MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 13, 2025, 9:30 a.m.
Oregon State Bar & Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom (Zoom)
Nadia Dahab (Zoom)
Hon. Andrew Erwin (In Person)
Hon. Christopher L. Garrett (Zoom)
Barry J. Goehler (In Person)
Hon. Jonathan R. Hill (Zoom)
Melissa Hopkins (Zoom)
Ryan Jennings (Zoom)
Lara Johnson (Zoom)
Eric Kekel (In Person)
Derek Larwick (Zoom)
Julian Marrs (Zoom)
Hon. Thomas A. McHill (Zoom)
Hon. Michelle McIver (Zoom)
Hon. Melvin Oden-Orr (Zoom)
Hon. Robert Raschio (Zoom)
Michael Shin (Zoom)
Hon. Scott Shorr (In Person)
Tom Spooner (In Person)
Hon. Todd Van Rysselberghe (In Person)
Bryce Whitman (In Person)
Alicia Wilson (Zoom)

Members Absent:

Vacant Defense Position

Guests:

John Adams, Oregon Tax Court (Zoom)
Kelly L. Andersen, Outgoing Chair (Zoom)
Aja Holland, Oregon Tax Court (In Person)
Avery Pickard, Oregon State Bar (In Person)
Rachel Trickett, Oregon Judicial Dept. (Zoom)
Margurite Weeks, Former Council Member (Zoom)
Nik Yanchar, Yanchar Law Office (Zoom)

Council Staff:

Shari C. Nilsson, Executive Assistant (Zoom)
Hon. Mark A. Peterson, Executive Director (In Person)

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 9 • ORCP 10 • ORCP 22 C • ORCP 27 • ORCP 38 C • ORCP 60 • Abusive Litigants in Probate Proceedings • Judgments • Arbitration • Attorney Fees • Civil Motion Practice • Contempt	• Council-Prepared Summaries of Rule Changes • Default Orders/Judgments • Depositions • Disclosures • Discovery	• ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery			

I. Call to Order

Mr. Andersen, outgoing Council chair, called the meeting to order at 9:30 a.m.

II. Introductions

Mr. Andersen asked guests and new members to introduce themselves. He then asked whether anyone had any corrections to the roster (Appendix A). Hearing none, he proceeded to the next agenda item.

III. Approval of December 14, 2025, Minutes

Mr. Andersen asked whether any member had suggestions for changes or corrections to the draft December 14, 2025, minutes (Appendix B). Hearing none, he asked for a motion to approve those minutes. Ms. Dahab made a motion to approve the December 14, 2025, minutes. The motion was seconded by Judge Bloom and approved by voice vote with no opposition or abstentions.

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

Mr. Andersen asked for nominations for the position of Council chair. Ms. Dahab nominated Mr. Goehler as chair. Judge Hill seconded the nomination, which was approved by voice vote with no opposition or abstentions. Mr. Goehler nominated Ms. Dahab as vice chair. Mr. Spooner seconded the nomination, which was approved by voice vote with no opposition or abstentions. Judge Peterson explained that, by tradition, the position of treasurer is held by the Council's public member. He stated that it is not a position that has strenuous duties. Judge Hill nominated Mr. Whitman as treasurer. Mr. Kekel seconded the nomination, which was approved by voice vote with no opposition or abstentions.

At this point, Mr. Andersen turned over the meeting to the new chair, Mr. Goehler. Mr. Andersen stated that he had truly enjoyed and valued his time on the Council, and wished the new Council the best of luck. Judge Peterson presented Mr. Andersen with a plaque as a token of the Council's appreciation for his eight years on the Council and two years as chair.

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

Judge Peterson referred the Council to the rules of procedure (Appendix C). He explained that these rules contain information about the Council's processes and that they were last updated in 2016 to bring them up to date with current practice. They are intended as a reference for Council members.

VI. Council Timeline & Workflow

Judge Peterson referred the Council to the timeline and workflow documents (Appendix D) that Ms. Nilsson created. They provide an overview of the Council's biennial process as well as a behind-the-scenes look at the administrative tasks that Council staff tends to throughout the biennium. They are intended as a reference for Council members.

VII. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson referred the Council to the rules promulgated by the Council last biennium (Appendix E). He noted that the statutory procedure is that, if the Legislature does not modify or reject the Council's promulgations, those promulgations become law effective January 1 of the following even-numbered year. The Legislature did not take any actions on the amendments promulgated in December of 2024, so they will become effective on January 1, 2026.

Judge Peterson explained that changes were made to Rule 1 to reflect the new associate members of the Oregon State Bar (OSB), as well as other changes to clean up the rule. Changes were made to Rule 14 to allow a judge to intervene during a deposition without the need to make the request in writing, reflecting current practice that was not written in the rule. Rule 35 is a new rule to curb abusive litigants from using the court system essentially to brutalize someone that they do not like very well, or taking actions that have no basis in law to try to obtain an unfair advantage, often by exhaustion or working the percentages that some parties will not defend themselves. Cleanup changes were made to Rule 39. Significant changes were made to Rule 55, including that the subpoena form must state that, if the subpoena is not honored, fines or jail time could result. Another change is to remove the objection process for document subpoenas and replace it with a motion to quash or motion to modify. Judge Peterson stated that he noticed that the UCTR Committee had made a change to UTCR 5.010 that requires conferral for this Rule 55 motion as well.

B. Council's Suggested Statutory Changes

Judge Peterson referred the Council to Appendix G. He stated that the Council had made a recommendation to the Legislature for a change to ORS 45.400. 30 days' notice in advance of the hearing for remote testimony did not seem to make sense any more, given the Council's changes to Rule 39 and Rule 58. The OSB included this suggestion as part of its law improvement package, it went to the Legislature, Judge Peterson testified before the House Judiciary Committee, and the Legislature made the change.

Judge Peterson stated that the Council had also wished to make a suggestion to the Legislature to amend ORS 46.415 to have the newly promulgated Rule 35 clearly apply to small claims cases, since Rule 1 of the ORCP states that the ORCP do not apply to small

claims cases where a different procedure is specified by statute or rule. Unfortunately, the Council did not have a lobbyist to present that suggestion to the Legislature, so the Legislature did not act on it.

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

Judge Peterson explained that the Legislature had not made any amendments to the ORCP nor made any changes to the Oregon Revised Statutes that will affect any of the ORCP. He noted that, both last biennium and this biennium, there were suggestions that the Council should include family law and probate lawyer members. This would potentially require a statutory change, as the makeup of the Council is set by statute. Another way to approach the issue would be to have the Oregon Association of Defense Council and the Oregon Trial Lawyers Association be cognizant of members who work in these areas and encourage them to apply for membership on the Council. Judge Peterson mentioned this because, not being a probate practitioner, as he looked at Senate Bill 168 he came to the realization that there is a statutory provision that certain ORCP apply to probate matters and certain ones do not.

D. Staff Comments

Judge Peterson stated that he is working on staff comments for the last two biennia. He noted that the Council had received a suggestion last biennium from attorney Richard Weill to provide a summary when amendments are published so that people who are reading them have a way of quickly determining what prompted the Council to make the change versus what may just be technical changes. This will also make it easier for staff to create staff comments at the end of the biennium, as they will already be largely drafted. The staff comments are not legislative history but, rather, just a shortcut to help the reader get to the heart of the matter.

VIII. Administrative Matters

A. Set Meeting Dates for Biennium

Mr. Goehler explained that, by tradition, the Council meets on the second Saturday of each month, with the exception of July and August. From time to time special meetings have been needed in the summer months, depending on workload, but not often. He asked whether any Council member had any comments about changing to a different Saturday schedule. Judge Hill stated that he would prefer to maintain the second Saturday schedule, as it is what most Council members expect and it works well.

Mr. Goehler then stated that, before the pandemic, the Council held in-person meetings with a phone-in option for members who were unable to attend in person. During the pandemic, meetings changed to fully remote via Zoom, and they have remained that way since. Today's meeting is hybrid, with both in-person and Zoom options. He stated that, from his perspective, there are advantages and disadvantages to both types of

meetings. One disadvantage to in-person meetings is that he is unable to have access to the same technology that he has in his home office, such as two screens to flip between documents and the meeting screen. Another disadvantage is that the members spread throughout the state are not always able to travel to Portland. He asked members their thoughts about continuing to hold hybrid meetings or changing back to entirely virtual meetings.

Judge Bloom stated that he was on the Council at a time when all meetings were held in person, and he appreciated that model. He stated that, while he recognized the advantages of virtual meetings, he would be in favor of keeping in-person meetings with the option of remote participation. He suggested perhaps having a certain number of meetings with an in-person option and the rest entirely remote. Mr. Goehler asked whether having meetings with an in-person option once per quarter would be reasonable. Judge Bloom suggested once per quarter and also for the publication and promulgation meetings.

Judge Hill stated that he thought that it would be good to get together in person once a year, but he acknowledged that there are members coming from remote places in the state who are unable to attend in person. He noted that we want to encourage judges and practitioners throughout the state to participate, so he thought that the default should be video conferencing. Judge Raschio stated that he does not have a major highway route to Portland, but that he is happy to travel there when he can. He stated that he likes in-person meetings, but that he also needs to have the hybrid option available.

With regard to the second Saturday schedule, Judge Raschio pointed out that second Saturdays work every month for him except for possibly in February 2026. The second Saturday is Valentine's Day and it is also a long holiday weekend. He suggested shifting the February meeting to the first Saturday. Judge Hill agreed.

Judge Peterson stated that he might be a bit old-fashioned, but that he likes meeting in person. He has felt a bit out of touch with Council members the last few biennia. However, as he lives just 5 minutes from the OSB center, he recognizes his privilege. Mr. Kekel asked whether the Council has ever considered a sort of retreat where members get together at a central location in the state. Judge Peterson explained that the Council's enabling statutes indicate that the Council should endeavor to meet at least one time in each congressional district, of which there are now six. The Council has, at times, held meetings in Eugene, Newport, Hood River, and Medford. Judge Shorr stated that he thinks that the virtual meetings have worked quite well because it is a statewide Council, and virtual meetings have also encouraged public participation. He noted that the limited in-person participation of the current meeting might be a quiet vote for the convenience of web-based meetings, although he could envision having the most important meetings be hybrid, like the publication and promulgation meetings.

Mr. Goehler stated that the consensus of the Council seemed to be in favor of the second Saturday schedule with the exception of the February meeting, which would be held on the first Saturday. He suggested holding the October 11, 2025, meeting via Zoom only to see how that goes, and postponing the decision on hybrid versus virtual only meetings until after that. He noted that, if the meetings are going to be hybrid, he may need to bring another computer to allow him to see all participants who are not on the big screen and to monitor the chat.

Ms. Hopkins stated that she is a member of Oregon Attorneys with Disabilities, and pointed out that virtual meetings are actually more accessible for a lot of individuals. She stated that requiring in-person meetings could eliminate participation that the Council would want to encourage. Ms. Nilsson pointed out that no meeting would be entirely in-person; there would always be a Zoom option available. Mr. Goehler did note that, with hybrid meetings, the people participating virtually may not be on a level playing field with the people participating in person, so that is definitely something to think about.

B. Funding

Judge Peterson explained that the Council is funded by general funds from the Oregon Legislature as a pass-through in the Oregon Judicial Department's (OJD) budget. The Council receives just under of $60,000 per biennium, a small sum that covers a stipend for the Executive Director and an hourly wage for the Executive Assistant. It also pays for software and things of that nature that the Council needs to keep going, and it seems to be adequate. A number of years ago, the Oregon State Bar began allocating $4,000 per year for member travel expenses so, to the extent that the Council does have meetings that are in person, members may fill out an OSB expense reimbursement form, turn it in to Ms. Nilsson, and receive reimbursement. The practice has been to pay the public member first, the judges second, and attorney members third.

The Council was hosted by the University of Oregon Law School for many years. When the last professor there who was Executive Director of the Council retired, Judge Peterson was chosen to head the Council at Lewis and Clark, which now provides office space, business services, insurance, computers, and other overhead. This is of real benefit for the state.

C. Results of Survey of Bench and Bar: Generally

Judge Peterson directed the Council's attention to the general public comments received from the Council's survey of bench and bar (Appendix I). He noted that there are several that seem to indicate that some lawyers and judges are not familiar with the work of the Council. One in particular states that there should be real lawyers on the Council; this seems to indicate that the respondent does not have a very deep understanding of the Council. Judge Peterson noted that Rule 1 states that the ORCP should provide for the speedy, inexpensive, and just administration of civil cases, and public feedback in the past has indicated that "inexpensive" is where the Council has fared the worst and is

something the Council should be mindful of. Mr. Goehler pointed out that there were some kudos in the comments, and that those were nice to see.

IX. Old Business

A. ORCP/Topics to be Re-examined from Previous Biennium (Appendix J)

1. ORCP 9 & ORCP 10

Judge Peterson called the Council's attention to the suggestions regarding Rule 9 and Rule 10 made last biennium and carried over to this biennium's agenda. He noted that, the last time the Council made a change to Rule 9, fax machines were still in vogue and email service was relatively new. However, the comments that were made then might still be true now: that attorneys can get a few hundred emails per day. Young practitioners may not recognize this, but email service is only effective if the recipient agrees to it. So, if an attorney who does not appreciate the technology of email and is nonetheless very inundated with them chooses not to agree to email service, they are stuck. Judge Peterson stated that he was not speaking in favor or against automatic email service; however, now that e-filing exists, it may be time to reconsider email service without consent.

Ms. Nilsson noted that attorney Nik Yanchar, who had made a suggestion regarding email service both last biennium and in this biennium's survey, was present via Zoom and willing to speak to the Council about his suggestions. Mr. Goehler invited him to speak. Mr. Yanchar thanked the Council for allowing him to speak. Although he is a member of the OSB's Board of Governors, he noted that he was speaking on this matter as an individual.

Mr. Yanchar stated that he had submitted suggestions relating to ORCP 9 and ORCP 10 in tandem with each other. He stated that the suggested change relating to email service is important for a few different reasons, the foremost being efficiency. It is 2025, Oregon has e-filing, and the federal courts only use electronic case filing. He feels that, if attorneys must accept email service through the federal court system, there is no reason why Oregon should not fall in line with that. He pointed out that the efficiency of email service is undeniable, especially given that the United States Postal Service (USPS) is not as reliable as it once was. He stated that he had done a test where he sent mail with USPS from one side of Portland to the other and it took five and a half days to arrive. Email, on the other hand, is instantaneous. When an attorney registers with the OSB, they are required to provide an email. This is an acknowledgment that email is a part of an attorney's daily practice life.

A second consideration for email service is money. Email is mostly free. There may be minor costs with other providers, but anyone can get a free Gmail account. With the rising cost of USPS, mail is getting more and more expensive

and, as mentioned, unreliable. Mr. Yanchar noted that he has recently run into situations with some defense counsel who will reply to every single email except ones that have discovery attached and who will argue that they received every other email except that one. At the motion hearing, the judge will tell the opposing counsel, this is your email on file with the OSB, you received all of the other emails, so you are presumed to have received the discovery email as well. That whole motion practice should not have to happen.

Mr. Yanchar pointed out that this is also an access to justice issue. Email will be vital for self-represented parties because it is less expensive and it makes it easier to have a discussion with the opposite side regarding discovery and potential resolution of the case outside of court.

Mr. Yanchar noted that he believes that a summons still does need to be served properly, but stated that his proposal is to otherwise allow email service if there is an attorney registered with the OSB who has an email address with the OSB. In tandem with this suggestion, he would like to do away with the 3-day mailing requirement in ORCP 10, because mail service would no longer exist. Email is instantaneously received. If it bounces back, then obviously that is a bad email and would not count. But if it goes through to the email on file with the OSB, there should be no reason to have an extra three days just for the sake of having an extra three days.

Mr. Yanchar also suggested including something in the ORCP to join with the Uniform Trial Court Rules (UTCR) that, if a lawyer registers to go through the Odyssey system, the e-file and serve is also proper service, just to kind of mirror each other because, in the UTCR, if you sign up through Odyssey and get served through Odyssey, that is proper service by email.

Mr. Goehler thanked Mr. Yanchar for bringing these suggestions to the Council. He stated that he disagreed with Judge Peterson's remark that an attorney can opt out of email service. An attorney can get a court order not to be electronically served, but opting out by rule is not there and he thinks that there is some confusion about that. Mr. Goehler stated that this is an issue that has evolved and that it is perhaps time to take another look at how email service can be fine tuned. He stated that a committee could examine service as a whole and think about things that may be needed in the future, such as cloud service.

Judge Erwin stated that, in Odyssey, the court has the ability to track when an email has been received an opened, and that has worked very well for the courts. He did not know whether that level of confirmation exists in other applications, but stated that it is worth looking into. Mr. Goehler observed that this is a concern that people have, as well as the concern that an email could end up in their spam filter. Mr. Yanchar pointed out that the current rule states that dropping something in the mail is an assumption that someone receives it. He

posited that email is more reliable than the USPS at this point and, since there is no confirmation requirement for USPS mail, there may not need to be one for email.

Ms. Hopkins stated that there is the ability to request a delivery receipt when sending an email, which is the same type of confirmation currently received in Odyssey. Mr. Yanchar pointed out that, at least in Gmail, the recipient is the one who needs to respond affirmatively to that delivery receipt request. It does not work automatically like it might in Outlook or other platforms.

Judge Peterson reiterated that this topic had not been looked at in some time and that it would be a good idea to have a committee consider it. He also stated that it may be a good idea to bring the UTCR Committee into the fold because, with the volume of emails that people receive, it might be wise to require some kind of language in the subject line identifying those emails that are related to a case or legal dispute.

Judge Bloom pointed out that there are many suggestions on the agenda to get through, and suggested forming a committee without further discussion. Judge Peterson asked whether there was at least one plaintiffs' attorney, one defense attorney, and one judge who wanted to serve on a service committee. Ms. Dahab, Judge McIver, Judge Peterson, Judge Raschio, Mr. Spooner, and Ms. Wilson agreed to serve on the committee, with Judge Raschio as chair. Ms. Nilsson pointed out that there are many more suggestions regarding service on the biennial survey, and asked the committee to include those in its considerations, as well as the suggestion regarding Rule 10 from last biennium received from attorney Young Walgenkim.

2. ORCP 27

Judge Peterson referred the Council to Judge Norby's suggestion regarding Rule 27 that was carried over from last biennium. He noted that the question was whether Rule 27 allows an unmarried minor in a case who is a parent to nominate themself as their own guardian ad litem. He noted that there is another suggestion from Judge Norby regarding Rule 27 later on the survey, so the Council may wish to postpone discussion about forming a committee at this time. However, this suggestion re-enforces the idea that it could be helpful to have a family law practitioner as a Council member.

3. ORCP 60

Judge Peterson explained that former Council chair Brooks Cooper had submitted a suggestion regarding Rule 60 to make it clear that a case cannot be dismissed without prejudice following a motion for directed verdict unless the court finds that the party opposing the motion can provide sufficient evidence to make a

prima facie case that they should be given a second chance. Judge Peterson stated that he does not know how often this issue comes up, but expressed that it would probably be frustrating for a litigant. Mr. Goehler stated that he had not heard of the situation outlined by Mr. Cooper happening, and asked whether anyone on the Council had encountered it. No Council member stated that they had. Mr. Goehler asked whether any Council members wished to form a committee to look into this suggestion or to look at Rule 60 generally. The Council did not express such an interest.

4. Judgments

Judge Peterson explained that the Civil Roundtable of Multnomah County judges had a meeting with some of the processing staff last biennium, and the staff had expressed that it is sometimes unclear when they are processing judgments which parties are still involved in the case. Judge Peterson thought that it might be helpful to amend Rule 67 to require, when submitting a judgment, language reciting any previous judgments that have occurred, so that court staff and judges are clear on which parties and issues still remain in the case.

Mr. Kekel pointed out that it is good practice to do this, and that he does it. Judge Peterson noted that he had taught his students to do this, but that it apparently is not being done by many lawyers. Mr. Kekel stated that the court needs to know that any parties that are not signing or stipulating to the general judgment have been dismissed or defaulted. Mr. Goehler wondered whether this is an ORCP issue or a UTCR issue. The issue of what types of judgments exist falls within the ORCP, but the form or contents of a judgment may fall within the UTCR. Judge Peterson stated that the contents are really driven by statute, specifically ORS Chapter 18, but he thought that Rule 67 would have a place for this. He acknowledged that it might be a bad idea, but it seemed to him that it could solve a problem for the court staff and judges. Mr. Goehler asked about the last time the Council made a change to Rule 67. Ms. Nilsson stated that it was 2014.

Ms. Dahab summarized the proposal as requiring a form of judgment where the attorney would summarize at the outset the prior judgments that have been entered in the case. Judge Peterson agreed with this summary. Mr. Goehler stated that the current practice is handled differently by different attorneys. Attorneys who rarely handle cases with multiple litigants, in contrast to Mr. Kekel, would not necessarily follow his practice of listing prior judgments when reaching the point of submitting a general judgment, as a convenience to the court. Ms. Wilson pointed out that the Legislature, by statute, has set forth the form of judgment. Ms. Dahab asked whether there is a problem with the Council supplementing the requirements that the Legislature has already set forth. Judge Peterson stated that he did not believe that requiring an introductory paragraph within a judgment would conflict with anything in ORS Chapter 18. Mr. Goehler

noted that Chapter 18 states the minimum requirements of what must be in a judgment, particularly what makes a judgment creditor. He opined that the Council adding gloss on that should not be problematic.

