

**2016 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.

Written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail or by e-mail to:

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The Council meeting at which the Council will 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 3, 2016

Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 3, 2016, meeting.

**2016 PROPOSED 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 that
5 may be heard ex parte; and every written request, notice, appearance, demand, offer to allow
6 judgment, designation of record on appeal, and similar document shall be served [upon] **on**
7 each of the parties. No service need be made on parties in default for failure to appear except
8 that pleadings asserting new or additional claims for relief against them shall be served [upon]
9 **on** them in the manner provided for service of summons in Rule 7.

10 **B Service; how made.** [Whenever] **Except as otherwise provided in Rule 7 or Rule 8,**
11 **whenever** under these rules service is required or permitted to be made [upon] **on** a party, and
12 that party is represented by an attorney, the service shall be made [upon] **on** the attorney
13 unless otherwise ordered by the court. Service [upon] **on** the attorney or [upon] **on** a party
14 shall be made by delivering a copy to that attorney or party; by mailing it to the attorney's or
15 party's last known address; **by e-mail as provided in section G of this rule;** by electronic service
16 as provided in section H of this rule; or, if the party is represented by an attorney, by facsimile
17 communication [or by e-mail] as provided in [sections] **section F** [or G] of this rule. Delivery of a
18 copy within this rule means: handing it to the person to be served; or leaving it at the person's
19 office with the [person's clerk or] person **who is** apparently in charge [thereof]; or, if there is no
20 one in charge, leaving the copy in a conspicuous place therein; or, if the office is closed or the
21 person to be served has no office, leaving the copy at the person's dwelling house or usual
22 place of abode with some person 14 years of age or older then residing therein. A party who
23 has appeared without providing an appropriate address for service may be served by filing [a
24 copy of] the pleading or other document with the court. Service by mail is complete [upon] **on**
25 mailing. Service of any notice or other document to bring a party into contempt may only be
26 [upon] **on** that party personally.

1 **C Filing; proof of service.** Except as provided by section D of this rule, all documents
2 required to be served [upon] **on** a party by section A of this rule shall be filed with the court
3 within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof
4 of service of all documents required or permitted to be served may be by written
5 acknowledgment of service, by affidavit or declaration of the person making service, or by
6 certificate of an attorney. Proof of service may be made [upon] **on** the document served or as a
7 separate document attached thereto.

8 **C(1) Proof of service by facsimile communication.** If service is made by facsimile
9 communication [*or by e-mail,*] **under section F of this rule,** proof of service shall be made by
10 affidavit or by declaration of the person making service, or by certificate of an attorney [*or*
11 *sheriff. If service is made by facsimile communication under section F of this rule,*] **and** the
12 person making service shall attach to the affidavit, declaration, or certificate printed
13 confirmation of receipt of the message generated by the transmitting technology.

14 **C(2) Proof of service by e-mail.** If service is made by e-mail under section G of this rule,
15 [*the person making service must certify*] **proof of service shall be made by affidavit or by**
16 **declaration of the person making service, or by certificate of an attorney, stating either that**
17 **the other party has consented to service by e-mail or** that he or she received confirmation
18 that the message **and attachment** [*was*] **were** received[, *either by return e-mail, automatically*
19 *generated message, facsimile communication, or orally; however, an*] **by the designated**
20 **recipient and specifying the method by which the sender received confirmation. An**
21 automatically generated message indicating that the recipient is out of the office or is
22 otherwise unavailable cannot support the required certification, **nor can an automatically**
23 **generated e-mail delivery status notification. Service by e-mail is effective at the time of**
24 **receipt of the message and any attachment by the designated recipient.**

25 **C(3) Proof of service by electronic service.** If service is made by electronic service
26 **under section H of this rule, proof of service shall be made by affidavit or by declaration of**

1 the person making service, or by certificate of an attorney, specifying that service was
2 completed by electronic service.

3 C(4) Proof of service on a party without a service address. Service on a party who has
4 appeared without providing an appropriate address for service shall be by affidavit or by
5 declaration of the person filing the document, or by certificate of an attorney, that service by
6 filing as provided in section B of this rule is appropriate.

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

11 **E Filing with the court defined.** The filing of pleadings and other documents with the
12 court as required by these rules shall be made by filing them with the clerk of the court or the
13 person exercising the duties of that office. The clerk or the person exercising the duties of that
14 office shall endorse [upon] on the pleading or document the time of day, the day of the month,
15 the month, and the year. The clerk or person exercising the duties of that office is not required
16 to receive for filing any document unless a caption that includes the name of the court; the
17 case number of the action, if one has been assigned; the title of the document; and the names
18 of the parties are legibly displayed on the front of the document, nor unless the contents of
19 the document are legible. Further, the clerk is not required to receive for filing any document
20 that does not include the name, address, and telephone number of the party or the attorney
21 for the party, if the party is represented.

