating a change to this rule is trying to strike that balance, which she believes that the Council has done as well as it can be done. She stated that she does appreciate the objections, and that she has considered them herself, but that she still thinks that a balance needs to be struck. Judge Norby pointed out that she has said all along that she has just been a scrivener and that she does not really have a position on the amendment to Rule 55, but that she has come to a point where she is now leaning in favor of it because of the need for that balance.

Mr. Andersen stated that he was initially mildly in favor of the change because he did not want people ignoring subpoenas. He noted that the committee's deliberations occurred at about the time that Steve Bannon had just thumbed his nose at a congressional subpoena. He stated, however, that he has carefully read the comments, and the fact that there were none in favor has been telling. As to Judge Peterson's comment about talking to the Utah judges, Mr. Andersen stated that he is not sure that judges are on the front line of this issue, because they see the result, not what happens behind the scenes. Mr. Andersen expressed concern that creating an easy exit for witnesses will result in too many taking that easy exit, leading to uncertainty in trials and more delay. He opined that the power of the subpoena needs to be strong and immediate, sometimes even the same day that it is issued. He stated that his position is now a resounding no.

Mr. Goehler echoed Judge Norby's thoughts. He stated that the Council's discussion all along has been the issue of access to justice. As a counterpoint to Mr. Andersen, Mr. Goehler suggested that the amendment does not allow for an easy exit. It just provides information to the subpoenaed witness. Currently, the options for a subpoenaed witness who has a problem with the subpoena are to either ignore the subpoena or to hire a lawyer. The proposed process does not require a neutral witness to hire a lawyer when they may or may not be able to afford to. Mr. Goehler stated that he did not think that this is a substantive change that will wreak havoc on on trial practice but, rather, a more fair process for the general public.

Judge Jon Hill asked whether the change could be framed as for the public interest benefit of the witness rather than for the benefit of the party subpoenaing the witness. Judge Peterson stated that this is a good summation. He stated that witnesses had either contacted Judge Litzenberger to ask her what to do if they could not attend, or had just not appeared at all. Judge Jon Hill stated that the idea is not only to inform the witness what the subpoena is and why they need to appear, but also to essentially serve the public's interest in law. Judge Peterson agreed. He stated that it is to put people who have no interest in litigation on some kind of a footing so that they have a path. He also pointed out that the one thing that was not mentioned in any of the five comments is that the language in the amendment also beefs up the subpoena to make it clear that, if a witness does not comply with a subpoena, they could face the significant adverse consequences of fines or jail time. He noted that the current subpoena form simply states that a witness is ordered to come to court.

Ms. Stupasky stated that she did not believe that this amendment would change anything about whether a witness who had decided not to obey a subpoena would come to court or not. She stated that she was against the language instructing a witness on how to fight a subpoena and did not feel that it was necessary. She noted that she has not had an issue with this in 35 years of practice. She referred to the example that lawyer Bill Gaylord used in his comment to the Council, and stated that she had watched that trial. She opined that Mr. Gaylord would have never been able to get the rebuttal witness on whom the case turned to appear at the last minute if he had to rely on a subpoena that included the language proposed in the amendment to Rule 55. Ms. Stupasky stated that what is really in the public interest is that clients in the state of Oregon are allowed to put on their cases and get justice. That means that lawyers need to have witnesses appearing at trial, immediately in some cases. If those witnesses want to move to quash, there is already a process for that. Delivering a subpoena with an invitation to essentially make a motion to the judge not to have to appear is just inviting a problem. Ms. Stupasky stated that she is not opposed to keeping the language in the amendment with regard to the consequences for not complying with a subpoena.

Judge Bailey noted that, similarly to the vexatious litigation issue, his confusion to folks' objections to this amendment comes in part because of the fact that the court has the inherent authority to do these things. He stated that the amendments would just codify this inherent power. With regard to subpoenas, he stated that he has heard frequent complaints about witnesses not showing up, and a witness can already file a motion to quash and the court can already grant it. Judge Bailey stated that he did not understand how the amendment to Rule 55 would in any way, shape, or form impact a party's ability to get a witness in front of the court. To him, all it seems to do is to make sure that the witness gets notified and understands the process, and that there are consequences for not complying. He pointed out that he understands that attorneys sometimes, like dogs, want to mark their territory, but that this amendment would give folks on the outside an opportunity to understand that there is a process that they can follow versus not showing up at all and having a warrant issued. He thanked the committee for good work on a good amendment.

Mr. Andersen agreed with Ms. Stupasky that providing a ready-made motion almost invites the subpoenaed witness to take an exit. He stated that he was also concerned that the use of the words "the right not to testify," also seem to almost encourage a subpoenaed witness to believe that they have a right not to show up. Judge Bailey stated that his understanding of how the amendment would work is that the witness would need to show up, unless the court tells them otherwise. This is already how subpoenas work. The amendment then says that, if the witness thinks they have a legal basis not to show up, they can fill out the form, but they still have to wait for the court to give them approval. The only difference is the form, but the motion to quash procedure is still the same as in the current rule. The witness is still subject to the court's jurisdiction until the court says otherwise. Judge Bailey stated that the amendment is essentially telling folks that, if they had a lawyer, their lawyer could file a motion to quash for them. However, since the Council wants people to have access to the courts without having to afford expensive attorneys, it is providing the paperwork to allow them to do it on their own. He stated that he understands that there are people who are worried, but that it seems to him that this just explains for people who are not attorneys the rights that they already have.

Mr. Larwick stated that his concern about the amendment is embedding a whole motion inside of the rule. He stated that the ostensible reason is to help witnesses who are not even part of the proceeding not to have to find lawyers to help them understand the rules. However, it seems to him that this line of thinking could extend to pretty much all of the rules. There are self-represented litigants who are responding many of the other discovery rules, and the Council is not embedding motions to help them avoid their discovery obligations in those contexts. Mr. Larwick stated that he could see singling out Rule 55 for this purpose if it was a widespread problem, but he has not seen evidence that it is widespread problem. He noted that he has had witnesses who could not appear at trial, but those

witnesses have called him to discuss the problem and he has tried to work around their scheduling issues.

In response to Judge Bailey's comments, Mr. Andersen stated that he feels that, by providing a motion, the average witness will think that the filling out of the motion will allow them to avoid coming to court until the judge says that they have to. He stated that the impression will be that they have complied just by filling out the motion. Judge Bailey asked whether the Council thinks that it is more fair to hide the ball from folks and make them have to get an attorney to know what their rights are. He stated that this is the impression that he is getting. His feeling is that the amendment is crystal clear: a witness must show up, unless and until the court tells them otherwise. Judge Bailey stated that the Council must have faith that people are reading and following instructions to some degree. He stated that his sense from some of these comments is that, because a witness does not know what their real legal obligations are, or what the legal outcome could be for them to say that they cannot be there, it is better to hide the ball because it is a better outcome for lawyers when witnesses just show up. Judge Bailey stated that he believes that the amendment is a good compromise. He pointed out that access to justice is something that the Oregon Judicial Department (OJD) has been stressing for a long, long time, and has done yeoman's work trying to achieve. He thinks that this amendment helps move the rules closer to that goal. Ms. Stupasky stated that it could not be further from the truth that she wants to hide the ball. Her motivation for voting against this amendment is for the citizens of the state of Oregon to get the justice that they deserve. She stated that witnesses who are subpoenaed can already move to quash if they want to move to quash.

Judge Norby responded to Mr. Larwick's concern about embedding a form in Rule 55. She pointed out that there are many rules and statutes that are designed for lawyers that contain forms, because even lawyers struggle sometimes to know what to put in a form or how to be concise. She opined that including a basic form is not the same thing as "embedding a motion," and noted that the form, as with forms designed for lawyers, is intended as a guide and does not dictate that people should use it. Judge Norby also noted that one of the comments mentioned a concern that a witness would not understand the language in a subpoena. She stated that she is disappointed when she hears comments like this, as the assumption seems to be that the people who are being subpoenaed are either under educated, functionally illiterate, or careless in their reactions to things that come from the courts. She stated that, based largely on the conversations that she is lucky enough to have with jurors, this is the opposite of true. Her experience is that people are smart and do read and try to follow communications from the courts. She stated that it would be pretty difficult to write a rule based on the assumption that some people will ignore or not read it carefully. She stated that she is not sure that evaluating a rule based on the exceptions is a good idea.

Judge Peterson noted that it appears that the amendment may not receive a super majority vote. With regard to Ms. Stupasky's remark that she likes the language in the amendment about consequences for failure to comply with the subpoena, it appears that this might be a compromise position that the Council is willing to take. However, he is reluctant to substantially modify the language of the published rule at the promulgation meeting. This may be a matter for the Council in the next biennium. However, Judge Peterson pointed out that there are also two minor fixes: one in subparagraph A(1)(a)(v) to include a missing citation; and one in paragraph B(1)(a) to change the word "upon" to "on." He stated that he would like to see the Council adopt these changes, even if the overall amendment is unsuccessful.

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

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 55, because it is in the benefit of the public at large, and because witnesses are different than parties. Mr. O'Donnell seconded the motion. The motion had twelve votes in favor and 8 votes against, but did not carry a super majority. The rule was not promulgated.

Mr. Crowley asked whether the Council would be willing to entertain Judge Peterson's suggestion to promulgate an amendment to Rule 55 that contains only the two changes that do not affect the operation of the rule. Judge Jon Hill made a motion to do so. Judge Norby seconded the motion, which passed 19-1 by roll call vote.

6. ORCP 57

Ms. Holley reminded the Council that the substantial changes to the rule are in section D. There are also some housekeeping changes throughout the rule, including changing the word "shall" to "must" or "may." The main change in subsection D(1) is to recognize that jurors do not have the right to sit on a particular jury, but that they do have the right to be free from discrimination. In paragraph D(1)(b), "physical defect" is changed to "impairment" and "duties" to "essential functions" to track more consistently with disability law. The amendment does not completely mirror the protections in ORS 659A.403, as the Council voted to have a more narrow set of protections for jurors. The amendment also sets a process for peremptory challenges under *Batson v. Kentucky*, 476 US 79 (1986), which changes the rule from the previous presumption that challenges were non discriminatory and allows a more balanced process and asks the courts to consider the totality of the circumstances.

Ms. Holley explained that paragraph D(4)(c) requires the court to sustain an objection to a peremptory challenge if the court finds that it is more likely than

not that a protected status was a factor in invoking that peremptory challenge. Paragraph D(4)(d) includes factors for the court to consider. The peremptory challenge process is preserved, but the mechanism by which a challenge that might be based on discrimination can be made is changed.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 57.

Judge Norby thanked Ms. Holley for her magnificent work in assembling the workgroup and guiding the Council through the many conversations on this topic throughout the biennium. Judge Jon Hill stated that the committee and the Council had worked hard to hone the language in the amendment so that it is both effective and not controversial. He noted that the comment the Council had received in support of the amendment also (Appendix C) encouraged further modification of the rule, but he asked that the Council promulgate the amendment as written. He congratulated Ms. Holley again on her great work.

Mr. Hood asked about the draft recommendation memo that accompanied the published rule and how it relates to the actual rule change. He asked if the memo is intended to be included with the promulgation. Ms. Holley stated that it is intended to go to the Legislature with the rule, if it is promulgated. She pointed out to Ms. Nilsson that the memo would need to be updated to no longer be called "draft" and to remove the reference to paragraph D(1), since the entire rule is being amended. Ms. Holley explained that the memo is meant to inform what the Legislature sees, partly because the Council voted last biennium that changes to Rule 57 may be substantive in nature. The memo contains a more thorough description of the process that was used. Judge Peterson stated that the goal was for attorneys, the public, and the Legislature to have a little bit more context for where the rule change came from. He stated that his intention would be for the memo to accompany the Council's transmittal letter to the Legislature. While Ms. Holley is convinced that the amendment is a substantive change to Rule 57, Judge Peterson and Judge Norm Hill believe that it is purely procedural. However, if the Legislature disagrees and decides to hold hearings on whether to make a change by statute, this memo will make very clear the context of the changes and the fact that a change to jury procedures would also affect criminal trials by statute.

Judge Norm Hill stated that the Council should keep the following in mind when it is dealing with any of the rules. The Council can write a rule that is perfect but if he, as a trial judge, cannot actually apply it to individual cases with any predictability, it does more harm than good. He stated that he is really impressed with the language in the published amendment of Rule 57, particularly with its predictability. It makes a significant improvement on the existing rule, it is useful, and it is simple and elegant enough that a trial judge can make a meaningful determination with some intellectual integrity, as opposed to just relying on

whatever they personally feel.