Judge McIver stated that she would volunteer to be on a committee to take a look at this issue. She agreed that it is a huge waste of time if the parties are not listed in a judgment. In her district, which has a master docket and no case assignments, it can take a long time before a proposed final judgment even lands with the correct judge because practitioners do not list the date of the last hearing or the judge who presided. This causes a backup in queue work and has more downstream consequences than one might anticipate.

Mr. Kekel, Judge McIver, Judge Peterson, and Mr. Spooner agreed to serve on a committee to examine Rule 67 and general judgments, with Mr. Kekel serving as chair.

5. Council-Prepared Summaries of Proposed Rule Changes

Judge Peterson noted that he had discussed the proposal for the Council to prepare summaries of proposed rule changes when he talked about staff comments. He stated that it is a brilliant idea and that Council staff will begin preparing these summaries this biennium.

X. New Business

A. Potential amendments received by Council Members or Staff since Last Biennium (Appendix K)

1. ORCP 22 C(1)

Mr. Goehler explained that the potential amendments received by staff since last biennium were both from Mr. Kekel. One suggestion was in regard to ORCP 22 C(1) and third-party practice. Mr. Kekel stated that, in the current rule, one has 90 days from service of the original complaint to file and serve a third party complaint. Should that not occur, the rule requires leave of court and consent of all parties. One of his concerns with this is that it is a potential malpractice trap if the 90 days is missed for whatever reason. In addition, if a plaintiff's lawyer or another defendant's lawyer does not want that party in the case, they can simply object and adding that party is foreclosed. Mr. Kekel explained that he just became involved in a large matter where the client he is representing was brought in very late. The matter deals with design, architectural, and engineering issues. His immediate question was whether his client's sub-consultant engineers should be brought into the case. He stated that this requires certification by a similarly credentialed professional to state in the pleadings that they believe this potential third party may have liability. The case has many documents, and

attempting to locate and retain an expert and have them get through thousands of pages of documents within 90 days was almost impossible. Mr. Kekel stated that he would propose eliminating the consent of all parties requirement and trust the judges as to whether or not they want to allow the addition of third parties after 90 days. Mr. Kekel stated that another question is whether the 90-day time frame is needed at all. He stated that he could understand the reason for a time frame, especially if courts are trying to adhere to a 12-month or 18-month schedule for resolution of a case. However, if the 90-day deadline is not met for whatever reason, it can have a huge impact.

Mr. Goehler summarized Mr. Kekel's proposal as changing the word "and" to the word "or" and taking a look at the 90-day time frame stated in the rule. Mr. Kekel stated that he would like to consider potentially eliminating the requirement of consent of all parties and taking a look at the time frame.

Judge Bloom agreed that subsection C(2) is an interesting part of the rule, and he knows of nothing else like it. It can be a "gotcha" because, even if the court was going to allow the third party to be added and there was no harm, if another party does not consent, it will not happen. He stated that he would be happy to join a committee to examine the rule. Part of the committee's work will be to examine why the provision was added and what other jurisdictions do. He stated that he believes that part of the reason is likely to allow the plaintiff to control the action, to some extent, so that additional parties are not brought in and the litigation is not delayed. Ms. Dahab stated that it is her understanding that there was a good reason for this part of the rule being created and that there are solutions to it in the appropriate case with consolidation. She stated that she would be happy to join a committee to help think through whether the Council's rationale for this part of the rule when Rule 22 was amended still hold true. Judge Bloom, Mr. Kekel, and Ms. Johnson also joined the committee, with Ms. Dahab serving as chair.

Mr. Goehler stated that he has done third-party practice in federal court. He stated that "federalizing" third-party practice in Oregon might actually be a good idea, because it is a lot simpler. There is a shorter, 14-day time frame, with just leave of court required. He stated that the federal rules would be one source for the committee to look at the pros and cons of how the federal rules deal with third-party practice. Judge Peterson noted that this issue had been raised with the Council when he first became Executive Director and then again when Bob Keating was chair of the Council. He stated that the pushback against making a change was substantial, but pointed out that this is a new Council and it is good to reconsider these issues. He also noted that this is the only rule in the ORCP that requires the consent of all parties and the court. Judge Peterson acknowledged the concern about trials being delayed, so he stated that the judge will certainly want to have a hand in decisions about parties being added at a late date. However, he noted that Mr. Keating had made a great argument that

sometimes these parties are not known about until day 89, and there is no way to get them in otherwise.

2. ORCP 38 C

Mr. Kekel stated that his law partner, Kevin Sasse, had sent him a suggestion regarding ORCP 38 C. Mr. Sasse was unable to attend the meeting, so Mr. Kekel stated that he would do his best to try to explain the issue. ORCP 38 C and its UTCR counterpart, UTCR 5.140, govern the taking of depositions for matters pending in other jurisdictions and states. His understanding is that there seems to be a clash between the processes in the two and that they can be read differently. The question seems to be whether the word "state" means any state or limited to a state that has adopted the Uniform Interstate Deposition and Discovery Act. Arguably speaking, UTCR 5.140 would only apply to the latter, but not ORCP 38 C.

Judge Peterson stated that his understanding is that the line of hierarchy is: 1) statutes; 2) ORCP; and 3) UTCR. If there is an ambiguity in Rule 38, perhaps it could be modified or made more clear. Mr. Goehler stated that it might be helpful to have Mr. Sasse come to a Council meeting and explain the issue further. He noted that this may be a situation where the rule is fine but that the UTCR may need some tweaking. Judge Hill noted that the Council may want to make the UTCR Committee aware of the issue. Ms. Trickett stated that, as the UTCR reporter from the Oregon Judicial Department, she is taking careful notes.

B. Potential amendments received from Council Survey (Appendix L)

Mr. Goehler stated that he would go through the suggestions from the Council survey, either line by line or subject by subject, and the Council would decide whether there is enough interest to form a committee to investigate further.

1. Abusive Litigants in Probate Proceedings

Judge Peterson stated that he had just learned of the probate code statute that states that some of the ORCP apply to probate matters and some do not. He noted that this may mean that a legislative fix is required to make Rule 35 apply to probate matters. Mr. Goehler asked Judge Peterson to explain the process for sending feedback to the people who submitted the comments. Judge Peterson stated that they have already been thanked for their comment and given information about today's meeting. Ms. Nilsson noted that not every person who had made a suggestion had included their name and contact information, so it would not necessarily be possible to contact them to let them know the results of the Council's discussion about their proposal. In this case, the person who made the suggestion did not leave contact information.

2. Arbitration

Mr. Goehler noted that arbitration is a statutory matter and that the Council has no power to make legislative changes. The Council agreed and declined to form a committee about this issue.

3. Attorney Fees, Relief from Judgment

Judge Peterson stated that he had read the case that was cited in the first suggestion regarding attorney fees. Family Abuse Prevention Act (FAPA) restraining order cases are, by statute, concluded by an order, not a judgment, so the judge determined that Rule 68 does not apply because Rule 68 has a carve-out for fees awarded pursuant to an order. He stated that another observation, not central to the ruling, was that FAPA forms are provided by the OJD and they do not contain an allegation claiming an entitlement to fees, which is required by Rule 68. Judge Peterson stated that he is currently working with a committee to revise some OJD forms, and some forms can definitely use some work. However, the fact that the case also mentions Rule 71 leads him to believe that perhaps someone filed a frivolous motion for relief from judgment and lost. Judge Peterson pondered whether a party is entitled to collect prevailing party and attorney fees on that order denying the Rule 71 motion. He noted that the case is a FAPA case, but it may have broader implications on other orders.

Judge Hill asked about the last time the Council looked at ORCP 68. Ms. Nilsson stated that it was 2014. Mr. Goehler noted that the next comment about attorney fees is very insurance law specific. He asked whether there were any volunteers for a committee to look at ORCP 68 and attorney fees. Mr. Goehler, Judge Shorr, and Mr. Spooner volunteered to serve on a committee, with Mr. Goehler as chair. Ms. Nilsson mentioned that retired Judge Eve Miller had made the first suggestion regarding Rule 68 and that the judge had e-mailed her to let her know she was unable to attend today's meeting. Ms. Nilsson suggested that the Judge Miller would be willing to talk to the committee about the issue.

4. Civil Motion Practice

Mr. Goehler noted that this comment appears to be a suggestion to revamp the entire judicial system, and he was not sure what could be done about that from an ORCP standpoint. The Council agreed and declined to form a committee about this issue.

5. Contempt/Order to Show Cause

Judge Hill stated that the comment about orders to show cause was quite broad and that he would require more specifics in order to pursue the matter further. Judge Bloom noted that the OJD is modifying its contempt procedure to try to

streamline it across the state. There will be changes coming, but those changes do not implicate the ORCP. Mr. Goehler asked whether there were any names given for the two comments about this issue so that the Council could reach out for more information. Ms. Nilsson stated that there were not. The Council declined to form a committee about this issue.

6. Default Orders/Judgments

Mr. Goehler stated that ORCP 69 B is critical, especially for defense practitioners. In some jurisdictions, one has to answer within 30 days, period, or one has defaulted. In other jurisdictions there is a notice of appearance that operates in the same way as ORCP 69 B. He asked Council members whether they believe that anything is broken about the current system, because doing anything different would be a huge change. Judge Peterson stated that ORCP 69 B is, in some respects, a professionalism rule. It also, theoretically, makes Rule 71 motions less challenging, because first one gets served with the summons and complaint, then one receives the 10-day notice. It seems to him that this reduces some litigation, as "surprise" is a basis for a Rule 71 B motion. Judge Peterson noted that the comment asked about limiting the requirement of notice of intent to take the default to originating complaints. He stated that he could understand how it could be a little frustrating to be required to give a 10-day notice on an amended complaint after a motion to dismiss with the right to re-plead, but he did not know how often it happens.

Mr. Kekel stated that he tends to look at it through the lens of what is good practice. If he is faced with a ruling and a motion is granted against all of his pleadings and he has to amend, it is good practice to clarify the exact time frame and what is going to happen in the order itself. Judge Peterson stated that, in the scope of a year, from commencement of a case until trial, it is just 10 days. The Council declined to form a committee about this issue.

7. Depositions

Mr. Goehler pointed out that, with regard to the first comment, the Council cannot make depositions apply to criminal proceedings. Only the Legislature can do that. The other comment suggests imposing a time limit on depositions, as the federal rules do. Judge Bloom stated that the thought that would be problematic. He pointed out that protective orders are available when needed. Imposing time limits, particularly under Oregon's system without interrogatories and other forms of discovery, would be problematic. He stated that he is wary of changing the mode of discovery in Oregon. Mr. Goehler stated that he agreed with Judge Bloom. He thinks that the system works the way it currently is designed, and attorneys can get assistance on a case-by-case basis if there is truly an issue. Protective orders are available if it seems like the other party is just trying to run up costs with a meaningless deposition. The Council declined to form a

committee about this issue.

8. Disclosures

Mr. Goehler stated that the suggestion was to require disclosures, similar to the federal rules. Judge Hill stated that it would be a pretty big lift logistically to even consider making such a change in Oregon, requiring bringing in a lot of outside entities for input. Mr. Kekel stated that it would either have to be mandatory in all cases or that there would have to be a waiver procedure, and wondered how that would be accomplished. He noted that more judicial resources would be expended addressing the waiver. The Council declined to form a committee about this issue.

9. Discovery

Mr. Goehler noted that there were many suggestions regarding discovery from the survey. He stated that the Council has, over the years, received many suggestions about "federalizing" Oregon's rules as far as expert disclosure, interrogatories, and no trial by ambush. He observed that, as the Council starts a new biennium with new membership, it is good to have a discussion about discovery. He recalled that the Council had a standing discovery committee for several biennia but that it had reached a sort of stasis where it did not seem to be required. He asked the Council whether it felt that a committee needed to be formed now to look at discovery, either generally or specifically to go over the suggestions from the survey. Mr. Goehler stated that his opinion is that the Oregon legal system is special because of its camaraderie and cooperativeness, which is fostered by the ORCP. A sanction-oriented rule system makes the attorneys less cooperative and more likely to look to gain an advantage to get sanctions.

Ms. Hopkins agreed and stated that she did not believe that Oregon needs any sort of explicit expert discovery. She stated that the bulk of her work is in medical negligence, and she feels a camaraderie with opposing counsel. While she may not provide the name of an expert, she will certainly discuss with opposing counsel what her expert will or will not testify to in an effort to resolve cases ahead of trial. Mr. Goehler noted that another thing that Oregon should be proud of is keeping the cost of litigation low. While he acknowledges that the Council receives comments that the cost of litigation in Oregon is high, his experience is that the cost of litigation in federal court is much higher, because there is more extensive discovery and more court deadlines. In terms of cost for litigants, he thinks that Oregon's system is good. Mr. Spooner agreed with Mr. Goehler. He stated that, in his practice, 90% of discovery disputes that do arise are in federal court cases, not Oregon cases, because of the federal discovery rules. The Council declined to form a committee about this issue.

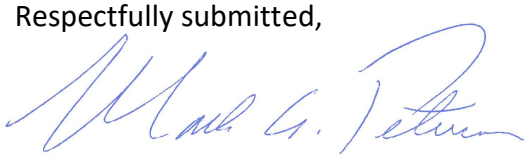
XI. Adjournment

Mr. Goehler noted that there were still more suggestions from the survey to examine, and he proposed forwarding them to the agenda for the October 11, 2025, meeting. The Council agreed. Mr. Goehler stated that he would appreciate if the committees that had been formed would meet, but that he would not necessarily expect any work product before the next Council meeting. Judge Peterson did ask committee chairs to provide a short written summary of their meetings to Ms. Nilsson to include in the meeting packet for the October meeting, as those summaries do help provide context in the history of how a rule change did or did not occur.

Ms. Wilson noted that the Uniform Collaborative Law Act is included in the survey suggestions. Since she was chair of a committee on that subject last biennium, she talked briefly to some of the practitioners who have their own committee on issue. She stated that she would draft a short memo on the subject to include in the meeting packet for October.

Mr. Goehler adjourned the meeting at 11:34 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

Council on Court Procedures
Roster/Term Matrix
2025-2027 Biennium

current as of 2025-09-01

Full Name	Email	Address 1	Address 2	Address 3	City State Zip	Phone	Fax	Member Type	Plaintiff or Defense
Hon. Scott Shorr	Scott.A.Shorr@ojd.state.or.us	Oregon Court of Appeals	1163 State St		Salem OR 97301			Court of Appeals Judge	n/a
Hon. Christopher L. Garrett	chris.garrett@ojd.state.or.us	Oregon Supreme Court	Supreme Court Bldg	1163 State St	Salem OR 97301	(503) 986-5555		Supreme Court Justice	n/a
Hon. Benjamin M. Bloom	benjamin.bloom@ojd.state.or.us	Jackson County Circuit Court	Justice Building	100 S Oakdale Ave	Medford OR 97501	(541) 776-7171	(541) 776-7057	Circuit Court Judge	n/a
Hon. Andrew Erwin	andrew.r.erwin@ojd.state.or.us	Washington County Circuit Court	145 NE 2nd Ave		Hillsboro OR 97124	(503) 846-8009		Circuit Court Judge	n/a
Hon. Jonathan R. Hill	jon.r.hill@ojd.state.or.us	Tillamook County Circuit Court	201 Laurel Ave		Tillamook OR 97141	(503) 842-2596		Circuit Court Judge	n/a
Hon. Thomas A. McHill	Thomas.A.McHill@ojd.state.or.us	Linn County Circuit Court	PO Box 1749		Albany, OR 97321	(541) 776-7171 x162	541-967-3848	Circuit Court Judge	n/a
Hon. Michelle McIver	michelle.a.mciver@ojd.state.or.us	Deschutes County Circuit Court	1100 NW Bond St		Bend OR 97703	503-388-5300		Circuit Court Judge	n/a
Hon. Melvin Oden-Orr	Melvin.Oden-Orr@ojd.state.or.us	Multnomah County Circuit Court	1200 SW 1st Ave Ste 1700		Portland OR 97204	(971) 274-0664		Circuit Court Judge	n/a
Hon. Robert Raschio	robert.s.raschio@ojd.state.or.us	Grant/Harney County Circuit Court	Grant County Courthouse	201 S. Humbolt Street	Canyon City OR 97820	541-575-1438	541-575-2165	Circuit Court Judge	n/a
Hon. Todd Van Rysselberghe	todd.l.vanrysselberghe@ojd.state.or.us	Clackamas County Circuit Court	1000 Courthouse Rd		Oregon City OR 97045	503-655-8644		Circuit Court Judge	n/a
Barry J. Goehler	Barry.Goehler@usaa.com	USAA - Offices of Barry J Goehler	10260 SW Greenburg Road, Stes 428 &425		Portland OR 97223	503-886-8769		Lawyer	Defense
Eric Kekel	ekekel@dunncarney.com	Dunn Carney LLP	851 SW 6th Ave Ste 1500		Portland OR 97204	503 224-6440	503 224-7324	Lawyer	Defense
Julian Marrs	julian.marrs@harrang.com	Harrang Long PC	497 Oakway Rd Ste 380		Eugene OR 97401	541 485-0220		Lawyer	Defense
Michael Shin	shinm@trimet.org	TriMet	101 SW Main St Ste 700		Portland OR 97204	503 962-5650		Lawyer	Defense
Alicia Wilson	wilsonam@jacksoncountyor.gov	Jackson County District Attorney's Office	815 W 10th St		Medford OR 97501	541 774-8181	541 608-2982	Lawyer	Defense
Jessica Zerpoli	jzerpoli@schwabe.com	Schwabe Williamson & Wyatt PC	1211 SW 5th Ave Ste 1900		Portland OR 97204	503-796-2763	503-796-2900	Lawyer	Defense
Nadia Dahab	nadia@sugermandahab.com	Sugerman Dahab	707 SW Washington St Ste 600		Portland OR 97205	(503) 228-6474		Lawyer	Plaintiff
Melissa Hopkins	melissa@jdsnyder.com	Law Offices of Judy Snyder	4248 Galewood St		Lake Oswego OR 97035	503-228-5027	971-277-3894	Lawyer	Plaintiff
Ryan Jennings	rsj@gattilaw.com	The Gatti Law Firm	235 Front St SE Ste 200		Salem OR 97301	503-363-3443	503-371-2482	Lawyer	Plaintiff
Lara Johnson	ljohnson@corsonjohnsonlaw.com	The Corson & Johnson Law Firm	940 Willamette St Ste 500		Eugene OR 97401	541 484-2525	541 484-2929	Lawyer	Plaintiff
Derek Larwick	derek@larwick.com	Larwick Law Firm PC	1190 W 7th Ave		Eugene OR 97402	(541) 600-4598	(541) 600-4598	Lawyer	Plaintiff
Tom Spooner	tom@spoonerstaggs.com	Spooner Staggs Trial Lawyers	9400 SW Barnes Rd Ste 550		Portland OR 97225	503-378-7777	503-588-5899	Lawyer	Plaintiff
Bryce Whitman	bryce@passadoreproperties.com	Passadore Properties	500 SW 116th Ave		Portland OR 97225	503-292-8595		Public Member	n/a
Shari C. Nilsson	nilsson@lclark.edu	Council on Court Procedures	c/o Lewis & Clark Law School	10101 S Terwilliger Blvd	Portland OR 97204	315-454-1280		Council Executive Assisant	
Hon. Mark A. Peterson	mpeterso@lclark.edu	Council on Court Procedures	c/o Lewis & Clark Law School	10101 S Terwilliger Blvd	Portland OR 97204	503-544-7022		Council Executive Director	
Avery Pickard	apickard@osbar.org	Oregon State Bar	PO Box 231935		Tigard OR 97281	503-431-6378 ext. 378		OSB Liaison	
Matt Shields	mshields@osbar.org	Oregon State Bar	PO Box 231935		Tigard OR 97281	503-930-7663		OSB Liaison	

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 14, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Michael Shin
Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Alicia Wilson

Members Absent:

Scott O'Donnell

Guests:

John Adams, Oregon Tax Court
Darnell Benitez
Kady Bourn, Brownstein Rask
"Carolyn D-K"
Jessie Minger, Schwabe Williamson & Wyatt
Matt Shields, Oregon State Bar
Rachel Trickett, Oregon Judicial Department
Stephanie Volin

Council Staff:

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

ORCP/Topics Discussed this Meeting		ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Promulgated	ORCP/Topics to be Reexamined Next Biennium
• Abusive Litigants (ORCP 35) • ORCP 1 • ORCP 14 • ORCP 39 • ORCP 55		• ORCP 10 • ORCP 12 • ORCP 15 • ORCP 19 • ORCP 21 • ORCP 23 • ORCP 58 • ORCP 68 • ORCP 69 • ORCP 71	• Annotated ORCP • Composition of Council • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • Uniform Collaborative Law Act • UTCR 5.100	• ORCP 1 • ORCP 14 • ORCP 35 • ORCP 39 • ORCP 55	• ORCP 9 • ORCP 10 • ORCP 27 • ORCP 60 • Email Service • Requiring lawyers to indicate the history of judgments in the case when preparing judgments • Staff Comments to Published Rules

Council on Court Procedures
September 13, 2025, Meeting
Appendix B-1

I. Call to Order

Mr. Andersen called the meeting to order at 9:30 a.m. He welcomed members and guests.

