MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 9, 2023, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Hon. Jonathan Hill
Meredith Holley
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Norman R. Hill
Derek Larwick
Hon. Thomas A. McHill

Guests:

Kenneth C. Crowley, Outgoing Chair
Barry J. Goehler, Awaiting Reappointment
Paul Hathaway, Lorber Greenfield & Polito
Ramon Henderson, Hodgkinson Street
Aja Holland, Oregon Judicial Department
Eric Kekel, Dunn Carney
Alicia Wilson, City of Medford
Greg Zahar, civilian volunteer, Eugene Police Department

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 54 ORCP 55 ORCP 57				

I. Call to Order

Mr. Crowley called the meeting to order at 9:32 a.m.

II. Introductions

Judge Peterson explained that there had been a delay in the Oregon State Bar (OSB) Board of Governors (BOG) appointing new members to the Council, and that there were currently six vacancies on the Council: four defense attorneys and two plaintiffs' attorneys. He noted that Mr. Goehler had asked to be reappointed and that, in his experience, the BOG reappoints members who ask for reappointment. Mr. Goehler stated that he would refrain from voting during the meeting.

Members and guests introduced themselves. Outgoing chair Ken Crowley stated that he had enjoyed his time on the Council and that it had been a great learning opportunity. He stated that appreciates all of the time and effort that Council members and staff put into the process and that he will miss being a part of it.

III. Approval of February 13, 2023, Minutes

Mr. Crowley asked whether members had the opportunity to review the February 13, 2023, minutes (Appendix A), and whether anyone had suggested changes. Hearing none, he asked for a motion to approve the minutes. Judge Bloom made a motion to approve the February 13, 2023, minutes. Mr. Andersen seconded the motion, which was approved unanimously by voice vote.

IV. Annual election of officers per ORS 1.730(2)(b)

Mr. Crowley asked for nominations for Council officers. Ms. Holley nominated Mr. Andersen as Council chair. Judge Norby seconded the nomination. Mr. Andersen stated that he would accept the responsibility if the Council voted for him. The Council voted unanimously by voice vote to elect Mr. Andersen as Council chair.

Mr. Crowley asked for nominations for vice chair. Mr. Goehler stated that he would be willing to serve if nominated, if he were to be reappointed. Judge Peterson suggested deferring the vote until the next Council meeting. Council members agreed.

Mr. Crowley asked for a nominee for the position of treasurer. Ms. Holley nominated Ms. Weeks for the position. Judge Norby seconded the nomination. Ms. Weeks accepted the nomination, which was approved unanimously by voice vote.

Mr. Crowley turned over the meeting to the new chair, Mr. Andersen. Judge Peterson presented Mr. Crowley with an engraved plaque to thank him for his service over the last eight years and his service as chair for the past biennium. Mr. Crowley stated that the reward has really been the process, and that it has been quite an enjoyable process for him to be a part of. He stated that he was going to dedicate his award to his wife, who had put up with a lot of missed Saturdays.

He stated that he has appreciated all of the support that he has received from every one of the members of the Council. Although there are sometimes differences of opinion, the way that we work through them is honest, and the process really works for us in Oregon.

V. Council Rules of Procedure per ORS 1.730(2)(b)

Judge Peterson stated that the Council's authorizing statute requires the Council to have rules of procedure (Appendix B). In 2016, the Council re-examined the rules and updated them. He invited Council members to read through the rules and to take a look at the Council Timeline (Appendix C) that Ms. Nilsson had put together to keep track of the statutorily-driven tasks that the Council must perform each biennium. It is a handy overview to help keep us on task.

VI. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson explained that, in the 2021-2023 biennium, the Council had considered a number of changes. Three of them were really heavy lifts, one of which got over the finish line and two of which did not. This is a new Council, and whether or not it will re-examine those two potential amendments or not remains to be seen. Appendix D lists the changes that the Council did promulgate. It also shows the changes in terms of what material is deleted and what material is added.

Judge Peterson briefly reviewed the promulgated rules:

- The change to Rule 7 was suggested by a non-lawyer process server. With regard to service on corporations, the rule contained requirements about serving an agent in the county where the case was commenced, which seemed like more of a venue issue. The language in question was found in the statute that predated Rule 7. No one on the Council could make any sense as to why the language was necessary, and it created problems because some courts were treating service on agents as substituted service. The Council simply removed the "in the county" language, as well as making technical changes such as changing the word "upon" to "on."
- Rule 39 was clarified and modernized to change telephone depositions to electronic depositions.
- Rule 55 was reorganized a few biennia ago to make the rule much clearer, and the Council has made a few changes since then to refine the rule. Last biennium, there was a suggestion made by a judge, which Judge Peterson agreed with, about having a procedure for an occurrence witness to object to a subpoena. The Council spent a lot of time crafting that process and also to make it clear in the wording of the subpoena that, if a witness ignores the subpoena, adverse consequences could await them. That rule change received a majority vote, but not the super majority vote required for promulgation.

However, there were some technical changes to Rule 55 that were promulgated.

- Rule 57 was the rule that the Council did a lot of heavy lifting on that did make it to the finish line. The Court of Appeals had actually asked the Council to look at Rule 57 in *State v. Curry*, 298 Or App 377 (2019), finding that the rule was not working. The changes focused on peremptory challenges and jury selection. It took two biennia to complete this work, and Ms. Holley was instrumental in putting together a workgroup to study the issue that included prosecutors and criminal defense attorneys, since Rule 57 also applies by statute to criminal trials.
- The changes to Rule 58 clarify remote testimony and bring it into the modern era.
- The change to Rule 69 was to update a reference to the Servicemembers Civil Relief Act, along with a few technical changes.

Judge Peterson stated that he was pleased to report that, after the promulgated rules were transmitted to the Legislature, the Legislature did not ask for the Council's clarification on any of them, nor did the Legislature take any action to modify or repeal the Council's promulgations. This means that the promulgated rules will become effective on January 1, 2024.

The House Judiciary Committee did, however, ask for a presentation from the Council, which is the first time this has happened during Judge Peterson's tenure with the Council. Mr. Andersen and Judge Peterson went to Salem and testified, and Judge Peterson felt that the presentation was somewhat instructive. He stated that the Council's liaison from the OSB thought that the chair of the House Judiciary Committee may have simply wanted the members, many of whom are not lawyers, to have some appreciation of what the Council does. Judge Peterson reported that, during the presentation on the changes to Rule 57, one member of the Committee interrupted to ask what a peremptory challenge is. At that point, Judge Peterson thought that the presentation was effective, because it showed the Committee that the Council is a specialized group that exists to deal with the ORCP, and the Legislature might be wise to defer to the Council in matters that regard the rules of court.

B. Staff Comments

Judge Peterson reported that staff comments for last biennium are not quite completed, but that they should be done soon and that they will be sent to Council members from last biennium for their review and comment. He explained that Council staff had drafted explanatory comments for promulgated rules since the beginning of the Council, but that they had stopped before his tenure on the Council, partly because of *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) and *State v. Gaines*, 206 P3d 1042 (Or 2009). However, the Council had decided several biennia ago that staff should resume writing comments. When

comments are drafted now, they stand alone and it is made clear that they are an indication of why the changes were made, but readers seeking legislative history are directed to look at the minutes for the deliberations of the Council. Staff comments are just a quick guide to what the changes were and what the Council was doing.

C. Legislative Assembly's ORCP Amendments Outside of Council Amendments

1. ORCP 55 B (SB 688)

Judge Peterson referred the Council to Appendix E, Senate Bill 688 from the last legislative session (2023), which was not passed. He stated that he and Mr. Andersen had discussed the bill briefly during their testimony before the House Judiciary Committee. The bill was designed to make service of subpoenas on willing witnesses available by e-mail as opposed to just by mail. He commented that the fix proposed in the bill is very simple, but that the Council's job is to examine such seemingly simple fixes to make sure they do not have unintended consequences.

Mr. Andersen invited guest Greg Zahar to speak about this issue. Mr. Zahar explained that he is currently a volunteer with the Eugene Police Department, and that one of his jobs is to serve criminal subpoenas for the agency. He stated that the district attorney's office has authorized volunteers to e-mail subpoenas to witnesses, but that the timeline they have been given for service and obtaining receipt of service is the standard that is set in the rules for US postal mail – ten days prior to the court date, and three days prior to the court date for a response. Mr. Zahar stated that his objective is to try to move from the "snail mail" standard to the instantaneous e-mail standard, so that, if a subpoena is e-mailed and the sender receives a receipt, then it is as good as served. He explained that he quite frequently receives rush subpoenas for delivery where the court date is less than 10 days away, which eliminates the possibility of emailing the subpoena, even if the witness is responsive to receiving it by e-mail.

Mr. Andersen noted that the amendments in the senate bill do not include a date for a response. He asked whether the intent is, as long as the witness responds electronically, there is no need to include a date. Mr. Zahar stated that he would defer to the Council's judgment on that. However, he pointed out that e-mail is instantaneous, and that they could conceivably e-mail a subpoena for a court date two days away and get a response receipt, so that the witness would be served and can appear in court.

Judge Norby thanked Mr. Zahar for the suggestion. She noted that she was the person who did the majority of the work reorganizing Rule 55, and that was such a major overhaul that the Council was concerned about adding anything new at that time – the thought was to make the existing rule understandable, readable, and usable. The plan was to evaluate the results and, after finding that the reorganization has been accepted and seen as an improvement, to start making any additional, incremental changes as needed. Judge Norby stated that Mr. Zahar's suggestion is exactly the sort of thing that the Council was hoping to be considering in attempts to modernize the rule. She stated that the Council would want to make sure not to create a scenario where a witness can be served instantaneously and then be expected to be able to appear immediately, so she was certain that the Council would be having further discussions about the suggestion. Ms. Holley stated that this circumstance may only apply in situations where a witness has waived personal service, so it seems like simultaneous electronic mailing might not be a problem because the witness may have already agreed to an appearance date.

Ms. Wilson pointed out that the comment appears to be coming from the criminal side, which is a completely different procedure under ORS chapter 136. She agreed that it is a good idea to look at Rule 55, but to also keep in mind that a change to Rule 55 might not address the concern that Mr. Zahar is raising. Judge Peterson stated that he believes that some of the cases for which Mr. Zahar is serving subpoenas are actually civil domestic violence cases. He stated that he does not have a vote on which proposals the Council will form committees; however, he suggested that proposals that were made in the Legislature might be important for the Council to take a serious look at.

Mr. Andersen asked Mr. Zahar for any additional comments regarding this requested change. Mr. Zahar stated that, in every circumstance where they e-mail witnesses, they have already contacted the witness and received permission to do so. Mr. Andersen asked whether Mr. Zahar could think of any reason that the service of subpoenas by e-mail would make any difference in a civil context as opposed to a criminal context. Mr. Zahar stated that he did not believe so, because it is a matter of convenience and streamlining the process. He noted that he has served subpoenas by e-mail to out-of-area witnesses in cases where it would be virtually impossible to serve them in person. Mr. Goehler asked how witness fees and travel payments are dealt with in such cases. Mr. Zahar stated that has not been personally involved in that aspect; the district attorney's office deals with that piece.

Mr. Andersen asked whether Judge Norby would be willing to examine the issue in more detail prior to the next Council meeting and present more information to the Council before the Council agrees to form a committee. Judge Norby agreed.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Mr. Andersen stated that it had been suggested that the Council's October meeting be held in person. He asked Council members to discuss their feelings about holding the October meeting, or another meeting during the biennium, in person. Some members were happy to continue meeting virtually, as it is easier for members outside of the Portland metro area. Some members expressed a desire to meet in person at some point during the biennium, but felt that October was too soon. Some felt that meeting in person later in the biennium would allow for more robust discussion on issues once committees had been formed. Ms. Nilsson pointed out that it is important to ensure strong attendance at the publication and promulgation meetings in September and December of 2024, respectively, and that in-person meetings in those months may not be advisable. Some members noted that combining the meeting with a fun group event afterwards may encourage more participation. It is also important to try to provide the best meeting experience possible for Council members who are unable to attend in person and who need to participate by Zoom or to call in.

After discussion, the Council agreed to hold an in-person meeting in June of 2024, presumably at the OSB's offices, unless another location is otherwise decided on later. The Council also agreed to meet on the second Saturday of the month. The meeting schedule will be as follows:

- October 14, 2023
- November 11, 2023
- December 9, 2023
- January 13, 2024
- February 10, 2024
- March 9, 2024
- April 13, 2024
- May 11, 2024
- June 8, 2024
- September 14, 2024
- December 14, 2024

B. Funding

Judge Peterson explained that the Legislature provides the Council with a general fund allocation, a pass through that is part of the Oregon Judicial Department's (OJD) budget. Last biennium that allocation was $57,343. During Judge Peterson's tenure on the Council, the Council has become associated with Lewis and Clark Law School, where he used to teach. The OJD sends a check to the law school, and it goes into a restricted account which is used to pay for Ms. Nilsson, who is now an independent contractor, and a modest stipend for the executive director. These funds also pay for expenses that the Council incurs in terms of necessary software and things of that nature. In addition to those funds, the OSB allocates $4000 per year in travel funds to the Council. Before the pandemic, the Council met in person, usually at the OSB and occasionally around the state. The funds from the OSB have usually been enough to pay our public member and the judge members, who are public servants. However, if we do not meet very much in person, that travel budget may be enough to also pay the mileage for our attorney members to travel to our in-person meeting in June.

C. Council Website

Ms. Nilsson explained that the Council website is something that she has been working on since she joined the Council in 2007. Prior to the creation of the website, Council history material was only available in seven different law libraries, roughly along the I-5 corridor. As of the last biennium, the website was very close to containing the complete history of the Council. This summer, Ms. Nilsson updated all of the rule histories for each rule amended by the Council. Meanwhile, Judge Peterson hired a research assistant who did the same with the legislative history of each rule that has been amended by the Legislature. Now, if someone wants to know the history of a rule that has been amended by either the Council or the Legislature, they can find that history on the website, along with the "legislative history" in the minutes. The website is pretty complete. Mr. Andersen stated that it is a website to be proud of and that it is very accessible.

D. Results of Survey of Bench and Bar: Generally (Appendix F)

Mr. Andersen stated that, in reading the survey, he noticed that there is a lot of public relations work for the Council to do. There are a lot of great things happening, but there are not many attorneys or members of the public who are aware of what we do and why it could be important to them. Judge Peterson stated that it is not for lack of trying, but he agreed that the survey indicated that there was, even among attorneys and judges, a lack of knowledge of what the Council is and what the Council does. He stated that Judge Norby had written a great article about the Council that the OSB Bulletin had declined to publish, but that the Oregon Association of Defense Counsel (OADC) had published it in their member publication. However, it clearly did not have the reach that we had hoped. Judge

Norby asked whether the article might be published on the Council's website. Ms. Nilsson asked whether the Council would need to reach out to OADC for permission to do so. Judge Norby stated that she had previously spoken to OADC about doing so and that it would be fine. Ms. Nilsson stated that she would put the article on the website.