22 **F Service by facsimile communication.** Whenever under these rules service is required
23 or permitted to be made [upon] on a party, and that party is represented by an attorney, the
24 service may be made [upon] on the attorney by means of facsimile communication if the
25 attorney has such technology available and said technology is operating at the time service is
26 made. Service in this manner shall be subject to Rule 10 [C]**B**. Facsimile communication

1 includes: a telephonic facsimile communication device; a facsimile server or other
2 computerized system capable of receiving and storing incoming facsimile communications
3 electronically and then routing them to users on paper or via e-mail; or an internet facsimile
4 service that allows users to send and receive facsimiles from their personal computers using an
5 existing e-mail account.

6 **G Service by e-mail.** *[Service by e-mail is prohibited unless attorneys agree in writing to*
7 *e-mail service.] Whenever under these rules service is required or permitted to be made on a*
8 *party, unless the party or the party's attorney is exempted from service by e-mail by an order*
9 *of the court, the service may be made by means of e-mail. Service is complete under this rule*
10 *on confirmation of receipt of the email or, if the receiving party has consented to service by*
11 *email, on transmission of the email.* *[This agreement] **Any party or any party's attorney** must*
12 *provide the [names] **name** and e-mail [addresses] **address** of [all attorneys] **that party or that***
13 ***attorney** and [the attorneys' designees,] **that attorney's designee**, if any, [to be] **on any***
14 ***document** served **by e-mail**. Any **party or** attorney who has [consented to] **communicated by***
15 *e-mail **or by electronic** service must notify the other parties in writing of any changes to [the]*
16 ***that party or that** attorney's e-mail address. [Any attorney may withdraw his or her agreement*
17 *at any time, upon proper notice via e-mail and any one of the other methods authorized by this*
18 *rule. Subject to Rule 10 C, service is effective under this method when the sender has received*
19 *confirmation that the attachment has been received by the designated recipient. Confirmation*
20 *of receipt does not include an automatically generated message that the recipient is out of the*
21 *office or is otherwise unavailable.] **Service in this manner shall be subject to Rule 10 B.***

22 **H Service by electronic service.** As used in this section, electronic service means using
23 an electronic filing system provided by the Oregon Judicial Department and in the manner
24 prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court.
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COUNTERCLAIMS, CROSS-CLAIMS, AND [THIRD PARTY] THIRD-PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as [such] **that** defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in [such] **that** defendant’s answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action, and shall be: (a) one arising out of the occurrence or transaction set forth in the complaint; or (b) related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served [upon] **on** the parties who have appeared.

C [Third party] Third-party practice.

C(1) After commencement of the action, a defending party, as a [third party] **third-party** plaintiff, may cause a summons and complaint to be served [upon] **on** a person not a party to the action who is or may be liable to the [third party] **third-party** plaintiff for all or part of the plaintiff’s claim against the [third party] **third-party** plaintiff as a matter of right not later than

1 90 days after service of the plaintiff's summons and complaint on the defending party.
2 Otherwise the *[third party]* **third-party** plaintiff must obtain agreement of parties who have
3 appeared and leave of court. The person served with the summons and *[third party]* **third-**
4 **party** complaint, hereinafter called the *[third party]* **third-party** defendant, shall assert any
5 defenses to the *[third party]* **third-party** plaintiff's claim as provided in Rule 21 and may assert
6 counterclaims against the *[third party]* **third-party** plaintiff and cross-claims against other *[third*
7 *party]* **third-party** defendants as provided in this rule. The *[third party]* **third-party** defendant
8 may assert against the plaintiff any defenses *[which]* **that** the *[third party]* **third-party** plaintiff
9 has to the plaintiff's claim. The *[third party]* **third-party** defendant may also assert any claim
10 against the plaintiff arising out of the transaction or occurrence that is the subject matter of the
11 plaintiff's claim against the *[third party]* **third-party** plaintiff. *[The plaintiff]* **Any party** may
12 assert any claim against *[the third party]* **a third-party** defendant arising out of the transaction
13 or occurrence that is the subject matter of the plaintiff's claim against the *[third party]* **third-**
14 **party** plaintiff, and the *[third party]* **third-party** defendant thereupon shall assert the *[third*
15 *party]* **third-party** defendant's defenses as provided in Rule 21 and may assert the *[third party]*
16 **third-party** defendant's counterclaims and cross-claims as provided in this rule. Any party may
17 move to strike the *[third party]* **third-party** claim, or for its severance or separate trial. A *[third*
18 *party]* **third-party defendant** may proceed under this section against any person not a party to
19 the action who is or may be liable to the *[third party]* **third-party** defendant for all or part of the
20 claim made in the action against the *[third party]* **third-party** defendant.