II. Administrative Matters

A. Approval of September 14, 2024, Meeting Minutes

Judge Norby made a motion to approve the draft September 14, 2024, minutes (Appendix A). Ms. Dahab seconded the motion, which was approved by voice vote with one abstention.

B. Election of Legislative Advisory Committee

Judge Peterson reminded Council members that the Council's authorizing statutes require biennial election of a Legislative Advisory Committee (LAC) to be available to the Legislature in the event that it has questions about the Council's promulgations or the Oregon Rules of Civil Procedure (ORCP). His recollection is that, during his time with the Council, the LAC has only been called on by the Legislature twice to answer questions. The statute indicates that the LAC should include two attorneys, the public member, and two judges. Judge Peterson asked for volunteers to serve on the LAC.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Goehler made a motion to include Judge Norby, Judge McHill, Mr. Goehler, Mr. Andersen, and Ms. Weeks on the LAC. Judge Hill seconded the motion, which was approved unanimously by voice vote.

C. Set First Council Meeting for September of 2025

After some discussion, the Council agreed to set the first Council meeting of the 2025-2027 biennium on September 13, 2025, and to follow a second-Saturday-of-the-month meeting schedule, unless the incoming Council later decides otherwise.

III. Old Business

A. Reports Regarding Last Biennium

1. ORS 45.400

Judge Peterson reminded the Council that, last biennium, the Council proposed a legislative change to remove the 30-day advance warning for wanting to take remote testimony in ORS 45.400. However, the Council did not have a sponsor for the bill in the Legislature, so it was not successful. This biennium, the Council proposed essentially the same change to ORS 45.400, and the Oregon State Bar

was willing to take it under their wing as part of their law reform package. Judge Peterson stated that he made a presentation to the Bar's committee, and they were enthusiastic about it. Legislative Council made some insignificant changes to the Council's proposal (Appendix B). With the proposed change being part of the OSB's package, it will likely pass. Mr. Shields stated that the OSB would probably ask Judge Peterson or someone else from the Council to provide testimony before the Legislature when the time comes.

2. Staff Comments

This item was carried over to the next biennium.

B. Discussion/Voting on Draft Amendments Published September 14, 2024

1. ORCP 1

Mr. Andersen referred the Council to the draft amendment of ORCP 1 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment. Hearing none, he asked for a motion for promulgation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 1

Ms. Holley made a motion to promulgate the published draft amendment of ORCP 1. Ms. Dahab seconded the motion, which passed unanimously by roll call vote with 21 votes and no abstentions.

2. ORCP 14

Mr. Andersen referred the Council to the draft amendment of ORCP 14 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment. Hearing none, he asked for a motion for promulgation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 14

Mr. Goehler made a motion to promulgate the published draft amendment of ORCP 14. Judge Oden-Orr seconded the motion, which passed unanimously by roll call vote with 21 votes and no abstentions.

3. ORCP 35

Mr. Andersen noted that the published draft of Rule 35 (Appendix C), a completely new rule, had received a good deal of public comment. He welcomed the members of the public who were interested in speaking regarding Rule 35 and invited them to speak.

Kady Bourn introduced herself as an attorney with Brownstein Rask who has been in practice for 29 years. She spoke in her personal capacity, and stated that her practice area is primarily probate and protective proceedings. She noted that there are many areas of law that allow a party to receive or recover attorney fees from an abusive litigant, including family law and landlord tenant law. In probate and protected proceedings, there are no good statutory mechanisms to recover attorney fees, and there can be a lot of abuse from litigants. Those areas are particularly inclined to deter self-represented litigants from participating. However, she has been involved with several cases of unrepresented heirs who have been disinherited and who were so offended that they decided to make it so expensive for the actual heir that they would not have any money left by the time the litigation ended. She opined that, for such cases, there need to be guardrails in place. While the personal representative can get attorney fees reimbursed from the assets of the estate, they can only get them reimbursed from an abusive litigant by trying to rely on some fuzzy case law, and that is up to judicial discretion.

Ms. Bourn stated that she was involved in a protective proceeding with an abusive litigant who has cost her protected person client hundreds of thousands of dollars of attorney fees, between his own fees and liability for fees for his court-appointed guardian, conservator, and trustee. She stated that there are also self-represented litigants who repeatedly file objections and then do not show up for court. For these reasons, Ms. Bourn stated that she supports the rule strenuously.

Stephanie Volin spoke in opposition to Rule 35. She stated that she supports that the Council is attempting to bring some sunlight to this process, which is apparently already in use. However, her concern is that Rule 35 will be abused in a not insignificant number of cases. She stated that she could provide an example from her family's own case, which is long closed.

Ms. Volin explained that there are several people who were involved in her family's case, including an attorney who has been sanctioned for discovery abuse, who resigned her law license, and who was since federally convicted and incarcerated for forging court orders. There was a judicial assistant who was discovered at trial to be exchanging toxic emails with that now-disbarred attorney. There was a judge whose conduct forced Ms. Volin's family to have to file for a writ of mandamus against her because of her dilatory handling of the case, who resigned 6 days later and, on her way out the door, signed damaging and punitive,

legally unsupportable orders that were all authored by the now-disbarred attorney. There was a trial court administrator who unfortunately tampered with the Court of Appeals record and blocked attempts to authenticate a court order. That trial court administrator has also since been fired but, before she was fired, she managed to block all of Ms. Volin's family's attempts to authenticate the order with the presiding judge. The presiding judge, Hon. Norm Hill, has since refused to authenticate that order, asking Ms. Volin's family at a hearing in 2020 why they even cared any more after 5 years.

When Ms. Volin heard that this new proposed Rule 35 is being considered, she reviewed the Council's minutes and noticed Judge Norm Hill describing someone like her family (it may have even been them) and it kind of crystallized for her what she basically already understood: that Oregon courts keep a secret, informal, extrajudicial, orally transmitted "do not help" list that says that it is okay to disregard everything that those on the list file or say, and just label them as crazy harassers. Her reading of the Council's minutes seems to indicate that this list is informal, a hodgepodge, and done through a patchwork of means. That explains to Ms. Volin why so many orders that her family has received against them bore no relation to the actual things that they filed. So, somehow, her family are vexatious litigants, despite suffering a disbarred attorney, a convicted attorney, and two disgraced court staff.

Ms. Volin stated that the reason she cares about being on a "bad list" and having no rights is because being put on that list has crippled her family's access to justice, such that they cannot even get a simple court order authenticated by the presiding judge, which is a fundamental administrative duty of all presiding judges. She also cares about the prejudice that is rolled into other courthouses, such as Clackamas, where she has discovered that the trial court administrator is having extrajudicial conversations with judges. She stated that it is really horrible to have no rights in Oregon. Ms. Volin opined that, until the courts can distinguish between a person attempting to re-litigate a case and a person who is attempting, under the weight of extrinsic fraud, to get the courts to recognize that they are the victims of such fraud and prejudice, a rule like Rule 35 is not a tool that should be available in Oregon courts. She stated that she understands that the Council is leading the way here nationally and that this is not something that is in other courtrooms currently (except that she thinks she saw some hints that maybe there was some other state that is adopting something similar). She stated that, if the Council does adopt this rule, she would urge the replacement of the word "abusive" with "vexatious," which is the common parlance. She stated that it is really upsetting to think of the additional damage that would have been wrought on her family if their opponent had a judicial finding that they were abusive rather than vexatious; they could have done a lot more damage with that. Ms. Volin thanked the Council for their time.

Jessie Minger introduced herself as an attorney who has practiced for over 20

years, currently with a firm that has a presence in Washington and Oregon. She stated that she is before the Council today to request respectfully that it promulgate Rule 35. She stated that her heart goes out to anyone who feels like they do not receive justice in Oregon and that she appreciates that this sentiment might exist in some situations. However, she believes that Rule 35 was created to actually promote justice for more citizens of the State of Oregon. She noted that Ms. Bourne had already spoken regarding the kinds of issues faced in protective proceedings and in probate. She wished to echo and reiterate those comments, as they are consistent with her experience.

Ms. Minger stated that she appreciated that Rule 35 has been deeply discussed by the Council and that the rule is, from her perspective, exceptionally well written. One of the things about the rule that she found to be especially noteworthy is that it allows recourse for any individual who has been deemed to be an abusive litigant to reverse it. To her, that is critical and hyper indicative of the amount of thought that went into the rule. The rule creates transparency, so that the person deemed to be an abusive litigant can be aware of why this is the case instead of living with what may currently be a secretive, unknown, or undercover type of procedure. The rule then gives the opportunity for that individual to contest and reverse it, an opportunity that does not exist today. Ms. Minger stated that she finds that to be especially compelling. She also asserted that the focus in terms of the cost of abusive litigants tends to be on the cost of litigation, whether it is the cost to hire counsel to deal with an abusive litigant, the cost of legal fees incurred, or the cost to taxpayers to have the court systems regularly and routinely have to deal with individuals who have an ability to figure out how to file pleadings and use that talent to the great difficulty of others. However, the cost of abusive litigants is far more strenuous. For example, for an individual who works on an hourly basis and who has to repeatedly take time off work to appear in courtrooms for proceedings, their job and their ability to pay rent for that month is jeopardized. The time required to drive to the courthouse park, walk, wait, attend the hearing, and come back might be a full-day event. There are also secondary elements of non-financial stress, like finding childcare.

Ms. Minger stated that, when a litigant continuously pulls parties into courtrooms, basically knowing they are not going to prevail, understanding that their pleadings and other documents are not going to be successful, but using the process to create the type of negative impact they wish to have for those individuals because they can, it is indeed abusive for those families and individuals involved. That is why the word “abusive” is appropriate. She stated that she sincerely appreciates that there is an opportunity here to address the problem, to protect both sides, and to be transparent. She appreciates the clarity, the efficiency of the words, and the mechanisms put into the rule, and she encouraged Council members to consider supporting it. She thanked the Council for its time.

Judge Bloom reminded the Council that he has previously shared his feelings about Rule 35. He expressed concern with promulgating the rule, opining that the court has an inherent authority regarding these issues, and stated that he believes that the rule creates more problems than it fixes. He stated that the court system is designed to allow access to justice, and that he believes that proposed Rule 35 diminishes that access to justice. In terms of balancing hardships, he thinks that the rule does more harm than it is designed to fix, and deals with situations that are rare, but do happen and have consequences, at the cost of affecting many otherwise legitimate claims.

Ms. Dahab stated that she wanted to make a few remarks because she voted against the vexatious litigant rule in the last biennium. She stated that she is very much in favor of this biennium's Rule 35, because some things have changed since last biennium that have given her clarity about the fact that the rule is necessary. First, the proposed Rule 35 is very different from last biennium's published rule, and for many of the reasons that Ms. Minger just described. It is a very well written and focused rule that clearly gets at the problem that it seeks to address, and it also provides some relief to litigants who may be subject to an abusive litigant order to be able to remove that order. Second, since the last biennium, Ms. Dahab has defended many cases against a vexatious litigant. Through that experience, the side effects to litigants of being on the receiving end of abusive litigation have become very clear to her–the things that they experience physically, mentally, and emotionally, and within their families and relationships. She therefore realizes that the proposed rule is useful and will serve to protect litigants who are in this situation. Ms. Dahab stated that she understands that there has been much discussion of the inherent authority that courts already have; however, it seems to her that it is useful to provide the trial courts with clear guidance on how they can address these situations when they arise. For those reasons, she plans to vote in favor of the promulgating Rule 35.

Mr. Larwick stated that, like Judge Bloom, he has made his thoughts on the proposed rule known from the beginning of the biennium. He stated that many of the comments in support of the rule seem to be based on stories or experiences of unreasonable conduct by a litigant that can waste time and money. He noted that every single person on the Council can probably come up with stories where they felt frustrated due to the conduct of somebody on the other side of one of their cases. He shares that frustration but, nonetheless, he does not think that the proposed rule is appropriate. He stated that he has read the Malheur County case that cited to a general Oregon statute about court judges managing their courts, and he is not persuaded that Oregon judges have inherent authority to prophylactically prevent new filings by a litigant or restrict access of any person or party they have considered abusive. Mr. Larwick stated that he also thinks that the rule is in violation of the due process clause, because it is using a party's past conduct to prevent their access to the court in future filings. He believes that the due process clause would require each controversy to be litigated on the merits in some way.

Judge Norby reminded the Council that she has been discussing for the past two biennia why she wants to make a version of this rule happen, and why she has needed the help of everyone on the Council to determine all of the factors that needed to be in the rule to make it better and more viable. She stated that she had been preparing for today's meeting by reading the comments that the Council has received, and that she would like to give some additional comments herself, perhaps in a different way than she has done so previously. As a judge, she knows well that judges, lawyers, and members of society are aware that judges are not always at their best. In fact, some judges are never at their best. Oregon judges have looked at the question of abusive litigants, and they believe that they do have this inherent authority, authority that they sometimes use when abusive litigation is happening in front of them that needs to be handled. However, also as a judge, Judge Norby feels like she has become a tool of abusers and that there is nothing she can do to stop these scenarios from playing out in her courtroom over and over again. She pointed out that, when one is in the middle of a situation, that is the worst time to try to figure out how to manage it. The trial judges of Oregon have been using this inherent authority sporadically and poorly, not considering all of the nuances that the Council has thought of over the last three years to try to make a rule that is targeted, transparent, and consistent statewide. Her feeling is that, as a judge who knows that she is not at her best when everything is coming at her from all angles, she prefers to have a clear and consistent rule to apply. Judge Norby expressed appreciation for Council members' careful consideration, and understanding for those who still have misgivings. Mr. Andersen thanked Judge Norby for her time in drafting the rule.

Judge Peterson reiterated that judges are using abusive litigant procedures, but those procedures are not transparent or consistent. He noted that the published rule has been very carefully vetted. While he has no vote in the matter, he stated that it is likely that cases of abusive litigants will be seen rarely, but judges will know them when they see them. As a judge, he has seen them, and his experience is that enhanced prevailing party fees are not sufficient as a detriment. Attorney fees are not always available and, even if they are, they are not a sufficient deterrent if the other side is impecunious. He stated that he will be interested to see the vote.

Mr. Andersen noted that attorneys Donald Bowerman, Ken Crowley, John Lundeen, and Brent Summers had written in support of the rule. He asked whether any of them were present at the meeting to present their views. They were not. Mr. Andersen predicted that the vote would be very close. He noted that the public comments were overwhelmingly in favor of the rule. He stated that he had listened to the comments made this morning, and that he still was not sure how he was going to vote.

Ms. Nilsson pointed out that Legislative Counsel had made suggestions for minor changes to the language of the rule (Appendix D) as follows:

In subsection B(4), change the phrase “Supreme Court chief justice” to “Supreme Court Chief Justice” to conform with the standards of statutory drafting.

In subsection C(3), the change the phrase “party who” to “party that” to conform with the standards of Council drafting.

In subsection D(8), change the phrase “ORCP 71 A, 71 B, or 71 D” to “Rule 71 A, 71 B, or 71 D” to conform with the standards of Council drafting.

Judge Peterson reemphasized that the Council may make minor amendments to a published rule that do not change the rule in any way that affects the meaning or operation of the published changes.

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

Judge Norby made a motion to promulgate the published draft of Rule 35 with the changes suggested by Legislative Counsel. Judge Jon Hill seconded the motion, which passed by roll call vote with 17 votes in favor, 4 opposed, and no abstentions.

4. ORCP 39

Mr. Andersen referred the Council to the draft amendment of ORCP 39 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment.

Judge Peterson noted that Legislative Counsel had suggested changes to the draft amendment of ORCP 39 (Appendix D):

In subsection C(2), change the phrase “the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) are satisfied” to “the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) of this subsection are satisfied” to conform with the standards of Council drafting.

In subsection C(6), remove the change of the word “shall” to the word “must,” as this change was already made during a previous biennium (i.e., the base text was incorrect in this instance).

Mr. Andersen asked for a motion for promulgation of the published rule with the changes suggested by Legislative Counsel.

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

Ms. Holley made a motion to promulgate the published draft amendment of ORCP 39 with the changes suggested by Legislative Counsel. Mr. Goehler seconded the motion, which passed unanimously with 21 votes in favor and no abstentions.

5. ORCP 55

Mr. Andersen referred the Council to the published draft amendment of Rule 55 (Appendix C). He noted that there had been many public comments on the published amendment.

Judge Peterson stated that he had read the comments and noted they all reference how one resists a subpoena. He pointed out that, when Rule 55 was substantially reorganized last biennium, an inconsistency appeared in that there was a way to resist a document subpoena, but there was no real, clear procedure for resisting a subpoena that requires one to appear personally. Rule 55 was promulgated in 1978, as were all the early rules and, since then, there have been gentle baby steps toward getting document production. The rule has continued to change over time. *Vaughan v. Taylor* [79 Or App 359 (1986)] ruled that document production without appearance was not allowed, so Rule 55 was amended accordingly. In 1982, the Council decided that a subpoena could be served by mail to a person who is willing to accept it by mail. In 1986, the Council made the change that hospital records could also be subpoenaed by mail. It was specifically in 1990 that the Council allowed document subpoenas to be issued. They could not be mailed under Section B but, rather, personally served. However, sections A, B, and F of the 1990 promulgation did allow document subpoenas, and the sky did not come crashing down as a result.

Judge Peterson noted that the comments to the proposed changes to Rule 55 seem to be concerned about getting rid of the ability to simply object to stop a document subpoena. There is no such defense for a subpoena requiring a personal appearance. On the face of it, it does seem unfair, because someone who may not even be a party to the case has to take steps to resist a subpoena. He stated that he does understand this unfairness; however, one of the comments states that the status quo is an elegant solution–you simply object, and that is it. The objection should be in writing. The Council has had conversations over the years about objections, and they do stop everything. Judge Peterson observed that third parties do not have any interest in the litigation and, if they are subpoenaed, they would have to see a lawyer because a subpoena does not tell them the tools that are available to them. The subpoena merely says that, if you do not produce the document you are being required to produce, you may go to jail. So, although the objection has worked very well for attorneys who know that they can simply file a written objection, it does not work well for someone who

does not have that information available to them.

Judge Peterson also pointed out that, since lawyers know that judges are quite busy and do not care to spend a lot of time ruling on discovery disputes, he cannot imagine a lawyer who has served a subpoena on a third party and not received a response who would not reach out to have a conversation about what the issue might be and how that issue might be worked out. If the issue cannot be worked out, a motion to compel is in order. The argument that the objection works perfectly is rather illusory. Judge Peterson opined that the proposed change to Rule 55 will not create a lot more motion practice, because attorneys that know what they are doing are already having those conversations and will work things out. For electronic records, Rule 43 already requires a conference. He stated that he is unimpressed by concerns for the unrepresented recipient of a subpoena who now has this valuable objection tool taken away, a tool that is not evident in the subpoena, and that they would not know how to use unless they read Rule 55 and understood it.

Ms. Holley stated that she appreciated Judge Peterson's remarks. She noted that the part of the rule that addresses confidential health information, paragraph D(4)(b), still allows for an objection. However, in section A, the objection was removed. She stated that she is curious as to whether that creates a conflict or whether the Council was intentionally trying to have two different processes. Judge Peterson responded that there are, in fact, two different processes, and that the Council had received a comment from attorney Scott Lucas that was later withdrawn when Mr. Lucas realized that hospital records are handled differently. The more specific section D will prevail with regard to hospital records, and those seem to be less of a problem than trying to subpoena documents from a small business where they may not know what to do. Most hospitals have received document subpoenas before. Ms. Holley noted that language in subsection A(7) was removed that referred to records of confidential health information (CHI) as defined under subsection D(1), so she wanted to ensure that the intent was not to eliminate that process. Judge Peterson stated that this is not the intent, and thanked Ms. Holley for raising the question. He stated that the minutes and staff comment will reflect that hospital records are not impacted by removing the unwritten objection. Mr. Andersen reiterated that Mr. Lucas did withdraw his initial objection.

Mr. Marrs pointed out that section D(4)(b) seems to only offer the objection process to the person whose CHI is being sought or that person's attorney, rather than the producing party itself. He expressed concern that the changes to Rule 55 would actually change how subpoenas for CHI would work. He echoed some of the public comments and stated that, in his experience, the objection process has typically led to a conferral between him and the subpoenaing party or the party being subpoenaed, depending on which side he is on. They usually resolve the issue without having to go to the court. He stated that he would not support the rule as it is written, because it removes that tool.