Judge Peterson stated that the first three questions in the survey ask whether the respondents believe that the ORCP promote the just, speedy, and inexpensive determination of civil court actions, which is the part of the Council's charge. 48.8% of respondents agreed that the ORCP promote the just determination of civil court actions; however, only 25.3% agreed that the ORCP promote the speedy determination, and only 13% the inexpensive determination. Judge Peterson stated that, when making rule amendments, it might be worthwhile to keep in mind that the general view seems to be that the Council may be doing a good job in terms of keeping the rules just, but not so much in terms of speedy or cheap.

Judge Peterson noted that the survey was sent to all bar sections with lawyers that are likely to be in civil court. He remarked that it is unfortunate that many members of the Oregon legal profession do not know the origin of the ORCP, nor are they familiar with the composition of the Council. Among those who are familiar with the Council, the quality of the Council's work fared well. There were questions about the responsiveness of the ORCP to the needs of litigants, lawyers, and judges. Not surprisingly, responsiveness to the needs of litigants fared highest. A significant number of people who took the time to answer the poll have never visited the website, which is unfortunate since it contains a wealth of information, but most who had visited the website found the content to be good or very good. Most respondents wanted either the Council or the Council and the Legislature to have responsibility for the ORCP. Finally, there were a number of general comments about the Council.

Mr. Andersen noted that 309 people responded to the survey generally, with about 200 completing the full survey. He stated that he felt that this is a fairly robust number to give an idea of how the Council's work is perceived.

Mr. Goehler noted that one of the common themes of the suggestions is to try to make the Oregon rules more like the federal rules. He stated that he finds it interesting that the survey results also show that the ORCP do not peg the top of the charts for being speedy and inexpensive, because federal court practice is nothing close to speedy or inexpensive. He stated that this is something to keep in mind as the Council is working through the suggestions.

Judge Jon Hill wondered whether some of the attorneys who made suggestions regarding cost issues might be domestic relations attorneys. He stated that he wondered whether there is a possibility to include a domestic relations attorney on the Council, or whether the attorney positions are limited to the plaintiffs' and

defense bar. Since there are other groups who use the ORCP, it might be worth considering broadening the composition of the Council. Mr. Andersen stated that this is a good suggestion that is worth considering.

Judge Norby suggested that having an attorney who deals with protective proceedings like guardianship might also be useful. Ms. Nilsson noted that the composition of the Council is statutory, but wondered whether that includes the specificity of plaintiffs' and defense bar members. Judge Norby stated that the statute would need to be examined to see whether it would need to be amended. She asked Ms. Nilsson whether the survey invites people to apply to join the Council. She suggested that this might be a helpful way to recruit interested parties. Ms. Nilsson stated that the survey does not do this now, but that she did not see any reason that it could not be included.

Judge Peterson noted that the BOG makes the attorney appointments and that Council staff does not have a hand in it except to let the OSB know how many plaintiffs' and defense attorneys are needed. He stated that the Council has always relied on judges, who have experience in family law and probate, for expertise in those areas, but that this is not completely fair.

Judge Norby remarked that including attorneys outside of the plaintiffs' and defense bar would also affect how the chair and vice chair are chosen, because that is also by rule supposed to alternate between a plaintiffs' attorney and defense attorney. Judge Peterson stated that it has been a matter of collegiality on the Council that the vice chair from the previous biennium has been elected as chair in the current biennium, and that a member from the opposing side is then elected as vice chair. He stated that he feels that this has been helpful in terms of members playing nicely during the during the deliberations. Judge Norby agreed, but felt that a domestic relations attorney who was potentially added, for example, could not hold one of those positions for fear of upsetting that balance. Judge Peterson agreed that is a concern. Ms. Nilsson pointed out that this alternating of positions is not by rule but, rather, by tradition. She wondered whether a recommendation to the Legislature for a statutory change would ultimately be needed to add new positions to the Council.

Judge Norby suggested forming a committee to further look at the issue. Mr. Andersen asked whether any member was willing to take a preliminary look at the issue before a committee was formed. Judge Bloom expressed concern about forming any committee before the Council has a full contingent of attorney members. Mr. Andersen agreed, and asked Ms. Nilsson to put this item on the agenda for the October meeting.

VIII. Old Business

A. ORCP/Topics to be Reexamined Next Biennium

1. ORCP 54 E / ORS 36.425(6)

Judge Peterson noted that this suggestion (Appendix G) had been submitted to the Council at the end of last biennium and that the previous Council did not have the time to consider it. He pointed out that the proposed solution is to modify a statute, which the Council does not have the authority to do. The concern is in regard to Rule 54 offers of judgment in court-annexed arbitration and how it impacts an award of attorney fees, and it may be that there is a different workaround to amend Rule 54 E. He suggested carrying this item over to the next meeting, as there are other suggestions about Rule 54 and a committee may be formed. The Council agreed. Ms. Nilsson stated that she could include it with the other suggestions regarding Rule 54 and they could all be considered together at the next meeting.

2. ORCP 57

Ms. Holley stated that these suggestions (Appendix H) came from a public comment made by the Oregon Justice Resource Center (OJRC) after the publication of amendments to Rule 57 last biennium. She noted that the additional changes to the rule were considered extensively by the workgroup and ultimately decided against. She suggested that the Council write the OJRC thanking them for their suggestions and referring them to the Dropbox link with the workgroup's content that includes the extensive consideration of the Washington rule. She also stated that her inclination would be not to add more to the rule now when the new version has not yet been tested. The Council agreed.

Ms. Holley asked whether Judge Peterson and Ms. Nilsson would be willing to write the letter. Ms. Nilsson stated that they would draft a letter and have Ms. Holley review it before sending.

Mr. Andersen thanked Ms. Holley again for her hard work in elegantly getting the ship to shore on the amendments to Rule 57 last biennium. Ms. Holley thanked Mr. Andersen for speaking on behalf of the amendment before the Legislature, and for everyone's efforts last biennium.

IX. New Business

A. Potential amendments received by Council Members or Staff since Last Biennium (Appendices I through K)
B. Potential amendments received from Council Survey (Appendix L)

Mr. Andersen proposed that Council members look carefully at the suggestions received through the survey before the next Council meeting so that they could be prepared to thoroughly discuss those items. He noted that it is important to honor the time of those respondents who took the time to share their ideas with the Council and give thorough consideration to their suggestions.

Ms. Nilsson noted that Judge Norby had e-mailed her earlier with some corrections to categorizations of some of those suggestions from the survey, and that she would be making those corrections. She stated that she would also take the remaining individual suggestions and categorize and include them in the chart so that they can all be more easily considered together by topic. She stated that she would get this to Council members in the coming week so that they would have plenty of time to look it over before the October meeting. Judge Norby asked that Ms. Nilsson include the vexatious litigation topic from last biennium, as she would like to try to form a committee again this biennium and make another attempt to create a rule this biennium.

Mr. Andersen asked Ms. Nilsson if she could also include individual page numbers on the meeting packet, in addition to the separately numbered attachment pages. Ms. Nilsson agreed that she would do this on the left side of the packet.

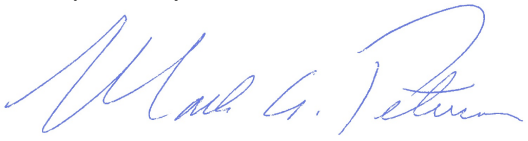
X. Appointment of committees regarding any items listed in VIII-IX

This item was deferred until the October meeting.

XI. Adjournment

Mr. Andersen adjourned the meeting at 11:04 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Monday, February 13, 2023, 12:00 p.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Drake Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Derek Larwick
Scott O'Donnell
Margurite Weeks

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 57	Lawyer Civility	ORCP 7	ORCP 54/ORS 36.425
ORCP 35	ORCP 4	ORCP 58	Lis pendens	ORCP 39	
ORCP 39	ORCP 14	ORCP 60	One set of rules	ORCP 55	
ORCP 55	ORCP 15	ORCP 68	Probate/trust	ORCP 57	
ORCP 57	ORCP 16	ORCP 69	litigation	ORCP 58	
ORCP 58	ORCP 17	ORCP 71	Quick hearings	ORCP 69	
ORCP 69	ORCP 18	Abatement	Self-represented		
ORS 45.400	ORCP 21	Affidaviting judges	litigants		
ORS 46.415	ORCP 22	Arbitration/mediation	Standardized forms		
	ORCP 23	Collaborative practice	Statutory fees		
	ORCP 27	Expedited trial	Trial judges		
	ORCP 32	Family law rules	UTCR		
	ORCP 47	Federalized rules			
	ORCP 52	Interpreters			

I. Call to Order

Mr. Crowley called the meeting to order at 9:27 a.m.

II. Administrative Matters

A. Executive Assistant

Judge Peterson explained that it was unusual for the Council to have a special meeting to approve minutes, and that this was the first time it had happened during his tenure on the Council. He stated that, during this biennium, Ms. Nilsson had helped her mother relocate to New York, dealt with her mother's medical crisis, and then moved overseas with her family to Sweden.

Judge Peterson informed the Council that he has been in negotiations with the law school, which is in partnership with the Council and handles its funds and employment needs, to terminate Ms. Nilsson as an employee and make her an independent contractor so that she can be paid in Sweden. The pandemic has shown that remote work is quite possible. It would cost the Council a bit extra because of Swedish taxes; however, the Council has adequate funds to cover the increased costs, and Ms. Nilsson has skills and institutional knowledge that make her somewhat invaluable.

Mr. Crowley asked whether the Council would be asked to ratify or approve the independent contract at some point. Judge Peterson stated that approval was not necessarily needed, but that he wanted the Council to be aware, since it would have an impact on the budget. Mr. Crowley stated that, in his almost eight years on the Council, Ms. Nilsson has been one of the two amazing fixtures. He stated that he has been incredibly impressed with Ms. Nilsson's development of the website, which has become a very useful and user-friendly tool with all kinds of great information. He stated that he appreciates the work that Ms. Nilsson has done to keep the Council running. Judge Peterson stated that he cannot imagine finding somebody else with the skills and institutional knowledge that Ms. Nilsson has, and that he just wanted to inform the Council of his intention to keep Ms. Nilsson associated with the Council, but as an independent contractor.

B. Approval of Meeting Minutes

Mr. Crowley asked whether the Council would prefer to review each individual meeting individually, or whether it was preferable to make a motion to approve all minutes as a group. Mr. Goehler made a motion to approve the minutes for the May 14, 2022; June 11, 2022; August 27, 2022; September 17, 2022; and December 10, 2022, meetings as drafted. Mr. Bundy seconded the motion, which was approved unanimously with no abstentions.

III. New Business

A. Council's Presentation to the House Judiciary Committee

Judge Peterson explained that the House Judiciary Committee had asked the Council to make a presentation. The Council's Legislative Advisory Committee members were not available on the short notice that was provided, so Mr. Andersen and Judge Peterson went to Salem and presented the work of the Council this biennium. Judge Peterson stated that, during his time on the Council, the Legislature had never asked for a presentation. He noted that he and Mr. Andersen had received positive feedback. At one point during the presentation, a legislator asked what a peremptory challenge was. Since most of the members of the Judiciary Committee are not lawyers, Judge Peterson's approach was to convince them that the Legislature had created a good body that does careful, deliberative, and transparent work that the Legislature never wants or needs to think about. He stated that he believes that he and Mr. Andersen accomplished that mission.

IV. Adjournment

Mr. Crowley adjourned the meeting at 12:11 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

COUNCIL ON COURT PROCEDURES
RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). These rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in ORS 1.725-1.760.

I. MEETINGS. Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Council. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of any such meeting shall be given personally, by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of that meeting except when a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called. All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a term of one year. Officers for the succeeding year shall be elected at the September meeting of the Council each year and shall serve until a successor is elected. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and shall perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to the meeting and provide reasonable notice to Council members of the agenda.

C. Committees. The Chair may appoint any committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. All committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee elected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. the Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. the LAC, after a request by a legislative committee, has presented any proposal to the Council and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the

Council on Court Procedures. The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless that position has been submitted to the Council and approved by a super majority. Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and who has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that the member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of all required notices of meetings of the Council; preparation and distribution of Council meeting agendas; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, the Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council appropriated by the Legislature shall be retained by the Lewis and Clark Law School and funds authorized for the Council by the Oregon State Bar shall be retained by the Bar. All such funds shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. The Council shall designate a location for an administrative office for the Council. All Council records shall be kept in that office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE.

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

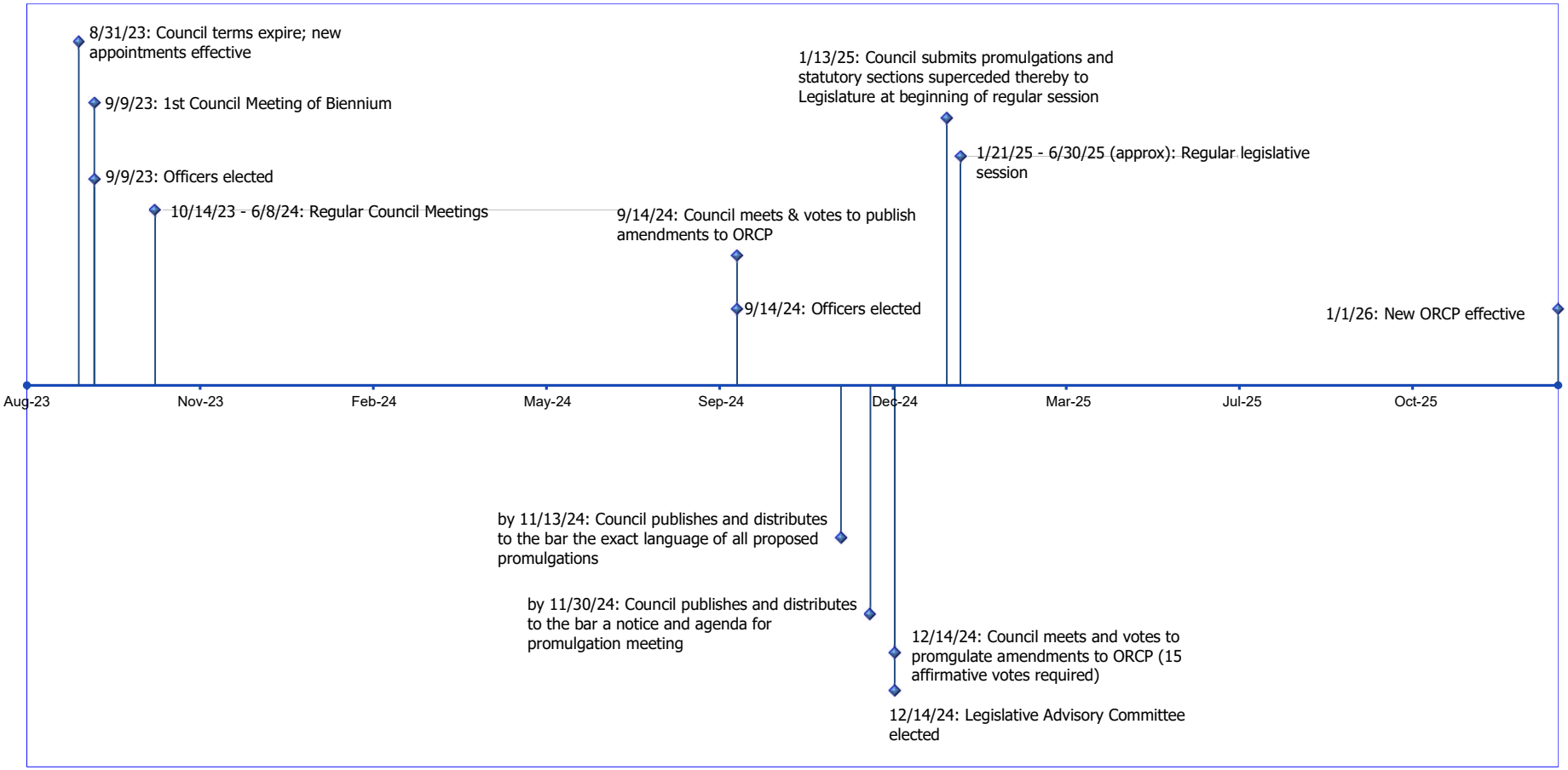
B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this 3rd day of December, 2016.

