

AMENDMENTS

TO THE

OREGON RULES OF CIVIL PROCEDURE

promulgated by the

COUNCIL ON COURT PROCEDURES

December 11, 2010

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 2011 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2012, unless the Legislative Assembly by statute modifies the action of the Council.

The amended rules are set out with both the current and amended language. New language is shown in boldface with underlining, and language to be deleted is italicized and bracketed.

Please note that, since the time of publication of proposed rule changes on September 11, 2010, the Council made non-substantive changes to its amendments to conform to the conventions and language of the existing Oregon Rules of Civil Procedure. These non-substantive changes were made to: ORCP 38 C(2); ORCP 38 C(2)(c); ORCP 38 C(2)(c)(i); ORCP 38 C(3); ORCP 38 C(4); ORCP 38 C(6); ORCP 43 E; ORCP 69 A(2); ORCP 69 C(1)(c); ORCP 69 C(2)(a); ORCP 69 C(2)(b); ORCP 69 D; and ORCP 69 E.

During its December 11, 2010, meeting the Council, based on comments from the bench and bar and further deliberations, promulgated rules 43 and 69 with amended language to clarify what is required of the parties by the amendments. The specific sections amended are: ORCP 43 E; ORCP 69 D(1)(a); and ORCP 69 D(1)(b).

The Council held the following public meetings during the 2009-2011 biennium:

- September 12, 2009, 9:30 a.m., Oregon State Bar
- October 10, 2009, 9:30 a.m., Oregon State Bar
- November 21, 2009, 9:30 a.m., Oregon State Bar
- January 9, 2010, 9:30 a.m., LaSells Stewart Center, OSU, Corvallis
- February 6, 2010, 9:30 a.m., Oregon State Bar
- March 13, 2010, 9:30 a.m., Oregon State Bar
- April 10, 2010, 9:30 a.m., Francis Hansen & Martin LLP, Bend
- May 8, 2010, 9:30 a.m., Oregon State Bar
- June 5, 2010, 9:30 a.m., Oregon State Bar
- September 11, 2010, 9:30 a.m., Oregon State Bar
- December 11, 2010, 9:30 a.m., Oregon State Bar

The Council expresses its appreciation to the bench and the bar for the comments and suggestions it has received.

**PROMULGATED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE**

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

2 **RULE 9**

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

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

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

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

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

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

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

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

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

1 **DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION**
2 **FOR JUDGMENT ON THE PLEADINGS**

3 **RULE 21**

4 **A How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a
5 complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading
6 thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss:
7 (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is
8 another action pending between the same parties for the same cause, (4) that plaintiff has not the legal
9 capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or
10 process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party
11 under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading
12 shows that the action has not been commenced within the time limited by statute. A motion to dismiss
13 making any of these defenses shall be made before pleading if a further pleading is permitted. The
14 grounds upon which any of the enumerated defenses are based shall be stated specifically and with
15 particularity in the responsive pleading or motion. No defense or objection is waived by being joined with
16 one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss
17 asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the
18 pleading and matters outside the pleading, including affidavits, declarations and other evidence, are
19 presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations
20 and other evidence, and the court may determine the existence or nonexistence of the facts supporting
21 such defense or may defer such determination until further discovery or until trial on the merits. If the
22 court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave
23 to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the
24 court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment
25 [*pursuant to subsection B(3) of Rule 54*].

26 * * * * *

1 **GENERAL PROVISIONS GOVERNING DISCOVERY**

2 **RULE 36**

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

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

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

16 **B(2) Insurance agreements or policies.**

17 B(2)(a) A party, upon the request of an adverse party, shall disclose:

18 **B(2)(a)(i)** the existence and contents of any insurance agreement or policy under which a
19 person transacting insurance may be liable to satisfy part or all of a judgment which may be
20 entered in the action or to indemnify or reimburse for payments made to satisfy the judgment[.];

21 **and**

22 **B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify**
23 **the provisions in any insurance agreement or policy upon which such coverage denial or**
24 **reservation of rights is based.**

25 B(2)(b) The obligation to disclose under this subsection shall be performed as soon as
26 practicable following the filing of the complaint and the request to disclose. The court may

1 supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and
2 expeditiously. However, the court may limit the extent of disclosure under this subsection as
3 provided in section C of this rule.

4 B(2)(c) Information concerning the insurance agreement or policy is not by reason of
5 disclosure admissible in evidence at trial. For purposes of this subsection, an application for
6 insurance shall not be treated as part of an insurance agreement or policy.