Mr. Shin asked what would happen timing-wise if a motion to quash or modify is filed as allowed by the proposed rule change: for instance, whether or not the obligation to comply with the subpoena is stayed. He stated that this is a practical question that he was not certain had been addressed.

With regard to Mr. Marrs' comments, Ms. Johnson reiterated that the current ORCP 55 D only provides for notice to be given to the person whose CHI is sought or that person's attorney. That person or their attorney may make written objections. The way the rule is set up, based on her reading and experience, is that a party seeking CHI through subpoena must certify that the patient and/or the patient's attorney have not filed written objections. So, the change to the rule, with subsection A(7), and reading the specific over the general and looking very specifically at D(4)(a)(i), who receives the notice, and who would therefore then have the time to file the written objection, makes it clear to her that subsection A(7) does not make any changes with regard to CHI. With regard to Mr. Shin's question, she stated that she suspects that, once the motion to quash or modify is filed, the party who has filed that motion would then be able to let the court know that there is an issue for the court to address, such as that the subpoena is overly broad or sought confidential materials, and the court would rule accordingly.

Mr. Larwick stated that a theme in many of the written comments regarding Rule 55 is the suggestion that the ability to file a written motion or the ability for the parties to confer was being taken away. He pointed out that, obviously, the parties can still confer about anything they want to confer about, and they can still write each other written objections if they so choose. However, this change would basically make the subpoena presumptively valid and shift the burden to the non-party who is arguing that they do not have to comply with the subpoena in some way. He noted that, as the rule is currently written, a non-party can just make a blanket objection without having to produce anything, and then the subpoenaing party has to try to guess what kind of objection they are making and what privileges and confidentiality they are invoking. The rule in its current form does not require them to articulate that. Mr. Larwick argued that, just like in a protective order motion, the party stating that they should be protected from a legally valid subpoena should have to explain why. That is why the burden should be shifted to them to move to quash. Otherwise, a written objection would just be sort of like the invitation concept that the Council discussed throughout the biennium where a subpoena is sent and it is just sort of like, "Hey, you want to produce something?" And the answer is, "No, I don't think so." Under the current version of Rule 55, the subpoena really has no force of law, and it requires the issuing party to then move to compel production of the subpoena.

Mr. Larwick stated that another issue raised in some written comments was a sort of small business concern, where a non-party small business that is not a party to the litigation may have some documents that the parties want for their dispute in court, and that small business might have to hire a lawyer to help them figure out how to avoid complying with the subpoena that they have received. In several of

the comments, this small business example was healthcare providers. He stated that he did not feel sympathetic in this case. He noted that, if a healthcare provider examined and treated one of the parties to litigation and generated medical records or some other type of evidence that the parties now need in their proceeding, that provider should have to turn over those records. If it is an architecture firm that has documents, they should have to turn them over. If it is any type of small business that has information that the parties need, the subpoena should be effective upon receipt, and if the small business wants to argue that it does not have to comply with the subpoena, the burden should shift to that non-party to explain why not.

Judge Norby noted that she was just the scrivener of the rule changes, and someone who has not been a lawyer issuing subpoenas for almost 20 years. She stated that her goal all along has been to make Rule 55 crystal clear to practitioners. She stated that she does not have a personal feeling about the rule change either way. However, she stated that she is puzzled by the fact that people think that they have to be invited to confer by yet another rule, because they should be conferring as a matter of course. She also addressed the question of whether, when the motion to quash is made, it would stay the obligation to produce. She stated that she thought that could be easily written into a motion in the following way: "I am making this motion, here is my reason, and I would like a stay until you make your decision." As a judge who has made decisions on motions to compel discovery, Judge Norby stated that, if there are good reasons to hold it up, the likelihood of her giving a harsh penalty for not having produced is pretty small.

Judge Shorr stated that he was sympathetic to those comments that expressed concern that the Council is shifting the burden. He noted that he had missed a meeting and perhaps missed the discussion around that. He observed that the party that tries to bring in another party through some procedure generally has the burden of persuasion. He stated that it seems to make sense that this has worked in the past and, if someone wants to move to compel documents, the burden should be on them at that point. An objection should stop the process, whether that allows conferral, which is a good thing, or keeps the parties out of court. He stated that it does seem make some inherent sense to him that the burden should be on the party who is in the litigation seeking third-party documents to show that there is a reason they should be compelled.

Mr. Goehler stated that he wanted to echo Mr. Larwick's comments. In his practice, he has been on both sides, issuing subpoenas and, also, assisting non-parties with responses to subpoenas. He stated that he is in favor of the rule change and believes that the burden shifting is good because there are often situations where a party objects and then there is radio silence. He pointed out that the way to start a discussion is with a motion. Here, if someone is served with a subpoena and they have to file a protective order motion, before they do that they are going to reach out and talk about it. Mr. Goehler opined that the proposed amendments to Rule 55 actually push lawyers closer to conferral and

collaboration rather than further away, certainly on the production side. Even after receiving an objection, most lawyers who are assisting with production are going to reach out and discuss, for example, the time frame of the request and other things that can bring the parties closer to agreement. This may not happen if the party can just object. Then, as Mr. Larwick pointed out, the subpoenaing lawyer is just fishing around to see what the basis of the objection is. Mr. Goehler opined that the burden shifting is good and, while it is big change in practice, it is a productive change for the process.

Judge Peterson stated that, once a subpoena is received, the recipient has two choices: comply or not. If not, the recipient can file a motion. If the recipient does not do so, whoever issued the subpoena would reach out to them before filing a motion to compel. Judge Peterson stated that, although the proposed change seems to be shifting the burden, the tool in the toolbox of the recipient is a tool that only lawyers know about and one that, perhaps, not all lawyers necessarily know about. He opined that the proposed change would reduce frivolous objections. Judge Peterson noted that he had heard in past meetings that subpoena deuces tecum have been served because the issuers were anticipating that there would be an objection to producing the documents, but he pointed out that subpoenaing the person is more expensive and not a good use of resources.

Judge Peterson noted that there were no comments on the rest of the changes in the rule. He wanted to take a moment to congratulate the Rule 55 committee, particularly Judge Norby as the scrivener. He pointed out that the change to section B(2)(d) was prompted by a proposed legislative amendment last biennium that the Legislature did not enact. The idea was to allow willing witnesses to be served by email. Judge Peterson opined that the Council's version is far better than the bill that was before the Legislature. It will allow service on willing witnesses, especially in cases where there is frequently a time crunch, to be much faster, easier, less expensive, and clearer than the old U.S. mail method.

Judge Bloom stated that the way he understands the proposed rule change is that it just shifts the method of response: if the recipient wants to respond, they must file a motion. It is not good enough to say, "I object," and then have an open-ended deadline. He stated that he thinks that filing a motion prompts conferral, and it also stays the obligation to respond. Then, if the party that files the subpoena goes back to that same court and says that they want sanctions because they did not receive the documents, it is implicit that the court is going to say that this is what we were deciding. It takes the place of the objection period, so Judge Bloom does not think it is a failure or a reason for objection to the proposed change. The process is already in there by saying you have to go to court to file the motion.

Mr. Andersen asked whether any of the people who had sent in public comments regarding Rule 55 were present to speak: Drew Baumchen, Gary Berne, Christy Carter, Elleanor Chin, Dylan Hallman, Marilyn Heiken, Scott Lucas, William Macke, Fallon Nedirist, or Steve Seal. None of them was present.

Mr. Andersen noted that the public comments seem to state that the proposed rule, as drafted, provides that the documents must be produced even though the parties are conferring. Judge Bloom opined that the proposed changes do not state that. A party objects to the subpoena and that stops production. Mr. Andersen noted that the public comments state that the rule change would make the choices: 1) get a lawyer and go to court to make your motion; or 2) produce the documents. Whereas the current rule provides that parties can confer and not produce until they have ironed out what needs to be produced. Judge Peterson stated that, if a non-party receives a subpoena, they will either produce the documents or they will not. They could get a lawyer and file a motion. Judge Peterson's suggestion, both last biennium and this, was to put a motion to quash on the back of the subpoena to make it easier for non-parties, but the Council was reluctant to do that. He remarked that we are not telling subpoena recipients that this objection and conferral procedure exists. The objection has to be in writing but, absent reading Rule 55, a subpoena recipient would not know that. Judge Peterson suggested that, even if a subpoena recipient did not produce documents, it is unlikely that any court would hold them in contempt. There would have to be a motion to compel first. Judge Peterson stated that the proposed change puts the burden of conferring on the person who issued the subpoena, because they will not want to go to court and ask for some kind of discovery sanction against someone for not responding to a subpoena when they have not followed up by asking what the problem is.

Ms. Johnson echoed Mr. Goehler's comments, and stated that she believes that the proposed changes would encourage conferral. Her experience with serving third-party subpoenas on persons or entities is that they often do not respond at all–no telephone calls, emails, or written objections. If the party receiving the subpoena has to either produce documents or file a motion in court, she believes that it would encourage that person or party to reach out to the person serving the subpoena to confer to express their objections and try come to a resolution before going before the court with issues that cannot be resolved. Ms. Johnson stated that the proposed change encourages parties to talk. It also allows access to information that the parties need to put their case in front of the court and the jury, and narrows the issues that the court would have to resolve, because the parties are better informed about what the nature of the objections are. Mr. Andersen asked if Ms. Johnson is in favor of the proposed Rule 55. Ms. Johnson stated that she is.

Judge Shorr noted that the language in current paragraph A(7)(a) states that a written objection can be served, and subparagraph A(7)(a)(ii) states that the party that served the subpoena may move for a court order to compel production at any time. He pointed out that the proposed subparagraph A(7) appears to put the burden on the party that has received the subpoena to move to quash. He asked whether that is the general understanding. Mr. Larwick replied that there is not an inherent burden on the party who is receiving the subpoena; it is just that, if they want to not comply with the subpoena, the burden is increased from a mere written objection to a motion to quash in court. He stated that, as Judge Peterson

mentioned, the party receiving the subpoena can always comply with the subpoena. They do not have to fight it. It is only if they want to fight it that a mere written objection is not sufficient. Mr. Andersen asked if Mr. Larwick is in favor of the proposed Rule 55. Mr. Larwick stated that he is.

Ms. Nilsson noted that Legislative Counsel had some recommendations for the Council regarding Rule 55 (Appendix D). Council staff did not agree with the recommendation to make a change to the way subparagraph B(2)(c)(i) and its following parts are organized to be consistent with statutory drafting practices, as it would conflict with Council drafting practices. However, Council staff does agree with the following suggestions that do not change the rule in any way that affects the meaning or operation:

> In subparagraph A(1)(a)(v), change the phrase "under paragraph A(6)(b), B(2)(a), B(2)(b), [B(2)(c)(ii),] B(2)(c)(i)(E), B(2)(d), B(3)(a), or B(3)(b) of this [rule.] rule; and" to "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(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b), or part B(2)(c)(i)(E) of this rule; and" for grammatical correctness and clarity.
>
> In subparagraph B(3)(b)(i), change the phrase "marshal's office of the Judicial Department" to "Marshal's Office of the Judicial Department" to conform with the standards of statutory drafting.
>
> In subparagaph B(3)(b)(i), change the phrase "criminal justice division" to "Criminal Justice Division" to conform with the standards of statutory drafting.

Ms. Nilsson asked Council members their thoughts about Legislative Counsel's suggestion regarding the phrase "under ORS Chapter 352" in subparagaph B(3)(b)(i). Legislative Counsel pointed out that ORS Chapter 352 is a chapter for the sake of organization, but that it is not an official series for the purpose of definitions, penalties, or administrative procedures. Accordingly, there is no reference to ORS Chapter 352 in statute. Most statutes have a police department established by a university under ORS 352.121 or ORS 353.125, so Legislative Counsel suggested that the Council refer to those two specific statutes. However, Council Staff was concerned by that proposal, since statutes change and get renumbered.

Mr. Andersen asked for suggestions on how to solve this issue. Mr. Goehler pushed back a bit on Legislative Counsel's suggestion, as he felt that it is not critical to specify what the current statute is for the purposes of this rule. The idea is to point in the direction of where the police forces are established. Ms. Johnson suggested using the phrase "under Oregon Revised Statute." Judge Peterson agreed with Mr. Goehler, and stated that it is less likely that the numbering of an entire ORS chapter will be changed. However, he did like Ms. Johnson's suggestion

as well, although perhaps "pursuant to statute" would be sufficient.

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

Judge Jon Hill made a motion to promulgate the published draft amendment of ORCP 55 with the changes suggested by Legislative Counsel and Judge Peterson. Judge Norby seconded the motion, which passed with 16 votes in favor, 4 opposed, and 1 abstention.

C. Vote on Whether to Send Recommendation for Amendment of ORS 46.415 to Legislature

Judge Peterson reminded the Council that the recommendation for the amendment of ORS 46.415 had been thoroughly considered by the Council in the last biennium, and was passed in the format before the Council today (Appendix E). However, it would have only been recommended to the Legislature if the then-titled vexatious litigant rule had passed. It did not. However, now that Rule 35 has been promulgated by the Council, it is appropriate to consider the recommendation again.

ORCP 1 indicates that the ORCP do not apply in small claims departments unless they are specifically made applicable. Judge Peterson pointed out that abusive litigation can and does happen in the small claims department. The proposal is simply to add to ORS 46.415 that Rule 35 is to be applied in the small claims department as well as in other civil matters in the court. Judge Peterson noted that, if the Council does decide to make this recommendation, it will need to find an appropriate person or agency to carry it in the Legislature.

Judge Jon Hill agreed that "small claims" really are not that small anymore and can be quite contentious, so he thinks that this is a good recommendation. He made a motion to recommend to the Legislature the amendment of ORS 46.415. Judge Norby seconded the motion, which passed with 18 in favor, 2 opposed, and no abstentions.

IV. New Business

A. Staff Summaries of Rule Changes (to be sent with published rules) (Appendix F)
B. E-Mail Service (Appendix G)
C. ORCP 27 (Appendix H)
D. ORCP 60 (Appendix I)

Ms. Nilsson explained that attorney Richard Weill had suggested that it would be helpful for the staff to create summaries of the published rules, so that people who are reading the published rule packet could have a quick summary of the changes and understand better what is being changed and why. Judge Peterson stated that, the more time that expires between promulgation and the creation of the staff comments, the more difficult

it becomes to write them, so creating them earlier rather than later could be helpful–a sort of preliminary staff comments that are sent out with the published rules to allow people to focus on the parts that will really make changes as opposed to the changes that are more grammatical or for consistency within the rules. This would perhaps make the comments more meaningful, and it would mean that the staff comments are nearly done by the time any rules are promulgated.

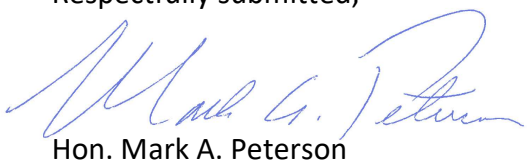
Mr. Goehler suggested that all items of new business be carried over to the agenda for the first meeting of the next biennium. He made a motion to do so. Judge McHill seconded the motion, which was passed unanimously by voice vote.

V. Adjournment

Judge Peterson thanked outgoing Council members for their years of service on the Council. He noted that this is important work that not many people take the time to volunteer for, and that each member has made a substantial contribution to Oregon civil procedure. Ms. Nilsson reminded outgoing members that they can also apply for CLE credit for their service.

Mr. Andersen thanked members for their work during this very productive biennium, and stated that he appreciated the collegiality, honesty, goodwill, and exchange of ideas. He adjourned the meeting at 11:23 a.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
BIENNIAL TIMELINE

8/25

Membership

8/31/25

Council terms expire; new appointments effective

9/25

1st Meeting

9/13/25

1st Council Meeting of Biennium

Officers elected

10/25

Meetings

10/11/25 - 6/13/26

Regular Monthly Council Meetings

9/26

Publication Meeting

9/12/26

Council meets & votes to publish amendments to ORCP

Officers elected

11/26

Publication

BY 11/11/26

Council publishes and distributes to the bar the exact language of all proposed promulgations, amendments, or repeals

Council publishes and distributes to the bar a notice and agenda for promulgation meeting

12/26

Proumulgation

12/12/26

Council meets and votes to promgulate amendments to ORCP (15 affirmative votes required)

Legislative Advisory Committee elected

1/27

Submission

1/11/27

Council submits promulgations and statutory sections superseded thereby to Legislature at beginning of regular session

1/27

Legislative Session

1/11/27 - 6/18/27

(approx) Regular legislative session

2/27

Changes Published

2/10/25

Council publishes any changes made during the promulgation meeting to the language of any proposed promulgation, amendment or repeal

1/28

Effective Date

1/1/28

New ORCP effective

Mark & Shari's Council Workflow

January 2025

Transmittal

- Promulgated rules to OJD for publication in advance sheets (within 60 days of meeting)
- Promulgated rules on Council website
- Send transmittal letter to legislature (copy Debbie @ Leg Counsel)
- Staff comments
- Talk with OJD re: funding

January 2025

Administrative

- Legislative highlights to Matt
- Fiscal impact statements
- Renew Shari's contract

April/May 2025

Prep for New Biennium

- Survey
  - Coordinate with OSB
- Membership (renewal/replacement)
  - Prepare matrix
  - Reach out to OSB & judge orgs
- Check calendar for 1st/2nd Saturday conflicts

Summer 2025

Projects

- Website changes/improvements
- Plaque for outgoing chair
- Certificates for outgoing Council members
- Compile survey
- Welcome letters & new member packets

October 2025

Administrative

- Update Blue Book
- State Library of Oregon – agency subscriptions annual data review

September 2025

Administrative

- Update state website with remaining meeting dates

August 2025

Organization

- Update state website w/Sept. mtg date
- Update website w/current membership information
- Publish agenda of Sept. meeting on Council website (2 weeks prior to meeting)
- Update listserv

January 2026

Administrative

- Renew Shari's contract

September 2026

Publication

- Send published rules to OJD for publication in advance sheets (within 60 days of meeting)
- Send published rules to Debbie so she gets a jump start on putting them in leg counsel format
- Post published rules on Council website

December 2026

Promulgation

- Send any changes to published rules to Debbie (compare her Leg Counsel version to final promulgated version to ensure they match up)
- Add provisional minutes to Council website

December 2026

Administrative

- Risk Report
- Fiscal impact training
- Ask Council members with expiring terms if they wish to be reappointed

AMENDMENTS

TO THE

OREGON RULES OF CIVIL PROCEDURE

promulgated by the

COUNCIL ON COURT PROCEDURES

December 14, 2024

COUNCIL ON COURT PROCEDURES

Judge Members

Hon. Christopher L. Garret, 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. Thomas McHill, Circuit Court Judge, Linn Co. (8/31/27)
Hon. Susie L. Norby, Circuit Court Judge, Clackamas Co (8/31/25)
Hon. Melvin Oden-Orr, Circuit Court Judge, Multnomah Co. (8/31/27)
Hon. Wes Williams, Circuit Court Judge, Wallowa & Union Co. (Resigned)

Attorney Members

Kelly L. Andersen, Medford (8/31/25) (Chair)
Nadia Dahab, Portland (8/31/25)
Barry Goehler, Lake Oswego (8/31/27) (Vice Chair)
Meredith Holley, Eugene (8/31/25)
Lara Johnson, Eugene (8/31/27)
Eric Kekel, Portland (8/31/27)
Derek Larwick, Eugene (8/31/25)
Julian Marrs, Eugene (8/31/27)
Scott O'Donnell, Portland (8/31/25)
Michael Shin, Portland (8/31/27)
Stephen J. Voorhees, Portland (8/31/25)
Alicia Wilson, Medford (8/31/27)

Public Member

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

Staff

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

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Council on Court Procedures
September 13, 2025, Meeting
Appendix F-2

INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 2025 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2026, 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 14, 2023, meeting, the Council made changes to the previously published versions of the following rules for the following reasons:

ORCP 35: In subsection B(4), the Council changed the phrase "Supreme Court chief justice" to "Supreme Court Chief Justice" to conform with the standards of statutory drafting.

In subsection C(3), the Council changed the phrase "party who" to "party that" to conform with the standards of Council drafting.

In subsection D(8), the Council changed the phrase "ORCP 71 A, 71 B, or 71 D" to "Rule 71 A, 71 B, or 71 D" to conform with the standards of Council drafting.

ORCP 39: In subsection C(2), the Council, changed the phrase "the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) are satisfied" to "the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) of this subsection are satisfied" to conform with the standards of Council drafting.

In subsection C(6), the Council removed the change of the word "shall" to the word "must," as this change was already made during a previous biennium (i.e., the base text was incorrect in this instance).

ORCP 55: In subparagraph A(1)(a)(v), the Council changed the phrase "under paragraph A(6)(b), B(2)(a), B(2)(b), [*B(2)(c)(ii),*] **B(2)(c)(i)(E)**, B(2)(d), B(3)(a), or B(3)(b) of this [*rule.*] **rule; and**" to "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(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b), or part B(2)(c)(i)(E) of this rule; and**" for grammatical correctness and clarity.