Judge Norm Hill stated that he would also like to suggest including in the transmittal letter to the Legislature a recommendation that it significantly increase juror pay. The OJD will be introducing a bill asking for increased juror compensation, and Judge Norm Hill stated that he thought it would be very powerful to have the Council on Court Procedures strongly support that. Although amendments to Rule 57 will be an improvement, nothing will make as much of a difference as making sure that jurors actually reflect Oregon's diversity, and the key to that is making sure that everyone has the ability to serve, regardless of their financial wherewithal. Ms. Holley noted that the memo does support OJD's proposals to increase juror pay. Judge Norm Hill stated that this is good, but that it is more likely to be noticed if the support is coming from the Council directly on the same level as the promulgated rules. Judge Peterson agreed and stated that he would run proposed language to include in the promulgation letter past the OJD.

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

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 57. Mr. Andersen seconded the motion, which was approved unanimously (20-0) by roll call vote.

Judge Jon Hill made a motion to include language in support of OJD's efforts to increase juror pay in the Council's' transmittal letter to the Legislature. Judge Norm Hill seconded the motion, which passed unanimously by voice vote.

7. ORCP 35

Judge Jon Hill stated that the committee had used case law to draft a rule that gives a coherent structure to the inherent powers of the court. He explained that Judge Norby had authored the rule and that she and the committee had done a huge amount of work on the various revisions. The committee had started out by looking at potential legislative fixes, but had ultimately decided to try to write a rule. He acknowledged the comments that the Council had received about the rule itself (Appendix D) but stressed that, as was discussed at the September publication meeting, the process laid out in the rule is set out in case law already.

Judge Norby stated that she had read the comments carefully and that she wanted to take the opportunity to go over the history of what the committee had done and the reasons behind it. She stated that the committee was formed to address a request that was received in response to the Council's biennial survey of bench and bar. That request had raised concern about the disproportionate

burden that small numbers of vexatious litigants place on court staff and judges and the justice system at large.

Judge Norby explained that the committee looked at vexatious litigant processes in state systems and the federal system, including reviewing the limited Oregon case law in which actions were successfully taken to address vexatious litigants. The committee concluded that, although the problem is limited, the burden on the courts is disproportionate, primarily because there is no clear process available to the courts to relieve this burden, particularly when it is created by self-represented litigants who are motivated by malice. This can sometimes occur in domestic relations proceedings and neighbor disputes, for example, where nothing is really sought from the courts except for the opportunity to unendingly bring misery to another person. Judge Norby opined that not very many attorneys, who are not judges or who have not previously been court staff, see the extent of the havoc this causes with the system. It is occasional, but the people who do it, do it repeatedly.

Judge Norby stated that ORCP 35 was purposely designed to collate and integrate processes that have been successfully used by the courts. The process is relatively easy for a self-represented litigant who is deemed vexatious to navigate. It is accessible to judges who are trying to figure out how to manage the problem. And again, it is for those rare occasions in which personal vendettas or manipulation is just crying out for restraint. Judge Norby stated that the concerns expressed by the comments and by Council members appear to be rooted in a fear that the creation of a rule implies that the process can and will be weaponized against litigants who are not at all vexatious, and that it will create barriers to access to legitimate justice that do not already exist. She stated that it is difficult to meaningfully respond to that fear, because it is a fear that apparently arises from factual past experiences with courts that acted cavalierly when they should not have. Judge Norby stated that one particular comment claimed that judges have the ability to simply toss out motions that they do not approve of and throw litigants out of courtrooms if they find them to be objectionable people, that this had happened in a case that the commenter had tried, and that this was the reason given that this rule is not needed – that the courts have inherent authority to do anything they want to do. She stated that she hopes that most judges conduct themselves differently and that those that do not probably need to be removed. The rules are, of course, written for the vast majority of lawyers and judges who follow them and who want processes to be thoughtfully created and uniformly applied. A driving force behind Rule 35 is to give judges, who do not believe that they can unilaterally act, a blueprint to follow to reduce the strain that vexatious litigants place on the courts and on other citizens.

Judge Norby also pointed out that there were some comments that claimed both that the rule is probably unconstitutional and that it duplicates processes that are already available to the court. She noted that both of those propositions cannot

be true. She stated that some comments argued that the rule is targeted to be weaponized against litigants with legitimate claims. However, a litigant cannot be deemed vexatious under this rule without a judge considering all of the factors in section D. Judge Norby stated that she believes that there is a fundamental difference between placing obstacles in the path of those who seek to abuse the courts and placing obstacles in the path of those who bring legitimate claims. She expressed surprise at the fact that so many of those who objected to the rule seem to think that judges and courts are ill equipped to differentiate between those two categories of litigants. She stated that she hoped that this is because they have had the good fortune not be involved in repetitive disputes with malicious opponents and not because they have a deeper lack of confidence in judges that the rule is not equipped to address.

Judge Norby opined that the fact that the published Rule 35 integrates the existing options that have been used by courts over time to appropriately deal with truly vexatious litigants recommends it as meritorious and constitutional. The fact that the committee's and Council's work was conformed to suggestions from representatives of entities that would be responsible for administratively implementing it, also seems to recommend it as thoughtful. And finally, the fact that it was requested by an anonymous responder to the Council's questionnaire, and that many judges on the Council support it, indicates that it is needed.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed Rule 35.

Leland Baxter-Neal introduced himself as the Director of Community Lawyering for Oregon Consumer Justice (OCJ), a statewide nonprofit that works to safeguard the rights of consumers through advocacy, strategic litigation, research, education, and community engagement. He stated that OCJ strongly opposes Rule 35 as drafted. He explained that OCJ has submitted detailed comments in writing and that he would briefly highlight a few of those for the Council today.

Mr. Baxter-Neal explained that OCJ has serious concerns about the impact the proposed rule would have on consumer access to justice, most particularly on low-income litigants, many of whom are forced to proceed as self-represented litigants because they cannot afford access to counsel. OCJ believes that there is already existing authority to address instances of vexatious filing, and that the way that this rule is written conflicts with the Oregon constitution and raises questions of federal constitutionality.

Mr. Baxter-Neal stated that OCJ believes that the definition of a vexatious litigant as drafted could prevent consumers who seek legitimate relief to which they may be entitled from having their day in court. This risk could be particularly heightened for consumers seeking to challenge a default judgment in a debt collection case. Too many collection cases result in default judgments because the

consumers never received notice of the case and do not know how to engage until after the judgment is entered. In cases where a consumer seeks to challenge the judgment, the rule could create serious additional barriers, and could further tip the scales in favor of debt collectors over consumers.

OCJ is also troubled by the proposed security deposit provision, which creates yet another barrier to access to justice for low-income Oregonians. The proposed rule conditions the ability of certain litigants to proceed on their ability to post a financial deposit, most importantly without any inquiry into their income level or their ability to pay. There may be two equally situated Oregonians with different income levels, both deemed vexatious litigants, and one will be able to proceed because they can afford to pay the deposit and one will not be able to proceed because they cannot pay. As drafted, OCJ believes the rule raises significant questions of constitutionality. The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under article 1, section 10 of the Oregon constitution and the First Amendment of the US Constitution. OCJ believes that the rule represents an unacceptable threat to that right. In addition, in multiple contexts, the U.S. Supreme Court and other federal and state courts have been clear that the government may not discriminate against individuals on account of their poverty by conditioning their ability to access justice on their ability to pay. OCJ believes that the security deposit requirement does just that. Mr. Baxter-Neal stated that he understands that the Council is seeking to strike a balance between the very real challenges imposed by by this issue, but that OCJ believes that the rule as drafted simply does not strike that balance appropriately.

Judge Peterson noted that lawyers are able to look for a scorpion under every rock because it is a part of their training – they always look for what could go wrong. He stated that he sees a lot of that in the comments in opposition to Rule 35. He noted that the Council had made a substantial change to Rule 27 a few biennia ago, and primarily plaintiffs' attorneys were terrified that those changes were going to cause all kinds of problems. They raised some real issues in terms of the statute limitations, and those got resolved. Judge Peterson noted that Judge Bob Herndon in Clackamas County, who was on that committee at the time, pointed out that the very good practitioners who had concerns about the change in the rule never saw the problems that arose under the previous rule, such as children being appointed as guardians ad litem of their adult parents and having those parents divorced in order to gain property. Judge Peterson pointed out that judges do see problems like this, as they do with vexatious litigants. He also noted that the changes to Rule 27 were made and, so far as he knows, the sky has not fallen.

Judge Peterson also observed that there appears to be some concern that lawyers who are bringing cutting-edge litigation will not only have their cases dismissed, which happens frequently anyway with cutting-edge litigation, but that they will

be branded with a scarlet letter and be essentially precluded from bringing more claims. He pointed out that it is fairly obvious when a claim is a cutting-edge claim versus a nonsense claim that is beyond the bounds of propriety. He stated that he is hearing that judges have all of this inherent power, even as far back as a 1906 case, but this is like saying that we have the tools, but we think we left them out in the back yard somewhere, they are probably rusty, we are not sure how to use them, and no one knows where the user manual might be. He opined that Rule 35 is just a huge user manual for those tools, and that it would be hugely beneficial for judges.

Mr. Andersen referred to the enhanced prevailing party fee available in ORS 20.190 and the fact that one of the factors that can be used to assess whether to award that fee is whether the conduct of a party was reckless, willful, malicious, in bad faith, or illegal. The statute also talks about the extent to which an enhanced prevailing party fee would deter others from asserting meritless claims and defenses. He expressed concern that the proposed Rule 35 would violate the statute. He also wondered what the proposed rule would accomplish that cannot already be accomplished by ORS 20.190(3). Mr. Crowley stated that proposed Rule 35 addresses the situation up front rather than after the fact. He asked why Mr. Andersen believes that Rule 35 would violate the statute. Mr. Andersen stated that ORS 20.190 already lays claim on the territory of meritless litigation. He stated that he was unaware of anything that empowers the Council to propose a rule without authorization in a statute. Mr. Crowley stated that there is a lot of other authority behind the proposed new rule that has been covered fairly extensively throughout the year.

Judge Norm Hill echoed Judge Peterson's point that trial court judges see this issue differently than some of the other members of the Council. To the point of those telling him that he has the inherent authority to designate a litigant as vexatious, he offered the following thoughts. Over the last five to seven years, an awful lot of what he understood for the previous almost 30 years as a lawyer to be the inherent authority of the trial court, he is now being told is not so inherent and that he does not have the authority to do as a judge. It used to be that if a lawyer did not show up to court habitually, a judge could strike that lawyer's pleadings as part of the court's inherent authority. Courts are now being told they cannot do that. His sense now is that he is not certain that the courts have the inherent authority to do anything. What this proposed rule would to is to take the very real problem of vexatious litigants and create a procedural framework that allows judges to apply the law fairly and appropriately, across the board and across jurisdictions. He stated that this is a significant improvement over the current situation. In the current climate, he prefers to have a rule that tells him what his authority is. And he thinks that there are a lot of judges in the same boat.

Ms. Holley stated that she thinks that one of the problems is that she hears folks saying that there is some inherent authority to address people who are

weaponizing litigation and harassing people, but she believes that it is more narrow than how this rule is written. If, for example, an incarcerated person who continues to make filings regarding their incarceration is determined to be a frivolous filer under paragraph A(1)(b) of the proposed rule, the punishment for that is that they would not be allowed to commence any actions. Would that include not being able to be a co-petitioner in a divorce case? She thinks that the amendment is more broad than the inherent authority that already exists. In talking to a number of lawyers, she has heard from people who really have been harmed by truly harassing litigation and weaponized litigation, so she recognizes that it can be harmful. However, she thinks that the language as written is too broad to address it.

Mr. Larwick acknowledged that he is not a judge and does not see the problem of self-represented litigants filing harassing lawsuits and clogging up the court system. He did not dispute that it is a problem. However, he is only looking at the text of the proposed rule. His main problem is with paragraph A(1)(b), which defines a vexatious litigant to be a person who files frivolous motions, pleadings, or other documents or engages in discovery or other tactics that are intended to cause unnecessary expense or delay. He pointed out that there is nothing in the rule that that limits this to self-represented litigants. He stated that he could imagine motions being filed between lawyers arguing that something was intended to cause unnecessary delay, or that a certain motion or pleading was frivolous. Mr. Larwick noted that plaintiffs' attorneys routinely receive multiple affirmative defenses raised by a defendant, sometimes with no evidence presented on many of them. He asked how that would not be considered frivolous pleading. Some of these defendants are institutional defendants like government agencies or insurance companies that are repeat players in the court system. From the defense bar's perspective, if a plaintiffs' lawyer is able to convince one judge that some of these tactics were employed, and they get branded with the scarlet letter of being a vexatious litigant, the rule does not even contain a procedure for them to undo that process. Mr. Larwick stated that lawyers are smart, and he predicted that they would find a way to weaponize this rule.