Council on Court Procedures: 2023-2025 Biennium Timeline (some dates approximate)



AMENDMENTS

TO THE

OREGON RULES OF CIVIL PROCEDURE

promulgated by the

COUNCIL ON COURT PROCEDURES

December 10, 2022

Council on Court Procedures
September 9, 2023, Meeting
Appendix D-1

COUNCIL ON COURT PROCEDURES

Judge Members

Hon. Christopher L. Garrett, Justice, Oregon Supreme Court, Salem (8/31/25)
Hon. Scott Shorr, Judge, Oregon Court of Appeals, Salem (8/31/25)
Hon. D. Charles Bailey, Circuit Court Judge, Washington Co. (8/31/25)
Hon. Benjamin Bloom, Circuit Court Judge, Jackson Co. (8/31/25)
Hon. Jonathan R. Hill, Circuit Court Judge, Tillamook Co. (8/31/25)
Hon. Norman R. Hill, Circuit Court Judge, Polk Co. (8/31/25)
Hon. David Euan Leith, Circuit Court Judge, Marion Co (8/31/23)
Hon. Thomas McHill, Circuit Court Judge, Linn Co. (8/31/23)
Hon. Susie L. Norby, Circuit Court Judge, Clackamas Co (8/31/25)
Hon. Melvin Oden-Orr, Circuit Court Judge, Multnomah Co. (8/31/25)

Attorney Members

Kelly L. Andersen, Medford (8/31/25) (Vice Chair)
Troy S. Bundy, Portland (8/31/23)
Kenneth C. Crowley, Salem (8/31/23) (Chair)
Nadia Dahab, Portland (8/31/25)
Barry Goehler, Lake Oswego (8/31/23)
Meredith Holley, Eugene (8/31/25)
Drake A. Hood, Hillsboro (8/31/23)
Scott O'Donnell, Portland (8/31/25)
Derek Larwick, Eugene (8/31/25)
Tina Stupasky, Eugene (8/31/23)
Stephen J. Voorhees, Portland (8/31/25)
Jeffrey Young, Portland (8/31/23)

Public Member

Margurite Weeks, Portland (8/31/25) (Treasurer)

Staff

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

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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 2023 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2024, 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, during its December 10, 2022, meeting, the Council made changes to the previously published version of ORCP 55 for the following reason:

ORCP 55: The Council voted not to promulgate any of the changes that would have affected the operation or meaning of Rule 55 but, rather, only to adopt the two minor changes intended to insert a missing internal reference and correct a word choice to make it consistent with the Council's grammatical preference.

Note also that, at the December 10, 2022, meeting, the Council's published proposed new Rule 35, relating to vexatious litigants, received an affirmative vote of a majority of the Council but failed to achieve an affirmance by the required supermajority and, thus, is not among the promulgated rules.

The Council held the following public meetings during the 2021-2023 biennium, all of which were held virtually via the Zoom platform:

September 11, 2021
October 9, 2021
November 13, 2021
December 11, 2021
January 8, 2022
February 12, 2022
March 12, 2022
April 9, 2022
May 14, 2022
June 11, 2022
August 27, 2022
September 17, 2022
December 10, 2022

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

2022 PROMULGATED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

SUMMONS

RULE 7

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

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

C Contents, time for response, and required notices.

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

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

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

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

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

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

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

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

_____

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

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

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September 9, 2023, Meeting
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finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

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

D(2) **Service methods.**

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

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

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

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

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

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

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

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

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

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

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

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

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

agent receives mail for the tenant, provided that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Return; proof of service.

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

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

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

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

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

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

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

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

_____

Affidavit of Publication

State of Oregon)

) ss.

County of)

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

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

_____

Notary Public for Oregon

My commission expires

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

_____

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

_____

Declaration of Publication

State of Oregon)

) ss.

County of)

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

_____

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

_____

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

affidavit.

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

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

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

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

DEPOSITIONS [*UPON*] ON ORAL EXAMINATION

RULE 39

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

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

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

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

C Notice of examination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C(7) Deposition by remote means.

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

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

D Examination; record; oath; objections.

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

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

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

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

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

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

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

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

E Motion for court assistance; expenses.

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

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

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

F Submission to witness; changes; statement.

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

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

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

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

G Certification; filing; exhibits; copies.

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

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

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

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

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

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

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

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

I Perpetuation of testimony after commencement of action.

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

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

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

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

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

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

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

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

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

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

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

SUBPOENA

RULE 55

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

A(1) Form and contents.

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

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

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

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

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

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

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

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

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

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

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A(3) Who may issue.

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

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

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

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

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

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

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

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

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify

requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

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

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

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

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

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

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

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

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

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

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

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

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

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

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

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

the laws of the United States to take testimony; or

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

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

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

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

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

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

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

B(2)(c)(iii) Signed mail receipt. The subpoena was mailed more than 10 days before the

date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

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

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

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

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

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

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

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate

one or more individuals to be available during normal business hours to receive service of subpoenas.

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

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

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

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

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

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

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

C(1) Combining subpoena for production with subpoena to appear and testify. A

subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

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

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

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

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

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

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

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

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

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

person.

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

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

D(4) Conditions on service of subpoena.

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

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

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

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

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

received.

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

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

_____

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

_____

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

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

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

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

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

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

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

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

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

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

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

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

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who is

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

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

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

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

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

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

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

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

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

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

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than

one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

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

JURORS

RULE 57

A Challenging compliance with selection procedures.

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

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

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

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

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

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

D Challenges.

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

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

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

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

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

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

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

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

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

separately or jointly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Alternate jurors.

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

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

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

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

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

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

OREGON COUNCIL ON COURT PROCEDURES
RECOMMENDATION REGARDING ORCP 57

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

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

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

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

Marion County Circuit Court	Judge David Leith (Council Member)
Wasco County Circuit Court	(Judge John Wolf substantively contributed in the 2019-2020 biennium)
Linn County Circuit Court	Judge Thomas McHill (Council Member)
Oregon State Bar	Matt Shields, Oregon State Bar Public Affairs Staff Attorney (Council Liaison)
Oregon Council on Court Procedures	Kenneth Crowley (Council Chair) Shari Nilsson (Executive Assistant)
Oregon District Attorneys Association	Kevin Barton, Washington County District Attorney (Workgroup Contributor) Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor)
Oregon Public Defender Services	Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor) Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor) Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor) Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor) Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor)
Oregon Trial Lawyers Association	Meredith Holley, Employment Discrimination Attorney (Committee Chair) Kelly Anderson, Personal Injury Attorney (Council Member) Nadia Dahab, Civil Rights Appellate Attorney (Council Member) Michelle Burrows, Civil Rights Attorney (Workgroup Contributor) J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) Juan Chavez, Civil Rights Attorney (Workgroup Contributor) Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor)

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

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

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

This recommendation relates to "for cause" and "peremptory challenges," which are the two ways a juror may be excluded from participation on a jury panel. Basically, a court may exclude a juror for one of the listed "for cause" reasons in ORCP 57 D(1). Additionally, in any civil or criminal case, each party gets a designated number of "peremptory challenges," allowing them to exclude a juror from participation for any reason. The parties usually meet outside of the jury's presence or pass slips of paper to the judge with a juror's number on the paper, and then that juror is excluded with no further questions asked. The one exception is that, consistent with Supreme Court decisions, under Oregon's current ORCP 57 D(4), a party may not exclude a juror because of race or sex.

If a party believes that the other party has made a "peremptory challenge" for a discriminatory reason, that party may object to the challenge. The current rule has a presumption that challenges are non-discriminatory. That presumption is not consistent with

current research or caselaw regarding what are called *Batson*[1] challenges, and these recommendations recognize that. Current research and caselaw, instead, recognizes that facially neutral reasons may be pretext for discrimination or unconsciously discriminatory. This amendment recognizes that every party making a peremptory challenge should already be examining whether bias may play a part in the desire to exclude the juror, or whether they believe there is a legitimate reason for the exclusion. While this is an important change, its importance largely lies in conforming with current caselaw and research.

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

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

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

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

Many interest groups requested that the protected characteristics under ORCP 57D(4) be expanded. Oregon's Public Accommodation Law, ORS 659A.403 reflects these additional protections, and these amendments expand ORCP 57D(4) to protect "race, color, religion, sex, sexual orientation, gender identity, or national origin," reflecting the statutory protections other than marital status and age.

One of the purposes of allowing parties or the court to exclude jurors from service is to prevent litigants from being harmed by a juror's unfair bias. Current research shows, however, that bias on the part of the parties or the court may perpetuate unlawful discrimination

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

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

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

[4] *Id.*

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

through the process of jury selection, even where the person perpetuating the bias may be unaware of the bias.

Because of the dangers of implicit, institutional, and unconscious bias impacting litigants and jurors without any of the parties being aware of the bias, the Council received strong recommendations to eliminate peremptory challenges entirely. The United Kingdom, Canada, and Arizona have eliminated peremptory challenges. Some experienced trial attorneys were reluctant to do this, however, because peremptory challenges allow attorneys to exclude a juror they fear will be unfavorable to a client without embarrassing that juror or confronting that juror regarding potential bias. Peremptory challenges offer some control to the parties that is otherwise not available through the jury trial process. Ultimately, the Council concluded that amendments may be made to ORCP 57 D(4) to promote fairness without eliminating peremptory challenges. The Council strongly recommends that the legislature adopt the proposed amendments in order to promote diversity on jury panels and provide protection against bias.

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

Priorities. The Council's priorities in amending this rule were to change the burden shifting issue, which, contrary to caselaw and research, puts the burden on the person making the objection in the current version of the rule. The Council also wanted to recognize that unconscious bias, not just explicit bias, plays a part in the lack of representation on jury panels.

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

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

The Council recommends amendment of ORCP 57 as shown in the promulgated rule.

TRIAL PROCEDURE

RULE 58

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Testimony by Remote Means

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

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

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

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

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

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

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

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

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

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

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

C Motion for order of default.

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

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

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

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

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

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

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

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

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

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

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

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

D Motion for judgment by default.

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

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

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

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

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

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

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

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

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

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

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

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

Senate Bill 688

Sponsored by Senator MANNING JR (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Allows witness to waive personal service of subpoena by electronic mail.

A BILL FOR AN ACT

Relating to waiver of personal service of subpoena; amending ORCP 55 B.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 55 B, as amended by the Council on Court Procedures on December 10, 2022, is amended to read:

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

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

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

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

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

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

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

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

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

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

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

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

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

B(2)(c)(iv) Signed mail receipt. If the subpoena was electronically mailed, the electronic mail was sent before the date to appear and testify and the witness sent an electronic mail response before the date to appear and testify verifying that the witness received the electronic mail.

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

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

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

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

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

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

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

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

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

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

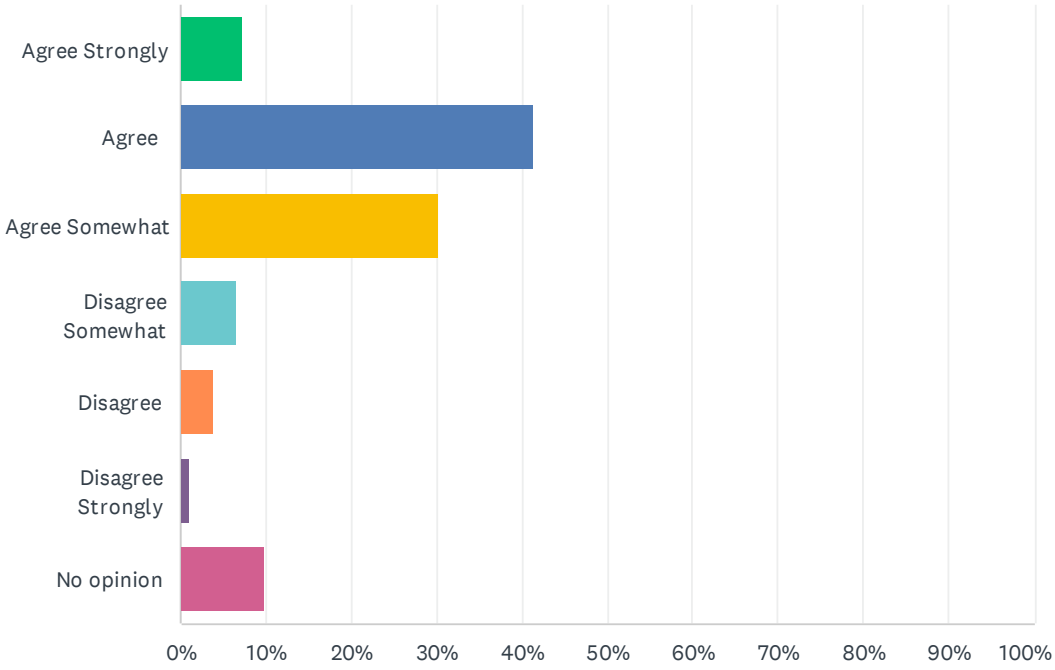
B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

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

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

Q1 Do you agree that the Oregon Rules of Civil Procedure promote the just determination of civil court actions?