In subparagraph B(3)(b)(i), the Council changed the phrase "marshal's office of the Judicial Department" to "Marshal's Office of the Judicial

Department" to conform with the standards of statutory drafting.

In subparagaph B(3)(b)(i), the Council changed the phrase "under ORS Chapter 352" to "pursuant to statute" to conform with the standards of statutory drafting.

In subparagaph B(3)(b)(i), the Council changed the phrase "criminal justice division" to "Criminal Justice Division" to conform with the standards of statutory drafting.

None of the aforementioned changes is intended to affect the meaning or operation of the respective rules.

The Council held the following public meetings during the 2023-2025 biennium, all of which were held virtually via the Zoom platform:

- September 9, 2023
- 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

In accordance with ORS 1.760, at its December 14, 2024, meeting, the Council elected a Legislative Advisory Committee. Upon request, the members of the Legislative Advisory Committee will be happy to meet with legislative committee members or staff, or with the leadership of the Legislative Assembly, to explain the work of the Council or any of the enclosed promulgated ORCP amendments. The members of the Committee are as follows:

Kelly Andersen
Barry Goehler
Hon. Susie Norby
Hon. Melvin Oden-Orr
Margurite Weeks

Legislative Advisory Committee members can be best reached by directing the request through Council staff.

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

2024 PROMULGATED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

A Scope. These rules govern [*procedure and practice*] **practice and procedure** in all circuit courts of this state, except in the small claims department of circuit courts, for all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, except where a different procedure is specified by statute or rule. These rules [*shall*] also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of circuit courts and for all other courts of this state to the extent they are made applicable to those courts by rule or statute. Reference in these rules to actions [*shall include*] **includes** all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin.

B Construction. These rules [*shall*] **will** be construed to secure the just, speedy, and inexpensive determination of every action.

C Application. These rules, and amendments thereto, [*shall*] apply to all actions pending at the time of or filed after their effective date, except to the extent that, in the opinion of the court, their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

D Definitions.

[*D "Rule" defined and local rules*.] **D(1)** References to “these rules" [*shall*] include Oregon Rules of Civil Procedure numbered 1 through 85. General references to **a** “rule" or "rules" [*shall*] mean only **a** rule or rules of pleading, practice, and procedure established by ORS 1.745, or promulgated under ORS 1.006, 1.735, 2.130, and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

[*E Use of declaration under penalty of perjury in lieu of affidavit.*]

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September 13, 2025, Meeting
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[*E(1)* ***Definition***.]

D(2) As used in these rules, "signature" and "signed" mean the person's name subscribed on the document.

D(3) As used in these rules, "affidavit" means a statement, confirmed by the oath or affirmation of the party signing it, that is sworn to or affirmed before a person authorized by law to administer oaths in the place where the affidavit is signed.

D(4) As used in these rules, "declaration" means a [*declaration*] **statement signed** under penalty of perjury. [*A declaration may be used in lieu of any affidavit required or allowed by these rules. A declaration may be made without notice to adverse parties.*]

D(5) All references in these rules to "attorney," "lawyer," or "counsel" include an associate member of the Oregon State Bar practicing law in the member's approved scope of practice.

E Use of declaration under penalty of perjury in lieu of affidavit. A declaration may be used in lieu of any affidavit required or allowed by these rules. The signature for declarations may be in the form approved for electronic filing in accordance with these rules or any other rule of court.

[E(2)] **E(1)Declaration made within the United States.** A declaration made within the United States must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: "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."

[*E(3)*] **E(2) Declaration made outside the boundaries of the United States.** A declaration made outside the boundaries of the United States as defined in ORS 194.805 (1) must be signed by the declarant and must include the following language in prominent letters immediately [*following*] **above** the signature of the declarant: "I declare under penalty of perjury under the laws of Oregon that the foregoing is true and correct, and that I am

physically outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. Executed on the _____ (day) of _____ (month), _____ (year) at _____ (city or other location), _____ (country)."

F Electronic filing. Any reference in these rules to any document[*, except a summons,*] that is exchanged, served, entered, or filed during the course of civil litigation [*shall*] **will** be construed to include electronic images or other digital information in addition to printed versions, as may be permitted by rules of the court in which the action is pending.

G Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D, subsection (3), paragraph (a), subparagraph (iv), part (A), as ORCP 7 D(3)(a)(iv)(A).

MOTIONS

RULE 14

A Motions; in writing; grounds. An application for an order is a motion. [*Every motion, unless made during trial, shall be in writing, shall*] **Every motion must** state with particularity the grounds therefor[,] and [*shall*] **must** set forth the relief or order sought. **Unless made on the record during a court proceeding, or during a deposition in accordance with Rule 39 E, every motion must be in writing.**

B Form. The rules applicable to captions, signing, and other matters of form of pleadings, including Rule 17 A, apply to all motions and other [*papers*] **documents** provided for by these rules.

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ABUSIVE LITIGANTS

RULE 35

A Abusive litigants. The presiding judge of any judicial district may, with due process, issue an order designating a party as an abusive litigant, restricting ongoing abusive filings, and requiring the posting of a security deposit, as provided in this rule.

B Definitions.

B(1) For purposes of this rule, "abusive litigant" means a person who is a party to a civil action or proceeding who in bad faith, through court filings, harasses, coerces, intimidates, discriminates against, or abuses another party to litigation.

B(2) For purposes of this rule, "designation order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

B(3) For purposes of this rule, "security" means an undertaking by an abusive litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

B(4) For purposes of this rule, "presiding judge" means either the presiding judge appointed by the Supreme Court Chief Justice, the judicial officer designated to fulfill presiding judge duties in the absence of the appointed presiding judge, or the judicial officer designated by the appointed presiding judge to oversee proceedings brought under this rule.

C Factors the court may consider. To determine whether a party is an abusive litigant as set forth in subsection B(1) of this rule, in addition to any other indicia of bad faith, the court may consider:

C(1) if the litigant is represented by counsel;

C(2) if the litigant has a good faith expectation of prevailing;

C(3) if the litigant is attempting to relitigate a resolved claim against the same party that prevailed, without first having diligently pursued appeal;

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C(4) if the litigant has a good faith motive in pursuing the litigation;

C(5) if the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

C(6) if the litigant is filing frivolous motions, pleadings, or other documents without any apparent basis in fact or law;

C(7) if the litigant has been restrained from contact with the opposing party by a court order that is active at the time of the new court filings;

C(8) if the litigant has a history of abusive litigation;

C(9) if the litigant has previously been declared a vexatious or abusive litigant in another jurisdiction; or

C(10) if there are any other considerations that shed light on the circumstances of the litigation.

D Designation and security hearing.

D(1) In any case pending in any court of this state, including a case filed in the small claims department, the presiding judge may, on the court's own motion, set a hearing to determine whether a litigant has engaged in abusive litigation. At the hearing on the motion, the court may request and consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant to the motion.

D(2) If, after considering all of the evidence, the court designates a party as an abusive litigant, the court must state its reasons on the record or in its written order. The court's order must be narrowly tailored to protect only the parties, persons, or category of people targeted by the abusive litigation, and to restrict only the disallowed topic or issues.

D(3) The court may require the abusive litigant to post security in an amount and within such time as the court deems appropriate in order for the litigation to continue. If the abusive litigant fails to post security in the time required by the court, the court must promptly issue a judgment by default with prejudice against the abusive litigant.

D(4) A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

D(5) A designation order will include a pre-filing requirement prohibiting an abusive litigant from commencing any new action or claim in the courts of that judicial district that falls within the scope of the designation made under subsection D(2) of this rule without first obtaining leave of the presiding judge.

D(6) On entry, a copy of the designation order must be sent by the court to: the person designated to be an abusive litigant at the last known address listed in court records, that person's attorney of record, if any, and the opposing parties, if any. Disobedience of such an order may be punished as a contempt of court, in addition to any other remedy in this rule.

D(7) A designation order does not prohibit an abusive litigant from filing responsive pleadings to any new action or claim commenced against them by another person.

D(8) A designation order is a presiding judge order, whether or not it is entered in the context of an active case proceeding. As a presiding judge order, a designation order is not subject to Rule 71 A, 71 B, or 71 D.

E Requesting exception to designation order.

E(1) Procedure. An abusive litigant or their attorney representative may request to initiate new litigation that would otherwise violate the court's designation order only by petition to the presiding judge, which may be made ex parte if no action is pending. The petition must be accompanied by an affidavit or a declaration and must include a copy of the document that the litigant proposes to file as an exhibit. The petition will only be granted on a showing that:

E(1)(a) the filing is made in good faith and not for the purpose of harassment, coercion, intimidation, discrimination, or abuse of another; or

E(1)(b) a statute of limitations or ultimate repose deadline is so close at hand that denial of the request to commence the new action could foreclose the litigant's right to bring

a potentially valid claim.

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

E(3) Relation back. If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file. On request to the presiding judge, in any proposed action with an imminent risk of obsolescence under a statute of limitations, the filing party may be permitted to serve a complete copy of the petition, affidavit, or declaration, and proposed pleading, on any party for whom expedited service is necessary to perfect jurisdiction under ORS 12.020.

F Setting a hearing stays pleading or response deadline. A court decision to set a hearing to designate a party as an abusive litigant stays pleading or response deadlines. After the presiding judge makes a determination on the merits of the motion, deadlines are set at the longest of the following, unless the court directs otherwise: their original date, within 10 days of service of the order, or within 10 days of the deposit of security.

G Cases filed without leave of the presiding judge. If an abusive litigant initiates new litigation that falls within the parameters of the designation order entered under subsection D(2) of this rule without first obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the abusive litigant is subject to a designation order. The notice must be served on the litigant and all parties at the most current address entered in court records. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim unless the abusive litigant files a motion for leave to proceed within 10 days of service of the notice. If the presiding judge issues an order allowing the action to proceed, then the abusive litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the

original pleading or within 10 days after service of that order, whichever period is longer, unless the court otherwise directs.

H Application to vacate designation order and set aside designation.

H(1) Procedure. An abusive litigant may file an application to vacate the designation order and set aside the "abusive litigant" designation. The application must be filed in the court that entered the designation order, either in the action in which the designation order was entered, or contemporaneously with a request to the presiding judge to file new litigation under section E of this rule. The application must be accompanied by evidence in the form of declarations or exhibits that support the premise that there has been a material change in the facts on which the order was granted and that justice would be served by vacating the order.

H(2) A court may vacate a designation order and set aside the abusive litigant designation on a showing of material change in the facts on which the order was granted and that justice would be served by vacating the order. An evidentiary hearing on an application under this section may be set at the court's discretion.

H(3) An abusive litigant whose application to vacate a designation order and set aside the designation is denied will not be permitted to file another similar application for one year after the date of denial of the previous application. An application to vacate under this subsection does not require an exception to a designation order under subsection E(1) of this rule.

DEPOSITIONS 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 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:

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 will be taken on [*such*] **the** terms [*as*] **that** 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 on oral examination must give reasonable notice in writing to every other party to the action. The notice 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*] **the** person or the particular class or group to which [*such*] **the** 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 must be attached to or included in the notice.

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C(2) **Special notice.** Leave of court is not required for the taking of a deposition by **the** plaintiff if [*the notice:*] **the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) of this subsection are satisfied.**

C(2)(a) **The notice** 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*] **defendant.**

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

C(2)(c) The plaintiff's attorney [*must sign*] **signed** the notice, and [*such*] **that** signature constitutes a certification by the attorney that**,** to the best of [*such*] **the** 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 subsection C(2) of this rule, the party was unable**,** through the exercise of diligence**,** to obtain counsel to represent [*such*] **the** party at the taking of the deposition, the deposition may not be used against [*such*] **the** 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 C(1) of this rule may provide that the testimony will be recorded by other than stenographic means, in which event the notice 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 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, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named must provide notice of no fewer than 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*] **that** person will testify. A subpoena must advise a nonparty organization of its duty to make [*such a*] **this** designation. The persons so designated 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 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.

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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 will put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent 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 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. On request of a party or deponent and payment of the reasonable charges therefor, the testimony will be transcribed.

D(3) **Objections.** All objections made at the time of the examination must be noted on the record. A party or deponent must state objections concisely and in a non-argumentative and non-suggestive manner. Evidence 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:

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

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

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 will propound them to the deponent on the record.

E [*Motion for court assistance; expenses.*] <u>Assistance from the court; expenses.</u>

E(1) **Motion for court assistance.** At any time during the taking of a deposition, 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*] **<u>a</u>** 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.*] **Rule 36 C.** The motion 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 will be resumed thereafter only on order of the court in which the action is pending. On demand of the moving party or deponent, the parties will suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Court assistance via remote means. A court may provide the assistance described in subsection E(1) of this rule by remote means. "Remote means" is defined in paragraph C(7)(b) of this rule.

[*E(2)*] **E(3) Allowance of expenses.** [*Subsection A(4) of Rule 46*] **Rule 46 A(4)** 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 will be submitted to the witness for [*examination, changes, if any,*] **examination; changes, if any;** and statement of correctness. With leave of court [*such*] **the** request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes that the witness desires to make will be entered 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 must promptly be served on all parties by the party taking the deposition. The witness 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*] **the** statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time if so ordered by the court, after the deposition is submitted to the witness, the party taking the deposition 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 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 must certify, under oath, on the transcript that [*such*] **the** 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*] **the** 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*] **the** party's attorney, 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.

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G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition 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 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*] **any** other person as may by writing be agreed 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 on request of any party under [*such*] **any** terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness will, 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*] **the** 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 will be marked for identification and the person producing them must afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials 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.** 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 must furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses 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*] **the** other party the amount of the reasonable expenses incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable 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 on the witness and the witness, because of [*such*] **this** 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*] **the** other party the amount of the reasonable expenses incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable 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 subsection C(1) through subsection C(7) of this rule and 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. Any objection 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*] **is** 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 will be on the party seeking perpetuation to show that:

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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 must be taken not less than 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 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 will proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition must be made at the time and noted on the record. The court before which the testimony is offered will rule on any objections before the testimony is offered. Any objections not made at the deposition 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*] **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*] **rule;**

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(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b), or part B(2)(c)(i)(E) of this rule; and**

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

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A(1)(a)(vi)(A) that all subpoenas must be obeyed unless a judge orders otherwise; and

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

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

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

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

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

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

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

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

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

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

A(5) **Proof of service.** Proving service of a subpoena is done in the same way as provided

in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) **Recipient obligations.**

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

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

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

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

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

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

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

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

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

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

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

A(7) Motion to quash or modify. A party or person that is subpoenaed may move to quash or move to modify the subpoena. A motion to quash or to modify must be filed with the court and served on the party that issued the subpoena before the date set for the recipient to appear or produce, but not more than 14 days after the date that the subpoena was served. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive, or may require that the party that served the subpoena pay the reasonable costs of compliance.

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 on the taking of a deposition in an action pending **therein;** [*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*] **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 **as** 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 **as** 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 transmitted electronically** to the witness, but [*mail*] **such** 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;*] **that:**

B(2)(c)(i)(A) the witness agreed to appear and testify if subpoenaed by a specified date using mail or electronic transmission to a designated e-mail, text message, facsimile, or other electronic account that the witness confirmed is accurate;

B(2)(c)(i)(B) the specific date, time, and place for the witness to appear and testify was coordinated with the witness and agreed on;

B(2)(c)(i)(C) the mail or electronic account used to deliver the subpoena contained no typographical or other errors that would affect delivery, and a copy of the electronic transmission is attached to the certification document;

B(2)(c)(i)(D) the mail or transmission was sent by the specific date agreed on;

[*B(2)(c)(ii)* ***Fee arrangements.*** *The party's attorney or attorney's agent made satisfactory*]

B(2)(c)(i)(E) satisfactory arrangements **were made** with the witness to ensure the payment of [*fees and mileage,*] **fees for one day's attendance and the mileage as allowed by law,** or the witness expressly declined payment; and

B(2)(c)(i)(F) the party has written, recorded, or electronic confirmation from the witness that the witness received the subpoena.

[*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,*] **the mileage as allowed by law,** 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 **the** 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 **the** 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.*] **a municipal police department, the Marshal's Office of the Judicial Department, an authorized tribal police department, a police department established by a university pursuant to statute, the Criminal Justice Division of the Department of Justice, the investigative office of a district attorney's office, or the investigative office of a humane society.**

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*] **that** 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*] **that** 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*] **that** 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*] **that** 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*] **that** served the subpoena at the expense of the party [*who*] **that** 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*] **that** 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*] **that** 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*] **that** 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.

RECOMMENDATIONS

to the

OREGON LEGISLATURE

from the

COUNCIL ON COURT PROCEDURES

for amendments to the

OREGON REVISED STATUTES

December 14, 2024

INTRODUCTION

The Council has proposed an amendment to ORS 45.400 that has been included in LC 513 (included below). During last biennium's promulgation of changes to Rule 39 and Rule 58, the discussion made clear that Oregon's lawyers and courts have learned how to utilize remote testimony. ORS 45.400 currently requires 30 days' notice if a party is seeking to present remote testimony. Although the statute provides for shortening the 30 day advance notice, clearly 30 days is generally excessive and encourages motions when a more practical time frame could be specified. The proposed language is:

> "sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow the nonmoving party to challenge the factors specified in subsection (3)(b) of this section and to establish the factors specified in subsection (3)(c) of this section."

The Council has also proposed an amendment to ORS 46.415. With the promulgation of the new Rule 35 regarding abusive litigants, there arose a concern that a good deal of the abuse that is perpetuated by such litigants occurs in Oregon's small claims courts. With the $10,000 maximum in the small claims courts, there is a potential for a great deal of harm to be inflicted on unwitting defendants who are drawn into the web of abusive litigants. ORCP 1 A provides "These rules [the ORCP] shall govern the practice and procedure . . . for the small claims departments of circuit courts . . . to the extent that they are made applicable by rule or statute." Therefore, it is deemed advisable to amend ORS 45.415 to make clear that ORCP 35 applies in the small claims departments of Oregon's circuit courts. Accordingly, the Council is proposing the addition of a new section 46.415 (3) that reads as follows:

> "The provisions of ORCP 35 apply to cases filed in the small claims department."

2024 RECOMMENDATIONS TO THE OREGON LEGISLATURE
FROM THE COUNCIL ON COURT PROCEDURES

Table of Contents

LC 513
2025 Regular Session
OSB00-003
8/14/24 (MNJ/ps)

D R A F T

SUMMARY

Digest: The Act makes some new rules for remote location testimony. (Flesch Readability Score: 61.3).

Changes notice requirements and requirements related to facilities and technology for motions to allow remote location testimony.

A BILL FOR AN ACT

Relating to remote location testimony; creating new provisions; and amending ORS 45.400, 107.717 and 163.770.

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

SECTION 1. ORS 45.400 is amended to read:

45.400. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

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

(3)(a) Except as provided under subsection (5) of this section, the court may allow remote location testimony under this section upon a showing of

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.

good cause by the moving party, unless the court determines that the use of remote location testimony would result in prejudice to the nonmoving party and that prejudice outweighs the good cause for allowing the remote location testimony.

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

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

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

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

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

(E) Any other circumstances that constitute good cause.

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

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

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

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

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

[*(E) Whether facilities that would permit the taking of remote location testimony are readily available.*]

(E) Whether reliable facilities and technology that would permit the taking of remote location testimony are readily available to the court,

counsel, parties and the witness.

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

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

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

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

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

(8) As used in this section:

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

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

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

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

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

SECTION 2. ORS 107.717 is amended to read:

107.717. (1) A party may file a motion under ORS 45.400 requesting that the court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 107.700 to 107.735.

(2) In [*exercising its discretion to allow written notice less than 30 days before the proceeding as required*] **determining whether notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the court shall consider the expedited nature of a proceeding under ORS 107.700 to 107.735.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 107.700 to 107.735.

(4) A motion or good cause determination under this section or ORS 45.400 is not required for ex parte hearings held by telephone under ORS 107.718.

SECTION 3. ORS 163.770 is amended to read:

163.770. (1) A party may file a motion under ORS 45.400 requesting that the circuit court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 163.760 to 163.777.

(2) In determining whether [*to allow written notice less than 30 days before the proceeding*] **notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the circuit court shall consider the expedited nature of a proceeding under ORS 163.760 to 163.777.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the circuit court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 163.760 to 163.777.

(4) A motion or good cause determination is not required for ex parte

hearings held by telephone under ORS 163.765.

SECTION 4. The amendments to ORS 45.400, 107.717 and 163.770 by sections 1 to 3 of this 2025 Act apply to motions filed under ORS 45.400 on or after the effective date of this 2025 Act.

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

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

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

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

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

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

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

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

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

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

Enrolled
House Bill 2461

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Judiciary for Oregon State Bar)

CHAPTER .....

AN ACT

Relating to remote location testimony; creating new provisions; and amending ORS 45.400, 107.717 and 163.770.

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

SECTION 1. ORS 45.400 is amended to read:

45.400. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

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

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

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

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

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

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

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

(E) Any other circumstances that constitute good cause.