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

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

19 A party may obtain, without the required showing, a statement concerning the action or
20 its subject matter previously made by that party. Upon request, a person who is not a party may
21 obtain, without the required showing, a statement concerning the action or its subject matter
22 previously made by that person. If the request is refused, the person or party requesting the
23 statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of
24 expenses incurred in relation to the motion. For purposes of this subsection, a statement
25 previously made is (a) a written statement signed or otherwise adopted or approved by the
26 person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a

1 transcription thereof, which is a substantially verbatim recital of an oral statement by the person
2 making it and contemporaneously recorded.

3 **C Court order limiting extent of disclosure.** Upon motion by a party or by the person
4 from whom discovery is sought, and for good cause shown, the court in which the action is
5 pending may make any order which justice requires to protect a party or person from annoyance,
6 embarrassment, oppression, or undue burden or expense, including one or more of the following:
7 (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and
8 conditions, including a designation of the time or place; (3) that the discovery may be had only
9 by a method of discovery other than that selected by the party seeking discovery; (4) that certain
10 matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5)
11 that discovery be conducted with no one present except persons designated by the court; (6) that
12 a deposition after being sealed be opened only by order of the court; (7) that a trade secret or
13 other confidential research, development, or commercial information not be disclosed or be
14 disclosed only in a designated way; (8) that the parties simultaneously file specified documents
15 or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to
16 prevent hardship the party requesting discovery pay to the other party reasonable expenses
17 incurred in attending the deposition or otherwise responding to the request for discovery.

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

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

3 **RULE 38**

4 **A Within Oregon.**

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

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

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

1 depositions taken within the United States under these rules.

2 **C Foreign depositions and subpoenas.**

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

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

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

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

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

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

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

20 **C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in**
21 **this state, the clerk, in accordance with that court’s procedure and requirements, shall**
22 **assign a case number and promptly issue a subpoena for service upon the person to whom**
23 **the foreign subpoena is directed. If a party to an out-of-state proceeding retains an**
24 **attorney licensed to practice in this state, that attorney may assist the clerk in drafting the**
25 **subpoena.**

1 C(2)(c) A subpoena under this subsection shall:

2 (i) conform to the requirements of these Oregon Rules of Civil Procedure, including
3 Rule 55, and conform substantially to the form provided in Rule 55 A but may otherwise
4 incorporate the terms used in the foreign subpoena as long as those terms conform to these
5 rules; and

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

9 C(3) Service of subpoena. A subpoena issued by a clerk of court
10 under subsection (2) of this rule shall be served in compliance with Rule 55.

11 C(4) Effects of request for subpoena. A request for issuance of a subpoena under
12 this rule does not constitute an appearance in the court. A request does allow the court to
13 impose sanctions for any action in connection with the subpoena that is a violation of
14 applicable law.

15 C(5) Motions. A motion to the court, or a response thereto, for a protective order or
16 to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this rule is
17 an appearance before the court and shall comply with the rules and statutes of this state.
18 The motion shall be submitted to the court in the county in which discovery is to be
19 conducted.

20 C(6) Uniformity of application and construction. In applying and construing this
21 rule, consideration shall be given to the need to promote the uniformity of the law with
22 respect to its subject matter among states that enact it.

1 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**
2 **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

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

16 **B Procedure.**

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

23 B(2) A request shall not require a defendant to produce or allow inspection, copying,
24 entry, or other related acts before the expiration of 45 days after service of summons, unless the
25 court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance
26 with subsection B(1) of this rule, or such other time as the court may order or the parties may

1 agree upon in writing, a party shall serve a response that includes the following:

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

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

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

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

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

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

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

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

25 **D Persons not parties.** A person not a party to the action may be compelled to produce
26 books, papers, documents, or tangible things and to submit to an inspection thereof as provided

1 in Rule 55. This rule does not preclude an independent action against a person not a party for
2 permission to enter upon land.