Mr. Hood thanked Judge Norby for leading the charge on this rule. He stated that he is in support of it, and sees vexatious litigants as a real problem. He also stated that he did not hear that there is any opposition to the idea that there is a problem that needs to be fixed. He stated that he does not see a better solution for it. If the courts already have the inherent authority to deem a litigant vexatious, it is probably better for everyone that the process is codified in some way, so that everyone knows what the standards are. With regard to Mr. Andersen's point about the prevailing party fee, in the cases that Mr. Hood has had where this type of troublesome litigant has been involved, they have had absolutely no care about what the financial stakes are. They have either divested themselves of any of their property through shell games, or the money just does not matter to them. In fact, he has had some of these litigants tell him that it does

not matter what the courts do or how they rule, that they will keep filing cases, appealing, and filing lawsuits on the same issue again. This is the kind of litigant that this rule is designed for.

Judge Peterson responded to Mr. Larwick that perhaps one of the things a court could consider is whether there is an attorney involved in the case. This might mitigate against finding an attorney vexatious, since it is primarily self-represented litigants who are causing these problems. However, an attorney who has earned it could potentially also receive the scarlet letter. Judge Peterson noted that ORS 20.190 does not fix the problem because, as Mr. Hood pointed out, one would be lucky to get five cents out of some of these litigants because they are either impecunious or they have made themselves appear impecunious. The financial impact is not an issue there. Judge Peterson stated that he was a little surprised that consumer advocates would think that judges are going to punish debtors who have a default judgment against them. He stated that he has not met any judges who are looking to create problems for people who are simply trying to legitimately raise access to justice issues in the court. This rule is designed for litigants that make judges say, "Wow, this is unbelievable. And we have to deal with this over and over because the person has the right to come in here and just keep filing this stuff."

Judge Bailey stated that he thinks that there are two different types of vexatious litigants. There is one type who files a lot of different claims. The other type files multiple motions in the same action. He stated that judges see a lot of the latter type in family law matters, which are different and perhaps more suited for this rule. Judge Bailey expressed disdain at the idea that people would be shut out of the system and unable to make their claims. He noted that the rule states that a litigant can file an ex parte request to file litigation, and that the presiding judge or designee must take a look at that request and determine whether there is or is not merit to the case. He stated that he thinks that the rule does not cut off anyone's ability to litigate.

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

Mr. Hood made a motion to promulgate the draft of Rule 35. Judge Bailey seconded the motion. The motion had twelve votes in favor and 8 votes against, but did not carry a super majority. The rule was not promulgated.

B. Vote on Whether to Send Recommendations for Amendments to Legislature

1. ORS 45.400

Judge Peterson explained that this is a proposal (Appendix E) for a recommendation to the Legislature to amend ORS 45.400, which currently requires 30 days' advance notice for remote testimony. He stated that the COVID-

19 pandemic had made remote testimony more commonplace, and also gave lawyers the tools to do it better. The suggestion is to simply make the requirement that the motion has to be sufficiently in advance so that the parties can weigh in on it and say whether it is a good idea or whether it is a bad idea, and then the court can approve it or not.

From the Council's extensive deliberations, it was determined that technology must be available not only to the courts, but to attorneys, parties, and witnesses. There is accordingly a suggested change to the language in 3(c)(E). Finally, in section 6, there is a suggestion for a correction of a typographical error in the existing statute.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed recommendation regarding ORS 45.400. Hearing none, he entertained a motion to approve the recommendation. Ms. Holley made a motion to approve the recommendation. Mr. Andersen seconded the motion, which was approved unanimously (20-0) by roll call vote.

2. ORS 46.415

Judge Peterson withdrew this item from the agenda, since it would only be applicable had Rule 35 been promulgated.

3. ORS 136.600

Judge Peterson reminded the Council that ORS 136.600 contains references to the old numbering of Rule 55. The proposed recommendation to the Legislature (Appendix F) would correct those references, since Legislative Counsel did not address this issue in a reviser's bill.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed recommendation regarding ORS 136.600. Hearing none, he entertained a motion to approve the recommendation. Judge Jon Hill made a motion to approve the recommendation. Mr. Goehler seconded the motion, which was approved unanimously (20-0) by roll call vote.

IV. New Business

No new business was raised.

V. Adjournment

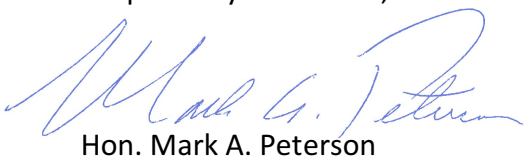
Mr. Crowley stated that he had very much enjoyed his time on the Council, and that he had gone from what he considered to be a civil procedure geek to an even more learned scholar of the ORCP during his tenure. He stated that he deeply appreciates everyone's involvement,

particularly during the pandemic. Mr. Crowley encouraged the Council to take another look at vexatious litigation and the subpoena rule next biennium.

Judge Norby thanked Mr. Crowley on the Council's behalf for his steady hand during over the course of the biennium and for running great virtual meetings.

Mr. Crowley adjourned the meeting at 11:33 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

**2022 PROPOSED AMENDMENTS TO**
**OREGON RULES OF CIVIL PROCEDURE**

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

To receive full consideration by the Council, written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure should be received by the Council no later than the close of business on December 2, 2022. Written comments may be sent by mail or by e-mail to:


Mark A. Peterson
Executive Director

Shari C. Nilsson
Executive Assistant

Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu
www.counciloncourtprocedures.org


The Council meeting at which the Council will consider written comments and receive oral comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 10, 2022

ZOOM MEETING:

https://us02web.zoom.us/j/85876809199?pwd=cG96b2FPMElMQjkvek03djNSY2JRdz09
Teleconference option: 1-253-215-8782
Meeting ID: 858 7680 9199
Passcode: 026350

**The Council will take final action on the proposed amendments at its December 10, 2022, meeting.**

**2022 PROPOSED AMENDMENTS TO**
**THE OREGON RULES OF CIVIL PROCEDURE**

**Table of Contents**

**SUMMONS**

**RULE 7**

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

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

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

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

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

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

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

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

C(3) **Notice to party served.**

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiffs attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

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

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C(3)(b) **Service for counterclaim or cross-claim.** A summons to join a party to respond to a counterclaim or a cross-claim pursuant to Rule 22 D(1) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with

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

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

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

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NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

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

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**D Manner of service.**

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

D(2) **Service methods.**

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

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

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

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

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

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

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

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

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

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

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

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

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

agent receives mail for the tenant, provided that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in controversy at the time of the commencement of the action, and who are served by publication, will be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought against those defendants by name.

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

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

**E By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260. However, service pursuant to subparagraph D(2)(d)(i), as well as the mailings specified in paragraphs D(2)(b) and D(2)(c) and part D(3)(a)(iv)(B) of this rule, may be made by an attorney for any party. Compensation to a

sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

**F Return; proof of service.**

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

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

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

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

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriffs deputy, the sheriffs or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true

copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt, if any, shall be attached.

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

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

_____

Affidavit of Publication

State of Oregon )

) ss.

County of )

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

Subscribed and sworn to before me this ___ day of-------. &.,2 _ _

_____

Notary Public for Oregon

My commission expires

-- day of-------. 2-.

_____

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

_____

Declaration of Publication

State of Oregon )

) ss.

County of )

I, ---------. say that I am the _____ (here set forth the title or job description of the person making the declaration), of the -------. a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the --------. a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published). I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

__ day of------. 2 _

_____

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

affidavit.

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

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

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

**G Disregard of error; actual notice.** Failure to comply with provisions of this rule relating to the form of a summons, issuance of a summons, or who may serve a summons shall not affect the validity of service of that summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of a summons that does not materially prejudice the substantive rights of the party against whom the summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of a summons that does not violate the due process rights of the party against whom the summons was issued.

**VEXATIOUS LITIGANTS**

**RULE 35**

**A Definitions.**

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

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

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

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

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

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

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

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

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

**B Issuance of pre-filing order. The court in any judicial district may, on its own motion or on the petition of any interested person, initiate an expedited administrative process to determine whether to enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that district without first obtaining leave of the presiding judge, as follows:**

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

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

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

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

**C Applications to commence new actions. A vexatious litigant's request to commence a new action or claim may be made by an ex parte application accompanied by an affidavit or a declaration and must include as an exhibit a copy of the complaint or other case-initiating**

**document that the litigant proposes to file. Applications are not subject to a filing fee.**

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

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

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

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

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

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

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

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

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

**D(1)(d) whether the litigant has caused unnecessary expense to opposing parties or**

**placed a needless burden on the courts;**

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

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

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

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

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

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

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

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

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

**DEPOSITIONS [*UPON*] ON ORAL EXAMINATION**

**RULE 39**

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

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

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

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

**C Notice of examination.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SUBPOENA**

**RULE 55**

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

**A(1) Form and contents.**

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

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

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

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

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

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

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

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

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

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

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

**right not to testify;**

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

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

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

**_____**

**IN THE CIRCUIT COURT OF THE STATE OF OREGON**

**FOR THE COUNTY OF _____**

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

**MOTION**

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

**_____**

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

**DECLARATION**

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

_____.

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

**DATED:**_____ **SIGNATURE:**_____

**PRINTED NAME(S):**_____

**ADDRESS:**_____

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

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

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

_____

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

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

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

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

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

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

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

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

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

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

**A(6) Recipient obligations.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

court orders less time;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

_____

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

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

_____

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

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

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

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

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

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

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

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

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

subpoena on the custodian or keeper of the records.

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

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

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

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

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

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

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

responsive to the subpoena; and

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

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

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

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

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

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

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

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

**JURORS**

**RULE 57**

**A Challenging compliance with selection procedures.**

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

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

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

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

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

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

**D Challenges.**

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

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

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

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

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

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

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

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

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

separately or jointly.

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

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

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

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

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

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

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

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

**D(4)(d)(ii) the extent to which the nondiscriminatory reason given could arguably be**

**considered a proxy for a protected status or might be disproportionately associated with a protected status;**

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

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

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

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

**F Alternate jurors.**

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

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

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

**F(4) Duties and responsibilities.** Alternate jurors [*shall*] **will** be drawn in the same manner; [*shall*] **will** have the same qualifications; [*shall*] **will** be subject to the same

examination and challenge rules; [*shall*] **will** take the same oath; and [*shall*] **will** have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror [*shall*] **may** not attend or otherwise participate in deliberations.

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

**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).

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 may implicate substantive rights of both litigants and jurors.

However, because the Council is made up of both plaintiffs' and defense lawyers, as well as judges from around the state, the Oregon Supreme Court, and the Oregon Court 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:

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|---|---|
| Oregon Supreme Court | Justice Christopher Garrett (Council Member) |
| Oregon Supreme Court Council on Inclusion and Fairness | Justice Adrienne Nelson (Workgroup Contributor)<br>(Justice Lynn Nakamoto substantively contributed to the Council's considerations in the 2019-2020 biennium.) |
| Oregon Court of Appeals | Judge Bronson James (Workgroup Contributor)<br>(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)<br>Judge Mark Peterson, *pro tem* (Council Staff)<br>(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) |

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| 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 Liaison) |
| Oregon Council on Court Procedures | Kenneth Crowley (Council Chair)<br>Shari Nilsson (Executive Assistant) |
| Oregon District Attorneys Association | Kevin Barton, Washington County District Attorney (Workgroup Contributor)<br>Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor) |
| Oregon Public Defender Services | Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor)<br>Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor)<br>Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor)<br>Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor)<br>Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor) |
| Oregon Trial Lawyers Association | Meredith Holley, Employment Discrimination Attorney (Committee Chair)<br>Kelly Anderson, Personal Injury Attorney (Council Member)<br>Nadia Dahab, Civil Rights Appellate Attorney (Council Member)<br>Michelle Burrows, Civil Rights Attorney (Workgroup Contributor)<br>J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) |

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| | Juan Chavez, Civil Rights Attorney (Workgroup Contributor)<br><br>Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor) |
| Oregon Association of Defense Counsel | Drake Hood, Civil Defense Attorney (Council Member)<br><br>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<br><br>Taylor Hurwitz, Trademark Attorney (Workgroup Contributor) |
| American Civil Liberties Union | (Eliza Dozono substantively contributed in the 2019-2020 biennium.) |
| Oregon Hispanic Bar Association | (Stanton Gallegos substantively contributed in the 2019-2020 biennium.) |
| Oregon State Bar Diversity Section | (Lorelai Craig substantively contributed in the 2019-2020 biennium.) |

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

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

This recommendation relates to "for cause" and "peremptory challenges," which are the two ways a juror may be excluded from participation on a jury panel. Basically, a court may exclude a juror for one of the listed "for cause" reasons in ORCP 57 D(1). Additionally, in any civil or criminal case, each party gets a designated number of "peremptory challenges," allowing them to exclude a juror from participation for any reason. The parties usually 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 presumption that challenges are non-discriminatory. That presumption is not consistent with current research or caselaw regarding what are called *Batson*[1] challenges, and these recommendations recognize that. Current research and caselaw, instead, recognizes that facially neutral reasons may be pretext for discrimination or unconsciously discriminatory. This amendment recognizes that every party making a peremptory challenge should already be examining whether bias may play a part in the desire to exclude the juror, or whether they believe there is a legitimate reason for the exclusion. While this is an important change, its importance largely lies in conforming with current caselaw and research.