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

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

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

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

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

[*(E) Whether facilities that would permit the taking of remote location testimony are readily available.*]

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

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

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

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

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

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

(8) As used in this section:

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

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

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

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

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

SECTION 2. ORS 107.717 is amended to read:

107.717. (1) A party may file a motion under ORS 45.400 requesting that the court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 107.700 to 107.735.

(2) In [*exercising its discretion to allow written notice less than 30 days before the proceeding as required*] **determining whether notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the court shall consider the expedited nature of a proceeding under ORS 107.700 to 107.735.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 107.700 to 107.735.

(4) A motion or good cause determination under this section or ORS 45.400 is not required for ex parte hearings held by telephone under ORS 107.718.

SECTION 3. ORS 163.770 is amended to read:

163.770. (1) A party may file a motion under ORS 45.400 requesting that the circuit court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 163.760 to 163.777.

(2) In determining whether [*to allow written notice less than 30 days before the proceeding*] **notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the circuit court shall consider the expedited nature of a proceeding under ORS 163.760 to 163.777.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the circuit court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 163.760 to 163.777.

(4) A motion or good cause determination is not required for ex parte hearings held by telephone under ORS 163.765.

SECTION 4. The amendments to ORS 45.400, 107.717 and 163.770 by sections 1 to 3 of this 2025 Act apply to motions filed under ORS 45.400 on or after the effective date of this 2025 Act.

Passed by House March 18, 2025

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Julie Fahey, Speaker of House

Passed by Senate April 30, 2025

.....
Rob Wagner, President of Senate

Received by Governor:

.....M.,....., 2025

Approved:

.....M.,....., 2025

.....
Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2025

.....
Tobias Read, Secretary of State

Council on Court Procedures
2025-2027 Biennium
Survey Results - General Comments

Topic	Comment
Appreciation	Excellent!
Appreciation	Happy to see the abusive litigant rule coming on line--it is needed more and more in the age of pro se abusive litigants using AI to prepare pleadings.
Appreciation	I'm glad that there is a committee to review these!
Appreciation	Like most committees, these volunteers work hard and I greatly appreciate their service.
Appreciation	Remarkable!
Appreciation	Thank you!
Composition of Council	Since moving from California, where I practiced for 35+ years, I have discovered how very little civil procedure exists in Oregon, and how haphazardly it is enforced. I believe CCP should be staffed only by practicing lawyers, so that reasonable rules can be promulgated.
Composition of Council	CCP: working attorneys from a variety of former jurisdictions. There is value in knowing what other jurisdictions do, and refusing to consider what other, more sophisticated jurisdictions do is not independent, it is spiteful. But let me tell you how I really feel!
Composition of Council	I am curious about the composition of the CCP. Having 6/6 who "primarily" represent Plaintiffs and Defendants seems like a recipe for mostly plaintiff's injury and insurance defense lawyers. I understand that represents a ton of the civil litigation, but it is very distinct from business and commercial litigation both in substance and the fact that many of us aren't "plaintiff's" or "defense" lawyers - which side of the v. we are on often just depends on who sues first and we very often have counterclaims in case such that everyone is prosecuting and defending claims.
Composition of Council	It would be helpful to have a highly experienced probate attorney on the CCP who can help ensure that the ORCP's are well coordinated with ORS 111 and ORS 125.
Composition of Council	Please include family law practitioners as members in the CCP.
Courts	Circuit courts need to standardize their procedures.

Council on Court Procedures
2025-2027 Biennium
Survey Results - General Comments

General	have none I am 72 and I can live with whatever the CCP and the legislature do until I retire
General	Most of my cases are arbitrated and I often act as an arbitrator, but we often look to the rules of the state court in discovery matters so it remains relevant.
Office of Administrative Hearings	Not your balilwick but the OAH and contested cases on complex matters in Oregon could really benefit from an audit and scrutiny to professionalize the OAH and reform outdated Contested Case procedure- particularly around evidentiary issues.
Response to proposals	I have had other attorneys approach me about the CCP's response when it declines to pursue a suggestion. I am not sure how detailed you get in your response to an individual when you're deny a suggestion, but it sounded like it's not very well explained and discourages attorneys from asking for more review or thinking the CCP is a waste of time. I have no personal experience with this, but I think it's worth letting you know about that viewpoint among some attorneys.
Rule History	As a small jurisdiction, many of Oregon's rules do not have elucidating case law. Where ORCPs were modeled after FRCPs or other states' rules, it would be helpful to have more resources around the rule history from the relevant jurisdiction.
SLR/Family Law	CCP has a long history of ignoring SRLs and under-considering family law. The rules on default, service, and motions have large gaps caused by these blind spots, specifically with respect to show-cause proceedings.
Website	It would be helpful for the council to have more timely updates to its website. I recognize that this would likely require additional personnel resources beyond the status quo, but it should be made a priority. Otherwise, there is a perception that the council performs its work in secret and transparency is curtailed until the amendment process concludes.
Website	The CCP website and its rule history by CCP and legislative amendments by rule is a wonderful research tool. Thank you for your efforts to develop to maintain that resource.
Working with Judiciary	The CCP should be working with the judiciary to discuss the fact that the judiciary routinely allows cases that should be dismissed on summary judgment to proceed. There is an increase in frivolous litigation, and the rules need to be applied in a way that makes them meaningful or useful. Washington courts routinely order summary judgment, and in Oregon, it is exceedingly, rare.

Shari Nilsson <nilsson@lclark.edu>

ORCP 9(G) Amendment

Nik Yanchar <nik@yancharlawoffice.com> Thu, Sep 5, 2024 at 6:56 PM
To: nilsson@lclark.edu

Morning,

I am running into a lot of elder attorneys as opposing counsel who are requiring specific consent regarding email service, and require everything to be mailed (despite faxing being allowed and many of the same have e-fax which goes right to their email).

This is inefficient and needs to be brought up to the times of 2024 and post-covid when no one was in the office.

I am willing to help work this if needed, but I would like to see an amendment where if there is an attorney representing the opposing party (or an attorney self-representing themselves), that email service of other papers, motions, etc. is sufficient, that upon request from the attorney to have it mailed then such mailing needs to be done, but the party being served still gets the time prescribed in ORCP 10 (the 3 days for mailing). So there is no prejudice in getting by email, just faster, more efficient, and stops the games played by attorneys holding the "i didn't specifically agree" card to stop.

Best,

Nik Yanchar, Esq.
(he/him)
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1826 NE Broadway
Portland, Oregon 97232
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F: 503-334-2902
www.yancharlawoffice.com

Please note that the office will be closed Fridays unless otherwise scheduled.

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Adam Hanson || Young Walgenkim

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June 26, 2024

VIA EMAIL

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

Re: Modified Proposal to Eliminate the +3 Day Rule for electronic service in ORCP 10B

Dear Hon. Mark Peterson and Members of the Council:

On August 4, 2023, I made a request to eliminate the +3 day mailbox rule under ORCP 10B. The Council rejected my proposal in October of 2023, and I write again with a modified proposal to eliminate the mailbox rule for all services other than physical mail.

Proposed Amendment:

> 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.

Problem with the Mailbox Rule 1:
ORCP 10B Causes Ambiguity and Creates Risk of Malpractice

It is universally accepted that laws should be clear, precise and unambiguous. Although the rule may seem facially clear, ambiguities often arise 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), the plaintiff was required to file a formal complaint in circuit court within 20 days of the notice. The plaintiff filed the complaint within 22 days of the notice, and the defendant moved to dismiss the case for failure to timely file a complaint under ORS 46.465(3)(a). In its response, the 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 attorney 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. The plaintiff lost out on a $28,000 claim and had to pay the defendant's attorney fees, all because of the lawyer's mistaken reliance on ORCP 10B.

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 10B has a possible conflict with many statutes that require timely responses. It is unreasonable to

[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 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.

require attorneys to look through legislative history to resolve every conflict between a statute and ORCP 10B.[2]

Problem with the Mailbox Rule 2:
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.

Justification for the Proposed Amendment

When ORCP 10B was written, additional three days were presumably 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. The only time ORCP 9 service does NOT trigger a +3 day extension is when service is made personally, which rarely happens.

My proposal is to treat all forms of electronic service (email, fax, OECI e-serve) as akin to personal delivery. Perhaps at one point when electronic service was new and uncertain, there was some justification to add the 3 day response time to alleviate uncertainties for practitioners. However, with modern improvements, electronic service is now instantaneous and just as reliable as personal delivery. Since the recipient receives service immediately after the documents are sent electronically (and are often timestamped), there is no justification to add the +3 day extension for responses. Federal courts have already eliminated the +3 day rule and we have not experienced any negative consequences, but rather clarity and consistency.

Some may argue that without ORCP 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

[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.

responses, the problem is with those rules, and it should not be addressed through ORCP 10B. In other words, the extra time needed 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. Having rules that modify other rules and statutes buried in an entirely separate section does not promote transparency and good faith and fair dealing.

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
young@hansonwalgenkim.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MARION COUNTY

OREGON CREDIT & COLLECTIONS BUREAU, Inc., Plaintiff, v. JAYSON M VALECH, Defendant.	Case No.: 22CV11731 ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WHEREFORE, Defendant filed a motion for summary judgment asserting the action must be dismissed. Plaintiff moved for summary judgment and responded to Defendant's motion. Defendant responded and replied. The parties appeared for argument on October 18, 2022. As stated on the record of the hearing the action is dismissed for the following reasons:

> The action must be dismissed because this Court lacks subject matter jurisdiction over the claim and personal jurisdiction over defendant as Plaintiff failed to file and serve the formal complaint in the time allowed by ORS 46.645(3)(a).

Defendant further moved for an award of fees pursuant to ORS 20.096, 20.083, and 20.097 and costs pursuant to ORCP 68. Def. Mot. Sum. Judgment at ¶ 4. Defendant is the prevailing party and may seek fees.

IT IS ORDERED that Defendant's motion for summary judgment is granted and Plaintiff's action is dismissed.

11/18/2022 4:23:51 PM

Circuit Court Judge Channing Bennett

Submitted by:
_s/ Bret Knewtson_____
Bret Knewtson OSB 033553
Counsel for defendant.
Service by court e-service on November 15, 2022 Jonathan Himes, jhimes@fwwlaw.com.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MARION COUNTY

OREGON CREDIT & COLLECTIONS BUREAU, Inc., Plaintiff, v. JAYSON M VALECH, Defendant.	Case No.: 22CV11731 CERTIFICATE OF READINESS

This proposed order is ready for judicial signature because:

_____ Each opposing party affected by this order or Judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

_____ Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.

_X__ I have served a copy of this order or judgment on all parties entitled to service on October 31, 2022, and:

__X_ No objection has been served on me.

____ I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.

____ After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.

_____ The relief sought is against an opposing party who has been found in default.

_____ An order of default is being requested with this proposed judgment.

____ Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.

_____ This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

Dated: November 15, 2022

s/ Bret Knewtson
Bret Knewtson, OSB 033553
Attorney for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

OREGON CREDIT & COLLECTIONS BUREAU, INC., Plaintiff, v. JAYSON M. VALECH, Defendant.	Case No. 22CV11731 PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Oral Argument Requested (30 minutes)

Plaintiff Oregon Credit & Collections Bureau, Inc. ("Plaintiff" or "OCCB") submits the following Cross-Motion for Summary Judgment and Response in Opposition to Defendant's Motion for Summary Judgment. This combined Motion and Response is supported by the Points and Authorities below, the Declaration of Janet Blair ("Blair Dec."), filed herewith, and the records and files herein.

UTCR 5.050 INFORMATION

Plaintiff estimates that thirty minutes will be required for the hearing on this motion. Official court reporting services are not required. Plaintiff requests oral argument by phone or Webex. The phone number of counsel for Plaintiff, Jonathon D. Himes, is (503) 228-6044 ext. 204. The phone number of counsel for Defendant Jayson M. Valech ("Defendant" or "Valech"), Bret Knewston, is (503) 846-1160.

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/ / /

MOTION

Pursuant to ORCP 47 A, Plaintiff Oregon Credit & Collections Bureau, Inc. ("Plaintiff" or "OCCB") moves for an order granting summary judgment in its favor and against Defendant on the grounds that there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.

POINTS AND AUTHORITIES

I. Summary of Argument

Plaintiff, a duly registered collection agency under Oregon law,[1] brought an action against Defendant Valech in the Small Claims Department of Marion County to collect on amounts owing under an account held by Artisan Custom Homes, Inc. ("Artisan") with Kilgore-Blackman Building Materials ("KBBM") and under which Defendant was a guarantor. KBBM assigned the Artisan account to Plaintiff in 2016, and after efforts at collection failed, Plaintiff initiated the small claims action against Defendant for breach of guaranty. Plaintiff ultimately obtained judgment by default. Later, Defendant moved to set aside the judgment, and the small claims department vacated the judgment (without briefing or further argument) and issued a notice to file a formal complaint in this Court. Defendant has now moved for summary judgment on Plaintiff's claim on various grounds, none of which prevent entry of judgment against him, as explained below. It is important to note that each of the grounds under which Defendant has moved for summary judgment are purely legal grounds—nothing in Defendant's motion creates an issue of material fact for trial.

Defendant first claims that Plaintiff did not file this action within the 20-day timeframe permitted by small claims statute, ORS 46.465. However, ORCP 10B provides that three days are added to any time period when the document that triggers running the time period is sent by mail, and Plaintiff filed and served its Complaint within that window. Defendant

[1] Plaintiff alleged in its small claims filing that it was a duly registered collection agency, but did not do so in the formal complaint filed in this case. However, a copy of Plaintiff's registration is enclosed as an exhibit to the Blair Declaration. *See* Blair Dec. Ex. 5.

argues that ORCP 10 is inapplicable because the Oregon Rules of Civil Procedure do not apply in a small claims action, but this action was filed in circuit court, and the filing of a complaint in circuit court is subject to the Oregon Rules of Civil Procedure.

Second, Defendant contends that the claim in the small claims action is an obligation to pay the purchase price of goods sold on credit, while the controversy alleged in the Complaint in this case is an independent obligation to pay the debt. As explained more fully below, Plaintiff's claim in this case is identical to the one brought in small claims. But even if that is not readily evident on the fact of the Complaint, Plaintiff's claim for relief indisputably *relates* to the underlying small claims action—and that is all that the small claims statute, ORS 46.465(3)(b), requires. It does not require that the causes of action be identical.

Third, Defendant argues that Plaintiff's claim is barred by the Uniform Commercial Code's statute of limitations for actions involving the sale of goods. However, in Oregon, action on a guaranty agreement is not barred by the running of the statute of limitations on the underlying debt—it is a separate and distinct agreement. In this case, Plaintiff has brought an action for breach of the guaranty agreement. That claim is subject to the six-year statute of limitations contained in ORS 12.080. Plaintiff filed its small claims action within that timeframe.

Fourth, Defendant raises a minor issue that Plaintiff did not allege in its Complaint that it is a duly registered collection agency with the State of Oregon, as required by statute. Plaintiff made this allegation in its small claims complaint, but inadvertently did not include this allegation in its Complaint in this case. Therefore, a copy of Plaintiff's registration has been included with the Blair Declaration in support of this motion showing that Plaintiff is, in fact, a registered collection agency.

Finally, Defendant asserts that the Complaint does not allege facts showing that Artisan was liable for the purchases made under the account, which in turn, would mean that there was no debt to guarantee. Again, the evidence submitted with the Blair Declaration plainly shows that Artisan entered into a credit agreement with KBBM, that KBBM sent account

statements to Artisan, and that Artisan failed to pay the balance owing on that account. As a personal guarantor on the account, Defendant is liable for any amounts remaining unpaid.

Ultimately, there is no dispute of material fact that Defendant entered into the guaranty agreement and failed to pay the amount owing under the Artisan account agreement. Defendant has not, and cannot, put forth evidence that contradicts the facts set forth in the Blair Declaration. Because Defendant's legal arguments are without merit, Plaintiff respectfully requests that this court enter summary judgment in favor of Plaintiff and against Defendant in the amounts prayed for in the Complaint.

II. Factual Background

On or about December 29, 2005, Artisan requested an open credit arrangement ("Account Agreement") from KBBM to finance the purchase of building materials. Blair Dec. ¶ 2. On that same day, Defendant executed a personal guaranty ("Guaranty"), under which he agreed to guarantee repayment of all amounts that Artisan owed to KBBM under the Account Agreement. *Id.* Ex. 1. Artisan obtained materials from KBBM under the Account Agreement from approximately September 15, 2015, through November 27, 2015. Ultimately, Artisan failed to pay for those materials, and KBBM assigned the account ("Artisan Account") to Plaintiff for collection on October 10, 2016. *Id.* ¶ 3, Ex. 2 (assignment of account).[2] From that point forward, Plaintiff made efforts to collect the amount owing on the account. Plaintiff had several conversations with Defendant Valech regarding the debt owed; Defendant did not deny that he owed the debt. *Id.* Importantly, Defendant does not deny in his Motion that owes the debt—only that this action is barred under various legal theories (all of which are unavailing, as explained below).

On or about July 20, 2021, Plaintiff sent a notice to Defendant containing KBBM statements evidencing the amounts owing on the Artisan Account and for which Defendant was

[2] The KBBM assignment of account (Ex. 2 to the Blair Declaration) lists "Artisan Custom Homes" as the primary debtor and Jayson Valech as an additional debtor. *See* Blair Dec. Ex. 2. This is consistent with Mr. Valech's obligations as guarantor under the Account Agreement.

liable. *Id.* ¶ 4, Ex. 3. When payment on the Artisan Account was not forthcoming, Plaintiff instituted an action against Defendant Valech in the Small Claims Department of the Marion County Circuit Court, Case No. 21SC20644 ("Small Claims Action"). In the Small Claims Action, Plaintiff alleged the following:

> I, Plaintiff, claim 1) Oregon Credit & Collections Bureau, Inc. is a duly registered and bonded collection agency under ORS 697.015 and ORS 697.031, and 2) on or about **SEPTEMBER 14, 2021**, the above- named defendant(s) owed Oregon Credit & Collections Bureau, Inc. the sum of $**10000.00** because the following debt(s) have been assigned to the plaintiff:

Original Creditor	Principal Balance	Collection Fee	Interest	Service Date
Kilgore Blackman Building Materials, LLC.	$10,000.00			09/30/2015 – 11/27/2015

Blair Dec. ¶ 5, Ex. 4. Although the amount owing on the Artisan Account was greater than the $10,000 limit for small claims actions, Plaintiff limited its damages in the Small Claims Action. Regardless, Defendant was given the KBBM Artisan Account statements prior to the initiation of the Small Claims Action and was well aware of the amount owing, as well as his status as a guarantor under the Guaranty.

Defendant did not file an answer to the Small Claims Action, and Plaintiff thereafter obtained a default judgment on January 20, 2021. Upon receiving a writ of garnishment issued pursuant to the judgment, Defendant filed a Motion to Vacate Judgment on March 11, 2022. The Small Claims Department granted relief from judgment on March 15, 2022, without further briefing or argument, and issued a Notice to File Formal Complaint in Marion County Circuit Court. Plaintiff subsequently filed this action on April 6, 2022, and served Defendant on April 7, 2022.

As of March 23, 2022, the unpaid balance on the Artisan Account is $28,751.46, which includes $12,184.48 in principal, $11,931.63 in interest, and collection fees pursuant to ORS 697.115 of $5,385.65. This amount has been reduced to reflect credit for payments of $1,413.19 previously received from Defendant. *Id.* ¶ 6. Under the terms of the Account

Agreement, Plaintiff is also entitled to collection of costs and attorney's fees incurred in this action. *Id.* Ex. 1.

III. Legal Argument

There is no genuine dispute that Valech executed the Guaranty, has failed to remit payment for the amount owing under the Artisan Account, and that Plaintiff has been damaged as a result. Accordingly, Plaintiff has stated a prima facie case for breach of the guaranty agreement. Furthermore, the arguments set forth in Defendant's Motion for Summary Judgment fail as a matter of law and do not prevent entry of judgment against him.

A. Legal Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47 C. The Court views "the facts and all reasonable inferences that may be drawn from them in favor of the nonmoving party." *Scott v. State Farm Mut. Auto Ins. Co.*, 345 Or 146, 148, 190 P3d 372 (2008). No genuine issue of material fact exists, however, if, based upon the record before the Court, "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." ORCP 47 C. A party opposing summary judgment "may not rest upon the mere allegations or denials of that party's pleading," but rather "must set forth specific facts showing that there is a genuine issue as to any material fact for trial." ORCP 47 D.

B. There is no genuine issue of material fact that Defendant owes the Account Balance to Plaintiff.

Plaintiff has demonstrated that Artisan entered into the Account Agreement and defaulted under the terms thereof by failing to make payments when due. *See* Blair Dec. ¶¶ 2-5, Ex. 1-3. Plaintiff has shown that Defendant Valech executed the Guaranty under which he agreed to guarantee payment of all amounts owing under the Artisan Account. *Id.* Ex. 1. Plaintiff has also detailed its damages. *Id.* ¶ 6. Accordingly, Plaintiff has made a prima facie case for breach

of the guaranty Account Agreement. To survive summary a motion for summary judgment, Defendant must set forth specific facts showing that there is a genuine issue as to any material fact for trial. ORCP 47 C. Defendant cannot do so here because he undeniably signed the Guaranty, defaulted under its terms, and has no valid defenses to Plaintiff's claims for damages, as explained below.