21 C(2) A plaintiff against whom a counterclaim has been asserted may cause a *[third*
22 *party]* **third-party defendant** to be brought in under circumstances *[which]* **that** would entitle a
23 defendant to do so under subsection C(1) of this section.

24 **D Joinder of additional parties.**

25 D(1) Persons other than those made parties to the original action may be made parties
26 to a counterclaim or cross-claim in accordance with the provisions of *[Rules 28 and 29]* **Rule 28**

1 **and Rule 29.**

2 D(2) A defendant may, in an action on a contract brought by an assignee of rights under
3 that contract, join as parties to that action all or any persons liable for attorney fees under ORS
4 20.097. As used in this subsection “contract” includes any instrument or document evidencing a
5 debt.

6 D(3) In any action against a party joined under this section of this rule, the party joined
7 shall be treated as a defendant for purposes of service of summons and time to answer under
8 Rule 7.

9 **E Separate trial.** *[Upon]* **On the** motion of any party or on the court’s own initiative, the
10 court may order a separate trial of any counterclaim, cross-claim, or *[third party]* **third-party**
11 claim so alleged if to do so would[: *(1) be more convenient; (2) avoid prejudice; or (3)*] **be more**
12 **convenient, avoid prejudice, or** be more economical and expedite the matter.

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1 **MINOR OR INCAPACITATED PARTIES**

2 **RULE 27**

3 **A Appearance of parties by guardian or conservator.** When a person who has a
4 conservator of that person’s estate or a guardian is a party to any action, the person shall
5 appear by the conservator or guardian as may be appropriate or, if the court so orders, by a
6 guardian ad litem appointed by the court in which the action is brought. The appointment of a
7 guardian ad litem shall be pursuant to this rule unless the appointment is made on the court’s
8 motion or a statute provides for a procedure that varies from the procedure specified in this
9 rule.

10 **B Appointment of guardian ad litem for minors; incapacitated or financially incapable**
11 **parties.** When a minor or a person who is incapacitated or financially incapable, as defined in
12 ORS 125.005, is a party to an action and does not have a guardian or conservator, the person
13 shall appear by a guardian ad litem appointed by the court in which the action is brought and
14 pursuant to this rule, as follows:

15 B(1) when the plaintiff or petitioner is a minor:

16 B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

17 B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of
18 the minor, or other interested person;

19 B(2) when the defendant or respondent is a minor:

20 B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within
21 the period of time specified by these rules or any other rule or statute for appearance and
22 answer after service of a summons; or

23 B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any
24 other party or of a relative or friend of the minor, or other interested person;

25 B(3) when the plaintiff or petitioner is a person who is incapacitated or financially
26 incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or

1 other interested person; or

2 B(4) when the defendant or respondent is a person who is incapacitated or is financially
3 incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or
4 other interested person, filed within the period of time specified by these rules or any other
5 rule or statute for appearance and answer after service of a summons or, if the application is
6 not so filed, upon application of any party other than the person.

7 **C Discretionary appointment of guardian ad litem for a party with a disability.** When a
8 person with a disability, as defined in ORS 124.005, is a party to an action, the person may
9 appear by a guardian ad litem appointed by the court in which the action is brought and
10 pursuant to this rule upon motion and one or more supporting affidavits or declarations
11 establishing that the appointment would assist the person in prosecuting or defending the
12 action.

13 **D Method of seeking appointment of guardian ad litem.** A person seeking
14 appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the
15 proceeding in which the guardian ad litem is sought. The motion shall be supported by one or
16 more affidavits or declarations that contain facts sufficient to prove by a preponderance of the
17 evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or
18 financially incapable, as defined in ORS 125.005, or is a person with a disability, as defined in
19 ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
20 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
21 court if an objection is received as specified in subsections F(2) or F(3) of this rule.

22 **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under
23 Section H of this rule, no later than 7 days after filing the motion for appointment of a guardian
24 ad litem, the person filing the motion must provide notice as set forth in this section, or as
25 provided in a modification of the notice requirements as set forth in Section H of this rule.
26 Notice shall be provided by mailing to the address of each person or entity listed below, by first

1 class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of
2 notice prescribed in Section F of this rule.

3 E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years
4 of age or older; to the parents of the minor; to the person or persons having custody of the
5 minor; to the person who has exercised principal responsibility for the care and custody of the
6 minor during the 60-day period before the filing of the motion; and, if the minor has no living
7 parents, to any person nominated to act as a fiduciary for the minor in a will or other written
8 instrument prepared by a parent of the minor.