**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 a *Batson* 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.

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

The research concludes that diversity of representation on jury panels contributes to the fairness of a jury's verdict.[2] It supports that unfairly excluding jurors particularly contributes to disproportionate incarceration based on race.[3] (For example, Black people are incarcerated in Oregon at a rate five times higher than white people in Oregon.[4]) The Oregon legislature has declared race-based discrimination against Black and indigenous people a public health crisis.[5] These amendments are particularly urgent because of this recognized crisis.

Many interest groups requested that the protected characteristics under ORCP 57D(4) be expanded. Oregon's Public Accommodation Law, ORS 659A.403 reflects these additional protections, and these amendments expand ORCP 57D(4) to protect "race, color, religion, sex,

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

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

[3] Willamette University College of Law Racial Justice Task Force, *Report on Use of Peremptory Challenges During Criminal Jury Selection in Oregon* at 26, WILLAMETTE UNIVERSITY (Jan. 2021).

[4] *Id.*

[5] House Resolution 6, 81st Or. Leg. Assembly (2021 Regular Session).

sexual orientation, gender identity, or national origin," reflecting the statutory protections other than marital status and age.

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

Because of the dangers of implicit, institutional, and unconscious bias impacting litigants and jurors without any of the parties being aware of the bias, the Council received strong recommendations to eliminate peremptory challenges entirely. The United Kingdom, Canada, and Arizona have eliminated peremptory challenges. Some experienced trial attorneys were reluctant to do this, however, because peremptory challenges allow attorneys to exclude a juror they fear will be unfavorable to a client without embarrassing that juror or confronting 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. The Council strongly recommends that the legislature adopt the proposed amendments in order to promote diversity on jury panels and provide protection against bias.

An additional pressing concern the workgroup and the Council recognized lies in financial and logistical barriers to jury service for marginalized populations, which are more likely to be financially disadvantaged and are also disparately impacted by non-diverse juries. For example, for many jurors, losing a full day of work for a $10 stipend may have a real impact on whether they can pay for essentials like food, housing, and childcare. In other situations, a family may have only one car, preventing a juror logistically from appearing at the courthouse every day. In many instances such as these, jurors who would contribute to a diverse jury panel may not be able to appear for jury duty in the first place, or judges are forced to release jurors because of the financial and logistical barriers, automatically reducing the size and diversity of a jury pool. For these and other reasons, the Council supports proposals from the Oregon Judicial Department to increase pay and financial support for jurors.

**Priorities**. The Council's priorities in amending this rule were to change the burden shifting issue, which, contrary to caselaw and research, puts the 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.

As described above, the recommendation also reflects expansion of the protected characteristics to reflect protections for "race, color, religion, sex, sexual orientation, gender identity, or national origin."

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

**TRIAL PROCEDURE**

**RULE 58**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**F Testimony by Remote Means**

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

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

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

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

**DEFAULT ORDERS AND JUDGMENTS**

**RULE 69**

**A In general.**

A(1) When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to appear by filing a motion or answer, or otherwise to defend as provided in these rules or applicable statute, the party seeking affirmative relief may apply for an order of default and a judgment by default by filing motions and affidavits or declarations in compliance with this rule.

A(2) The provisions of this rule apply whether the party entitled to an order of default and judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a counterclaim or cross-claim.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

**B Intent to appear; notice of intent to apply for an order of default.**

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

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default. The notice of intent to apply for an order of default cannot be served before the time required by Rule 7 C(2) or other applicable rule or statute has expired. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

**C Motion for order of default.**

C(1) The party seeking default must file a motion for order of default. That motion must

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

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

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

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

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

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

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

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

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

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

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

**D Motion for judgment by default.**

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

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

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

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

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

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

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

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

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

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

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

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

Shari Nilsson <nilsson@lclark.edu>

# Proposed Amendment to ORCP 55

1 message

**Brian Dretke** <brian@dretkelaw.com> Wed, Nov 30, 2022 at 1:08 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council Members:

I am writing regarding the proposed amendment to ORCP 55.

As I understand it, the amendment would require a party issuing a subpoena to also provide the subpoenaed witness with a template, or form, to quash the subpoena because it would create an "unjustifiable burden" on the subpoenaed witness. As a civil trial lawyer and former circuit court judge, I believe this new requirement will only increase the burden on the litigants and the courts. In my experience nobody appreciates being subpoenaed to court and will look for any reason to avoid an appearance. This new requirement provides a ready-made, albeit confusing, method to avoid appearing. It also places the subpoenaed witness, unfamiliar with the law, in potential legal jeopardy if their perceived "unjustifiable burden" is inadequate. That term is not defined, and I expect that attempts to construct a definition would further muddy the waters. One person's unjustifiable burden may not be equal to another's because it is all subjective (e.g., "I'm caring for my mother who just had a stroke." vs. "I'm scheduled to work that day and I just started this new job."). Thereafter, under this proposed rule change, it all comes down to judges making a determination as to whether there is an "unjustifiable burden." This will be a time-consuming process, particularly when there is no opportunity to inquire further. Judges deal with this issue with potential jurors before a jury is seated on the morning of trial, but in those instances there is a colloquy between the potential juror and the court to flesh out the reasons the juror cannot serve. But making a decision as to whether an unjustifiable burden is proven based on a few sentences jotted down by a subpoenaed witness in a declaration will not allow a proper evaluation, only speculation. We all know what the uniform jury instructions say about speculation. Alternatively, if a hearing is required, the time spent by the court inquiring of an unrepresented subpoenaed witness, together with further inquiry by attorneys for the litigants, will overcrowd an already impossibly busy docket.

Moreover, the subpoenaed witness is advised that "making a motion that is not supported by facts and law may result in a judgment against me for any attorney fees paid to oppose my motion." Again, subpoenaed witnesses unfamiliar with law will likely have no idea what constitutes "a motion that is not supported by facts and law." What facts? What law?

It is very likely that many of the subpoenaed witness who file the form motion to quash will believe they have complied with their obligation to respond to the subpoena by simply completing the form, sending it to the court, and "giving a copy" to the issuer of the subpoena, whatever that means. Then, after a no-show for deposition or trial, the legal wheels start turning and the subpoenaed witness finds he or she is now facing a fine, jail time, and/or a judgment for attorney fees. This is particularly troubling for trial subpoenas as a no-show witness at a trial leaves a donut hole in the proceeding and mucks up the works for everyone: jury, litigants and the court.

I am opposed to this rule change for the reasons stated above. I appreciate the opportunity to be heard by this committee.

Sincerely,

*Brian C. Dretke*

Attorney at Law

## The Dretke Law Firm

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Ste 610 PMB #29

Bend, OR 97701

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**brian@dretkelaw.com**

Shari Nilsson <nilsson@lclark.edu>

# Comments on proposed changes to Rule 55

1 message

**Bill Gaylord** <bill@gaylordeyerman.com> Mon, Nov 28, 2022 at 3:42 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>
Cc: "Don Corson (dcorson@corsonjohnsonlaw.com)" <dcorson@corsonjohnsonlaw.com>

Attn: Mark A. Peterson and Shari C. Nilsson

Dear Members of the Council on Courts Procedure:

My attention has been directed to the proposed Rule 55 changes published recently by the Council by my friend Don Corson and by the Oregon Trial Lawyers Association. I am interested in this subject as a recently retired (to pro bono license status) long-time Oregon trial lawyer, a former eight year member and two year chair of the Council, a former eight year member and two-term chair of the Uniform Trial Court Rules Committee, a former board member and president of OTLA, a former board member of the American Association for Justice, former board member and two term president of the Civil Justice Association (formerly known as Pound Institute for Civil Justice), and former board member of Public Justice (formerly known as Trial lawyers for Public Justice). Though my forty nine year legal career was almost exclusively in the practice of plaintiffs' personal injury law, the concerns that I wish to express about changes to civil subpoena procedures should, in my view, trouble practitioners from all quarters of the civil trial bar as well as the judiciary.

Admittedly I do not know the background of these proposed changes. I am at a loss to explain what problem this solution is in search of. There must be some very serious system failure happening frequently to justify a proposal that, in my opinion, jeopardizes the business of adjudicating justice in civil disputes, apparently out of fear that subpoenas will inconvenience witnesses or companies and institutions who employ potential witnesses and/or maintain records that can be relevant to civil litigation.

I practiced law during an era when courts proudly supported and defended the role of court processes in the resolution of private disputes, and paid little attention to complaints by businesses, service providers, records custodians and others who took offense to being subjected to the power of subpoenas. I can recall an instance when a circuit court judge instructed a reluctant witness to cancel surgical schedules and return to court for the afternoon session or be held in contempt of court at peril of jail. Those were judges who believed, as I do, that efficient and non-violent resolution of civil disputes is a cornerstone of democratic society, and more important than the convenience of businesses, professional persons, and other legitimately subpoena'd entities. I am not familiar with any rationale that would favor spoon feeding persons or institutions being subpoena'd with a form and instructions for how to dodge a valid subpoena.

As I read the proposed form motion and declaration to quash a subpoena, it practically begs a recipient to dash off a broad-brush standardless claim, and submit it just in time to spoil the usefulness of the subpoena regardless of any ruling later made to affirm the subpoena or re-assert the court's power to compel attendance or production of the witness or evidence. It invites lay witnesses to make their own most favorable interpretation of phrases such as "unjustifiable burden", while fairly implying that there is some sort of general "right not to testify." I daresay, this language is so undefined and open to wildly varying interpretation that the "penalty of perjury" sanction mentioned further in the form will never be enforced. It is probably true that every reluctant witness I ever subpoena'd to court or to a deposition felt I had imposed on them an "unjustifiable burden." Given the fact that lay persons are invited to make up their own interpretations of such terms, this form will give them what amounts to a free shot to cancel and avoid the subpoena at least until a court's docket can deal with non-sensical excuses provided, or fact-finding to figure out the merits of an ambiguous objection/motion.

As a practical matter, adding the prefabricated (and possibly fabricated) motion/declaration option will have the effect of changing subpoena's from a status of presumptively valid and generally complied with to an unreliable tool, impossible to count on until the time set for testimony, when either the witness or their opt-out form arrives. No lawyer can or should contend with the kind of uncertainty of schedules this might cause. The procedure imagined with this change will, in my experience, inevitably add time to the preparation of any litigation, and probably require cancellations of trials as well as, obviously, discovery or perpetuation depositions. A patch of the business of discovery and trial preparation that has traditionally been conducted imperfectly but fairly effectively by cooperation among counsel for scheduling witnesses, viewing evidence, copying documents, would become much more likely to demand court time, and derail everything else on the schedule for the case in question.

I have won trials by discovering on the last day before my rebuttal evidence was presented in court that a witness for my opponent had mislead the court and jury about a fact that I could prove by subpoena'ing one more witness to bring documents to court on two hours notice. I don't see any where in the proposal how the new rule anticipates the not-uncommon need to issue subpoena's during trial or for attendance in a matter of hours or few days from service of the subpoena. No justice-seeking court system can exclude the possibility for that to occur and require enforcement. A witness served with the new form subpoena, and unhappy about late disruption of their daily routine, will very likely use the invited dodge, and make their testimony literally unavailable or so untimely after court action on their motion to quash that the benefit of the testimony is lost.

It might be more straightforward and less confusing if we simply changed the language in every subpoena from compelling attendance or production to asking "please, if you don't mind, would you help us out here?"

I ask the Council to table the proposed declaration and motion to quash form sections of the proposed new rules.