C. The various legal grounds raised in Defendant's Motion do not prevent entry of judgment against Defendant.

Defendant makes four overarching arguments in support of his Motion for Summary Judgment: (1) that this Court lacks subject matter jurisdiction because Plaintiff failed to timely file the formal complaint in this action and that Plaintiff does not meet the requirements set out in ORS 46.465 that Plaintiff's allegations in the Complaint must "relate" to the claim brought in the small claims action; (2) that Plaintiff's claim is barred by the Uniform Commercial Code statute of limitations; (3) that Plaintiff does not have standing to bring this claim because it did not allege that it is a duly registered collection agency under ORS 697.015; and (4) that Plaintiff failed to allege that Artisan was liable for the purchases made, and thus there was no underlying debt to guarantee. These arguments are addressed in turn below.

1. This Court has subject matter jurisdiction over this action.

Defendant makes two arguments in support of his contention that this Court lacks subject matter jurisdiction. First, Defendant contends that Plaintiff failed to file and serve the formal complaint in the time allowed by ORS 46.465(3)(a). Second, Defendant argues that Plaintiff's claims at issue in this action are not the same claims that were alleged in the Small Claims action. Each of these arguments are misplaced.

a. <u>Plaintiff timely filed its Complaint.</u>

Defendant first argues that this Court is without subject matter jurisdiction because Plaintiff did not file the complaint in this action within the 20 day timeframe required by ORS 46.465(3)(a). Defendant states that the Complaint must have been served by Monday, April

4, 2022, which is exactly 20 calendar days after the Notice to File Formal Complaint was sent.

In this case, Plaintiff filed the Complaint on April 6, 2022, and it was served on Defendant on April 7, 2022. Both of these dates are within the ORCP 10B allotment for additional time after service by mail. That rule provides for an additional three days to be computed to the prescribed period to respond. ORCP 10B. Defendant claims that the rules of Civil Procedure do not apply in small claims court unless specified by a small claims rule. ORCP 1. The issue, however, is that this action is no longer in small claims court—it is in Oregon Circuit Court—and the Oregon Rules of Civil Procedure apply. Accordingly, Plaintiff had until April 7, 2022, to file and serve the formal complaint in this case. As indicated above, both the filing and service of the Complaint were complete as of April 7, 2022.

Should the Court find Defendant's argument availing, however, case law is clear that the proper action is not dismissal—or in this instance, summary judgment—but rather a remand to the small claims court. *See Melkonian v. Pfister*, 107 Or App 266 (1991) (remand to small claims court is appropriate remedy, not dismissal with prejudice).

It bears mentioning that the small claims court seems to have improperly vacated the judgment obtained in the Small Claims Action. ORS 46.485 provides that a judgment in small claims court is "conclusive upon the parties, and no appeal may be taken from the judgment." ORS 46.485(4). Plaintiff obtained judgment in small claims in January 2022 and proceeded to make efforts to collect on the judgment through writs of garnishment. In early March 2022, Defendant moved under ORCP 71 for relief from judgment under the "excusable neglect" standard. The small claims court thereafter simply vacated the judgment without argument or any additional briefing—Plaintiff, therefore, did not have an opportunity to respond to Defendant's motion to vacate. If anything, Defendant's motion to vacate should have been heard in civil court where Plaintiff would have been afforded a chance to respond and defend against that motion on the merits. Thus, if this court is inclined to remand this case to small claims, Plaintiff requests an opportunity to be heard on Defendant's motion to vacate.

b. The claims in Plaintiff's Complaint relate to the same controversy alleged in the Small Claims Action.

Defendant further argues that dismissal of the Small Claims Action is warranted because the civil complaint filed in this case "does not reflect the same controversy asserted in the small claims complaint," citing ORS 46.465(3)(b) (requiring that plaintiff's claim in the formal complaint be related to the same controversy).[3] Motion at 4. Defendant's argument is largely about the facts contained in the Small Claims Action—or rather, that the complaint filed therein only contained facts referencing the original creditor, KBBM, the "Service Date" of 9/30/2015 – 11/27/2015, and the amount prayed for ($10,000). Defendant also takes issue with the notion that nothing in the small claims complaint would have put Defendant on notice that he was personally liable under a guaranty. This argument is wholly without merit. Defendant was named individually in the Small Claims Action—not Artisan Homes—just as he is named individually in this case. Furthermore, the claim at issue in this action clearly relates to the claim alleged in the Small Claims Action. In the Small Claims Action, Plaintiff alleged as follows:

> I, Plaintiff, claim 1) Oregon Credit & Collections Bureau, Inc. is a duly registered and bonded collection agency under ORS 697.015 and ORS 697.031, and 2) on or about **SEPTEMBER 14, 2021**, the above- named defendant(s) owed Oregon Credit & Collections Bureau, Inc. the sum of $**10000.00** because the following debt(s) have been assigned to the plaintiff:

Original Creditor	Principal Balance	Collection Fee	Interest	Service Date
Kilgore Blackman Building Materials, LLC.	$10,000.00			09/30/2015 – 11/27/2015

Blair Dec. Ex. 4. Defendant argues that it is "speculative" as to what Plaintiff was attempting to

[3] For reference, that statute provides, in part:

> "The plaintiff's claim in the formal complaint filed pursuant to this subsection is not limited to the amount stated in the claim filed in the small claims department, but the claim in the formal complaint must relate to the same controversy."

ORS 46.465(3)(b).

prove in the Small Claims Action, but the facts of that complaint are fairly clear: Plaintiff alleged that Defendant owed it the sum of $10,000 under the KBBM account that had been assigned to Plaintiff.

In this case, the claim at issue is not limited to the amount stated in the Small Claims Action because Plaintiff is not limited by the $10,000 limit on actions brought in small claims court. ORS 46.405(3) (limit on small claims actions is $10,000). Nonetheless, the claim at issue plainly relates to the same controversy. Plaintiff has alleged that Artisan requested an open-credit arrangement from KBBM; Valech executed a personal guarantee that guaranteed repayment of all amounts that Artisan owed to KBBM under the credit arrangement; that KBBM assigned the Artisan account to Plaintiff for collection; and that Valech, as guarantor, has refused to pay the amount owing. *See* Complaint ¶¶ 5-11; Blair Dec. ¶¶ 2-5.

Defendant argues that Plaintiff was required in the Small Claims Action "to allege that Defendant was obligated to pay for the purchases made by Artisan as the material fact of the small claims action for this action to be the same cause of action asserted in case #22CV11731." Motion at 4-5. Importantly, however, Plaintiff's claim need not be the "same cause of action" as Defendant contends; rather, it must only be *related to* the same controversy as the underlying small claims complaint. ORS 46.465(3)(b). As indicated above, Plaintiff is seeking to collect on the amount owing under the Artisan Account, of which Valech has had notice since at least July 2021. Blair Dec. Ex. 3. Valech (individually) is the defendant in both cases, and OCCB has sought in both actions to collect on the Artisan Account, and importantly, Valech's only personal obligation is under the Guaranty. Clearly, the Guaranty is "related" (within the meaning of ORS 46.465(3)(b)) to the underlying small claims action, regardless of the exact cause of action. Again, nothing in ORS 46.465 requires Plaintiff to maintain the same cause of action—only that its claim(s) in the formal civil complaint relate to the underlying small claims action. That standard is clearly met here.

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2. Plaintiff's claims are not barred by the statute of limitations.

Defendant claims that the statute of limitations on a claim involving the sale of goods under the Oregon Uniform Commercial Code applies to this action. *See* ORS 72.7250 (providing that statute of limitations for contract on a sale of goods is four years). However, in Oregon, an action on a guaranty is not barred by the running of the statute of limitations on the underlying debt; it is an entirely distinct concept and is subject to the six-year statute of limitations provided by ORS 12.080 for actions on a contract.

In the case of a guaranty agreement, a guarantor is not discharged because the statute of limitations has run against the principal. *See Eustis v. Park-O-Lator Corporation*, 249 Or 194, 199 (1967). A guaranty is, by its very nature, a conditional promise to pay only on the condition that the principal debtor fails to pay. Indeed, Defendant's Motion even cites the same principle:

> In *Eustis*, this court held that a creditor could proceed against a guarantor even though the statute of limitations would have barred an action against the principal debtor. Implicit in the *Eustis* rationale is the idea that an action on a debt is distinct from an action on a guarantee of that debt. Thus, raising a bar to one of the actions does not affect the ability to bring the other.

Motion at 5 (quoting *Sumner v. Enercon Development Company*, 307 Or 579, 583-84 (1989)). Thus, in this case, even if the underlying Artisan debt is barred by statute of limitations in ORS 72.7250, the action against Valech as guarantor is not. That cause of action is subject to the six-year statute of limitations contained in ORS 12.080. Here, the first KBBM statement was sent to Artisan on 9/30/2015. Blair Dec. Ex. 3, p. 4. The six-year limitations period for that invoice ran on September 30, 2021. Plaintiff initiated the Small Claims action on September 14, 2021, which was within the limitations period.

Defendant reads too much into *Moorman Mfg. Co. of California, Inc. v. Hall*, 113 Or App 30 (1992). That case involved an action for an account stated against the same parties that were liable for the underlying debt. There, the court applied the four-year UCC statute of

limitations on an action on account stated because even though an account stated is an agreement independent of the underlying sales transaction, it could not be divorced from the sales transaction. 113 Or App at 33. That is not the case here. In this case, Artisan was liable for the underlying debt; Valech is a guarantor of any obligations owing under the Artisan Account. The nature of each agreement is separate and distinct from the other, and Valech's obligation as a guarantor was, and is, entirely contingent on whether Artisan paid that amount owing under its account. That is different than the account stated claim in *Moorman* in which the principal obligors reaffirmed the underlying debt. The court's stated rationale that the UCC drafters intended that one limitation period apply to all transactions involving the sale of goods, regardless of the theory of liability asserted, simply does not apply in this instance. The Guaranty is a wholly separate agreement to pay amounts owing; it is not an agreement to pay for goods purchased under an account. *Sumner*, 307 Or at 583-84; *Eustis*, 249 Or at 199.

Accordingly, the six-year limitations period for breach of contract actions under 12.080 applies to Plaintiff's claim for breach of the Guaranty. As indicated above, Plaintiff filed the Small Claims Action within that timeframe, and consequently, this action is not time-barred.

3. Plaintiff is a duly registered collection agency under ORS 697.015 and has legal standing to bring this action.

Defendant next argues that this action must be dismissed because Plaintiff lacks statutory standing as a collection agency to bring the claim asserted in this case.

Defendant first claims that this action must be dismissed because Plaintiff did not allege that it is a duly registered collection agency under ORS 697.015. *See* ORS 697.045 (requiring collection agency to allege and prove that it is registered in order to bring or maintain an action).[4] This, Defendant states, is fatal to Plaintiff's claim, and it cannot be cured by an

[4] The statute states, in full:

> No collection agency is entitled to bring or maintain an action involving the collection of a claim or account on behalf of its customers in any courts of this state without alleging and proving that it is duly registered under ORS 697.015 (Registration requirement) and 697.031 (Registration

amendment to the complaint or otherwise. Defendant reads too much into that statute, however. Nothing in the statute prevents Plaintiff from either amending its complaint to state that allegation or from proving it is a duly registered collection agency at a different procedural posture. The statute only provides that a collection agency cannot bring or maintain an action without alleging and proving that it is duly registered. ORS 697.045. As indicated above, Plaintiff is, in fact, a duly registered collection agency. Blair Dec. ¶ 7, Ex. 5. Furthermore, Plaintiff has already alleged that it was a duly registered collection agency in the Small Claims Action. *See* Blair Dec. Ex. 4 (complaint filed in Small Claims Action attesting as such). Even though Plaintiff has proven that it is duly registered, the failure to include that allegation in the Complaint is not fatal, and Defendant points to no authority showing otherwise. Should this court find merit in Defendant's argument, however, Plaintiff asks to be granted leave to amend its complaint to state this allegation.

Second, Defendant asserts that Plaintiff does not have standing because it failed to allege that the assignment of the debt was in writing. Defendant argues that the written assignment from KBBM to Plaintiff—and only the written assignment—gives Plaintiff the requisite standing to bring an action to recover the amount owing from the account. Defendant misreads the statute. ORS 697.045(1) provides as follows:

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> procedure). A registration certificate or a certification of registration by the Director of the Department of Consumer and Business Services for any designated time period shall be received by the court as prima facie evidence of the collection agency's registration for the time period designated.
>
> ORS 697.045(4).

> (1) A registered collection agency has a property right in any claim or account assigned to the agency in writing for collection. Except as may be otherwise provided in writing between the assignor of the claim or account and the registered collection agency, the registered collection agency as assignee of the claim or account, in its own name, may:
>
> (a) Collect the claim or account;
>
> (b) Compromise or accept settlement of the claim or account;
>
> (c) Bring and maintain an action to recover the amount owing from the claim or account; and
>
> (d) With prior written approval of the assignor, transfer or forward the claim or account to another collection agency for collection.

ORS 697.045(1). Defendant makes the specious argument that Plaintiff has not alleged the assignment was in writing, so the natural result is that the assignment did not explicitly give Plaintiff the right to bring this action. This argument is misleading. The statute does not prescribe pleading requirements; it simply states that a collection agency has a property right in any claim or account assigned to the collection agency for collection. As such, it can collect on the account, compromise or settle the account, or bring an action to recover the amount owing. The ability to bring an action does not depend on whether the written assignment of the account provides for such ability—that right is provided by statute. ORS 697.045(1)(c).

In any event, Plaintiff has shown that it received a written assignment from KBBM. Blair Dec. ¶ 3, Ex. 2. Plaintiff clearly and unequivocally has standing to bring this action.

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4. Artisan was liable for the purchases of the goods sold by KBBM on credit, and Defendant is liable as a guarantor under the Guaranty.

Plaintiff has demonstrated that Artisan entered into the Account Agreement with KBBM. Blair Dec. Ex. 1. Nonetheless, Defendant argues that the Account Agreement was entered into by Defendant personally, despite the "business" section of the credit application being filled out, which lists "Artisan Homes, Inc." as the applicant. *Id.* Defendant expends quite a bit of space arguing that there is no place on the credit application for a person to sign on behalf of a company, and that as a result, the agreement can only be read to mean one thing: that Valech entered into the agreement for the sale of goods personally. This argument is a red herring and should be rejected.

Oregon courts have adopted the objective theory of contracts—i.e., that words are commonly understood to have meanings accepted by all persons and attempt to apply an independent, objective standard to the accepted meanings of the words used in an agreement. *See, e.g.*, *Holdner v. Holdner*, 176 Or App 111, 120, 29 P3d 1199 (2001), *rev den*, 334 Or 288 (2002). Under that theory, the standard of interpretation is the meaning that would be ascribed by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. *Id.*

Here, Defendant did not fill out the application for credit as an individual; he filled out the business section of the application, listing Artisan as the applicant. *See* Blair Dec. Ex. 1 (Account Agreement). Furthermore, page two of the Account Agreement states that "any and all purchases for the *company* . . . will be paid by the *company* as per Kilgore-Blackman terms." *Id.* (emphasis added). If those payments are not made, the agreement provides that the guarantor is personally liable for any amount owing, including any collection costs and attorney's fees. *Id.* Simply put, a plain reading of the Account Agreement shows that Artisan clearly entered into the Account Agreement and that Valech agreed to personally guaranty payment of any sums owing.

The fact that Artisan—and not Valech individually—entered into the Account Agreement is further buoyed by the Artisan Account statements that were sent to Defendant, as well as the written assignment of the account itself. *See* Blair Dec. Ex. 2, 3. The assignment of the account, for example, lists "Artisan Custom Homes" as the primary debtor, and it lists "Jayson Valech" as an additional debtor. *Id.* Ex. 2. This is consistent with Defendant's obligations as a guarantor under the Account Agreement. Furthermore, each of the Artisan Account statements (Ex. 3 to the Blair Declaration) show that the materials purchased were sold to "Artisan Custom Homes"—they were not sold to Valech individually. *Id.* Ex. 3. Additionally, the KBBM Account Statements (Ex. 6 to the Blair Declaration) further evidences that the account was held in Artisan's name—not Valech's—and this reinforces the fact that Artisan was the primary obligor on the credit arrangement. *Id.* Ex. 6.

There is simply no question that the Account Agreement was entered into by Artisan. As guarantor, Valech was obligated to pay any amounts outstanding. He failed to do so, and as a result, he is liable for breach of the Guaranty.

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IV. Conclusion

Plaintiff has stated a prima facie case for breach of the guaranty agreement. Artisan clearly entered into the credit arrangement with KBBM, and Valech indisputably agreed to personally guarantee amounts owing thereunder, but failed to remit payment for the amount owing on the Artisan Account. Plaintiff has also detailed its damages. Furthermore, nothing in Defendants' Motion creates an issue of material fact for trial. Plaintiff timely filed this action, and it was filed within the applicable statute of limitations period prescribed for breach of contract actions under ORS 12.080. As explained above, there is also no question that Plaintiff has standing to bring this action as a duly registered collection agency.

For the foregoing reasons, Plaintiff should be granted summary judgment on its claim for breach of the guaranty agreement, and Defendant's Motion should be denied.

DATED this 13th day of July, 2022.

FARLEIGH WADA WITT

By: *Jonathon D. Himes*
Harold B. Scoggins, III, OSB #914217
Jonathon D. Himes, OSB #193770
(503) 228-6044
hscoggins@fwwlaw.com
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Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was electronically filed with Marion County Courthouse through the OJD eFiling system.

I further certify that on July 13, 2022, I served a true copy of PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT on:

Attorney for Defendant

Bret Knewtson, Esq., OSB #03355
3000 NE Stucki Ave, Suite 230
Hillsboro, OR 97124
bknewtson@yahoo.com

VIA REGULAR MAIL ☒
VIA CERTIFIED MAIL ☐
VIA EMAIL ☒
VIA COURIER ☐
OJD EFILING SYSTEM, if registered, at the party's email address as recorded on the date of service in the eFiling system. ☒

Dated: July 13, 2022.

FARLEIGH WADA WITT

By: *Jonathon D. Himes*
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Shari Nilsson <nilsson@lclark.edu>

RE: New Twist on ORCP 27

Susie Norby <Susie.L.Norby@ojd.state.or.us> Thu, Aug 29, 2024 at 1:05 AM
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, Shari Nilsson <nilsson@lclark.edu>

I think the policy is essentially elevating parental rights over presumptions that minors are incapacitated by age. I think I agree with that, but I haven't put a lot of thought into it.

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:58 PM
To: Susie Norby <Susie.L.Norby@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

In addition to being questionable in the policy department, the statute could be better written. I suspected there might be such a law, but is it saying that minors can represent themselves in those three limited kinds of proceedings or that they can sign waivers and settlement agreements and the like as a part of, e.g., a filiation case?.

Mark

Mark A. Peterson

Circuit Court Judge Pro Tem

Multnomah County Circuit Court

1200 SW First Avenue

Portland, OR 97204

Office: (971) 274-0453

Email: Mark.A.Peterson@ojd.state.or.us

From: Susie Norby <Susie.L.Norby@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:51 PM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

Here's the obscure statute! But I still think ORCP 27 should refer to this situation somehow. 😊

109.112 Mother, father or putative father deemed to have attained majority. The mother, father or putative father of a child shall be deemed to have attained majority and, regardless of age, may give authorizations, releases or waivers, or enter into agreements, in adoption, juvenile court, filiation or other proceedings concerning the care or custody of the child. [1975 c.640 §10]

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:46 PM
To: Susie Norby <Susie.L.Norby@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

Susie,

My initial thought is that minors should not be having babies! But, I stopped handling family law cases a long, long time ago, so what do I know. This is but one example of why there should be a couple of family law lawyers on the Council who spend time in the trenches and whose vantage point is not from a perch on the bench. Seriously, I think Role 27 B says they must have an adult in charge for the proceeding. However, there may be some obscure statute in the family law part of the ORS that points in another direction. Could use some family law practitioners. We should put this in the list of issues for next biennium's September meeting.

Mark

Mark A. Peterson

Circuit Court Judge Pro Tem

Multnomah County Circuit Court

1200 SW First Avenue

Portland, OR 97204

Office: (971) 274-0453

Email: Mark.A.Peterson@ojd.state.or.us

From: Susie Norby <Susie.L.Norby@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 2:53 PM

To: Shari Nilsson <nilsson@lclark.edu>; Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: New Twist on ORCP 27

Something to put on the list for the next biennium!

Today a colleague came to see me to ask about the application of ORCP 27 to a specific Custody & Parenting Time court case.

The parties – Mother and Father to the child – are both under 18 years of age. Neither is emancipated. Neither has a GAL. My colleague asked whether he could proceed with the scheduled hearing in spite of their ages and their absence of a fiduciary of any kind.