9 E(2) If the party is 18 years of age or older, notice shall be given:

10 E(2)(a) to the person;

11 E(2)(b) to the spouse, parents, and adult children of the person;

12 E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or
13 persons most closely related to the person;

14 E(2)(d) to any person who is cohabiting with the person and who is interested in the
15 affairs or welfare of the person;

16 E(2)(e) to any person who has been nominated as fiduciary or appointed to act as
17 fiduciary for the person by a court of any state, any trustee for a trust established by or for the
18 person, any person appointed as a health care representative under the provisions of ORS
19 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of
20 attorney;

21 E(2)(f) if the person is receiving moneys paid or payable by the United States through
22 the Department of Veterans Affairs, to a representative of the United States Department of
23 Veterans Affairs regional office that has responsibility for the payments to the person;

24 E(2)(g) if the person is receiving moneys paid or payable for public assistance provided
25 under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a
26 representative of the Department;

1 E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided
2 under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a
3 representative of the Authority;

4 E(2)(i) if the person is committed to the legal and physical custody of the Department of
5 Corrections, to the Attorney General and the superintendent or other officer in charge of the
6 facility in which the person is confined;

7 E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

8 E(2)(k) to any other person that the court requires.

9 **F Contents of notice.** The notice shall contain:

10 F(1) the name, address, and telephone number of the person making the motion, and
11 the relationship of the person making the motion to the person for whom a guardian ad litem is
12 sought;

13 F(2) a statement indicating that objections to the appointment of the guardian ad litem
14 must be filed in the proceeding no later than 14 days from the date of the notice; and

15 F(3) a statement indicating that the person for whom the guardian ad litem is sought
16 may object in writing to the clerk of the court in which the matter is pending and stating the
17 desire to object.

18 **G Hearing.** As soon as practical after any objection is filed, the court shall hold a hearing
19 at which the court will determine the merits of the objection and make any order that is
20 appropriate.

21 **H Waiver or modification of notice.** For good cause shown, the court may waive notice
22 entirely or make any other order regarding notice that is just and proper in the circumstances.

23 **I Settlement.** Except as permitted by ORS 126.725, in cases where settlement of the
24 action will result in the receipt of property or money by a party for whom a guardian ad litem
25 was appointed under section B of this rule, court approval of any settlement must be sought
26 and obtained by a conservator unless the court, for good cause shown and on any terms that

1 | the court may require, expressly authorizes the guardian ad litem to enter into a settlement
2 | agreement.

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1 | be performed as soon as practicable following the filing of the complaint and the request to
2 | disclose. The court may supervise the exercise of disclosure to the extent necessary to insure
3 | that it proceeds properly and expeditiously. However, the court may limit the extent of
4 | disclosure under this subsection as provided in section C of this rule.

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

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

11 | **B(3) Trial preparation materials.**

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

22 | **B(3)(ii) Prior statements.** A party may obtain, without the required showing, a
23 | statement concerning the action or its subject matter previously made by that party. [*Upon*] **On**
24 | request, a person who is not a party may obtain, without the required showing, a statement
25 | concerning the action or its subject matter previously made by that person. If the request is
26 | refused, the person or party requesting the statement may move for a court order. The

1 provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For
2 purposes of this subsection, a statement previously made is [(a)] **either:** a written statement
3 signed or otherwise adopted or approved by the person making it[,]; or [(b)] a stenographic,
4 mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a
5 substantially verbatim recital of an oral statement by the person making it and
6 contemporaneously recorded.

7 **C Court order limiting extent of disclosure.**

8 **C(1) Relief available; grounds for limitation.** [*Upon*] **On** motion by a party or by the
9 person from whom discovery is sought, and for good cause shown, the court in which the
10 action is pending may make any order [*which*] **that** justice requires to protect a party or person
11 from annoyance, embarrassment, oppression, or undue burden or expense, including one or
12 more of the following: [(1)] that the discovery not be had; [(2)] that the discovery may be had
13 only on specified terms and conditions, including a designation of the time or place; [(3)] that
14 the discovery may be had only by a method of discovery other than that selected by the party
15 seeking discovery; [(4)] that certain matters not be inquired into, or that the scope of the
16 discovery be limited to certain matters; [(5)] that discovery be conducted with no one present
17 except persons designated by the court; [(6)] that a deposition after being sealed be opened
18 only by order of the court; [(7)] that a trade secret or other confidential research, development,
19 or commercial information not be disclosed or be disclosed only in a designated way; [(8)] that
20 the parties simultaneously file specified documents or information enclosed in sealed
21 envelopes to be opened as directed by the court; or [(9)] that to prevent hardship the party
22 requesting discovery pay to the other party reasonable expenses incurred in attending the
23 deposition or otherwise responding to the request for discovery. **In deciding what constitutes**
24 **an undue burden, the court shall consider, among other things, the proportionality of the**
25 **request for production to the needs of the case including the importance of the issues at**
26 **stake in the action, the amount in controversy, the parties' relative access to relevant**

1 **information, the parties' resources, the importance of the discovery, and the burden or cost**
2 **of producing the information.**

3 **C(2) Denial of motion.** If the motion for a protective order is denied in whole or in part,
4 the court may, on such terms and conditions as are just, order that any party or person provide
5 or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in
6 relation to the motion.