William. A. Gaylord

New Mailing address:

80296 Pacific Rd.

Arch Cape, Oregon 97102

(503) 789 1926

Shari Nilsson <nilsson@lclark.edu>

# Proposed Amendment to Rule 55A

1 message

**Gene Hallman** <Gene@hallman.pro> Wed, Nov 30, 2022 at 7:17 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Mark A. Peterson, Executive Director

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

c/o Lewis and Clark Law School

10101 S. Terwilliger Blvd

Portland, OR 97219

ccp@lclark.edu

www.councilonCourtprocedures.org

To Council on Court Procedures,

I write to express my concern about the proposed amendments to ORCP 55A and particularly ORCP 55A(1)(a)(vii) which may be read to suggest that a recipient of a subpoena should file a Motion to Quash to object to the subpoena. By way of relevant background, following a one-year clerkship with the Oregon Supreme Court, I have had an active civil trial and appellate practice for 47 years. I have served twice on the Uniform Trial Court Rules Committee, once in the dark ages when the rules were first formulated and once recently, ending this year. I have also served on various ethics committees and commissions including the State Professional Responsibility Board, the Supreme Court Disciplinary Board and the Judicial Fitness and Disability Commission.

My problems with the proposed amendment are two fold:

First, it appears to be a solution in search of a problem. I have not seen situations where the attorney goes to the expense of having a person served with a subpoena and including fees and mileage for an improper purpose. In those few situations where the deposition is improperly conducted in violation of ethical rules, safeguards may be resorted to. See *In re Newell*, 348 Or 396, 234 P3d 967 (2010) (deposition of a represented witness without notice to the person's counsel).

Second, and more importantly, the proposed amendment gives the witness guidance as to which, of several, options to follow in objecting to the subpoena. I have no objection to a statement that a witness who feels that a subpoena is faulty may object to the subpoena. However, to specify a Motion to Quash over other available procedures (Protective Order or Motion to Modify as to time or place) gives the recipient legal advice, and maybe not good legal advice. The rule, as drafted also seems to tell the recipient that a Motion to Quash is a normal expected part of the procedure even where no grounds (except irritation at being served) exist.

Thank you for your time and for your work on this important council.

Gene Hallman

W. Eugene Hallman

Hallman Mediation & Arbitration

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Pendleton OR 97801

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(541) 310-1859

PIUCCI LAW
TRIAL LAWYERS

November 30, 2022

***SENT VIA EMAIL AND USPS***

Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu

Dear Mr. Peterson and Ms. Nilsson,

I offer these comments in opposition to the proposed changes to ORCP 55.

I have been practicing in the area of plaintiff's personal injury litigation for over 40 years. I practice with my son and partner, Joe Piucci (2013) at Piucci Law. Our firm now also litigates civil rights cases. I have been President of the Oregon State Bar (2011) and the Oregon Trial Lawyers Association (2000-2001).

I am unaware of problems which may have caused well-meaning people to suggest the changes being considered to ORCP 55 (Subpoena). In our experience, the power of subpoena is not misused by Oregon litigants and remains essential in the zealous representation of our clients. It is a normal and well used tool for both sides in our cases.

Whatever problems may exist, they will be nothing in comparison to what may occur if the proposed changes become law. How will a subpoena compel testimony if the person subpoenaed is offered a chance to avoid the subpoena? (And they already can file a Motion to Quash, a very little used process). What good will a subpoena be if people are offered an excuse to ignore it? While some might follow the proposed Motion to Quash, many won't, just believing that it isn't compulsory. I would bet as many just "blow off" the subpoena as would go through the process to quash.

And what a nightmare for judges and litigants! Inserting Motion hearings into the pre-trial process just to rule on the power of the subpoena will distract, waste precious time and burden the court system with unnecessary hearings. In fact, as it is currently, should a good reason to request a hearing arise close to trial, it is already likely that the matter will be considered by the trial judge on the morning of day one of the trial. This will pave a torturous road for the Presiding Judges around the state, I expect.

PIUCCI LAW
TRIAL LAWYERS

The proposed changes are unnecessary and will cause a big mess. Don't do it!

Thank you for your consideration.

Sincerely,

Stephen V. Piucci
steve@piucci.com

# LAW OFFICES OF JUDY SNYDER

Judy Snyder
*judy@jdsnyder.com*

Holly Lloyd
*holly@jdsnyder.com*

Melissa Hopkins
*melissa@jdsnyder.com*


November 28, 2022

By Email only : ccp@lclark.edu

Council on Court Procedures

Re: Opposition to proposed amendment to ORCP Rule 55

To Chair Crowley and the Members of the Council on Court Procedures:

We are a three attorney plaintiffs' civil litigation firm. It is common for us to be involved in litigation in which the defendant's attorney uses ORCP Rule 55 subpoenas to compel the production of documents pertaining to our clients, including medical records, personnel files, and other documents which may be relevant to liability or damages. ORCP 55 is used less frequently to compel the attendance of witnesses for deposition; i.e. former co-workers, family members or significant others. On occasion, as the attorneys for the plaintiff, we seek protective orders to oppose or limit those subpoenas.

It is my impression that plaintiffs' attorneys use ORCP Rule 55 subpoenas less frequently than our colleagues in the defense bar. Nevertheless, I am writing to express my concerns and opposition to the proposed amendments which add the following to Rule 55 A(1)(a)(v):

> A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraph A(6)(b), B(2)(a), B(2)(b), B(2)(c)(ii), B(2)(d), B(3)(a), or B(3)(b) of this rule[.]; *and*
> *A(1)(a)(vi) state the following in substantially similar terms:*
> *A(1)(a)(vi)(A) that the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a right not to testify;*
> *A(1)(a)(vi)(B) that compliance with a subpoena is mandatory unless a judge orders otherwise, and*
> *A(1)(a)(vi)(C) that disobedience of a subpoena is punishable by a fine or jail time.*
> *A(1)(a)(vii) A motion to quash must be included with the subpoena in substantially the following form:*
>
> _____
> *IN THE CIRCUIT COURT OF THE STATE OF OREGON*
> *FOR THE COUNTY OF _____*
>
> *Case No. _____*
> *(Case Caption to be Inserted ) MOTION AND DECLARATION*
> *by Party Issuing Subpoena) ) TO QUASH SUBPOENA*




1000 S. W. BROADWAY, SUITE 2400, PORTLAND, OREGON 97205 • PHONE: 503-228-5027 • FAX: 503-241-2249

*MOTION*

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

_____

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

*DECLARATION*

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

_____

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

*DATED:* _____*SIGNATURE:* _____
*PRINTED NAME(S):* _____
*ADDRESS:* _____
*PHONE NUMBER:* _____*EMAIL ADDRESS:* _____

*[Court Name and Address to be Inserted by Party Issuing Subpoena]*
*NOTICE: IF YOU FILE THIS MOTION WITH THE COURT, YOU MUST ALSO GIVE A COPY OF THE FILED MOTION TO THE PERSON WHO INITIATED THE SUBPOENA.*

These amendments lead with the instruction that "the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a right not to testify." My opposition to these amendments is, in part, based on the extra work these amendments will create for all of the attorneys involved in the litigation, the increased costs of litigation for the parties, the consequences to the court to accommodate the hearings required to resolve objections to the subpoenas, and the delays this process will cause to the litigation.

Historically, the vast majority of the ORCP 55 subpoenas are not controversial. On occasion, issues regarding the subpoenaed documents can be resolved by discussions between the attorneys for the parties before the subpoena is issued. It is infrequent that the entity or individual who receives a subpoena expresses an objection to producing the subpoenaed documents or to appearing for a deposition. On the rare occasions when an objection occurs, the witness's concerns are commonly resolved by a discussion between the attorneys for the parties; i.e. additional time required to locate the documents, accommodations for the deposition, etc.

The proposed amendments to ORCP 55 encourage the entity or individual who has been subpoenaed to oppose the production of the documents or the appearance at deposition. I suspect that many will assert that gathering and producing documents creates an "unjustifiable burden" as it is not their core work. Moreover, a lay person is unlikely to have a desire to take time away from their ordinary activities and/or employment and may be convinced that they have a "right not to testify". The amendment includes a draft of a motion which suggests that such a right exists, yet we know this is infrequently a valid defense to a subpoena.

If in response to a subpoena with these proposed instructions, the witness contacts me to discuss their objections, I cannot provide the witness with legal advice. I am not in a position to tell the witness if they have a "right not to testify" or if requiring them to produce documents is an "unjustifiable burden." Nevertheless, under these amendments, the witness is encouraged to have that discussion with the attorney who issued the subpoena. This creates an unresolvable conflict of interest for the attorney.

Accordingly, I respectfully request that the Council does not adopt these proposed amendments to ORCP Rule 55.

LAW OFFICES OF JUDY SNYDER

Judy Danelle Snyder

Judy Danelle Snyder (Nov 28, 2022 16:15 PST)

Judy Danelle Snyder



1000 S. W. BROADWAY, SUITE 2400, PORTLAND, OREGON 97205 • PHONE: 503-228-5027 • FAX: 503-241-2249

Oregon Justice Resource Center
Advocate. Educate. Engage.

December 1, 2022

Mark Peterson and Shari Nilsson
Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu

Re: In Support of the Proposed Amendment to Rule 57 D

Dear Mr. Peterson and Ms. Nilsson,

The Oregon Justice Resource Center (OJRC) writes in support of the proposed amendment to Rule 57 D as a significant step forward in eliminating discrimination in jury selection. The current rule is inadequate to address the problem and falls short of even the *Batson* rule from federal case law, which should be a floor, not a ceiling, when it comes to equal protection in jury procedures. The current rule also promotes nondiverse juries, resulting in lower quality decision making and unjust outcomes. The amendment represents a worthwhile improvement.

The goal of the OJRC is to promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them. We work in collaboration with like-minded organizations to maximize our reach to serve underrepresented populations, to train future public interest lawyers, and to educate our community on issues related to civil rights and civil liberties.

Oregon's court rules addressing bias in jury selection are in desperate need of reform. In the 1986 case of *Batson v. Kentucky*, the U.S. Supreme Court ruled it unconstitutional for a court or a party to exclude a prospective juror from jury service on the basis of their race—an insidious practice that has perpetuated systemic injustice. The Court outlined a procedure for challenging this misuse of peremptory strikes, now known as a *Batson* challenge. Oregon developed Rule 57 D, which purports to implement a *Batson*-like procedure. But twice in the last three years—in 2019's *State v. Curry* and again in *State v. McWoods* this past July—the Court of Appeals has had to reverse unjust criminal convictions because of biased jury selection and the flawed trial court procedures that attach thereto. The problem of discriminatory jury selection persists, despite all parties agreeing that it should not.

Because there is no centralized repository for tracking *Batson* challenges, the OJRC has attempted to gather data on the pervasiveness of the problem by contacting all thirty-six of the state's district attorney offices. We asked them for their records reflecting the use of *Batson* challenges in their jurisdictions since the middle of 2019, when *Curry* was decided. Because these prosecutors are the plaintiffs in all the state's criminal trials, they are in an advantageous position to notice the problem when it arises. And the offices have incentives to find such cases:

to aid their attempts to end discriminatory jury selection and to secure just and irreversible convictions.

Twenty-five district attorneys responded. Several wracked their personal memories or informally polled their offices to let us know about a collective handful of incidents they remember. But none of the district attorney's offices methodically track how often *Batson* challenges occur. Several district attorneys took their office's lack of recalled experience with formal *Batson* challenges as a good sign that bias in jury selection is not a problem in their jurisdiction. We are concerned, however, that the lack of data suggests a flaw in the process for identifying and collecting instances of discrimination, therefore making it impossible to address the issue internally.

We also asked the district attorneys for materials from any training presentations on jury selection they presented since *Curry* was decided. The vast majority had conducted no formal trainings on the topic. The materials we did receive from eight counties show a dearth of training on strategies for avoiding implicit or explicit bias in jury selection. In some cases, the materials present problematic strategies for circumventing *Batson* by identifying and recommending the use of what amount to proxies for race, rather than addressing the biases and practices that result in racist outcomes.

- One county advised deputies district attorneys, "Don't rely solely on stereotypes, BUT trust your gut." The same training presentation recommended picking jurors who were "employed vs. unemployed," "home owner vs. apartment owner," "college graduate vs. non-college graduate," and "manager/supervisor vs. newer employee"—all criteria which would in practice disproportionately exclude members of groups with protected statuses.
- Another county provided a presentation that trained prosecutors to "[b]e careful thinking along gender/racial lines BUT.... Think about how a potential juror's life experience has shaped his/her beliefs" including "Is this the kind of juror who might dislike my witnesses [and] Is this the kind of juror who might dislike the State." The same presentation recommended relying on the zip code disclosed in jury questionnaires to research crime maps available online and consider "What sort of real life relationship does this juror have with crime?"
- One county's five slides devoted to *Batson* in a thirty-slide presentation about jury selection was the most extensive treatment of the rule among the materials we reviewed. But the same presentation's mention of the core reason for *Batson*, eliminating bias, boiled down to a single bullet point amidst a longer list of practice tips: "Don't make inappropriate challenges (obviously)."