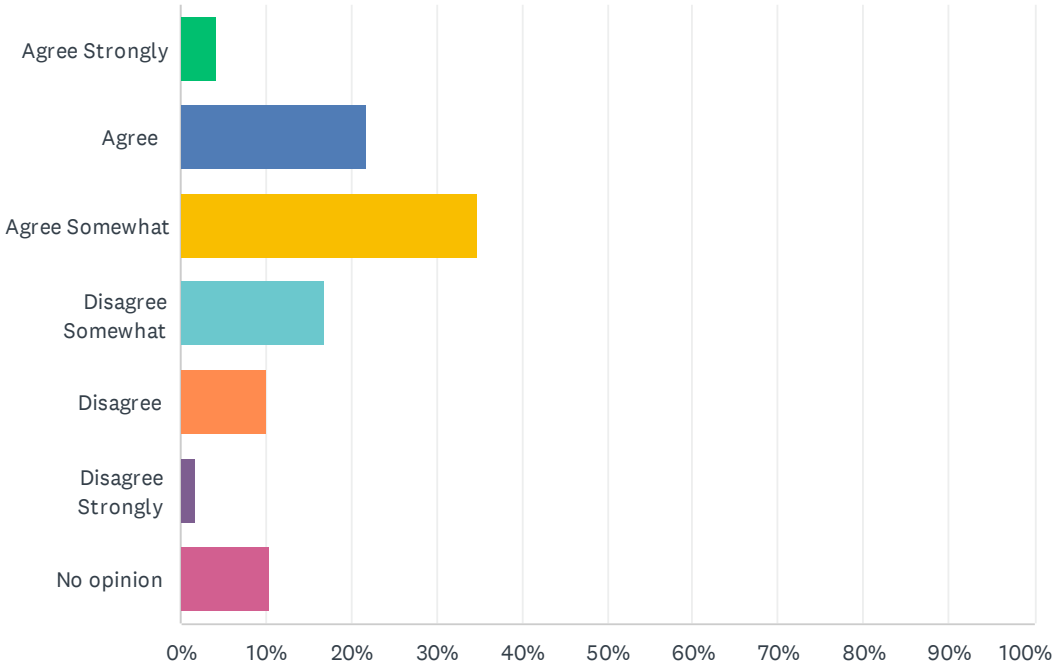
Answered: 307 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	7.17%	22
Agree	41.37%	127
Agree Somewhat	30.29%	93
Disagree Somewhat	6.51%	20
Disagree	3.91%	12
Disagree Strongly	0.98%	3
No opinion	9.77%	30
TOTAL		307

Q2 Do you agree that the Oregon Rules of Civil Procedure promote the speedy determination of civil court actions?

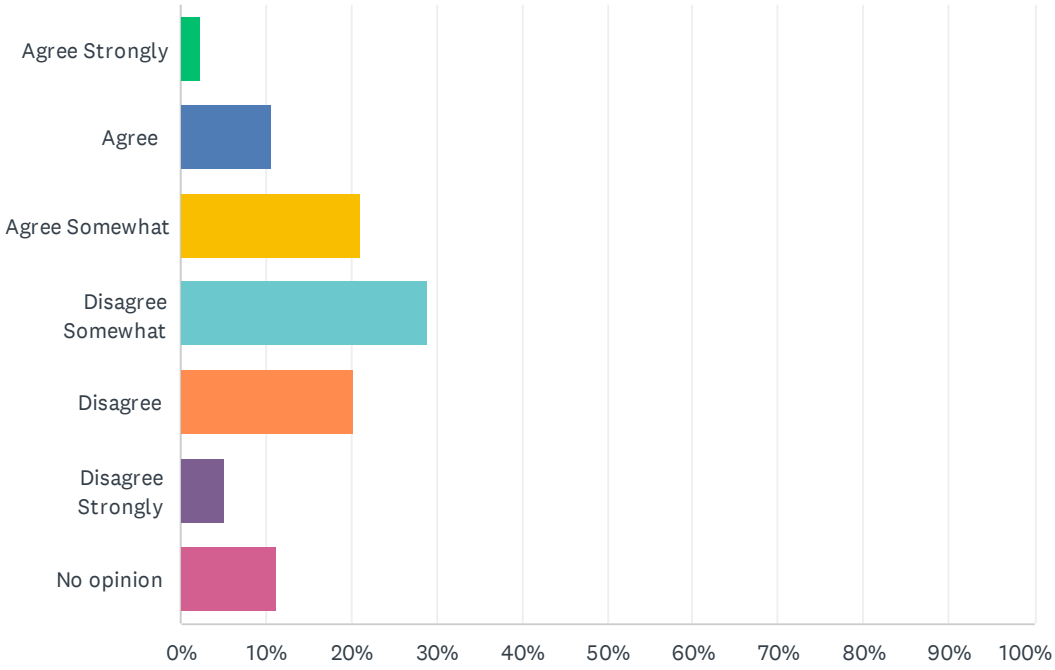
Answered: 307 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	4.23%	13
Agree	21.82%	67
Agree Somewhat	34.85%	107
Disagree Somewhat	16.94%	52
Disagree	10.10%	31
Disagree Strongly	1.63%	5
No opinion	10.42%	32
TOTAL		307

Q3 Do you agree that the Oregon Rules of Civil Procedure promote the inexpensive determination of civil court actions?

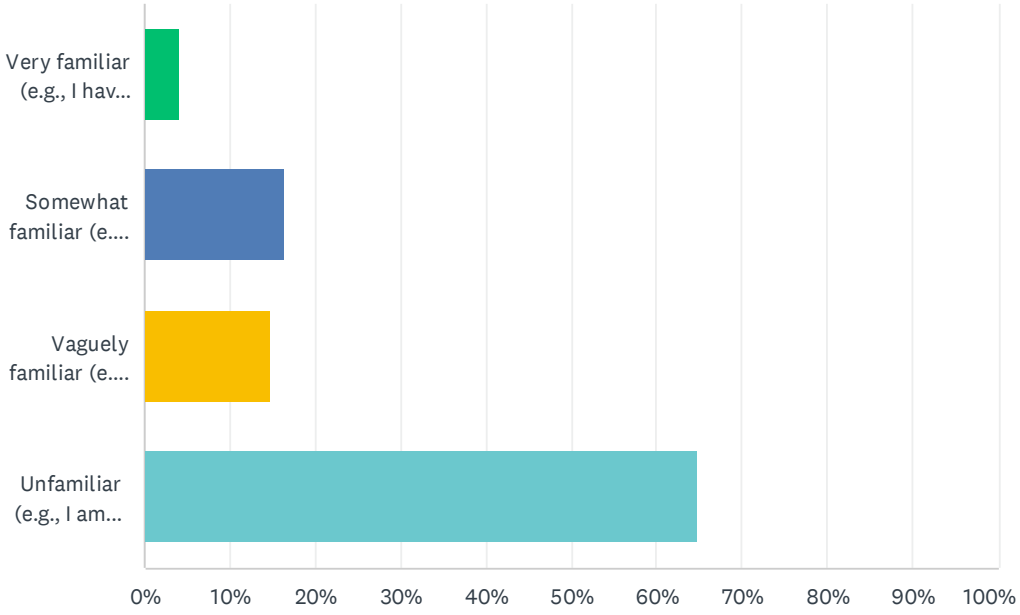
Answered: 307 Skipped: 0



ANSWER CHOICES	RESPONSES	
Agree Strongly	2.28%	7
Agree	10.75%	33
Agree Somewhat	21.17%	65
Disagree Somewhat	28.99%	89
Disagree	20.20%	62
Disagree Strongly	5.21%	16
No opinion	11.40%	35
TOTAL		307

Q4 Please rate your familiarity with the composition of the CCP.

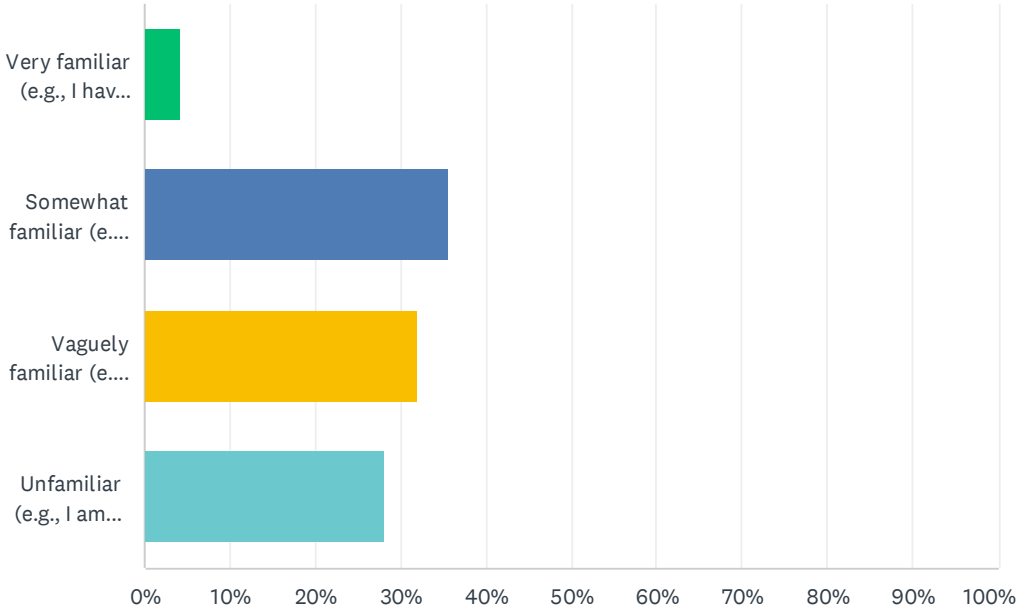
Answered: 298 Skipped: 9



ANSWER CHOICES	RESPONSES	
Very familiar (e.g., I have read the statute that provides for appointments to the Council and its makeup; I have served on the Council)	4.03%	12
Somewhat familiar (e.g., I am somewhat aware of the makeup of the Council; I have a friend or colleague who has served on the Council)	16.44%	49
Vaguely familiar (e.g., I may know someone who has served on the Council)	14.77%	44
Unfamiliar (e.g., I am unsure of who serves on the Council)	64.77%	193
TOTAL		298

Q5 Please rate your familiarity with the work of the CCP.

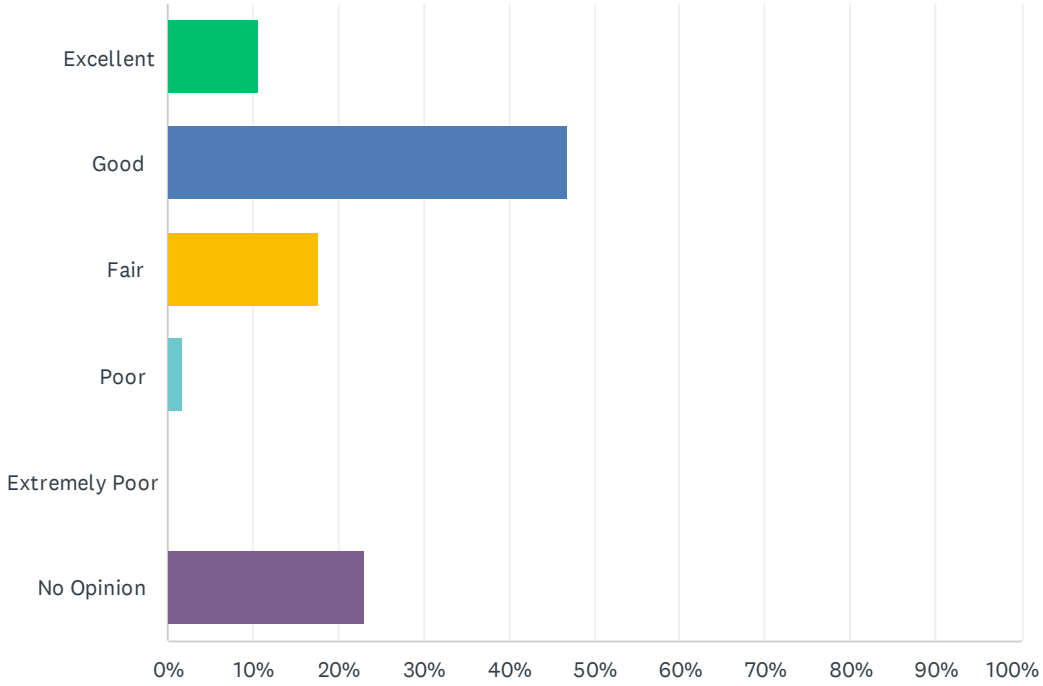
Answered: 298 Skipped: 9



ANSWER CHOICES	RESPONSES	
Very familiar (e.g., I have or a colleague has served on the Council; I have made a proposal to the Council; I regularly follow the work of the Council)	4.36%	13
Somewhat familiar (e.g., I pay attention to when the Council amends the ORCP)	35.57%	106
Vaguely familiar (e.g., I know that the Legislature does not have primary responsibility for the ORCP; I am unsure of when and how amendments are made)	31.88%	95
Unfamiliar (e.g., I am uncertain as to how the ORCP were created; I do not know when or how the ORCP are amended)	28.19%	84
TOTAL		298

Q6 How would you rate the quality of the CCP's work?

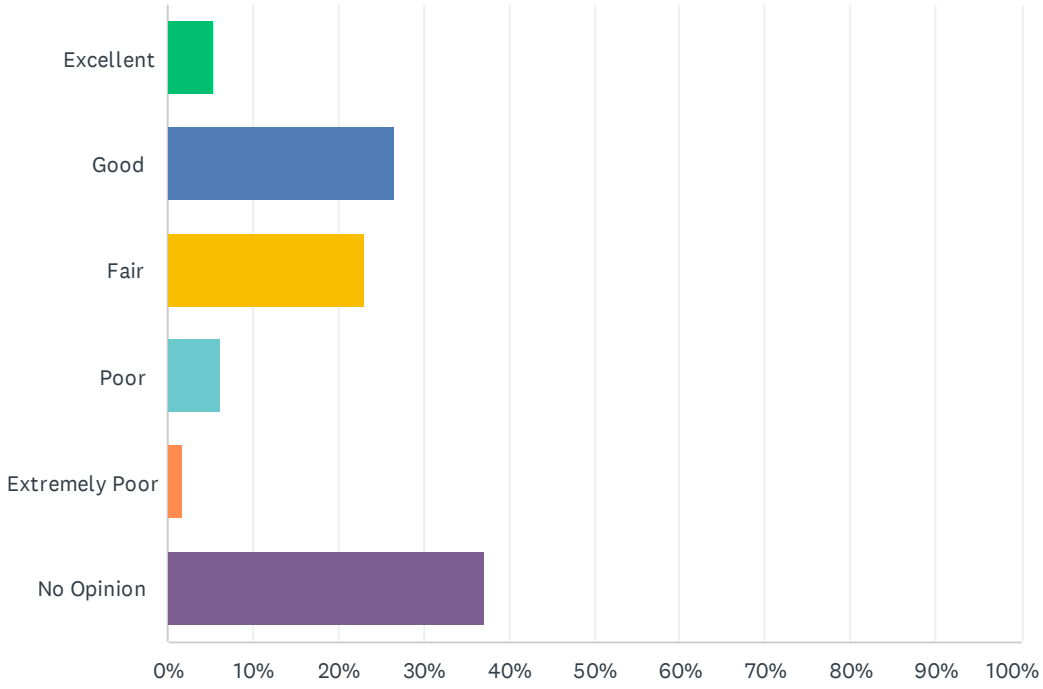
Answered: 113 Skipped: 194



ANSWER CHOICES	RESPONSES	
Excellent	10.62%	12
Good	46.90%	53
Fair	17.70%	20
Poor	1.77%	2
Extremely Poor	0.00%	0
No Opinion	23.01%	26
TOTAL		113

Q7 How would you rate the CCP's responsiveness to the needs of litigants?