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1 be performed as soon as practicable following the filing of the complaint and the request to
2 disclose. The court may supervise the exercise of disclosure to the extent necessary to insure
3 that it proceeds properly and expeditiously. However, the court may limit the extent of
4 disclosure under this subsection as provided in section C of this rule.

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

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

11 **B(3) Trial preparation materials.**

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

22 **B(3)(ii) Prior statements.** A party may obtain, without the required showing, a
23 statement concerning the action or its subject matter previously made by that party. [*Upon*] **On**
24 request, a person who is not a party may obtain, without the required showing, a statement
25 concerning the action or its subject matter previously made by that person. If the request is
26 refused, the person or party requesting the statement may move for a court order. The

1 provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For
2 purposes of this subsection, a statement previously made is [(a)] **either:** a written statement
3 signed or otherwise adopted or approved by the person making it[,]; or [(b)] a stenographic,
4 mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a
5 substantially verbatim recital of an oral statement by the person making it and
6 contemporaneously recorded.

7 **C Court order limiting extent of disclosure.**

8 **C(1) Relief available; grounds for limitation.** [Upon] **On** motion by a party or by the
9 person from whom discovery is sought, and for good cause shown, the court in which the
10 action is pending may make any order [*which*] **that** justice requires to protect a party or person
11 from annoyance, embarrassment, oppression, or undue burden or expense, including one or
12 more of the following: [(1)] that the discovery not be had; [(2)] that the discovery may be had
13 only on specified terms and conditions, including a designation of the time or place; [(3)] that
14 the discovery may be had only by a method of discovery other than that selected by the party
15 seeking discovery; [(4)] that certain matters not be inquired into, or that the scope of the
16 discovery be limited to certain matters; [(5)] that discovery be conducted with no one present
17 except persons designated by the court; [(6)] that a deposition after being sealed be opened
18 only by order of the court; [(7)] that a trade secret or other confidential research, development,
19 or commercial information not be disclosed or be disclosed only in a designated way; [(8)] that
20 the parties simultaneously file specified documents or information enclosed in sealed
21 envelopes to be opened as directed by the court; or [(9)] that to prevent hardship the party
22 requesting discovery pay to the other party reasonable expenses incurred in attending the
23 deposition or otherwise responding to the request for discovery. **In deciding what constitutes**
24 **an undue burden, the court may consider, among other things, the proportionality of the**
25 **request for production to the needs of the case including the importance of the issues at**
26 **stake in the action, the amount in controversy, the parties' relative access to relevant**

1 **information, the parties' resources, the importance of the discovery, and the burden or cost**
2 **of producing the information.**

3 **C(2) Denial of motion.** If the motion for a protective order is denied in whole or in part,
4 the court may, on such terms and conditions as are just, order that any party or person provide
5 or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in
6 relation to the motion.

1 | be performed as soon as practicable following the filing of the complaint and the request to
2 | disclose. The court may supervise the exercise of disclosure to the extent necessary to insure
3 | that it proceeds properly and expeditiously. However, the court may limit the extent of
4 | disclosure under this subsection as provided in section C of this rule.

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

9 | B(2)(d) **Definition.** As used in this subsection, "disclose" means to afford the adverse
10 | party an opportunity to inspect or copy the insurance agreement or policy.

11 | **B(3) Trial preparation materials.**

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

22 | **B(3)(ii) Prior statements.** A party may obtain, without the required showing, a
23 | statement concerning the action or its subject matter previously made by that party. [*Upon*] **On**
24 | request, a person who is not a party may obtain, without the required showing, a statement
25 | concerning the action or its subject matter previously made by that person. If the request is
26 | refused, the person or party requesting the statement may move for a court order. The

1 provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For
2 purposes of this subsection, a statement previously made is [(a)] **either:** a written statement
3 signed or otherwise adopted or approved by the person making it[,]; or [(b)] a stenographic,
4 mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a
5 substantially verbatim recital of an oral statement by the person making it and
6 contemporaneously recorded.