In *Curry*, the court observed that Rule 57 D "provide[s] little guidance" in addressing biased jury selection and suggested that the Council on Court Procedures should consider a "concrete set of rules" like reforms adopted in neighboring Washington as a potential step "to help ensure that jury selection is free from discrimination, implicit or explicit." 298 Or App 377, 389.

The proposed amendment to Rule 57 D seizes the Court of Appeals' invitation and presents a significant improvement over the existing rule. The OJRC commends the Council and its workgroup for drafting these changes and urges that they be adopted. There are several specific ways in which the proposed rule improves upon what came before:

- The presumption that peremptory strikes are nondiscriminatory, likely unconstitutional as violative of *Batson*, is eliminated.
- Protected statuses are identified as "race, color, religion, sex, sexual orientation, gender identity, or national origin."
- The burden is clarified to rest with the party exercising the peremptory challenge, upon objection, to "articulate reasons supporting the peremptory challenge that are not discriminatory."
- The standard is clarified for the court to sustain the objection "if the court finds that it is more likely than not that a protected status . . . was a factor in invoking the peremptory challenge."
- The danger of implicit bias—that is, "the extent to which the nondiscriminatory reason given could arguably be considered a proxy for a protected status or might be disproportionately associated with a protected status"—is enumerated as a circumstance to consider.

There are also points in the proposed amendment that present room for further improvement. The OJRC recommends that the Council consider further amendment in the future:

- Rule 57 D should explicitly identify and include a list of presumptively invalid reasons for a peremptory strike that have been used as proxies for discrimination. Washington's rule identifies such presumptively invalid reasons as "(i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker."
- The rule should address the specific problem of reliance on one party's observed conduct of a prospective juror, which can be shaded by implicit bias. Washington's rule recognizes that "allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers" have all historically been associated with discrimination and makes them presumptively invalid as bases for exclusion from the jury unless prior notice is given and either the opposing party or the court corroborates the observations.
- The procedure for exercising peremptory strikes—typically by secret ballot with the panel in the courtroom, with the juror immediately excused and a new juror brought to the seat—should be adjusted to allow for adequate time to make and consider an objection, outside of the jury's presence, between the announcement of the strike and the excusing of the juror.

Finally, while this is an important step by the Council, much work remains for others "to help ensure that jury selection is free from discrimination, implicit or explicit." The OJRC recommends that the legislature empower the Criminal Justice Commission to compile data on *Batson* challenges—from district attorneys and from courts—to facilitate research into the efficacy of anti-discrimination efforts. The OJRC further recommends that Oregon's district attorneys adopt training practices that treat *Batson* not as a procedure to endure nor an obstacle around which to find loopholes but a guidepost to eliminate implicit discrimination. We hope

future trainings will meaningfully address strategies to avoid real bias, whether explicit or implicit, in the selection of juries.

Sincerely,

/s/ Brian Decker
Brian Decker
Transparency and Accountability Director/Attorney
Oregon Justice Resource Center
bdecker@ojrc.info

Zach Winston
Zach Winston
Director of Policy and Outreach
Oregon Justice Resource Center
zwinston@ojrc.info

Shari Nilsson <nilsson@lclark.edu>

# ORCP 35 Comment

**Chandra Basham** <cbasham@medicalinjurylaw.org> Tue, Nov 22, 2022 at 8:04 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Good Morning,
I would like to submit the following comment on ORCP 35:

Proposed rule ORCP 35 does not appear constitutional or in accord with other principles of the Oregon judicial system. If a person or business is determined to be "vexatious", ORCP 35 would abridge and encumber the rights of individuals/businesses to litigate controversies. Once deemed vexatious by a judge anywhere in the United States, a litigant would forever be burdened to undergo judicial review in order to access Oregon's civil justice system.

The proposed rule offers no mechanism for review of the determination of "vexatious", nor are there objective standards on which to make an initial determination or appellate determination of "vexatious" litigant. In our political climate, it is everywhere around us that what appears vexatious to an adversary, often appears zealous advocacy, or even bare bones decency, to an ally.

It is the reality of litigation and controversy that some litigants take positions upsetting to the personal feelings or biases of opposing counsel or the judiciary, and yet, those individuals and businesses are nonetheless, entitled to hearings, due process and an opportunity to present evidence in the Oregon courts in the same way litigants with less controversial/vexing cases may. If a litigant's position turns out to be frivolous and totally unsupported by law and evidence, then the courts may issue sanctions in accordance with other ORCP's.

To understand the hazard of ORCP 35, we only have to think of what would have become of Brown v. Board of Education if the Plaintiff had been deemed a vexatious litigant by a presiding judge in Kansas. Presumably, no court in Oregon would ever listen to Plaintiff Oliver Brown, especially on similar facts, without forcing Brown to shoulder his opponent's legal fees. Schools everywhere in Oregon would be emboldened to exclude his daughter Lidia Brown, without fear of litigation.

No business or individual, no matter how vexing, should be given what amounts to a life sentence without parole to pre-litigation judicial review and pre-litigation cost shifting. Without objective standards or opportunity for review of the "vexatious" determination, this can and will undermine access to justice for the most vulnerable and create an incentive to re-victimize "vexatious", under-represented people whom already experience unequal access to courts.

Thank you for your consideration,

Chandra

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Shari Nilsson <nilsson@lclark.edu>

# Comments concerning proposed ORCP 35 -- vexatious litigant proposal

1 message

**Gary Berne** <GBerne@stollberne.com> Mon, Nov 28, 2022 at 7:43 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Members of the Council on Court Procedures:

Out of all due respect, I was shocked when I read proposed rule 35. There have been instances where people have grossly misused the civil litigation process. This is infuriating to the court system and parties who have been affected. But the proposal speaks with an anger that I hope we can all seek to avoid in resolving disputes through our justice system. The proposal is at odds with our concept of free and open courts, which are open to the public despite the difficulties that sometimes creates. The proposal creates a procedure where the court itself becomes an adverse litigant that can initiate a proceeding where there is no case or controversy and which is intended to impose a prior restraint on access to the court along with a financial burden that is expensive and also acts as a restraint.

Courts already have the means to deal with abusive and frivolous litigation under Rules 17 and 46 and ORS 20.105. Many provisions of proposed rule 35 overlap with these provisions and, to the extent that the existing provisions already lead to needless anger and disputes, will add to the expense and court and lawyer time.

It would seem that the abusers are known to the courts and lawyers or quickly became known. It is a “know it when you see it” situation. A party can file a two page motion to dismiss or the court can set a hearing to consider dismissal. I had a case where the judge did just that. The judge pulled a “motion to intervene” out of the file, said the record should reflect that he was tossing it in the waste basket, and told the man who filed it to leave the court room. The judge knew this man and made it clear that the judge was not going to get into a dialog with him.

Thank you for considering my comments.

Gary Berne

Gary M. Berne
gberne@stollberne.com
Pronouns: he/him/his

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Shari Nilsson <nilsson@lclark.edu>

# Comment re COCP Proposed Vexatious Litigant Rule - ORCP 35

1 message

**Zack Duffly** <zack@dufflylaw.com> Sat, Dec 3, 2022 at 1:56 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council Members:

I write to share my strong opposition to the proposed ORCP 35 "vexatious litigant" rule. I am currently a plaintiff's-side lawyer, but have also worked at a Big Law defense firm, and clerked for judges at both the Oregon Court of Appeals and the U.S. District Court for the District of Oregon.

First, the proposed rule is not needed. The courts already have inherent authority to take action when faced with a vexatious litigant. In addition to that inherent authority, ORCP 17 requires a party signing a document to certify that the document is not being filed for any improper purpose and allows sanctions for improper filings. ORCP 17 further provides sanctions that could be applied to either plaintiffs or defendants for vexatious filings. *See, e.g.,* Order Declaring Plaintiff a Vexatious Litigant, Woodroffe v. State of Oregon, 15CV1047 (Malheur Cty. June 2, 2015).

Second, the proposed rule is likely unconstitutional. The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under Article I, section 10, of the Oregon Constitution, and the First Amendment of the U.S. Constitution. As proposed, ORCP 35 allows trial courts to deem individuals in pending cases as "vexatious" without first making findings to that effect. Even in other jurisdictions allowing entry of trial court orders deeming individual litigants "vexatious," the court must make findings before individuals may be precluded from filing claims. *See, e.g., Molsky v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007).

Thank you for your consideration.

Respectfully,

**Zachary R. Duffly, Esq.**
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https://dufflylaw.com/
Pronouns: he, him

Shari Nilsson <nilsson@lclark.edu>

# Proposed ORCP 35

1 message

**John Gear** <gearjm@icloud.com> Tue, Nov 29, 2022 at 8:43 AM
To: ccp@lclark.edu

I write to object to the proposed rule and to note that it is ultra vires for the council, which the Legislature formed to

> promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state ***which shall not abridge, enlarge or modify the substantive rights*** of any litigant.

ORCP 1.730 (emphasis added). The proposed rule most definitely would abridge the rights of certain litigants.

Luckily, ORS 33 contempt proceedings offer a remedy to the problem with no new rules needed.

If it is felt that new rules are needed, the Council should withdraw the proposed ORCP 35 and its administrative rule process and instead recommend new subsections for ORS 20.105 to the Legislature, which would provide that parties facing claims or counterclaims from any party who has previously been sanctioned under ORS 20.105 for making frivolous claims or defenses shall have access to a new “special motion to dismiss” similar to the special motion to strike of ORS 31.150.

A successful special motion to dismiss would provide for an award of attorney fees to the party who filed the special motion and then the “pre-suit review" of claims and counterclaims by the court contemplated by ORCP 35 as a sanction for having filed a frivolous claim or counterclaim after once having been sanctioned for doing so.

The special motion to dismiss would take priority on the civil docket and the burden would shift to the party facing the motion to show that their new claims/counterclaims are colorable, non-frivolous, and based on evidence.

John Gear (he/him/his)
JohnGearLaw.com, SalemConsumerLaw.com

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December 1, 2022

Mark A. Peterson
Executive Director

Shari C. Nilsson
Executive Assistant

Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu

**RE: Proposed ORCP 35**

Dear Council Members,

I write this letter on behalf of myself, multiple colleagues, and Oregon consumers. I have served as a long-standing member and past Chair of the OSB Consumer Law Executive Committee. I refer to myself as a consumer rights attorney, because I have been representing Oregon consumers and debtors who have been victimized by unlawful debt collection and trade practices for about fourteen years. In that time, I have seen a myriad of scams targeting some of our most vulnerable citizens, including via the filing of debt collection lawsuits by debt collection agencies, debt buyers, and debt collection law firms.

I have seen dozens, if not hundreds, of default judgments taken against Oregonian consumers for which the underlying debts were the result of identity theft or fraud. I have also dealt with many instances involving default judgments that were obtained without proper service, where the alleged debtor had no opportunity to respond to the complaint. In many of these scenarios, creditors and debt collectors have violated federal and state debt collection statutes. In rare cases, these aggrieved consumers have the knowledge, wherewithal, and good fortunate, to obtain representation to seek redress for the harm caused by these illegal practices. Far more commonly, these injured consumers are forced to seek redress in our courts on their own.

I, and several of my fellow consumer law colleagues, have reviewed the text of the proposed ORCP 35 "Vexatious Litigants" rule. We have serious concerns. Chiefly, the language of the rule is far too broad. As just one example, the consumers described above who are victimized by an unscrupulous creditor or debt collector—which I can assure you exist—and have had a default judgment improperly entered against



COCP Meeting Packet
December 10, 2022
Attachment D-5

them, would be deemed a "vexatious litigant" when subsequently seeking to obtain relief for the offending party's violations of our federal and state unlawful debt collection laws. Such a result is untenable. I can also assure you that certain creditors and debt collectors, among others, *will* use this rule as a sword, rather than the shield for which it is intended.

We also have legitimate concerns about the constitutionality of this proposed rule, given its ambiguity, overbreadth, and "streamlined" process provisions. In our view, this proposed rule would significantly impinge on the right to seek redress in our courts and would violate due process. And it is not hyperbole to believe that it will have a much more dramatic and negative effect on our most vulnerable citizens, as opposed to those with substantial resources. We understand there may be a problem with truly "vexatious" litigants in some of our courts. However, there are certainly more narrowly tailored potential, and currently available, tools and solutions to address this problem, than this overly broad, constitutionally unsound proposed rule. In other words, we should not be using a sledgehammer to crack a nut. Doing so will almost surely result in unintended consequences and harm.