3 **E Electronically stored information.**

4 **A request for electronically stored information may specify the form in which the**
5 **information is to be produced by the responding party but, if no such specification is made,**
6 **the responding party must produce the information in either the form in which it is**
7 **ordinarily maintained or in a reasonably useful form.**

1 **DISMISSAL OF ACTIONS; COMPROMISE**

2 **RULE 54**

3 **A Voluntary dismissal; effect thereof.**

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

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

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

1 **B Involuntary dismissal.**

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

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

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

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

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

1 **D Costs of previously dismissed action.**

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

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

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

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

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

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

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

1 **DEFAULT ORDERS AND JUDGMENTS**

2 **RULE 69**

3 **A [Entry of order of default.] In general.**

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

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

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

14 [*If the party against whom an order of default is sought has filed an appearance in the action, or*
15 *has provided written notice of intent to file an appearance to the party seeking an order of*
16 *default, notice, in the form prescribed by Uniform Trial Court Rule 2.010, of the intent to apply*
17 *for an order of default must be filed and served upon the party against whom an order of default*
18 *is sought at least 10 days, unless shortened by the court, prior to entry of the order of default.*
19 *These facts, along with the fact that the party against whom the order of default is sought has*
20 *failed to plead or otherwise defend as provided in these rules, shall be made to appear by*
21 *affidavit, declaration, or otherwise and, upon such a showing, the clerk or the court shall enter*
22 *the order of default.*

23 A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no
24 default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i)
25 unless the plaintiff submits an affidavit or a declaration showing:

26 A(2)(a) that the plaintiff has complied with Rule 7 D(4)(a)(i); and

1 A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff
2 or could be determined from any records of the Department of Transportation accessible to the
3 plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy
4 of the summons and the complaint, together with notice of intent to apply for an order of default,
5 to the insurance carrier by first class mail and by any of the following: certified, registered, or
6 express mail with return receipt requested; or that the identity of the defendant's insurance
7 carrier is unknown to the plaintiff.]

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

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

11 **B(2) If the party against whom an order of default is sought has filed an**
12 **appearance in the action, or has provided written notice of intent to file an appearance,**
13 **then notice of the intent to apply for an order of default must be filed and served at least 10**
14 **days, unless shortened by the court, prior to applying for the order of default. The notice**
15 **of intent to apply for an order of default must be in the form prescribed by Uniform Trial**
16 **Court Rule 2.010 and must be filed with the court and served on the party against whom**
17 **an order of default is sought.**

18 [B Entry of judgment by default.

19 B(1) By the court or the clerk. The court or the clerk upon written application of the
20 party seeking judgment shall enter judgment when:

21 B(1)(a) The action arises upon contract;

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

24 B(1)(c) The party against whom judgment is sought has been defaulted for failure to
25 appear;

26 B(1)(d) The party seeking judgment submits an affidavit or a declaration stating that, to

1 *the best knowledge and belief of the party seeking judgment, the party against whom judgment is*
2 *sought is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in*
3 *ORS 125.005, or a respondent as defined in ORS 125.005;*

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

6 *B(1)(f) An affidavit or a declaration pursuant to subsection B(4) of this rule has been*
7 *submitted; and*

8 *B(1)(g) Summons was personally served within the State of Oregon upon the party, or an*
9 *agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule*
10 *7 D(3)(a)(i), 7 D(3)(b)(i), 7 D(3)(c)(i), 7 D(3)(d)(i), 7 D(3)(e), or 7 D(3)(f).*

11 *B(2) By the court. In cases other than those cases described in subsection (1) of this*
12 *section, the party seeking judgment must apply to the court for judgment by default. The party*
13 *seeking judgment must submit the affidavit or declaration required by subsection (1)(d) of this*
14 *section if, to the best knowledge and belief of the party seeking judgment, the party against*
15 *whom judgment is sought is not incapacitated as defined in ORS 125.005, a minor, a protected*
16 *person as defined in ORS 125.005, or a respondent as defined in ORS 125.005. If the party*
17 *seeking judgment cannot submit an affidavit or a declaration under this subsection, a default*
18 *judgment may be entered against the other party only if a guardian ad litem has been appointed*
19 *or the party is represented by another person as described in Rule 27. If, in order to enable the*
20 *court to enter judgment or to carry it into effect, it is necessary to take an account or to*
21 *determine the amount of damages or to establish the truth of any averment by evidence or to*
22 *make an investigation of any other matter, the court may conduct such hearing, or make an*
23 *order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The*
24 *court may determine the truth of any matter upon affidavits or declarations.*

25 *B(3) Amount of judgment. The judgment entered shall be for the amount due as shown by*
26 *the affidavit or declaration, and may include costs and disbursements and attorney fees entered*

1 pursuant to Rule 68.