7 **C Court order limiting extent of disclosure.**

8 **C(1) Relief available; grounds for limitation.** [*Upon*] **On** motion by a party or by the
9 person from whom discovery is sought, and for good cause shown, the court in which the
10 action is pending may make any order [*which*] **that** justice requires to protect a party or person
11 from annoyance, embarrassment, oppression, or undue burden or expense, including one or
12 more of the following: [(1)] that the discovery not be had; [(2)] that the discovery may be had
13 only on specified terms and conditions, including a designation of the time or place; [(3)] that
14 the discovery may be had only by a method of discovery other than that selected by the party
15 seeking discovery; [(4)] that certain matters not be inquired into, or that the scope of the
16 discovery be limited to certain matters; [(5)] that discovery be conducted with no one present
17 except persons designated by the court; [(6)] that a deposition after being sealed be opened
18 only by order of the court; [(7)] that a trade secret or other confidential research, development,
19 or commercial information not be disclosed or be disclosed only in a designated way; [(8)] that
20 the parties simultaneously file specified documents or information enclosed in sealed
21 envelopes to be opened as directed by the court; or [(9)] that to prevent hardship the party
22 requesting discovery pay to the other party reasonable expenses incurred in attending the
23 deposition or otherwise responding to the request for discovery. **In deciding what constitutes**
24 **an undue burden, the court may consider, among other things, the proportionality of the**
25 **request for production to the needs of the case including the importance of the issues at**
26 **stake in the action, the parties' relative access to relevant information, the parties' resources,**

1 **the importance of the discovery, and the burden or cost of producing the information.**

2 **C(2) Denial of motion.** If the motion for a protective order is denied in whole or in part,
3 the court may, on such terms and conditions as are just, order that any party or person provide
4 or permit discovery. The provisions of Rule 46 A(4) apply to the award of expenses incurred in
5 relation to the motion.

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1 **PRODUCTION OF DOCUMENTS AND THINGS AND [ENTRY**

2 **UPON LAND] ENTERING PROPERTY FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

4 **A Scope.** Any party may serve on any other party [*a request: (1)*] **any of the following**
5 **requests:**

6 **A(1) Documents or things. A request** to produce and permit the party making the
7 request, or someone acting on behalf of the party making the request, to inspect and copy any
8 designated documents (including electronically stored information, writings, drawings, graphs,
9 charts, photographs, sound recordings, images, and other data or data compilations from
10 which information can be obtained and translated, if necessary, by the respondent through
11 detection devices or software into reasonably usable form) or to inspect and copy, test, or
12 sample any tangible things [*which*] **that** constitute or contain matters within the scope of Rule
13 36 B and [*which*] **that** are in the possession, custody, or control of the party [*upon*] **on** whom
14 the request is served; [*or (2)*]

15 **A(2) Entering property. A request to enter** [*to permit entry upon designated*] land or
16 other property in the possession or control of the party [*upon*] **on** whom the request is served
17 for the purpose of inspection and measuring, surveying, photographing, testing, or sampling
18 the property or any designated object or operation thereon, within the scope of Rule 36 B.

19 **B Procedure.**

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

26 B(2) **Time for response.** A request shall not require a defendant to produce or allow

1 inspection, copying, entry, or other related acts before the expiration of 45 days after service
2 of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service
3 of a request in accordance with subsection B(1) of this rule, or such other time as the court
4 may order or **to which** the parties may agree [*upon*] in writing, a party shall serve a response
5 that includes the following:

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

11 B(2)(b)[*as to*] **a statement that, except as specifically objected to, a reasonable effort**
12 **has been made to obtain** any requested item not in the party's possession or custody, [*a*
13 *statement that reasonable effort has been made to obtain it, unless specifically objected to,*] or
14 that no such item is within the party's control;

15 B(2)(c) [*as to*] **a statement that, except as specifically objected to, entry will be**
16 **permitted as requested to** any land or other property[, *a statement that entry will be*
17 *permitted as requested unless specifically objected to*]; and

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

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

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

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

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

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

11 **E Electronically stored information (“ESI”).**

12 **E(1) Form in which ESI is to be produced.** A request for [*electronically stored*
13 *information*] **ESI** may specify the form in which the information is to be produced by the
14 responding party but, if no such specification is made, the responding party must produce the
15 information in either the form in which it is ordinarily maintained or in a reasonably useful
16 form.

17 **E(2) Meetings to resolve issues regarding ESI production; relevance to discovery**
18 **motions. In any action in which a request for production of ESI is anticipated, any party may**
19 **request one or more meetings to confer about ESI production in that action. No meeting**
20 **may be requested until all of the parties have appeared or have provided written notice of**
21 **intent to file an appearance pursuant to Rule 69 B(1). The court may also require that the**
22 **parties meet to confer about ESI production. Within 21 days of the request for a meeting,**
23 **the parties must meet and confer about the scope of the production of ESI; data sources of**
24 **the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant**
25 **to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues**
26 **pertaining to metadata; and any other issue a requesting or producing party deems relevant**

1 **to the request for ESI. Failure to comply in good faith with this subsection shall be considered**
2 **by a court when ruling on any motion to compel or motion for a protective order related to**
3 **ESI. The requirements in this subsection are in addition to any other duty to confer created**
4 **by any other rule.**

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1 and qualify or deny the remainder. An answering party may not give lack of information or
2 knowledge as a reason for failure to admit or deny unless the answering party states that
3 reasonable inquiry has been made and that the information known or readily obtainable by the
4 answering party is insufficient to enable the answering party to admit or deny. A party who
5 considers that a matter of which an admission has been requested presents a genuine issue for
6 trial may not, on that ground alone, object to the request; the party may, subject to the
7 provisions of Rule 46 C, deny the matter or set forth reasons why the party cannot admit or
8 deny it.