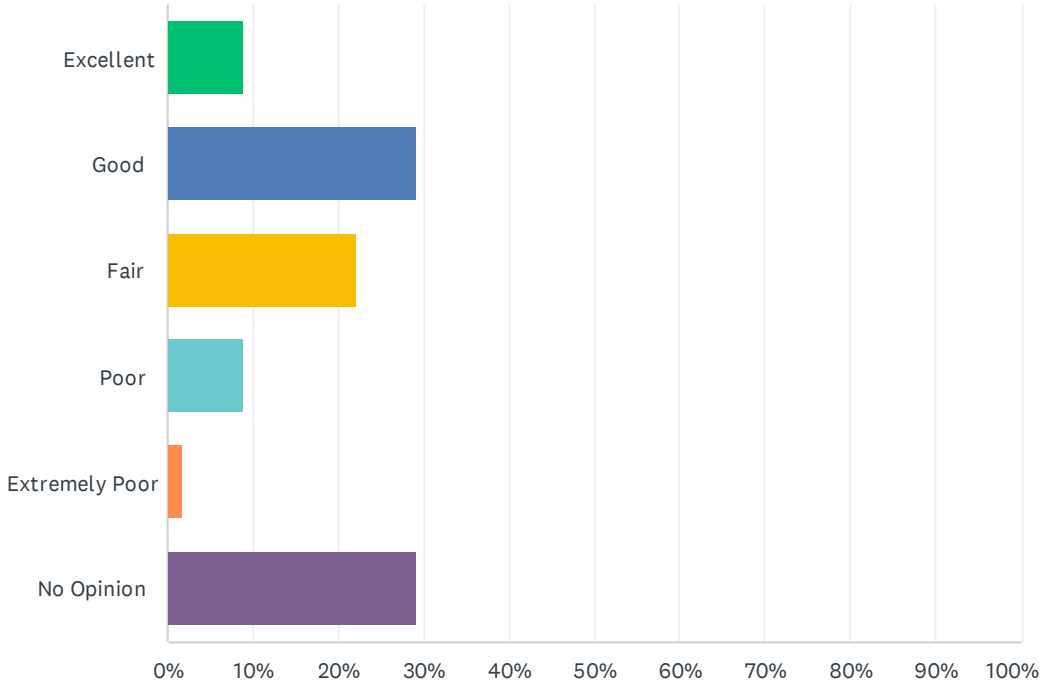
Answered: 113 Skipped: 194



ANSWER CHOICES	RESPONSES	
Excellent	5.31%	6
Good	26.55%	30
Fair	23.01%	26
Poor	6.19%	7
Extremely Poor	1.77%	2
No Opinion	37.17%	42
TOTAL		113

Q8 How would you rate the CCP's responsiveness to the needs of lawyers?

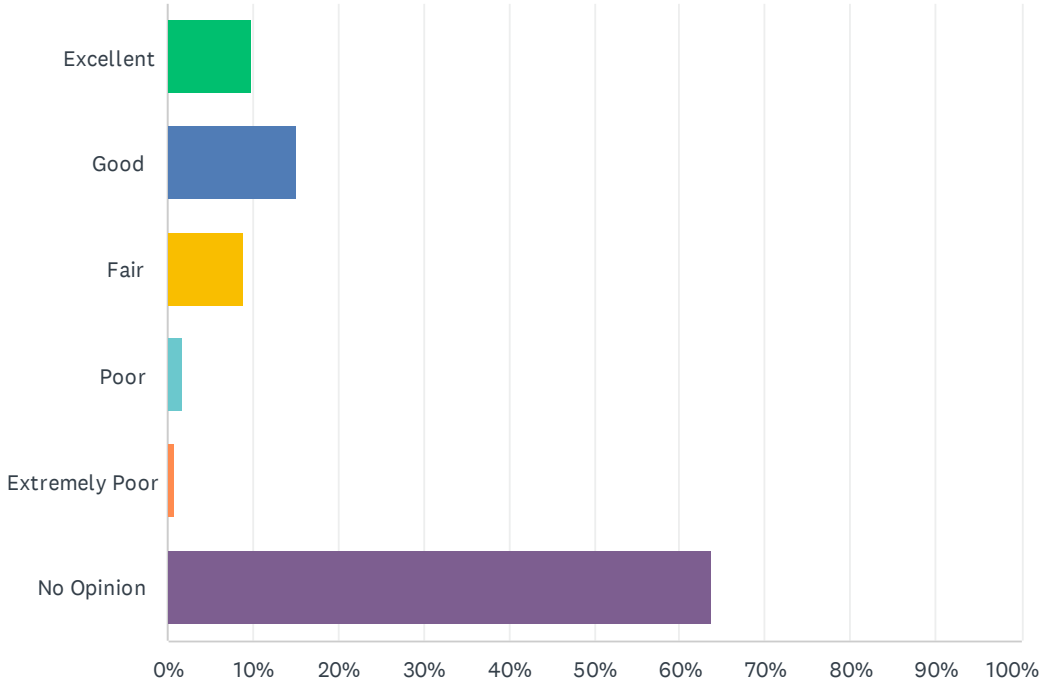
Answered: 113 Skipped: 194



ANSWER CHOICES	RESPONSES	
Excellent	8.85%	10
Good	29.20%	33
Fair	22.12%	25
Poor	8.85%	10
Extremely Poor	1.77%	2
No Opinion	29.20%	33
TOTAL		113

Q9 How would you rate the CCP's responsiveness to the needs of judges?

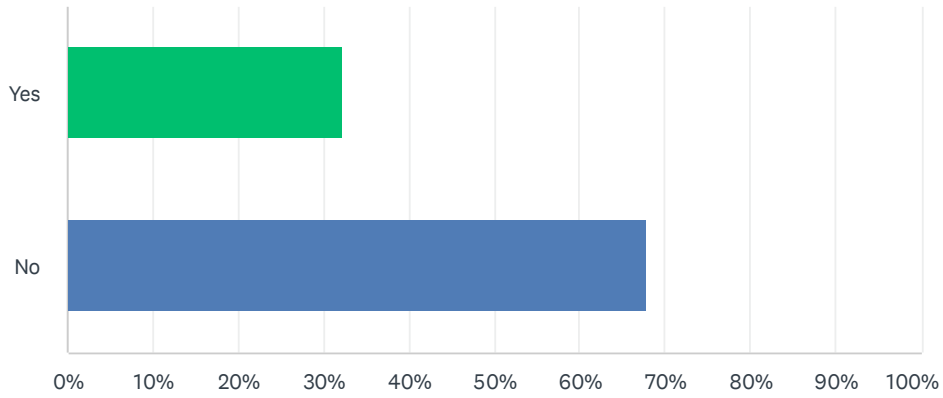
Answered: 113 Skipped: 194



ANSWER CHOICES	RESPONSES	
Excellent	9.73%	11
Good	15.04%	17
Fair	8.85%	10
Poor	1.77%	2
Extremely Poor	0.88%	1
No Opinion	63.72%	72
TOTAL		113

Q10 Have you visited the CCP website?

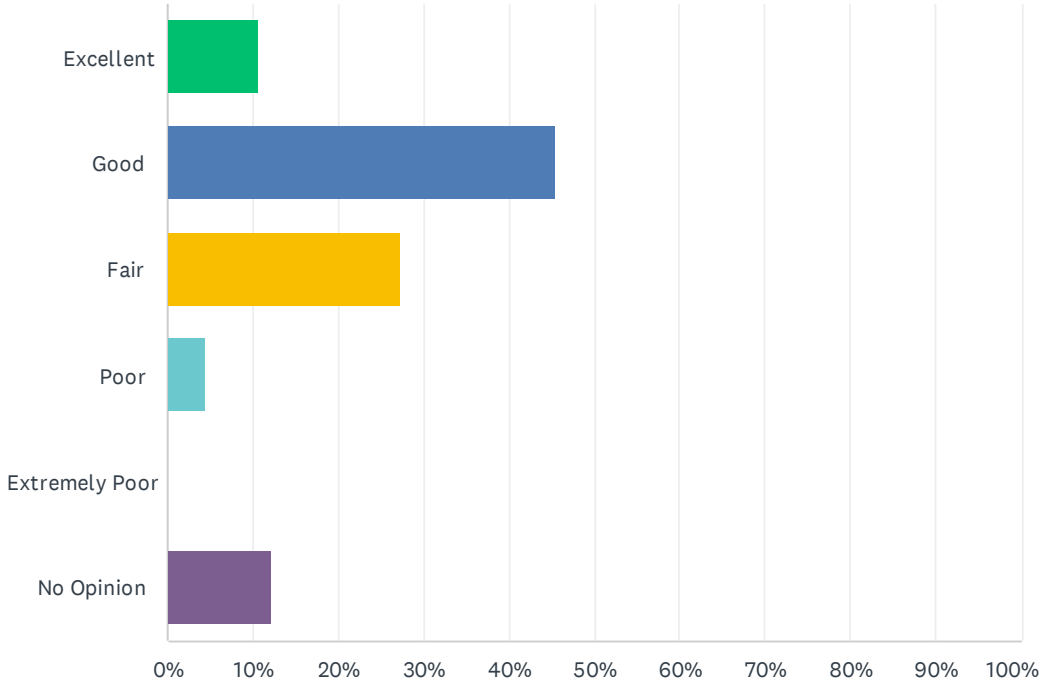
Answered: 208 Skipped: 99



ANSWER CHOICES	RESPONSES	
Yes	32.21%	67
No	67.79%	141
TOTAL		208

Q11 Please rate the CCP website's usefulness in terms of content:

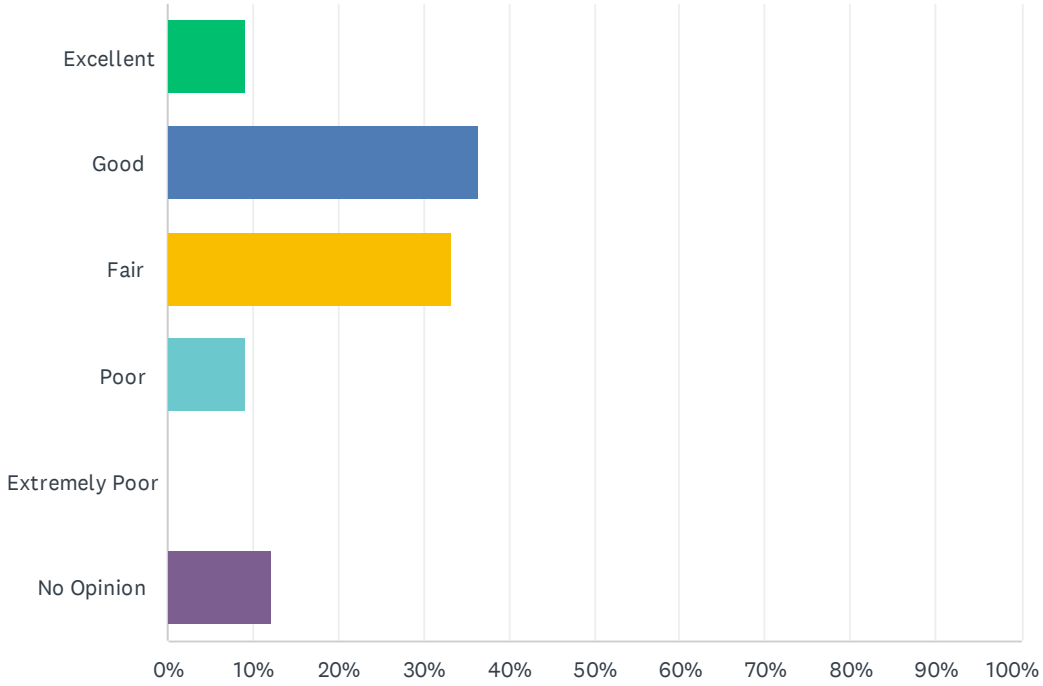
Answered: 66 Skipped: 241



ANSWER CHOICES	RESPONSES	
Excellent	10.61%	7
Good	45.45%	30
Fair	27.27%	18
Poor	4.55%	3
Extremely Poor	0.00%	0
No Opinion	12.12%	8
TOTAL		66

Q12 Please rate the CCP website's usefulness in terms of organization:

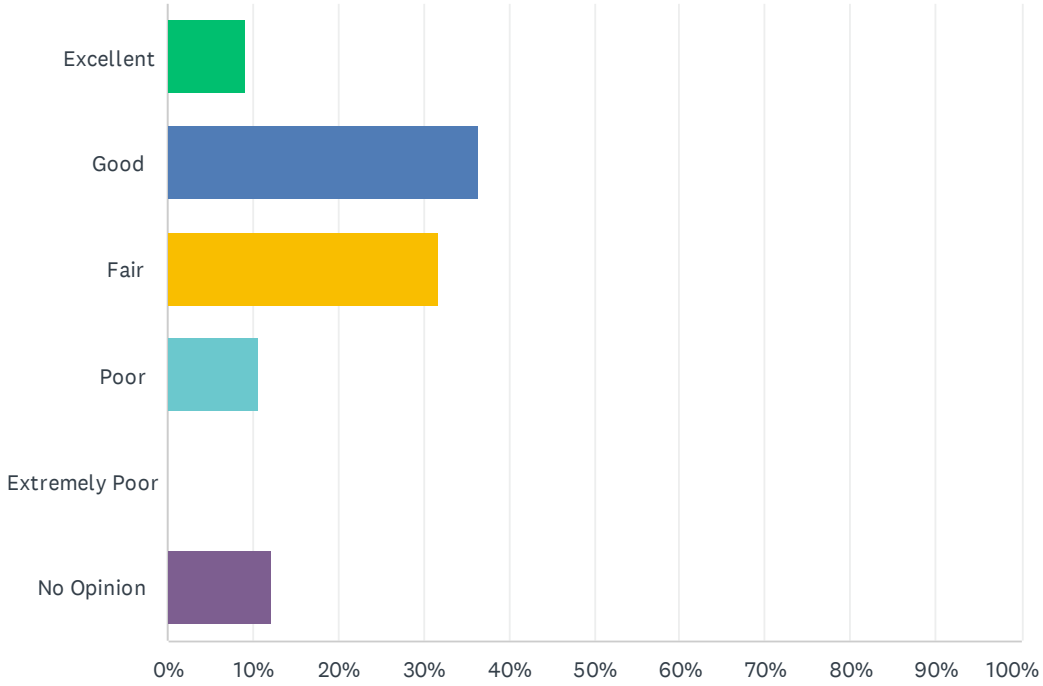
Answered: 66 Skipped: 241



ANSWER CHOICES	RESPONSES	
Excellent	9.09%	6
Good	36.36%	24
Fair	33.33%	22
Poor	9.09%	6
Extremely Poor	0.00%	0
No Opinion	12.12%	8
TOTAL		66