2 *B(4) Non-military affidavit or declaration required. No judgment by default shall be*
3 *entered until the filing of an affidavit or a declaration on behalf of the plaintiff, showing that the*
4 *defendant is or is not a person in the military service, or stating that plaintiff is unable to*
5 *determine whether or not the defendant is in the military service as required by Section*
6 *201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended, except*
7 *upon order of the court in accordance with that Act.]*

8 **C Motion for order of default.**

9 **C(1) The party seeking default must file a motion for order of default. That motion**
10 **must be accompanied by an affidavit or declaration to support that default is appropriate**
11 **and contain facts sufficient to establish the following:**

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

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

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

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

25 **C(1)(e) whether the party against whom the order is sought is or is not a person in**
26 **the military service, or stating that the movant is unable to determine whether or not the**

1 party against whom the order is sought is in the military service as required by Section
2 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 521, as amended.

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

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

10 C(2)(b) is a person in the military service, an order of default may be entered
11 against the party against whom the order is sought only in accordance with the
12 Servicemembers Civil Relief Act.

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

16 *[C Setting aside default. For good cause shown, the court may set aside an order of*
17 *default and, if a judgment by default has been entered, may likewise set it aside in accordance*
18 *with Rule 71 B and C.*

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

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

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

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

1 **contemporaneously;**

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

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

7 **D(2) The form of judgment submitted shall comply with all applicable rules and**
8 **statutes.**

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

14 *[E “Clerk” defined. Reference to “clerk” in this rule shall include the clerk of court or*
15 *any person performing the duties of that office.]*

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

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

21 **E(2) whether the identity of the defendant's insurance carrier is known to the**
22 **plaintiff or could be determined from any records of the Department of Transportation**
23 **accessible to the plaintiff; and**

24 **E(3) if the identity of the defendant’s insurance carrier is known, that the plaintiff**
25 **not less than 30 days prior to the application for an order of default mailed a copy of the**
26 **summons and the complaint, together with notice of intent to apply for an order of default,**

1 to the insurance carrier by first class mail and by any of the following: certified, registered,
2 or express mail, return receipt requested; or that the identity of the defendant's insurance
3 carrier is unknown to the plaintiff.

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

1 **RELIEF FROM JUDGMENT OR ORDER**

2 **RULE 71**

3 **A Clerical mistakes.** Clerical mistakes in judgments, orders, or other parts of the record
4 and errors therein arising from oversight or omission may be corrected by the court at any time
5 on its own motion or on the motion of any party and after such notice to all parties who have
6 appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be
7 corrected as provided in subsection (2) of section B of this rule.

8 **B Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc.**

9 **B(1) By motion.** On motion and upon such terms as are just, the court may relieve a
10 party or such party's legal representative from a judgment for the following reasons: (a) mistake,
11 inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due
12 diligence could not have been discovered in time to move for a new trial under Rule 64 F; (c)
13 fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other
14 misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied,
15 released, or discharged, or a prior judgment upon which it is based has been reversed or
16 otherwise vacated, or it is no longer equitable that the judgment should have prospective
17 application. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion
18 under Rule 21 A which contains an assertion of a claim or defense. The motion shall be made
19 within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt of
20 notice by the moving party of the judgment. A copy of a motion filed within one year after the
21 entry of the judgment shall be served on all parties as provided in Rule 9 B, and all other motions
22 filed under this rule shall be served as provided in Rule 7. A motion under this section does not
23 affect the finality of a judgment or suspend its operation.

24 **B(2) When appeal pending.** A motion under sections A or B may be filed with and
25 decided by the trial court during the time an appeal from a judgment is pending before an
26 appellate court. The moving party shall serve a copy of the motion on the appellate court. The

1 moving party shall file a copy of the trial court's order in the appellate court within seven days of
2 the date of the trial court order. Any necessary modification of the appeal required by the court
3 order shall be pursuant to rule of the appellate court.

4 **C Relief from judgment by other means.** This rule does not limit the inherent power of
5 a court to modify a judgment within a reasonable time, or the power of a court to entertain an
6 independent action to relieve a party from a judgment, or the power of a court to grant relief to a
7 defendant under Rule 7 D(6)(f), or the power of a court to set aside a judgment for fraud upon
8 the court.

9 **D Writs and bills abolished.** Writs of coram nobis, coram vobis, audita querela, bills of
10 review, and bills in the nature of a bill of review are abolished, and the procedure for obtaining
11 any relief from a judgment shall be by motion or by an independent action.