9 **C Motion to determine sufficiency.** The party who has requested the admissions may
10 move to determine the sufficiency of the answers or objections. Unless the court determines
11 that an objection is justified, it shall order that an answer be served. If the court determines
12 that an answer does not comply with the requirements of this rule, it may order either that the
13 matter is admitted or that an amended answer be served. The court may, in lieu of these
14 orders, determine that final disposition of the request be made at a designated time prior to
15 trial. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the
16 motion.

17 **D Effect of admission.** Any matter admitted pursuant to this rule is conclusively
18 established unless the court on motion permits withdrawal or amendment of the admission.
19 The court may permit withdrawal or amendment when the presentation of the merits of the
20 case will be [*subverted thereby*] **furthered** and the party who obtained the admission fails to
21 satisfy the court that withdrawal or amendment will prejudice [*such*] **that** party in maintaining
22 [*such*] **that** party's case or [*such*] **that** party's defense on the merits. Any admission made by a
23 party pursuant to this rule is for the purpose of the pending action only, and neither
24 constitutes an admission by [*such*] **that** party for any other purpose nor may be used against
25 [*such*] **that** party in any other action.

26 **E Form of response.** The request for admissions shall be so arranged that a blank space

1 | shall be provided after each separately numbered request. The space shall be reasonably
2 | calculated to enable the answering party to insert the admissions, denials, or objections within
3 | the space. If sufficient space is not provided, the answering party may attach additional papers
4 | with the admissions, denials, or objections and refer to them in the space provided in the
5 | request.

6 | **F Number.**

7 | **F(1) Generally. Excluding requests identified in subsection F(2) of this rule, a [A] party**
8 | **may serve more than one set of requested admissions [upon] on an adverse party[,]** but the
9 | total number of requests shall not exceed 30, unless the court otherwise orders for good cause
10 | shown after the proposed additional requests have been filed. In determining what constitutes
11 | a request for admission for the purpose of applying this limitation in number, it is intended
12 | that each request be counted separately, whether or not it is subsidiary or incidental to or
13 | dependent upon or included in another request, and however the requests may be grouped,
14 | combined, or arranged.

15 | **F(2) Requests related to admissibility of business records. Notwithstanding**
16 | **subsection F(1) of this rule, and in addition to any requests made under that subsection, a**
17 | **party may serve a reasonable number of additional requests for admission to establish the**
18 | **authenticity and admissibility of documents under Rule 803(6) of the Oregon Evidence Code.**

SUMMARY JUDGMENT

RULE 47

A For claimant. A party seeking to recover [*upon a claim, counterclaim, or cross-claim*] on any type of claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor [*upon*] as to all or any part [*thereof*] of any claim or defense.

B For defending party. A party against whom [*a claim, counterclaim, or cross-claim*] any type of claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part [*thereof*] of any claim or defense.

C Motion and proceedings thereon. The motion and all supporting documents [*shall*] must be served and filed at least 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits or declarations and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based [*upon*] on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit or a declaration under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the

1 issue of liability alone although there is a genuine issue as to the amount of damages.

2 **D Form of affidavits and declarations; defense required.** Except as provided by section
3 E of this rule, supporting and opposing affidavits and declarations [*shall*] **must** be made on
4 personal knowledge, [*shall*] **must** set forth such facts as would be admissible in evidence, and
5 [*shall*] **must** show affirmatively that the affiant or declarant is competent to testify to the
6 matters stated therein. Sworn or certified copies of all [*papers*] **documents** or parts thereof
7 referred to in an affidavit or a declaration [*shall*] **must** be attached thereto or served therewith.
8 The court may permit affidavits or declarations to be supplemented or opposed by depositions
9 or further affidavits or declarations. When a motion for summary judgment is made and
10 supported as provided in this rule, an adverse party may not rest [*upon*] **on** the mere
11 allegations or denials of that party's pleading[, *but*]; **rather**, the adverse party's response, by
12 affidavits, declarations, or as otherwise provided in this section, must set forth specific facts
13 showing that there is a genuine issue as to any material fact for trial. If the adverse party does
14 not so respond, the court shall grant the motion, if appropriate.