Q13 Please rate the CCP website's usefulness in terms of navigability:

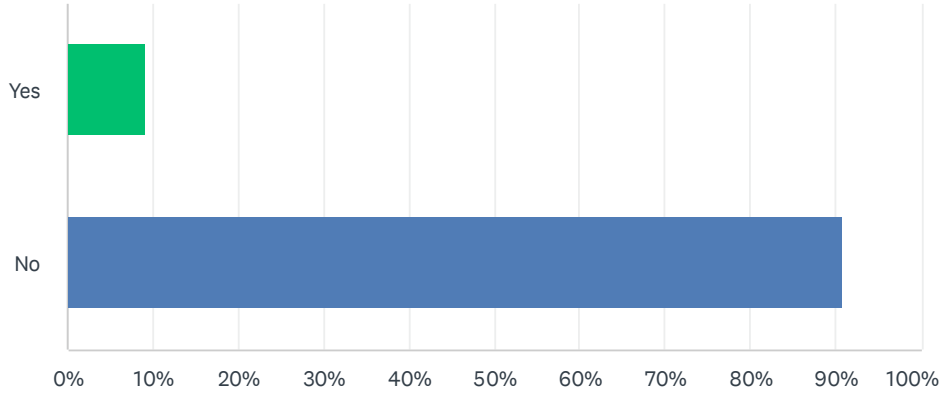
Answered: 66 Skipped: 241



ANSWER CHOICES	RESPONSES	
Excellent	9.09%	6
Good	36.36%	24
Fair	31.82%	21
Poor	10.61%	7
Extremely Poor	0.00%	0
No Opinion	12.12%	8
TOTAL		66

Q14 Have you ever made a proposal to the CCP?

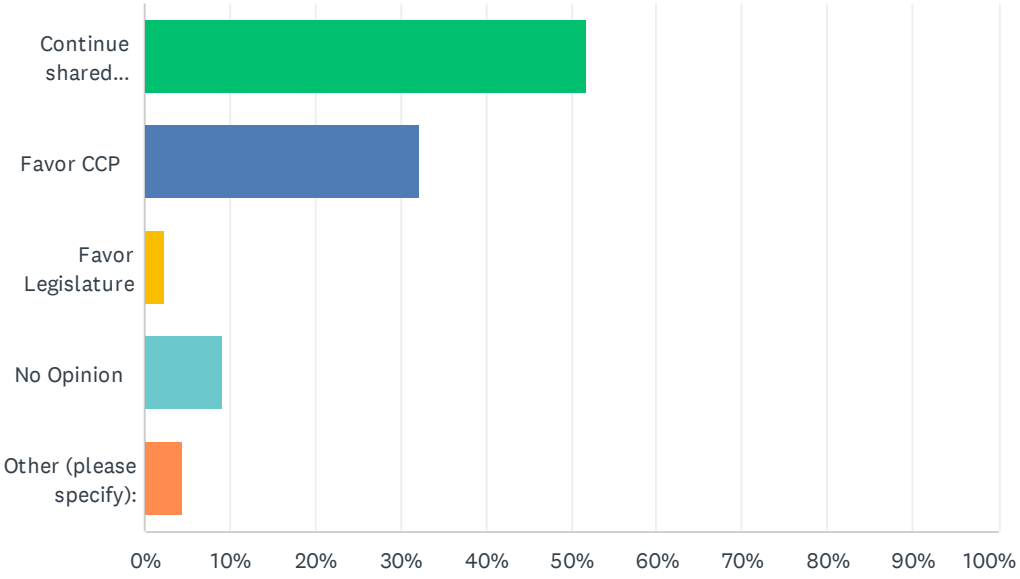
Answered: 207 Skipped: 100



ANSWER CHOICES	RESPONSES	
Yes	9.18%	19
No	90.82%	188
TOTAL		207

Q15 Prior to 1979, most civil trial procedures were found in statutes enacted by the Legislature. The ORCP were drafted by the CCP and can be amended by the CCP, subject to a review by the Legislature, which can amend or reject the CCP's promulgated changes (i.e., the authority is now shared between the Legislature and the CCP). Who do you think should have the authority to draft and amend Oregon's civil trial procedures?

Answered: 286 Skipped: 21



ANSWER CHOICES	RESPONSES	
Continue shared authority	51.75%	148
Favor CCP	32.17%	92
Favor Legislature	2.45%	7
No Opinion	9.09%	26
Other (please specify):	4.55%	13
TOTAL		286

#	OTHER (PLEASE SPECIFY):	DATE
1	Should be subject to review and approval by the Supreme Court of Oregon	8/16/2023 5:33 PM
2	I believe a committee (smqll) of practicing litigators should be charged with drafting and amending the ORCP. I believe they should look to other states with far more complex codes of civil procedure. i believe the code should be brought into line with other states so that Oregon is not alone in its behaviors. I believe discovery needs to be completely revamped.	8/16/2023 5:21 PM
3	The legislature should have the final say.	8/16/2023 3:45 PM
4	The Oregon Supreme Court	8/16/2023 3:25 PM

5	Tough call. Torn between continue to share authority and CCP. Needs to be oversight.	8/16/2023 3:07 PM
6	Slighty favor CCP subject to review by Oregon Supreme Court	8/16/2023 3:01 PM
7	Supreme court	8/16/2023 3:00 PM
8	OSB special committee	7/28/2023 1:49 PM
9	CCP with Supreme Court approval/ratification required	7/27/2023 7:53 AM
10	State bar	7/26/2023 5:02 PM
11	Shared authority expanded to scholars/professors and attorneys who represent clients other than plaintiffs and defendants	7/26/2023 3:48 PM
12	more imput should be solicited from practitioners with day-to-day experience on a regular basis. The transition to digital filing has been atrocious, and this survey is the first opportunity I've had to express any concerns.	7/26/2023 3:41 PM
13	I would favor CCP if balance civil v criminal and pl v def	7/26/2023 3:28 PM

Council on Court Procedures
Survey Comments
2023-2025 Biennium

Category	Comment
General comments	Thank you!
General comments	It's a tough job, isn't it?
General comments	Keep up the good work!
General comments	This isn't responsive to this question but there's no question addressing this. There was a question asking whether I have provided a suggestion for a rule change and, as that question was framed, my answer was no. However, I have submitted feedback relative to proposed rule changes.
General comments	Thank you for your work - I am glad to learn a bit about the CCP.
General comments	Thank you for your efforts to improve our judicial system.
General comments	Keep it up!
Council procedure	It is difficult to remember the rules I had issues with several years ago. I wish you sent this survey out yearly.
Makeup of the Council	The CCP should be balanced to intentionally not favor one side or the other in civil litigation, it is often perceived as favoring only plaintiff-side.
Makeup of the Council	The continued practice of CCP having at least one highly experienced probate/protective proceeding attorney is important to me. Not just plaintiffs and defendants bar are affected by the rules.
Makeup of the Council	Reduce the number of circuit judges to two circuit judges on the CCP.
Makeup of the Council	Legislators---ironically, should not have power over the court rules of procedure. Frequently, they make changes that adversely affect attorneys. Plus, if people are on the CCP they should be practicing attorneys with current court and litigation experience.
Makeup of the Council	My perception is selection of CCP members is biased. Additionally, applicants should at receive an acknowledgement of application and notice of rejection.
Website	It's unclear to me, based on the information on the website, which entity or statute governs the CCP's work and composition. Given that this is a public body of great interest to lawyers and legal professionals, the website surely could make it clear where the CCP derives its mandate and what rules govern their activities.

SITUATION: Conflict between Court Rules and Arbitration Statute

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

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

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

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

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

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

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

ORS 36.425
Filing of decision and award

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

Oregon Justice Resource Center
Advocate. Educate. Engage.

December 1, 2022

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

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

Dear Mr. Peterson and Ms. Nilsson,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

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

Shari Nilsson <nilsson@lclark.edu>

Re: ORCP and EPPDAPA

1 message

Mark Peterson <mpeterso@lclark.edu> Sat, Aug 13, 2022 at 2:17 AM
To: < @gmail.co >
Cc: Shari Nilsson <nilsson@lclark.edu>

Mr. ,

I will look into the issue that you have raised regarding service issues in EPPDAAPA cases. As you may know, the Council works on a biennial schedule and will not consider new changes to the ORCP until September of 2023. (The Council is completing its work on this biennium's changes.)

Thank you for raising this issue. If I have insight to offer, I will respond further but not over the next week as I will be out of state.

Mark

Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Tue, Aug 9, 2022 at 5:18 PM < @gmail.com> wrote:

> Hello,
>
> I am writing to suggest improvement to the Oregon Rules of Civil Procedure (ORCP) as they apply to EPPDAPA cases. The council has already in the past (See November 2011 Minutes) affirmed that the ORCP applies to EPPDAPA cases. When a respondent requests a hearing from the court this is a written request and ORCP 9(A) requires that the petitioner be served a copy but right now the EPPDAPA statute under ORS 124.020(9)(b) delegates serving a copy of the request on petitioner to the Clerk of Court during the notice of hearing process or so it appears. I am a petitioner in a EPPDAPA case and was never served a copy of the request for hearing and when I contacted the court to ask why I wasn't served citing ORCP 9(A) and ORS 124.020(9)(b) I was told that the neither the respondent nor the Clerk is required to provide me any service of a copy and that I could go purchase a copy of my own. The fact I wasn't served as a pro se disabled petitioner deprived me of time to prepare and adequate service and notice process. For these reasons I am asking the council to improve ORCP 9 or any other areas of the ORCP so that parties in these EPPDAPA proceedings get proper service of filings. I did ask Judge Patrick Henry for a continuance and order directing the Clerk to serve me but he denied this and didn't accept the argument that I was entitled to a copy of the request or that I was entitled to service of it. It appears to me the Multnomah County Circuit Court as a practice does not treat ORCP as applying to EPPDAPA proceedings which is unfortunate as it can deprive both parties from processes they are entitled to under the ORCP.

August 4, 2023

VIA EMAIL

Council on Court Procedures
Attn: Mark Peterson
c/o Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR, 97219

Re: Proposal to Eliminate the +3 Day Rule in ORCP 10B

Dear Hon. Mark Peterson and Members of the Council:

I write to request a helpful simplification in civil practice through removal of the +3 day rule under ORCP 10B. I hope to present on this in person but provide you with a summary of the reasons here first.

ORCP 10B provides:

> **B Additional time after service by mail, e-mail, facsimile communication, or electronic service.** Except for service of summons, whenever a party has the right to or is required to do some act within a prescribed period after the service of a notice or other document upon that party and the notice or document is served by mail, e-mail, facsimile communication, or electronic service, 3 days shall be added to the prescribed period.

This rule should be deleted because it is unclear, ambiguous, and inconsistently applied.

A. ORCP 10B Causes Ambiguity and Creates Risk of Malpractice

It is universally accepted that laws should be clear, precise and unambiguous. Although the rule seems facially clear, ambiguities arise often when the rule is applied. A common source of confusion arises with application of the rule to statutory timelines, such as whether the rule applies when a defendant to a small claims action demands jury trial (i.e., does the plaintiff have 20 days

to file a complaint in circuit court under ORS 46.465(3)(a) or does the plaintiff get an additional 3 days under ORCP 10B)?

This question was raised in *Oregon Credit & Collections Bureau, Inc., v. Valech,* Case No. 22cv11731. There, the plaintiff collection agency filed a small claims complaint, and the defendant requested jury trial. Pursuant to ORS 46.465(3)(a), plaintiff was required to file a formal complaint in circuit court within 20 days of the notice. Plaintiff filed the complaint within 22 days of the notice, and defendant moved to dismiss the case for failure to timely file a complaint under ORS 46.465(3)(a). In its response, plaintiff argued that +3 day rule under ORCP 10B applies and should allow him to file the complaint within 23 days. (*See* attached *Valech* Response to Summary Judgment at 2-3). The court found in favor of the defendant and dismissed the case, awarding fees to the defendant. (*See* attached *Valech* Order). When the case was dismissed, the statute of limitations had run, and the plaintiff was unable to pursue its claim at all. This is all because of the lawyer's mistaken reliance on ORCP 10B, possibly giving his client a malpractice claim.

Similar questions arise in other statutory settings such as ORS 20.080, probate (ORS 113.145), and protective proceedings (ORS 125.065). Some may argue that it is simple enough to interpret because statutes trump rules, and therefore ORCP 10B does not apply to statutory timelines. The analysis is not as simple as it seems. In *State v. Vanornum,* 354 Or 614, 317 P3d 889 (Or. 2013), Justice Landau said in his concurring opinion that some rules in ORCP are statutes and some are not. *Id.* at 633. If the legislature amends, repeals, or supplements any rule submitted by the CCP, the resulting rules are statutes. *See id.* "If the legislature chooses not to amend, repeal, or supplement the rules that the council submits, those rules simply 'go into effect' on January 1 following the end of the legislative session. When they 'go into effect,' however, they do so as rules, not as statutes." *Id.* (internal citations omitted). "To the extent that any rule conflicts with a statute enacted by the legislature, the rule is invalid." *Id.* at 634. Applying Justice Landau's concurring opinion, a practicing attorney upon identifying a conflict between an ORCP and a statute, would have to look up the legislative history for each rule to see if that rule was amended, repealed or supplemented by the legislature at any time in its history. If a rule had been amended, repealed or supplemented by the legislature at one point, the attorney would have to compare it to the statute and see which came later to decide whether the rule or the statute applies.[1] ORCP

[1] Moreover, if the rule was amended by the legislature after the statute with which it is in conflict was enacted or amended, but was again amended by the CCP but not amended, repealed, or supplemented by legislature, then the

10B has a possible conflict with many statutes that require timely responses. It is unreasonable to require attorneys to look through legislative history to resolve every conflict between a statute and ORCP 10B.[2]

B. The costs of confusion from ORCP 10B exceed its benefits

Presumably, when ORCP 10B was written, additional three days were needed to account for the delay in delivery of mail. Since then, technology has greatly improved to a point where electronic service methods (email, e-file service, and fax) are instantaneous and substantially more reliable than USPS.[3] Currently, the only time ORCP 9 service does NOT trigger a +3 day extension is when service is made personally, which rarely happens.