For these reasons, I respectfully urge that the Council to reject adoption of the proposed ORCP 35 "vexatious litigant" rule and go back to the drawing board—if a new rule is indeed necessary. Thank you for your time and consideration.

Best regards,

Kelly D. Jones, OSB No. 074217

Shari Nilsson <nilsson@lclark.edu>

# Opposition to COCP Proposed Vexatious Litigant Rule - ORCP 35

1 message

**Chris Larsen** <chris@pdm.legal> Tue, Dec 6, 2022 at 1:58 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Members of the Council on Court Procedures,

I am a trial lawyer and former Judge Pro Tem for Multnomah County where I worked full time for 6 years in civil and criminal courts. I write to express my opposition to the proposed ORCP 35.

I am concerned that proposed ORCP 35 may be unfairly used to prevent particularly vulnerable persons from accessing our civil justice system. Having seen first-hand certain collection agencies act in bad faith pursuing debt collection in small claims court, the proposed changes could easily be used unfairly against unrepresented debtors. Other persons, such as incarcerated persons or person with mental disabilities, could also be easy targets under the proposed rule.

The courts already have existing authority to deem litigant as "vexatious" in appropriate cases. *See Alderman v. Tillamook Cty*., 50 Or 48, 54, 91 P 298 (1907); *Wolfe Investments, Inc. v. Shoyer*, 240 Or 549, 402 P2d 516 (1965) (defining vexatious proceeding); *Molsky v. Evergreen Dynasty Corp.,* 500 F.3d 1047 (9th Cir. 2007); *see also Schnitzer v. Stein*, 96 Or 343, 189 P 984 (1920) (courts have inherent authority to make rules and issue orders to methodically dispose of cases). Circuit courts in Oregon have invoked that authority in some cases. *See* Order Declaring Plaintiff a Vexatious Litigant, *Woodroffe v. State of Oregon*, 15CV1047 (Malheur Cty. June 2, 2015). In addition to that inherent authority, ORCP 17 requires a party signing a document to certify that the document is not being filed for any improper purpose and allows sanctions for improper filings. ORCP 17 further provides sanctions that could be applied to either plaintiffs or defendants for vexatious filings.

Thank you for your consideration and your important work.

Best regards,

**Christopher A. Larsen | Attorney | Of Counsel**

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Email | Web

PIUCCI LAW
TRIAL LAWYERS

November 30, 2022

***SENT VIA EMAIL AND USPS***

Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu

Dear Mr. Peterson and Ms. Nilsson:

Please accept this letter in support of my objection to the proposed "vexatious litigants Rule 35. I understand that certain players (judges, litigators) have raised this issue but wonder why they haven't sought to employ ORCP 17 with respect to the problems they seek to address with this proposed rule. As well, there are state and federal cases which uphold courts authority to make rules and issue orders. As an example, in Woodroffe v. State of Oregon 15CV1047 (Malheur County June 2, 2015) the court did declare plaintiff to be a vexatious litigant.

I have been practicing plaintiff's personal injury litigation for 40 years. I was President of the Oregon State Bar (2011) and the Oregon Trial Lawyers Association (2000-2001). In these roles and as a plaintiff's lawyer I am well aware of the many roadblocks that people, especially low income and other marginalized Oregonians must overcome under the rules and systems already in place. I think the proposed rule will, if implemented, be just another tool to weaponize the powerful against the less powerful. For example, should a debtor have a default judgment taken against her, should she seek to pursue remedies against the creditor, or debt collector for unlawful debt collection practices she may be subject to penalty under the proposed rule. I'm sure there are many other situations that will in practice, be unjust.

Moreover, this sounds unconstitutional, as the right to seek redress of grievances is fundamental. As well, First Amendment issues are sure to arise. The proposed rule threatens the basic rights of people who will be forced into a separate filing system once deemed "vexatious".

Finally, do our courts need another level of cases? The proposed "Vexatious Litigant's" rule will put burdens on court and staff time and will place the courts in a strange position of being the protectors of defendants against ordinary people.

//
//

PIUCCI LAW
TRIAL LAWYERS

Thank you for your consideration.

Sincerely,

Stephen V. Piucci
steve@piucci.com

Shari Nilsson <nilsson@lclark.edu>

# Comment regarding proposed amendment to ORCP 35 - Vexatious Litigant

**Julene Quinn** <julene.m.quinn@gmail.com> Tue, Nov 22, 2022 at 8:31 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I have several concerns about the proposed amendments to ORCP 35 regarding vexatious litigants. I mostly handle appellate law, and this is an important perspective.

Often, it takes multiple cases before an issue satisfactorily presents itself for an appellate court to consider it. Even more so, it takes numerous appellate decisions before the Oregon Supreme Court will grant review in order to address an issue. And, even then, often an issue is so important it takes multiple decisions from the Supreme Court to flesh out the legal framework on that issue. Such multiple cases after the first "finally decided" case would qualify a party as a vexatious litigant when one of the purposes of the litigation is to obtain a satisfactory decision from appellate courts.

Another concern (objection) I have for my clients is that a vexatious litigant is declared when another state so determines. I do not think that Oregon should cede its control over its own courts to other jurisdictions. Having practiced in more than one jurisdiction, I am pleased with the openness of Oregon courts (particularly the appellate courts) as compared to other places. Oregon is significantly different than other jurisdictions. Listing other states for a comparison would not serve, but the committee can determine on its own why it lives in Oregon and the differences in Oregon that it appreciates. Adopting other states' or federal perspectives on who is a vexatious litigant simply on their say-so is not an appropriate delegation of authority, legally or socially.

The next concern I have is that I represent vulnerable people often against strong and moneyed institutions. They weaponize statutes, litigation, appeals, motions, discovery, etc. Any right given in rules is used to create more, useless hurdles before a party can just get to the merits of an issue. Frankly, it is more waste of time and resources than just litigating the merits. The hurdles serve to prevent the determination of liability, not resolve it. This proposed rule provides yet one more hurdle against smaller parties to prevent access to justice.

I am also concerned about the breadth of the definition. It includes relitigating a question of law. Given the difficulty in getting a case to the Supreme Court on an issue of law, this rule prevents or chills a party's attempt to litigate a question of law to the Supreme Court. I'm not sure that, by court rule, this body has the constitutional or statutory authority to prevent, chill, limit multiple attempts to litigate a question of law up to the appellate courts. If this body has that authority, it certainly should not be exercising its authority in a manner to limit access to courts – a hallmark of our constitutional society.

The rule also prevents further determination of issues that might be concluded in one decision, but not decided. The language is so sweeping – "cause of action, claim, controversy, or any of the issues of fact or law determined or concluded." Essentially, it labels as vexatious a litigant who attempts to file one more action possibly covered by a first action – that is, *one* strike and you are out. The rule is so broad it has no tolerance. This is a very scary and dangerous rule.

The need for such a rule is not clear. The courts have contempt powers and other constitutional and statutory authority that allow initial review of actions filed. Motion practice can easily ferret out ill-filed claims. Branding a party with a V, for vexatious litigant, smacks of an intolerant society. Justice is so important as a determiner of rights that it cannot be compromised. The alternative is obtaining "justice" outside of the courts, and that vigilantism is not a step towards civility.

Thank you for considering my comments.

*~Julene Quinn*
Julene M. Quinn, Attorney at Law
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Shari Nilsson <nilsson@lclark.edu>

# opposition/concern regarding proposed ORCP 35

**Steve Seal** <steve@steveseallaw.com> Tue, Nov 22, 2022 at 9:02 PM
To: ccp@lclark.edu

Good morning,
thank you for considering the following.

I am concerned that the proposed rule will be deemed unconstitutional if it is ever reviewed by the Oregon Supreme Court because it lacks constitutionally acceptable procedural safeguards. Courts and litigants should instead rely on ORS Chapter 33's provisions regarding contempt.

Best regards,
Steve Seal
OSB 085384

--
Steve Seal
(he/him)
***Please Note Our New Address Effective July 5***
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December 2, 2022

Council on Court Procedures
c/o Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR 97219
Via: ccp@lclark.edu

**Regarding: Proposed Rule ORCP 35 (2022) Vexatious Litigants**

Dear Members of the Oregon Council on Court Procedures,

Thank you for the opportunity to comment on the proposed new ORCP 35 rule to create a process for designating certain individuals as "vexatious litigants" if they take specific actions with respect to filings in Oregon state court.

Oregon Consumer Justice (OCJ) advances a consumer marketplace that puts people first, assures that every financial and business transaction is fair and safe, and ensures that consumers have recourse to exercise their rights. OCJ advances the rights of consumers through advocacy, strategic litigation, research, education, and engagement and works to bring consumer justice into balance for all Oregonians with a focus on BIPOC communities and other groups most harmed by predatory practices.

OCJ has serious concerns about the impact the proposed new ORCP 35 rule could have on consumer access to justice. We believe there is already existing authority to address instances of vexatious filing, and as proposed, the rule conflicts with Oregon's state Constitution.

In particular, we are raising concerns about

1. The potential impact on consumers who seek to challenge a default judgment in a debt collection case under the proposed definition of a vexatious litigant,

2. The additional barrier to access to justice through the proposed security requirement,
3. The creation of a new fee-shifting provision, and
4. The constitutionality of the proposed rule.

**Vexatious Litigant Definition**

We are very concerned that the definition of vexatious litigant as proposed could include a consumer who seeks to challenge a default judgment entered in a debt collection case. In our Community Listening Sessions, Oregon Consumer Justice heard from many community members about barriers they faced in the struggle to achieve justice. Too many collection cases result in default judgments because consumers never receive the notice of the case, so they don't know how to engage until after the default judgment is entered. In cases where a consumer seeks to challenge that judgment, the additional barriers created by the vexatious litigant definition would add insult to injury. A recent report from the National Consumer Law Center (NCLC) *Evaluating Regulation F: A Six-month Check-up on New Federal Debt Collection Regulations* documents the power imbalances that benefit debt collectors over consumers and which the proposed ORCP 35 rule would perpetuate. NCLC found that debt collectors continue to sue and threaten to sue on time-barred debts, although this was prohibited by Regulation F. These are the types of cases where consumers will be negatively impacted by the proposed ORCP 35.

There are other circumstances where consumers seeking justice would also be included in the proposed definition, including, for example, tenants who may seek to relitigate habitability because of additional harm discovered from earlier water damage.

Significantly, consumers with the fewest financial resources who, as a result, are unable to obtain counsel and must proceed pro se, would be highly vulnerable to coming under this rule, not because they act with malicious or "vexatious" intent, but rather because the complexity of this rule may not be understood.

In addition to consumers, ORCP 35, as proposed, could also be used against incarcerated and formerly incarcerated individuals and people living with mental

health disabilities. These populations already face difficulties accessing our court systems because of systemic barriers created not only in our courts, but in our prisons, health care and many other settings, and the proposed ORCP 35 would only add to those existing barriers.

**Security Requirement**

The requirement that an individual deemed a "vexatious litigant" post a security deposit to proceed raises serious concerns about equity and constitutionality. This requirement amounts to a "pay-to-play" rule under which a litigant's ability to proceed in court may be determined entirely by their financial resources.

One participant in our listening sessions shared with the group, "Sin dinero, no hay justicia (Without money, there is no justice)." The security requirement in the proposed amendment is yet another barrier for low-income Oregonians to access justice. We are particularly concerned that this would apply to small claims court. Given the existing power imbalance between consumers and debt collectors, the additional possibility of a security requirement for consumer litigants is very concerning, particularly since there is no penalty for vexatious defense tactics.

Further, the U.S. Supreme Court and other federal and state courts have been clear that the government may not discriminate against individuals on account of their poverty by conditioning their ability to access justice on their ability to pay. Yet the security deposit requirement does just that.

**Fee Shifting**

Given the broad definition and the likelihood of consumers being defined as vexatious litigants, we are concerned about the implications of the fee-shifting provision within the security requirement and the impact it would have on access to justice.

**Existing Authority**

Oregon state and federal courts already have the inherent authority to deem litigants as "vexatious" in appropriate circumstances. *See Alderman v. Tillamook Cty.*, 50 Or 48, 54, 91 P 298 (1907); *Wolfe Investments, Inc. v. Shoyer*, 240 Or 549, 402 P2d 516 (1965) (defining vexatious proceeding); *Molsky v. Evergreen Dynasty Corp.,*

500 F.3d 1047 (9th Cir. 2007); *see also Schnitzer v. Stein*, 96 Or 343, 189 P 984 (1920) (courts have inherent authority to make rules and issue orders to dispose of cases methodically). Circuit courts in Oregon have invoked that authority in some cases. *See* Order Declaring Plaintiff a Vexatious Litigant, *Woodroffe v. State of Oregon*, 15CV1047 (Malheur Cty. June 2, 2015). In addition to that inherent authority, ORCP 17 requires a party signing a document to certify that the document is not being filed for any improper purpose and allows sanctions for improper filings. ORCP 17 further provides sanctions that could be applied to either plaintiffs or defendants for vexatious filings.