15 **E Affidavit or declaration of attorney when expert opinion required.** Motions under
16 this rule are not designed to be used as discovery devices to obtain the names of potential
17 expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for
18 summary judgment, is required to provide the opinion of an expert to establish a genuine issue
19 of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed,
20 qualified expert has been retained who is available and willing to testify to admissible facts or
21 opinions creating a question of fact[,] will be deemed sufficient to controvert the allegations of
22 the moving party and an adequate basis for the court to deny the motion. The affidavit or
23 declaration [*shall*] **must** be made in good faith based on admissible facts or opinions obtained
24 from a qualified expert who has actually been retained by the attorney, who is available and
25 willing to testify, and who has actually rendered an opinion or provided facts [*which*] **that**, if
26 revealed by affidavit or declaration, would be a sufficient basis for denying the motion for

1 summary judgment.

2 **F When affidavits or declarations are unavailable.** Should it appear from the affidavits
3 or declarations of a party opposing the motion that *[such]* **the** party cannot, for reasons stated,
4 present by affidavit or declaration facts essential to justify the opposition of that party, the
5 court may deny the motion or may order a continuance to permit affidavits or declarations to
6 be obtained or depositions to be taken or discovery to be had, or may make *[such]* **any** other
7 order as is just.

8 **G Affidavits or declarations made in bad faith.** Should it appear to the satisfaction of
9 the court at any time that *[any of the affidavits or declarations]* **an affidavit or declaration**
10 presented *[pursuant to]* **under** this rule *[are]* **was** presented in bad faith or solely for the
11 purpose of delay, the court shall *[forthwith]* order the party *[employing them]* **filing the**
12 **affidavit or declaration** to pay to the other party the amount of the reasonable expenses
13 *[which]* **that** the filing of the *[affidavits or declarations]* **affidavit or declaration** caused the
14 other party to incur, including reasonable attorney fees, and any offending party or attorney
15 may be subject to sanctions for contempt.

16 **H Multiple parties or claims; limited judgment.** If the court grants summary judgment
17 for *[less]* **fewer** than all parties *[and]* **or fewer than all** claims **or defenses** in an action, a limited
18 judgment may be entered if the court makes the determination required by Rule 67 B.

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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 under subsection (1) of this section 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 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 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 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 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 more than one

1 person at a time from the bystanders, or from the body of the county, the sheriff shall return a
2 list of the persons so summoned to the clerk. The clerk shall draw names at random from the
3 list until the jury is completed.

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

8 **D Challenges.**

9 **D(1) Challenges for cause; grounds.** Challenges for cause may be taken on any one or
10 more of the following grounds:

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

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

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

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

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

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

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

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

22 **D(3) Conduct of peremptory challenges.** After the full number of jurors has been passed
23 for cause, peremptory challenges shall be conducted by written ballot or outside of the
24 presence of the jury as follows: the plaintiff may challenge one and then the defendant may
25 challenge one, and so alternating until the peremptory challenges shall be exhausted. After
26 each challenge, the panel shall be filled and the additional juror passed for cause before

1 another peremptory challenge shall be exercised, and neither party is required to exercise a
2 peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal
3 to challenge by either party in the order of alternation shall not defeat the adverse party of
4 such adverse party's full number of challenges, and such refusal by a party to exercise a
5 challenge in proper turn shall conclude that party as to the jurors once accepted by that party
6 and, if that party's right of peremptory challenge is not exhausted, that party's further
7 challenges shall be confined, in that party's proper turn, to such additional jurors as may be
8 called. The court may, for good cause shown, permit a challenge to be taken as to any juror
9 before the jury is completed and sworn, notwithstanding that the juror challenged may have
10 been previously accepted, but nothing in this subsection shall be construed to increase the
11 number of peremptory challenges allowed.

12 **D(4) Challenge of peremptory challenge exercised on basis of race, ethnicity, or sex.**

13 D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity,
14 or sex. Courts shall presume that a peremptory challenge does not violate this paragraph, but
15 the presumption may be rebutted in the manner provided by this section.

16 D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on
17 a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise
18 of the challenge. The objection must be made before the court excuses the juror. The objection
19 must be made outside of the presence of the jurors. The party making the objection has the
20 burden of establishing a prima facie case that the adverse party challenged the juror on the
21 basis of race, ethnicity, or sex.

22 D(4)(c) If the court finds that the party making the objection has established a prima
23 facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity,
24 or sex, the burden shifts to the adverse party to show that the peremptory challenge was not
25 exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of
26 justification as to the questioned challenge, the presumption that the challenge does not

1 violate paragraph (a) of this subsection is rebutted.

2 D(4)(d) If the court finds that the adverse party challenged a prospective juror on the
3 basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.

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

8 **F Alternate jurors.**

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

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

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

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

1 | deliberations.

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

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