Some may argue that without 10B's extra 3 days, there just isn't enough time to file responses, especially when the response is due within 7 days or less. In such cases, each individual rule should be amended to allow extra time. If rules do not give enough time to file responses, the extra time should be written into those specific rules, and not somewhere else in the ORCPs. For example, ORCP 47C should be amended to allow 8 days instead of 5 for a party to reply to a response opposing summary judgement motion. Rules should be self-contained, especially with respect to deadlines imposed by those rules. Parties and attorneys should not have to refer back and forth through various rules and statutes to determine their response deadlines.

C. ORCP 10B is a Barrier to Access to Justice

Rules should be clear and accessible to everybody, not just to attorneys who are familiar with the practice. As written, ORCP 10B creates an unfair advantage to practitioners who are readily familiar with the rules over new attorneys, out of state attorneys, and pro se litigants, by hiding the extra time allowance in a section that is separate from where the response times are found. Such a practice goes against the concept of fair play and substantial justice, and acts as a barrier to access to justice.

latest rule would not trump the statute, but the previous one would. These kinds of situations can make a relatively simple task of determining response deadlines very cumbersome very quickly.

[2] There are numerous other areas in which ORCP 10B creates ambiguity and risk of malpractice. I would be happy to go over each of those instances if the Council is interested.

[3] On a related note, mail service under Rule 9 should be abolished altogether, especially if the party is represented.

I would like the opportunity to go over more problematic scenarios Rule 10B and present my case in person in front of the Council, so that I can address any individual concerns the members may have about my proposal. Thank you very much for your time and courtesies.

Sincerely,

/s/ Young Walgenkim
Young Walgenkim
Hanson & Walgenkim, LLC

Shari Nilsson <nilsson@lclark.edu>

Re: ORCP serious flaw for self-represented litigants (rule 36)

Mark Peterson <mpeterso@lclark.edu> Fri, Jun 23, 2023 at 8:46 PM
To: < @seastorm.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

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I am assuming that you are litigating in Oregon's (state) circuit courts. You will find that the Federal Rules of Civil Procedure and the Oregon Rules of Civil Procedure are quite different. I will add your suggestion for a rule amendment to the Council's agenda for the first biennial meeting (when the Council decides which rules to consider for amendment). However, the rules providing for specific discovery methods are instructive as to timing. See, e.g., Rules 37 A, 39 A, 41 A and 43 A.

Mark
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On Fri, Jun 23, 2023 at 6:24 AM < @seastorm.com> wrote:

> I am forced to be a self-represented litigant because of cross-industry blacklisting and what I believe are life-endangering civil liberties violations as well as false light portrayals about me. This has affected every aspect of my life, including my access to the justice system to try to remedy these problems. It's a horrible situation that I am trying to litigate to the best of my ability through the court system.
>
> Yesterday I had a major case affecting my health dismissed on summary judgment in part because I did not understand that litigants themselves (IOW, the plaintiff) must initiate discovery. I didn't see anything at all - and still don't - in ORCP about how discovery is initiated. Other documents online specified that it is improper to ask for discovery before a judge orders a conference. Based on that - the lack of information about how discovery is initiated in Oregon, plus the FRCP rule in which it appears that the court initiates the process - when all the defendants simultaneously filed Motions For Summary Judgment immediately after the complaint was filed - I thought that as long as I provided SOME evidence and raised questions of fact, that the Motion would be denied. I responded to all the Motions and - again, based on what I did and did not read in the rules - read the replies and waited for the hearing.
>
> At the hearing I was chastised for not having asked the defense for discovery materials prior to the hearing. The judge acted like I should have known from reading the ORCP that I was supposed to ask for discovery materials. The mistake I made was based on an omission in ORCP and erroneously assuming that the process would be like the federal process. If the ORCP had said explicitly how to commence discovery, I would not have made this mistake. Today I'll be spending time trying to figure out how to begin the discovery process in

> Oregon.
>
> Courts and due process are supposed to be available to citizens, but there are a number of ways that pro se and indigent litigants are treated very poorly. In addition, we cannot access a lot of the materials that attorneys or people with wealth can access (like ABA materials). I have to rely heavily on what I can access - case law online, rules, and statutes.
>
> Thank you.

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12	Clerks and e-filing	The e-filing system and it's implementation is very poor, and it now seems like the clerks wield arbitrary control over pleadings that are filed. Additionally conducting all of the filing via this remote system has made the clerks unhelpful in resolving filing defects. For example: a pleading is filed, "accepted", but then weeks later an email will annouce the pleading is rejected/unsigned with little to no explanation or assistance in correcting the issue. This issue cuts across all counties, and under the old system a clerk would discuss and explain any issue rather than issue a fiat rejection from on high. This results in wasted time, money, and energy as a practitioner searches for the "fix" without any assistance from often unreachable clerks. The ORCPs need to be modified to make it clear that the clerks are not to act as empowered gatekeepers, which is precisely what ORCP 12 seems to direct "pleadings shall be liberally construed". Thus some form of rule needs to make it clear that just because an attorney files a pleading with the wrong coding (e.g. motion to compel production vs motion to compel discovery) the pleading should not be rejected over what amounts to essentially a bookeeping exercise by the court.
21	15, 19, 47 E	ORCP 19 and ORCP 21 arguably pose a conflict with one another when considered alongside ORCP 15. There potential timing implications per ORCP 15 in failing to deny allegations in a complaint and where a litigant moves for a partial motion to dismiss. There should be a deferred period for an answer while a motion is pending. The same should apply for a partial motion for summary judgment ORCP 47. Please see Wells Fargo Bank v. Clark, 294 Or. App. 197 and https://willamette.edu/law/resources/journals/wlo/orappeals/2018/09/wells-fargo-bank-v.-clark.html.
21		The time frames in Rule 21 are complicated for no good reason.
21		It would be useful to clarify whether ORCP 21 requires a party to assert a lack of subject matter jurisdiction in an initial response to a complaint or whether that defense can be asserted at any time. ORCP 21A(1) lists lack of subject matter jurisdiction, so arguably under ORCP 21F, the motion is waived if not included in the initial response. On the other hand, ORCP 21G says the court must dismiss a case where there is lack of subject matter jurisdiction, implying that the defense may not be waived by failing to include it in the initial response in accordance with ORCP 21F. It would be good to have clarity on whether the defense of a lack of subject matter jurisdiction is or is not waived by not including this defense in the initial response to a complaint.
10 B		Please remove the +3 day rule under ORCP 10B. I have many reasons supporting the removal, and I would like to discuss those with the appropriate person from CCP
10 B		ORCP 10B. Adding an additional 3 days to respond to a notice or other document for all types of service is stupid. The additional time rule should be deleted and all of the standard response times should be extended for 3 days so attorneys do not have to consult multiple rules.
23 A		ORCP 23A - if parties have agreed to amendment after a response has been filed, a Motion, Declaration, and Order to allow the amendment should not be required. This causes more expense for parties, and more work for judges. This rule should be revised to allow the amendment to be filed along with a Declaration indicating that the parties have agreed as confirmed in a writing, attached to the Declaration. No order should be required.
55 B(9)		I would like to amend the rule regarding jury questions as applies to criminal matters, with the rule amended to allow defense to veto any questions proposed.
55 B(9)		I practice criminal law exclusively. ORCP 58B(9) should be amended to prohibit juror questions in criminal trials. Alternatively, it should be amended to prohibit juror questions if objected to by the defense. Any discussions regarding juror questions should be resolved on the record and outside of the presence of the jury.
55 B(9)		At least for criminal matters, I believe that ORCP 58B(9) should remove juror questions altogether, or pbe amended to read: “With the court’s consent, jurors shall be permitted to submit to the court written questions directed to witnesses or to the court[, except that in a criminal matter, jurors may not submit questions if objected to by any defendant]. The court shall afford the parties an opportunity to object to such questions outside the presence of the jury.”
55 B(9)		ORPC 58 B (9) should be amended as follows: “With the court’s consent, jurors shall be permitted to submit to the court written questions directed to witnesses or to the court[, except that in a criminal matter, jurors may not submit questions if objected to by any defendant]. The court shall afford the parties an opportunity to object to such questions outside the presence of the jury.” I can submit briefing in support of the argument that allowing juror questions in a criminal matter violates due process, just send me an email to george112076@gmail.com. Thanks for your time and attention. George Gilbert, OSB. No. 112076
55 D		ORCP 55 continues to be a bit confusing. (I know it was revised not terribly long ago).
55 D		**The 2019/2020 revisions to ORCP 55 were very helpful in clarifying issues with issuing and serving subpoenas, but I would recommend going a step further and having a separate ORCP involving out-of-state subpoenas.** I suggest the same for ORCP 7 in relation to out-of-state service and especially in foreign jurisdictions not party to the Hague Service Convention. The CCP definitely has a better grasp of the needs of litigants in comparison with the Legislature. The CCP does good work and the archives of past ORCPs and historical notes are immensely helpful.

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55 D		Please clarify the timelines for ORCP 55D document production. After the reconfiguration from ORCP 55H, it became less clear. For example, when seeking disclosure of mental health records of an opposing party, if there already exists a Qualified Protective Order and Order for In Camera Review, it needs to be clearer as to how much advanced notice is required to give the opposing party/counsel before the subpoena is sent to the entity from whom records are sought. Is it the same 14 days as when the records are to be produced directly to the requesting party? What is "reasonable?" Can the words "In Camera Review" be included to clarify, since that is the actual terminology used?
68 C		ORCP 68 could be clearer on the procedure for requesting and objecting to fees. I can't offer specifics but I've seen a variety of ORCP 68 requests and forms of objections.
68 C		I work with many clients who are representing themselves. One of the issues I run into frequently is the lack of a notice requirement in Rule 68 C(4). Receiving a document entitled Statement of Attorney Fees is not sufficient to provide notice that a party may oppose the request by filing an objection. An attorney may provide that information in a cover letter but in my experience rarely do.
68 C		Attorney fees award if a court enforces an unwritten local rule, in favor of the attorney objecting to the unwritten (SLR) rule.
68 C		Clarifying rules under ORCP 68 for claiming attorney fees and costs, other than upon entry of a judgment or upon request for supplemental judgment for costs of collection after entry of a judgment. There is an implied miscellaneous procedure for fees by motion but the rules are unclear. The specific example giving rise to the issue is a post-judgment motion under which a party has a right to fees, but where the prevailing party is not the original judgment creditor.
69	7	In my experience, Rule 69B encourages gamesmanship by defendants flouting the intent of the rule. It ends up putting the onus on the plaintiff to go through the dance of pinging the defendant, then filing a notice of intent to take default, just to get the defendant to file an answer.
69		(4) Address or clarify procedures relating to motions to allow relief requested (e.g., a party files a motion seeking affirmative relief, and the other side does not respond/object/request hearing, etc.), and otherwise clarify application/scope of ORCP 69 with respect to family law modification proceedings (ORS 107.135), in particular. Example: in original domestic relations action, both parties appeared, and a judgment of dissolution entered. Years later, one party moves to modify the judgment under ORS 107.135 and serves the order to show cause on the other party in the manner required by ORCP 7. The non-moving party does not respond or answer the order to show cause re: modification within the time required (or otherwise provide notice of intent to do so). In this circumstance, is the moving party permitted to seek default under ORCP 69, or does the rule no longer apply because the other party technically did appear/defend in the original underlying matter, albeit possibly many years prior? (This may seem like a silly question, but I've heard of courts rejecting motions for default in such circumstances, appearing to rely on the aforementioned reasoning.)
71 B		Make it harder to vacate default judgments under orcp 71B(1)(a) excusable neglect, or add some sort of penalty or attorney fee provision. The low threshold for what constitutes excusable neglect under the current case law practically makes the rule pointless and only creates more time and expense for attorneys and their clients.
71 C		ORCP 71B and C - The court should have the inherent ability to set aside a judgment for Intrinsic fraud - which relates to the merits of the case - under ORCP 71C, rather than extrinsic fraud. Extrinsic fraud should not be a basis for a set aside under ORCP 71C (which has no time limitation). ORCP 71B(1) already permits set aside for both intrinsic or extrinsic fraud if filed within one year. Currently, an intrinsic fraud discovered more than a year from the judgment notice is barred from a set aside order. That seems backwards. The court should be more concerned about intrinsic fraud upon the court - where a party's fraud is directly related to the merits. The policy of finality of judgments is important - and should apply to extrinsic fraud as it does under ORCP 71B. But if a person is intentionally committing fraud about the merits of a cause (intrinsic), they should not have more safety from a set aside ruling than would a person who commits fraud about an issue that has no real bearing on the case (extrinsic). ORCP 71C authority to set aside an order without time limitation should be applicable to only intrinsic fraud. As is now, case law states the direct opposite. The recent case of A.B.A. v. Wood, 326 Or App 25 (2023) , has a good discussion of the types of fraud. The person in that case who was wronged, and later found evidence of intrinsic fraud, was denied relief because they sought a set aside under ORCP 71C (and was too late to file under ORCP 71B). Alternatively, there should be a longer statute of limitations under ORCP 71B if the fraud is intrinsic (e.g. ORS 107.452 provides for a 10 year SOL if a divorcing spouse learns of intentional concealment of assets after the judgment).
71 C		Extend the period in which people can file to set aside a judgment that they did not know about and make it easier to have an unknown judgment set aside. I have seen cases where the records show the wrong person was served but it was many years too late. This sort of rule favors the large corporations and bill collectors over people.
Apply the ORCP to administrative law cases		Not your domain, but Oregon's administrative proceedings are bordering on dysfunctional when complex matters are involved. The system simply cannot handle complex proceedings. There needs to be some attention to addressing standardization of procedures in those proceedings - which would likely work much better if they were governed by the ORCP.
Assign (and keep) one judge to a case (Mult. Co.)		In re Multnomah County in particular - could we PLEASE have judges assigned to cases from the beginning? It's so inefficient and unworkable, even with the newer "motions judge" process. If the motions judge doesn't rule someone's way, they won't agree to them continuing....which necessitates educating a new judge. So dumb!
ORCP/UTCR/OJD		Weave more UTCR in to the ORCP.
ORCP/UTCR/OJD		I sometimes wonder whether and to what extent the CCP, UTCR committee, and the committee or individuals responsible for promulgating OJD's Forms interact with one another, and whether there would be any benefit to increased collaboration amongst and between them?
ORCP/UTCR/OJD		It seems like the ORCPs have lost most of their relevance because the UTCRs and LCRs are more important to follow. The ORCPs give a big picture, but if you aren't familiar with the UTCRs and LCRs of various courts, the procedures in the ORCPs often become meaningless.