**Constitutionality**

The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under Article I, section 10, of the Oregon Constitution, and the First Amendment of the United States Constitution. The proposed ORCP 35 threatens these basic rights, deeming and stigmatizing a class of people as "vexatious" and forcing them into a filing system separate from other litigants. The security deposit requirement linking access to justice to someone's ability to pay also adds constitutional questions. The rule as proposed appears in conflict with constitutional rights.

Thank you for this opportunity to provide feedback on the proposed ORCP 35. We urge you to reconsider the proposed rule ORCP 35 and explore options under existing authority to address current problems.

Sincerely,

Robert Le
Legal Director

Shari Nilsson <nilsson@lclark.edu>

# Concerns with proposed ORCP 35 from L&C alumna

**Alana G I Simmons** <alana@safe-harbor-law.com> Wed, Nov 23, 2022 at 8:45 AM
To: ccp@lclark.edu

Hello there –

I wanted to join other trial attorneys in expressing my concerns regarding the proposed new ORCP 35 as it will really negatively impact access to justice in OR and will likely target/impact members of minority groups and other disadvantaged groups in Oregon.

I borrow various notes from a colleague, but I wholeheartedly agree with her summation below. Please do not push forward this rule change. It will have a drastically negative affect.

The rule defines the phrase "vexatious litigant" too broadly and provides several avenues for deeming someone "vexatious" either at the initiation or during the pendency of a proceeding. Either way, if someone is deemed "vexatious," they can no longer file complaints/petitions without leave of court, must post a security deposit to do so, and can very quickly have their cases dismissed.

This rule gives rise to several problems, many of which will impact my clients, others of which will generally impact the integrity of the judicial system and only increase the number of obstacles to access that already exist. It surely will be weaponized against individuals who already face barriers to accessing the justice system.

1. Constitutionality: The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under Article I, section 10, of the Oregon Constitution, and the First Amendment of the United States Constitution. The proposed ORCP 35 threatens these basic rights, deeming (and stigmatizing) a class of people as “vexatious” and forcing them into a filing system separate from other litigants. This is probably unconstitutional, and it adds burdens on court staff, positioning the courts as protectors of defendants.

2. Contrary to Law/Process: As proposed, ORCP 35 also allows trial courts to deem individuals in pending cases as “vexatious” without first making findings to that effect; caselaw from other jurisdictions allowing entry of trial court orders deeming individual litigants “vexatious” in certain circumstances require such findings before individuals may be precluded from filing claims. *SeeWhatcom County v. Kane,*31 Wn. App. 250, 640 P.2d 1075 (1981) (injunction prohibiting party from filing pleadings without court’s permission must be supported by reasons); *Molsky v. Evergreen Dynasty Corp.*,500 F.3d 1047 (9th Cir. 2007) (court enjoining pro se litigant from filing anything without first obtaining

permission of the court must create an adequate record for review and enter findings of harassment or frivolousness).

3. Weaponization Against Vulnerable Communities and Litigants: Proposed ORCP 35 will certainly be weaponized against certain already vulnerable populations, including debtors, incarcerated people, and people with mental health disabilities. These populations already face difficulties effectively accessing our court system.

To be sure, the definitions in and process set forth under ORCP 35A could be applied to plaintiffs or defendants. But the penalty is to restrict the "vexatious litigant" from *filing* actions; there is no penalty (or corresponding remedy to the opposing party) for vexatious defense tactics.

Proposed ORCP 35 is likely to be used to harm my clients if they take certain positions in litigation or other proceeding, do not prevail, but later seek redress by other means. For instance, debtors who may have default judgments against them in collection actions, who later seek to pursue remedies against the creditor or debt collector for unlawful or unfair debt collection practices, fall within the definition of "vexatious litigants" and thus would be subject to penalty. Creditors or debt collectors will not hesitate to weaponize proposed ORCP 35 if it becomes law. (Note that members of the COCP disagree—they refuse to believe that litigants and attorneys are likely to use the proposed rule in a harmful way. COCP needs to take off their rose-colored glasses and understand that this absolutely will be used as a weapon in litigation for ill-purposes.)

4. Existing Authority: Oregon state and federal courts already have the inherent authority to deem litigants as "vexatious" in appropriate circumstances. *See Alderman v. Tillamook Cty.*, 50 Or 48, 54, 91 P 298 (1907); *Wolfe Investments, Inc. v. Shoyer*, 240 Or 549, 402 P2d 516 (1965) (defining vexatious proceeding); *Molsky v. Evergreen Dynasty Corp.*,500 F.3d 1047 (9th Cir. 2007); *see also Schnitzer v. Stein*, 96 Or 343, 189 P 984 (1920) (courts have inherent authority to make rules and issue orders to methodically dispose of cases). Circuit courts in Oregon have invoked that authority in some cases. *See*Order Declaring Plaintiff a Vexatious Litigant,*Woodroffe v. State of Oregon*, 15CV1047 (Malheur Cty. June 2, 2015). In addition to that inherent authority, ORCP 17 requires a party signing a document to certify that the document is not being filed for any improper purpose and allows sanctions for improper filings. ORCP 17 further provides sanctions that could be applied to either plaintiffs or defendants for vexatious filings.

In other words, the ORCPs and the courts already have the authority they need to manage vexatious litigation. Nonetheless, proposed ORCP 35 creates an entire court structure only to filter what actions may or may not be initiated, only inviting defendants, corporate parties, or other entities to use the rule to take advantage of and harm individuals. And, by imposing additional prefiling requirements and procedures on trial court administrators, and security deposit requirements on individuals already trying to make ends meet, the

rule only creates additional burdens those who may have meritorious claims for relief and courts needing to adjudicate those claims.

I appreciate your time and consideration.

Sincerely,

**Alana G. I. Simmons**

*Attorney at Law*

*Class of 2014 at Lewis & Clark Law School*

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# Proposed ORCP 35

1 message

**Matt Sutton** <ms@matthewsuttonlaw.com> Tue, Nov 29, 2022 at 2:54 PM
To: ccp@lclark.edu

Good Morning:

I am an Oregon consumer protection attorney who has been in practice since 1992. I am writing to express my concerns about this proposed rule.

I represented consumers who at times are involved in multiple lawsuits. It is common for us to file claims and counterclaims in State and Federal Court to protect them from unlawful collection activities. I have clients who have been sued multiple times by collection agencies or other creditors. Their efforts to defend against these action are frequently unsuccessful, thereby requiring follow up litigation. I am concerned that this new rule imposes unnecessary and burdensome new requirements that may make it more difficult to protect consumers with otherwise proper litigation. Here are a few of the concerns:

1. **Constitutionality:** The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under Article I, section 10, of the Oregon Constitution, and the First Amendment of the United States Constitution. The proposed ORCP 35 threatens these basic rights, deeming (and stigmatizing) a class of people as "vexatious" and forcing them into a filing system separate from other litigants. This is probably unconstitutional, and it adds burdens on court staff, positioning the courts as protectors of defendants.

2. **Contrary to Law/Process:** As proposed, ORCP 35 also allows trial courts to deem individuals in pending cases as "vexatious" without first making findings to that effect; caselaw from other jurisdictions allowing entry of trial court orders deeming individual litigants "vexatious" in certain circumstances require such findings before individuals may be precluded from filing claims. *See Whatcom County v. Kane,* 31 Wn. App. 250, 640 P.2d 1075 (1981) (injunction prohibiting party from filing pleadings without court's permission must be supported by reasons); *Molsky v. Evergreen Dynasty Corp.,* 500 F.3d 1047 (9th Cir. 2007) (court enjoining pro se litigant from filing anything without first obtaining permission of the court must create an adequate record for review and enter findings of harassment or frivolousness).

3. **Weaponization Against Vulnerable Communities and Litigants:** Proposed ORCP 35 will certainly be weaponized against certain already vulnerable populations, including debtors, incarcerated people, and people with mental health disabilities. These populations already face difficulties effectively accessing our court system.

To be sure, the definitions in and process set forth under ORCP 35A could be applied to plaintiffs or defendants. But the penalty is to restrict the "vexatious litigant" from *filing* actions; there is no penalty (or corresponding remedy to the opposing party) for vexatious defense tactics.

Proposed ORCP 35 is likely be used to harm your clients if they take certain positions in litigation or other proceeding, do not prevail, but later seek redress by other means. For instance, debtors who may have default judgments against them in collection actions, who later seek to pursue remedies against the creditor or debt collector for unlawful or unfair debt collection practices, fall within the definition of "vexatious litigants" and thus would be subject to penalty. Creditors or debt collectors will not hesitate to weaponize proposed ORCP 35 if it becomes law. (Note that members of the COCP disagree—they refuse to believe that litigants and attorneys are likely to use the proposed rule in a harmful way.)

4. **Existing Authority:** Oregon state and federal courts already have the inherent authority to deem litigants as "vexatious" in appropriate circumstances. *See Alderman v. Tillamook Cty*., 50 Or 48, 54, 91 P 298 (1907); *Wolfe Investments, Inc. v. Shoyer*, 240 Or 549, 402 P2d 516 (1965) (defining vexatious proceeding); *Molsky v. Evergreen Dynasty Corp.,* 500 F.3d 1047 (9th Cir. 2007); *see also Schnitzer v. Stein*, 96 Or 343, 189 P 984 (1920) (courts have inherent authority to make rules and issue orders to methodically dispose of cases). Circuit courts in Oregon have invoked that authority in some cases. *See* Order Declaring Plaintiff a Vexatious Litigant, *Woodroffe v. State of Oregon*, 15CV1047 (Malheur Cty. June 2, 2015). In addition to that inherent authority, ORCP 17 requires a party signing a document to certify that the document is not being filed for any improper purpose and allows sanctions for improper filings. ORCP 17 further provides sanctions that could be applied to either plaintiffs or defendants for vexatious filings.

In other words, the ORCPs and the courts already have the authority they need to manage vexatious litigation. Nonetheless, proposed ORCP 35 creates an entire court structure only to filter what actions may or may not be initiated, only inviting defendants, corporate parties, or other entities to use the rule to take advantage of and harm individuals. And, by imposing additional prefiling requirements and procedures on trial court administrators, and security deposit requirements on individuals already trying to make ends meet, the rule only creates additional burdens those who may have meritorious claims for relief and courts needing to adjudicate those claims.

Thank you for your consideration.

Best,

Matthew Sutton

Attorney at Law

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Shari Nilsson <nilsson@lclark.edu>

# Proposed ORCP 35 - Vexatious Litigants

**Gregory Zeuthen** <gkz@zlawoffice.com> Tue, Nov 22, 2022 at 11:51 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I am writing to express my opposition to proposed ORCP 35.

The rules of civil procedure and the courts already have authority to manage vexatious litigation. See ORCP 17. See also Alderman v. Tillamook Cty., 50 Or 48, 54, 91 P 298 (1907); Wolfe Investments, Inc. v. Shoyer, 240 Or 549, 402 P2d 516 (1965) (defining vexatious proceeding); Molsky v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007). Despite this, proposed ORCP 35 creates a new structure only to filter what actions may or may not be initiated, only inviting defendants, corporate parties, or other entities to use the rule to take advantage of and harm individuals.

More fundamentally, the rule appears to violate Article I, section 10 of the Oregon constitution (right to remedy). The proposed rule is poised to be used against those marginalized individuals in our society. The penalty is to restrict the "vexatious litigant" from filing actions while there is no penalty (or corresponding remedy to the opposing party) for vexatious defense tactics.

Finally, this rule, if implemented, will put an extra workload on judges and court staff.

Let's throw out this proposed rule and use what is already available under existing case law and ORCPs. If these avenues are truly unworkable, perhaps a cleaner and less onerous version of the rule could be proposed.

**Gregory K. Zeuthen**

**Gregory K. Zeuthen, Attorney at Law, P.C.**

**210 SW Morrison Street, Suite 400**
**Portland, Oregon 97204**

**OSB 843961**

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

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

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

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

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

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

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

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

(E) Any other circumstances that constitute good cause.

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

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

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

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

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

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

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

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

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

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

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

(8) As used in this section:

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

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

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

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

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

**136.600 Certain civil procedures applicable in criminal context.** The provisions of ORS 44.150 and [*ORCP 39 B and 55 E and G*] **ORCP 39 B, 55 A(6)(d), and B(4)** apply in criminal actions, examinations and proceedings.