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Discovery (Rules 36-46)	47 E; UTCR conferral on all motion	Commentary may help the inconsistent application of the rules by judges. Too much variability. And the summary judgment rule is being abused with the attorney declaration. I'm not a fan of expert discovery but there is too much hiding the ball.
Discovery (Rules 36-46)	47 C; Expert discovery	We should adopt a requirement for conferral on all civil motions, not just discovery motions. The 60-days-before-trial deadline for filing summary judgment motions should be removed or a discovery cut-off should be imposed to ensure discovery is complete in time to meet the MSJ deadline.
Discovery (Rules 36-46)	Expert discovery; federalize the ORCP	Add a rule for use of interrogatories. Change ORCP 26 to require disclosure of experts and use of exchange of expert reports. Make ORCP like federal court practice.
Discovery (Rules 36-46)	Expert discovery; federalize the ORCP	Our rules should more closely track the FRCP, particularly with respect to identification of witnesses and experts before trial and expert discovery.
Discovery (Rules 36-46)	Expert discovery	Provision for appealing decisions on preliminary injunctions and TROs; expert discovery
Discovery (Rules 36-46)	Expert discovery	Expert discovery, but try getting that by OTLA.
Discovery (Rules 36-46)	Expert discovery	get rid of trial by ambush with respect to expert testimony.
Discovery (Rules 36-46)	Expert discovery	allow expert discovery; include interrogatories among discovery options
Discovery (Rules 36-46)	Federalize the ORCP	1) Allow interrogatories in discovery (can save discovery expenses by avoid unnecessary depositions when document requests alone are insufficient) 2) Renumber the ORCPs to align with FRCP rule numbers (like Washington does with its Civil Rules)
Discovery (Rules 36-46)	Federalize the ORCP	In general, the ORCP should better match the FRCP.
Discovery (Rules 36-46)	Proportionality in discovery	Adding a proportionality requirement for discovery like the FRCP.
Discovery (Rules 36-46)	Proportionality in discovery	Adopt a proportionality rule simliar to that in FRCP 26
Discovery (Rules 36-46)		Legislature to create a Family Law Discovery Master (impartial) and both parties must supply documentation. CCP to draft procedures and sanctions. Goal/Aim is to reduce discovery costs and attorney fees and create an equitable process (restrict/ limit the discovery games/ disparate information.
Discovery (Rules 36-46)		Trial by ambush should be done away with. Automatic mandatory discovery in every case. This would reduce the cost and level the playing field.
Discovery (Rules 36-46)		Please, PLEASE, delete the stupid addition to ORCP 43 that was put in a few years ago that says if you don't respond to an rfp within 30 days your objections are deemed waived. That serves absolutely no purpose than to add a procedural booby trap to the rule. I routinely advise opponents that I pay no attentio to that part of the rule, and ask that they do the same, which is also needless. Get rid of it. .
Discovery (Rules 36-46)		ORCP 36 and the UTCR on discovery motions. The lack of disciplined approaches to discovery requests and responses is increasing. It's way more difficult and abstract then it should be to enforce compliances.
Discovery (Rules 36-46)		There needs to be a procedure for the short docket landlord/tenant cases so that discovery will occur timely.
Discovery (Rules 36-46)		Could allow for interrogatories as a discovery tool that would cost parties less than a deposition.
Discovery (Rules 36-46)		I would like to explore the possibility of amending ORCP 43 and 45 to provide shorter timelines for summary proceedings, such as FED cases (forcible detainer and entry). Currently, it is up to the court to specify a shorter timeline for responding to discovery requests if they choose to do so. The court never does so on its own motion - which effectively requires a defense attorney to make motion to the court for a shorter timeline when they may have been hired only a few days prior to a trial date and are scrambling to draft and file an amended answer and corral witnesses. This is unduly burdensome on the defense attorney in FED cases and further weighs the scales in favor of Plaintiffs who are already far better-positioned to win their case based on having better access to counsel.
Discovery (Rules 36-46)		As a small-town attorney representing ordinary people, I see a disconnect between what the rules are meant to do, and what actually happens. Clients are often shocked to see how parties FAIL to play by the rules (discovery especially), without reprimand by the Court -- unless, of course, they spend their own money trying to get sanctions or court orders to address the issue. Even then, the at-fault party still seems to get the benefit of the doubt, and a million chances, presumably to preserve "access to justice" and "due process." Even with a fee award, there is the issue of collection. Thus, the party who plays by the rules bears a financial burden for managing dysfunctional/cheating litigants, and confidence in the court system's ability to deliver "justice" is diminished. I don't know what the solution is, but the courts shouldn't be bending over backwards to protect parties who are pro-se and abusive of the system -- or parties who hire an attorney who is complicit in the abuse -- in the name of access to justice. Abusive plaintiffs may need to have their cases dismissed as a discover sanction. Abusive defendants may need similar treatment. It might cause successive case filings, but it could send a message over time.
Discovery (Rules 36-46)		Automatic discovery sanctions, discovery cutoff dates. Actual teeth to the rules.
Discovery (Rules 36-46)		The Code should be amended to include a limited number of interrogatories. More cases drag on and require depositions than they should if basic information was required from the parties. The lack of discovery mechanisms and lack of any real enforcement of ORCP 44 and 45 result in parties withholding documents and information that if disclosed earlier in the proceedings would likely lead to resolution without the need for trial preparation or use of the court's resources for trial dates that ultimately do not proceed.
Electronic signatures		Something addressing digital signatures should be incorporated into the ORCP regarding parties and counsel signing paperwork, declarations/affidavits.

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Electronic signatures		It would be convenient to allow for electronic/digital signature (Adobe Esign for example) of declarations submited in support of motions.
Judges and the ORCP		I don't have a specific rule, but judges should be required to follow the Rules in every case. I feel they allow manipulation of the rules depending on who they want to favor.
Judges and the ORCP		I have had a judge recently tell me that these rules and the statutes are just "form over substance." Shocking to me. I would like a rule that explains to judge's these aren't just suggestions. These are rules that they must apply and respect.
Judges and the ORCP		Provide training for judges on civil procedure
Judges and the ORCP		We need a review mechanism for courts that disregard or simply do not know the ORCP without adding to our clients' attorney fees. Someone please look in on the Deschutes County Probate Court. It seems as if everyone is operating as though there were no ORCP and it is creating chaos.
Mediation	Incorporate Uniform Collaborative Law Act in ORCP	I would like to see the ORCP changed to incorporate the Uniform Collaborative Law Act - https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf
Mediation	Add mediation as option in court-annexed ADR	I strongly urge that mediation be added to the ADR options. Mediation has as good a resolution rate as nonbinding arbitration, and in many cases, the parties would prefer to satisfy the ADR requirement via mediation -- but most courts don't allow that, and leaving it to each court to decide does not promote the consistent administration of justice.
Motion practice	Allow use of letter requests in lieu of motion practice	Allow matters to be brought to attention of courts without formal motions; e.g., email request for conference to address matters matters. If court believes the matter warrants the usual written motion process, he/she can so require. The amount of time and money wasted -- wasted -- on the formality and delay and expenses associated with "the rules" is positively staggering.
Non-precedential opinions	Opposition to non-precedential opinions	The non precedential opinions are a horrible idea. I read the advance sheets every week. It is clear the appellate judges would rather write a short letter than an actual opinion. That having been said, some of the NPO's are very good and SHOULD be law. I practice in the family law area. The number of published opinions has dropped to almost zero since last year. This state of affairs is not helpful. The job of the appeals court is to review and make law. It does not do this with the NPO. I really think this is a mistake which will freeze the state of the law to what it is in 2023 or move it forward way too slowly. I can see an NPO in very limited cases, but not the way it is in fact being used now. I strongly strongly believe that this practice is a mistake.
Non-precedential opinions		Get rid of NPO's.
Plain language		I would love to contribute to any efforts to translate the rules into plain language so that more Oregonians can understand the process and participate in civil litigation.
Plain language		As a newly barred attorney, I filed my first action in court the spring. I read the ORCP through multiple times, as well as your TCR and local rules. I nevertheless got a whole bunch of things wrong. The judge told me I should read the MRCP thoroughly. I thought I had, but it was also clear to me after reading it multiple times that the rules are written so that people who understand how to operate in the courts already can read them. They are not written in a way that allows people to access the courts if they don't already know how to interface with courts. There is a lit of assumed knowledge not spelled out in the rules.
Plain language		It would be good for the CCP to continue to consider the needs of self-represented litigants when developing rules of civil procedure and drafting them in language that can be easily understood by a self-represented litigant.
Provide an annotated ORCP/UTCR		A well annotated version of the rules with cross references to the OTCRs would be helpful
Remote probate practice		Making the probate process as friendly as possible to be conducted remotely is preferable.
Self-represented litigants		Rules guiding both attorneys, judges and litigants on the responsibility of pro se parties to abide by the rules, particularly those strictly applied to lawyers but not so much to pro se parties. This is in regard to time for motions, replies, amendments, form of pleadings, exhibits, ex party contacts, inappropriate remarks to counsel or tribunals.
Self-represented litigants		Always keep self-represented individuals in mind.
Self-represented litigants		The rules are a morass of confusion and traps for the inexperienced or unrepresented. People who do not have lawyers or law degrees are held to the same standards as lawyers and this is unjust and confusing for them.
Service	7; 9	Greater allowance for electronic service.
Service	7; 13	Clean up summons and service, translate into plain language and Spanish, require the court to make form available when ORCP lays out the text of the document (e.g. Summons). Allow "posting" to be done by court staff. Its confusing and hard for the public to be moving and posting things to bulletin board for alt service. Why doesn't Rule 13 acknowledge that family law complaints are called "Petition?" I have been struggling to reconcile ORS 18.075(b) and ORCP 67 and 54.
Service	7	I see a hole in the service rules on how to serve a state official, sued in their personal capacity. Does the rules for individual apply, or the rule for the State apply. The federal rules address this issue explicitly FRCP 4(i)(2) and (3).

Council on Court Procedures
Survey Suggestions
2023-2025 Biennium

Category/Rule	Subcategory/additional information	Suggestion
Service	7	I would also like to see ORCP 7 loosened up a bit as to service requirements. A lot of time seems to be lost on trying to get folks served and in family law, certain provisions (like retroactive support) are contingent upon date of service.
Service	7	The 2019/2020 revisions to ORCP 55 were very helpful in clarifying issues with issuing and serving subpoenas, but I would recommend going a step further and having a separate ORCP involving out-of-state subpoenas. **I suggest the same for ORCP 7 in relation to out-of-state service and especially in foreign jurisdictions not party to the Hague Service Convention.** The CCP definitely has a better grasp of the needs of litigants in comparison with the Legislature. The CCP does good work and the archives of past ORCPs and historical notes are immensely helpful.
Service	7	Like federal court, there should be a broader ability for waiver of process service. Plaintiff should submit the waiver, if Defendant fails to waive, Defendant should pay the costs of process service.
Service	7	Consider possible service by electronic means such as email or facebook. We often allow this as an alternative when service cannot be made in person, but it might be more efficient to include it as an option in certain cases.
Service	7	Establish a new method for notice rather than publication in newspapers, which is an ineffective method of notifying general public
Service	9; 10 B; UTCR 5.100	UTCR 5.100 is unclear and makes things very difficult for attorneys, especially when the other party is unrepresented. it is a rule that makes no sense and most judges seem to ignore it. It should simply be done away with- or amended to apply to only orders and judgments that have substance to them more than granted or denied. The timelines are also ridiculous. If you are going to say 7 days, plus 3 for mailing, why not just say 10. and why do we need that much time if we fax or email. Also, no one pays attention to the service rule that says it is only considered served when the other party acknowledges receipt. Common sense is lacking in a lot of these rules.
Service	9; reduce paper copies	Reduce requirements for paper copies;
Service	9; require litigants/attorneys to update service information	(1) Make clear(er) that parties who have appeared/provided notice of intent to appear in an action have a duty and continuing obligation to provide the court & other parties with current contact information sufficient to allow for service of process under ORCP 9. We run into issues with this frequently when dealing with unrepresented (pro se) litigants. I do note that UTCR 2.010(13) partially addresses this by requiring attorneys/parties to provide notice of change in address or telephone number, but doesn't clearly require provision of contact information in the first instance. Cf. UTCR 1.110(2), 2.010(6) & (13), and 2.080(1). However, it seems more appropriate to incorporate this requirement directly into the ORCP. See, e.g., ORCP 9, ORCP 17A, and/or ORCP 69B.
Service	9	ORCP 9. It's time to incorporate some version of email service, WITH ADEQUATE PROTECTIONS FOR CIRCUMSTANCES WHERE SERVICE MIGHT BE MISSED, into the ORCP.
Service	9	Make email service without the need for a read receipt to be the standard.
Service	9	Service by e-mail is antiquated and not in-line with how the law is practiced in the present-day.
Service	9	It would be very good if email became the only method of correspondence and we eliminated regular mail altogether. It is inefficient and no more reliable than email.
Training on civil procedure		I like the rules, but most young lawyers seem to be unaware of many of the rules and their purposes. Perhaps more training on procedure in law school and intro CLE courses?
UTCR 5.100		(2) Clarify/adopt procedures with respect to disputes over form of judgment/orders. (UTCR 5.100 leaves a lot to be desired, to say the absolute least).
Vexatious litigants rule		(3) Adopt - or perhaps recommend that the legislature adopt or investigate - remedies/procedures which provide at least some sort of limited protection from abuse/harassment by vexatious litigants (whether party is pro se or represented). See, e.g., California Code of Civil Procedure s. 391(b); cf. 28 USC 1927. I know this is a tricky issue which raises very real access to justice concerns, but I represent a lot of survivors of domestic violence/sexual assault, and it is not uncommon for perpetrators to weaponize and misuse the (civil) court system to intimidate and/or continue to exert control over the victim. Effective remedies to address this behavior are so limited as to be virtually non-existent, which further emboldens these individuals to continue engaging in the same behavior. Again, I know this is a difficult subject area, and I of course worry about infringement on an individual's right to access the courts, but I can't help but think that there must be a way to balance the interests at stake here.
Vexatious litigants rule		We badly need a rule on vexatious litigants. The current climate in litigation is getting far more antagonistic and pro se plaintiffs are filing multiple lawsuits against the same defendants. Please, please, please move the vexatious litigant rule forward so defendants who are being harassed have a rule/procedure to rely upon to stop the craziness!