I interpreted B(1)(a) to potentially allow a minor over 14 to apply to be his/her own GAL, if necessary. Therefore, I reasoned, my colleague should go ahead with the hearing without that odd step.

Then our (non-lawyer) Family Court Services employee advised, with assurance, that minors who are parents of a child need not have a fiduciary or GAL to proceed. So he did. But the employee did not cite us to any legal authority for her position.

The CCP may want to consider another amendment to ORCP 27 to clarify that minor parents of a child may litigate their family law cases without an adult representative.

Just thought I'd pass this on!

Susie

COOPER WHITMAN LLC

TRIAL LAWYERS

November 8, 2024

Via email: ccp@lclark.edu

Hon. Mark A. Peterson
c/o Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR 97219

Dear Judge Peterson:

I hope you, Shari and the Council members are well.

I write to propose a change to ORCP 60 to clarify one part of it.

The final sentence of the current rule is "[i]f a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict."

Without context this grant of discretion seems illogical and directly at odds with the purpose of the rule: to dismiss a claim when the party has not made a *prima facie* case before resting their case in chief.

I recently tried a jury trial for a defendant. I provide some of the facts to give context to the trial judge's perspective that drover her ruling.

Plaintiffs were neighbors of a decedent. I represented the trustee of the trust that held all her assets. It was conceded that for a number of years Plaintiffs had provided extraordinary levels of support and care to their neighbor. They testified that they did so because they believed she was leaving them her house in her trust and were motivated by gratitude for that expected future gift. Of course, no version of the trust ever contained a bequest for them at all.

Their claim was for unjust enrichment.

I argued, that as a matter of law, services provided purely out of an expectation of a future gift, absent some agreement, can never produce enrichment which is unjust.

The trial judge agreed with me on the law and granted my motion, but the judge was clearly very moved by the uncontroverted evidence of the immense amount of time and efforts the Plaintiffs spent helping their elderly neighbor.

The judge, thus, acceded to Plaintiffs' counsel's request to enter a dismissal without prejudice as the plain language of the rule allows the Court to do.

The Council staff report from the 1978-79 biennium when this rule change was promulgated indicates this change was made because "[i]n a jury case, if the judge feels that a plaintiff should be given a chance to refile when the evidence presented by the plaintiff is insufficient, the judge can grant a judgment of dismissal without prejudice under ORCP 54, instead of directing a verdict."

In my case the motion was based on the legal insufficiency of otherwise uncontroverted evidence, it was not based on the failure of Plaintiffs to provide some, or sufficient evidence on any element of their claim.

I would recommend that the final sentence of ORCP 60 be modified to say "[i]f a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict *if the court finds that the party against whom the motion was made filed to provide sufficient evidence to make a* prima facie *case but should be given a second chance to do so by refiling the case*."

As it exists the rule provides judicial discretion that is not sufficiently cabined to the intent of the rule. This leads, as in my case, to bad outcomes.

These parties had a trial (my predecessor counsel had chosen not to move for summary judgment and I did not have the required time to do so before trial when I assumed the role of counsel to the Defendant) and Plaintiffs put on all the evidence they chose to adduce. The Court found, *as a matter of law*, that their claim failed, not based on insufficiency of their evidence.

Having granted a without prejudice dismissal the Court has denied Plaintiffs the right to appeal if they choose (the dismissal is not final) and has bound the parties, if Plaintiffs wish, to re-litigate the exact same case to likely the same outcome (unless the appellate courts change our law of unjust enrichment).

Clarity in the rule can help these and future jurists and parties to avoid such duplication of efforts.

As always, I'd be glad to participate in any Council meeting where this proposal is discussed.

Sincerely,

/s/ Brooks Cooper
Chair of the Council in the 2011 – 2013 biennium

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mediation communications statutory privilege.

Mr. Goehler asked Ms. Holland whether stays are within the purview of the Uniform Trial Court Rules. Ms. Holland stated that there may be a UTCR regarding informing the court if a bankruptcy stay is needed, but she could not think of any others. Judge Peterson noted that chapter 7 of the UTCR contains deadlines in terms of moving cases along. Mr. Goehler stated that this is why he was thinking that case progression is more in the UTCR realm than the ORCP realm.

Mr. Goehler suggested that Council members think about the issue in the time between now and the June meeting. At the June meeting, the Council can make a decision about whether to proceed further or not.

IV. New Business

Judge Peterson stated that the Multnomah County civil roundtable recently had a conversation with the civil case processing staff, and an issue had come up regarding processing different kinds of judgments. It is difficult to figure out whether they are general judgments, supplemental judgments, or limited judgments. Judge Peterson suggested that, as he taught his students when he was teaching, it is best practice for lawyers to indicate whether there were prior judgments in the language of the proposed judgment submitted to the court. The processing staff stated that not many lawyers do so. Judge Peterson wondered whether it would be a good idea to make a rule change to require lawyers to indicate the history of judgments in the case when preparing judgments.

Judge Norby stated that, from a judicial perspective, she appreciates this idea. When she is preparing for the next day's cases and reading through long files with many electronic documents, it is difficult for her to ascertain how many defendants are still in the case, how many had a limited judgment dismissing them or concluding their claims, and where things stand. She stated that, if each successive judgment of any ilk would refer back to whether there are prior ones and what those prior ones did, it would be very helpful. However, she did not know how difficult it would be for attorneys.

Mr. Goehler suggested putting the matter on the agenda for next biennium and stated that there could possibly be a judgment committee formed. Judge Peterson stated that he would check in with Multnomah County's civil processing staff and refine the suggestion a bit, but that perhaps a change to Rule 67 would be appropriate. Attorneys are, after all, supposed to make sure that their judgments ultimately resolve all issues for all parties, and this might be something to add to the checklist as attorneys work their way through the case, to make sure that limited judgments are reflected in the general judgment.

Mr. Kekel stated that this is his first term on the Council, and that there are a few rules that he personally has some concerns about. He wondered about the best way to bring them to the attention of the Council for next biennium. Judge Norby stated that he could respond to the biennial survey when it comes out or bring up the ideas at the first meeting of the next biennium. Ms. Nilsson suggested that Mr. Kekel could also send her an e-mail with his thoughts or proposals and that she would put them on the agenda for next biennium.

Shari Nilsson <nilsson@lclark.edu>

proposed amendments

Richard Weill <rawpc@aol.com> Wed, Dec 4, 2024 at 10:35 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Staff, having served 2 terms on the UTCR committee years ago...I actually read these things when I see them on the bar's website. What would be helpful is if you would prepare summaries of the proposals so we understand the essence of what is being changed, reasons, who proposed, etc. Just a suggestion that would help I think in digesting the proposed amendments.

Richard A. Weill (OSB 821396)
TROUTDALE LAW FIRM
102 W. Historic Columbia Rvr. Hwy
Troutdale OR 97060
(503) 492-8911 fax 492-8705

Shari Nilsson <nilsson@lclark.edu>

CCP Proposed Rules to Consider

Eric A. Kekel <EKekel@dunncarney.com> Sun, Jul 13, 2025 at 1:05 AM
To: "nilsson@lclark.edu" <nilsson@lclark.edu>

Hi Shari:

This email is to request that the Counsel consider two ORCPs as follows:

➢ ORCP 38 C which addresses deposition subpoenas in matters pending in other jurisdiction – attached is an email from one of our partners Kevin Sasse that explains an issue he had with this rule and its UTCR counterpart. I have not delved fully into the issue raised but understand there seems to be a conflict between the two rules and the request appears to be to clarify ORCP 38 C so practitioners know under what circumstances it controls over the UTCR.

➢ ORCP 22 C(1) third-party practice – the current rule in sum is that a third-party complaint must be filed and served within 90-days from service of the original complaint. If after 90-days, consent of all parties and leave of court is required. This can and has been a malpractice trap for defense attorneys especially when insurance defense counsel is not retained until close to the deadline. Given the UTCR on timing for when trial is to be set, a deadline is understandable but maybe not necessary. More importantly, the consent of all parties after the running of 90-days is problematic and but the defense attorney at a significant disadvantage. Why should plaintiff's counsel have the ultimate control over third-party practice after 90-days? The recommendation is to remove that requirement and leave it solely up to the court to determine whether to allow third-practice after 90-days.

Thank you and let me know if you need anything further.

Eric A. Kekel

ekekel@dunncarney.com

Direct 503.306.5306 | Fax 503.224.7324 | DunnCarney.com

DUNN CARNEY LLP

Dunn Carney Allen Higgins & Tongue LLP

Suite 1500, 851 SW Sixth Avenue | Portland, OR 97204

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---------- Forwarded message ----------
From: "Kevin T. Sasse" <KSasse@dunncarney.com>
To: "Eric A. Kekel" <EKekel@dunncarney.com>
Cc:
Bcc:
Date: Wed, 2 Jul 2025 22:38:37 +0000
Subject: Court Rules Suggestion

Hi Eric,

As discussed, ORCP 38 C governs deposition subpoenas in Oregon for matters pending in other jurisdictions. The relevant UTCR is UTCR 5.140.

We were local counsel for a Meritas affiliate in Missouri, who wanted to take some depositions in Oregon. We had no issues with the first subpoena under the streamlined, expedited process in UTCR 5.140(1). However, on the second subpoena, the court indicated that we had to follow the more involved process set forth in UTCR 5.140(2).

UTCR 5.140(1) provides that "[t]o obtain discovery in the State of Oregon for a proceeding pending in another state pursuant to Oregon Rule of Civil Procedure (ORCP) 38 C, a party must submit to the court all of the following: (a) The foreign subpoena. (b) An original and two copies of a fully completed subpoena that [complies with the ORCPs]. (c) A petition and request for issuance of a subpoena pursuant to ORCP 38 C . . . stating that (i) The foreign subpoena was issued by a court of record of a state as 'state' is defined in ORCP 38 C(1)(b); (ii) The fully completed subpoena complies with the requirements of the ORCP, including ORCP 55; and (iii) The fully completed subpoena contains the names, addresses, email addresses, and telephone numbers of all attorneys of record and self-represented parties in the foreign proceeding."

State is defined in ORCP 38 C(1)(b) to mean "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States". Missouri seems to qualify.

ORCP 38 C(6) provides, "In applying and construing this section, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it." It does not say that it only applies if the other state extends reciprocal privileges. *Compare* Va. Code Ann. § 8.01-412.14 (extending privilege only to those jurisdictions that have extended similar privileges), *with* ORCP 38 C(6) (no such language).

The court took the position that ORCP 38 C and UTCR 5.140(1) only apply to states that have enacted the Uniform Interstate Depositions and Discovery Act. Apparently, there are only two states and two other jurisdictions that have not enacted the act. (see UIDDA map).

The court's position appears to have been based on UTCR 5.140(2), which provides in part, "[t]o obtain discovery in the state of Oregon for a proceeding pending in a foreign jurisdiction not subject to ORCP 38 C, a party must file a writ, mandate, commission, letter rogatory, or order executed by the appropriate authority in the foreign jurisdiction with a circuit court of this state."

On its face, UTCR 5.140(2) is confusing. What foreign jurisdiction would be *subject to* a rule of our state? Moreover, while we all know you should read a rule in its entirety, if you read UTCR 5.140(1), there is nothing to definitively suggest that it only applies if the foreign jurisdiction is subject to UIDDA. In my view, it's a completely fair reading to say that UTCR 5.140 governs the process set out in ORCP 38 C, which, unlike Virginia's statue, does not expressly carve out jurisdictions that don't extend reciprocal privileges.

It's only when you compare UTCR 5.140(1) ("proceeding pending in another state pursuant to [ORCP 38 C]") and UTCR 5.140(2) "proceeding pending in a foreign jurisdiction not subject to ORCP 38 C") that you might come to the conclusion that UTCR 5.140(1) is referring to states that have similarly enacted the UIDDA. However, it's not an obvious, or at least a clear, reading.

I'm frankly not sure the UTCRs get to restrict the process set forth in ORCP 38 C, but arguably they are not in conflict (in which case, the ORCPs would presumably govern as quasi-legislative authority). Nonetheless, I think this needs some clarity.

Thanks!

Kevin T. Sasse

ksasse@dunncarney.com

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Court Rules Suggestion.eml
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Council on Court Procedures
2025-2027 Biennium
Survey Results - Rule Proposals

Category	Topic	Rule(s) Mentioned	Staff Notes	Suggestion
Abusive Litigants	In probate proceedings		*See Rule 35, effective 1/1/26*	I have testified in support of the proposed ORCP change that would allow sanctions against "abusive" litigants, which currently are not available in probate proceedings.
Arbitration			ORS 36.400	standardize court mandatory arbitration rules and forms for all counties to the extent the ORCP provides for mandatory arbitration of matters under $50,000.
Attorney Fees	Relief from judgment	ORCP 68 ORCP 71		In light of A.N.A. v Alexander, 336 OrApp 369 (2024) clarify whether Rule 68 does not apply to attorney fee requests for all orders; for example, after a judge rules on a motion brought for relief pursuant to ORCP 71.
Attorney Fees		ORCP 68	ORCP 68 B ORCP 68 C(1)	Amend ORCP 68 to say that in direct insurance claims brought under ORS 242.061 that all matters of costs are resolved pursuant to the statute. Amend ORS 742.061 and ORCP 68 to say that proof of loss is defined as proof that a loss has occurred, by any means of communication, phone call, email, letter, etc. and that proof that repairs have been made is not proof of loss within the meaning of the statute.
Civil Motion Practice			UTCR 5.010 UTCR 5.030	I find civil motion practice creates an unnecessary cost and burden to the litigation process. Litigators spend absurd numbers of hours writing motions which the court often only review in passing. There must be a better way to get to the heart of the motion disputes.
Contempt				Incorporating contempt procedures and rules into the ORCP.
Contempt/Order to Show Cause				There are so many procedures that are just out of date and need revising. Some of these are in the ORCP, but some overlap with ORS. Then entire Order to Show Cause process in family law & contempt cases should be scrapped.
Default Orders/Judgments	Notice of intent to take default	ORCP 69 B		ORCP 69 B also seems like a waste of money and time. If a party has been served, it should not to be reminded that it should appear. If we cannot agree to get rid of it, can we at least limit it to originating complaints? It is frequently used for the purpose of delay after an amended complaint is filed. If a trial court grants a motion to make more definite and certain, the plaintiff only has 10 days to file an amended complaint. Theoretically, under ORCP 15 B, the defendant should file an amended response. However, they typically double that time because they wait for the plaintiff to file an ORCP 69 notice instead. (And yes, this is absolutely how Multnomah presiding has interpreted this rule for years.) This is a waste of money and time for all involved.
Depositions	Applying to criminal proceedings			Depositions should apply to criminal proceeds. There is no just reason why someone charged with a crime should not have the same rights as someone being sued for monetary damages.
Depositions	Time limits	ORCP 39	FRCP 30(d)(1)	Amend ORCP 39 to impose time limit on depositions. The federal seven-hour limit is almost always adequate, and a party can obtain a court order for more time with a showing of good cause.
Disclosures			FRCP 26(a)(1) FRCP 26(a)(3)	I think there should be mandatory disclosures in all civil cases. The current requirement that the litigant serve the request does not serve the parties, the court, or the administration of justice.
Discovery	Enforcement and scope			No good comes from trial by ambush. It merely clogs the system with cases that should settle. No good comes from failure to provide specific consequences for failure to comply with discovery. No good comes from limitations in the type and variety of allowed discovery.

Council on Court Procedures
2025-2027 Biennium
Survey Results - Rule Proposals

Category	Topic	Rule(s) Mentioned	Staff Notes	Suggestion
Discovery	Enforcement of discovery rules		ORCP 46	I think there is a major issue with attorneys not following the rules when it comes to discovery. In my view, many, if not most, attorneys throw RFP in the garbage and wait for the Motion to Compel to be filed. It is only at that point that anyone gets serious about production. To a degree, the problem rests with judges who are reluctant to enforce the rules. At the same time, the judges love to complain about the lawyers not getting along and producing the documents. I believe firmly that if we got serious about imposing attorney fees, there would be far fewer discovery disputes. I think that this will also drive down the costs of civil litigation.
Discovery	Expedited in landlord-tenant cases		SLR?	Also, maybe set forth shorter discovery timelines for FED cases, or maybe a specific grant of authority to judges at first appearance to set a discovery schedule before an expedited trial including an opportunity to compel production/response.
Discovery	Expert discovery	ORCP 36	FRCP 26(a)(2) FRCP 26(b)(4)	Amend ORCP 36 to allow limited expert discovery. There is no legitimate reason to continue trial by ambush. It's an antiquated form of litigation that is out of step with the rest of the country and has no solid arguments in its favor other than inertia.
Discovery	Expert discovery	ORCP 36	FRCP 26(a)(2) FRCP 26(b)(4)	Amend ORCP 36 to explicitly permit expert discovery in all instances
Discovery	Expert discovery		FRCP 26(a)(2) FRCP 26(b)(4)	We need expert discovery.
Discovery	Expert discovery		FRCP 26(a)(2) FRCP 26(b)(4)	Specifically allow expert discovery.
Discovery	Expert discovery		FRCP 26(a)(2) FRCP 26(b)(4)	Separate discovery rules for judicial-review proceedings of agency orders under ORS 183.484. Elimination of expert-discovery bar. Alternatively, clearer guidance on the scope of expert testimony, rebuttal, and the expert file to be produced at trial. Ideally, require production of expert file before trial.
Discovery	Expert discovery		FRCP 26(a)(2) FRCP 26(b)(4)	(2) Expert discovery should be allowed, even if only on a limited basis. Trial by ambush in highly technical cases is exceedingly difficult, and it prevents the parties from providing the court with a complete picture of the relevant issues, potentially leading to the omission of information that is critical to the administration of justice.
Discovery	Federal better, expert discovery		FRCP 26	The federal system's discovery procedures are far superior in terms of giving the parties firm due dates to work from and in the disclosure of experts. The lack of expert discovery results in unjust results, unfair proceedings, and a massive amount of party and judicial waste. The federal system also seems to do a much better job of reigning in litigants that blatantly violate the rules of civil procedure, such as pro se litigants or attorneys that know what they can get away with.

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Discovery	FRCP 16			(C) An ORCP analog to Rule 16. The lack of any deadlines pretrial for amending pleadings or completing discovery beyond a 60 day deadline for summary judgment is difficult for parties and the court alike. Attorneys routinely hear the court noting difficulty in finding summary judgment time within 60 days of trial, but defense counsel have to ensure the answer will not be a 47F affidavit. Giving courts the authority to set case management orders including amending pleadings, adding parties, or complete fact discovery would be helpful to parties and the courts alike.
Discovery	General		ORCP 36-46	The Advisory Committee on Civil Justice is working suggestions for process improvements. Some of the key solutions are exploring adding interrogatories and increasing the speed and judicial oversight of document discovery.
Discovery	Interrogatories			Add interrogatories as a discovery device.
Discovery	Limitations/ penalties		ORCP 36 C ORCP 46	Consider limitations on excessive discovery, penalties on parties and attorneys for abuses of rules.
Discovery	Proportionality	ORCP 36 B(1) ORCP 43 A(1)	ORCP 36 C ORCP 43 E	(1) ORCP 36 B(1) and/or ORCP 43 A(1) should include a proportionality limitation. Electronic discovery is tremendously expensive and time-consuming, and the rules should provide an express limitation for judges who are less familiar with civil procedure and may be otherwise unwilling to exercise their inherent authority to limit excessively broad discovery requests.
Discovery	Proportionality/ limits	ORCP 36 C FRCP 26(b)(1) FRCP 26(b)(2)(c)		Oregon's current discovery rules are ill equipped to prevent abusive and expensive discovery practices, particularly with respect to e-discovery. Amend ORCP 36 C to include proportionality requirements found in FRCP 26(b)(1) and discovery limits provided in FRCP 26(b)(2)(C)
Ex Parte				I would like to see uniformity regarding what constitutes an appropriate ex parte submission. This is currently left to the SLR's, which are vague which makes things uncertain. I see attorneys submitting things ex parte that really should be due to the grey areas.
General	"How To" Guides		ORCP 69 C ORCP 69 D	I think it would be helpful for there to be published "how to" guides that walk through the steps needed to accomplish certain tasks like, filing for default, motions to strike, allow for service by email when defendants reside outside the country, etc. With links to the rules that require X procedure or filing of a document, because the rules can be very unclear and reference a certain
General	Clarity			More definitions and less ambiguity would be helpful.
General	Clarity			Simplification and modernization of the ORCP.
General	Federalization		UTCR 5.010 FRCP 26 FRCP 6(c)	In general, I believe that the rules should more closely mimic the federal rules of civil procedure, particularly regarding discovery and timing of motions practice.

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Guardians ad litem		ORCP 27	ORCP 27 E ORCP 27 F	ORCP 27 does not contain any disqualifiers that prevent someone from serving as a GAL. Those who ask to be a GAL should be required to disclose their criminal histories, any serious mental health conditions, and any potential conflicts with the interest of the person they seek to represent. Perhaps the rule should be modified to create threshold disqualifiers.
Joinder	FED cases	ORCP 24 B		ORC 24B is confusing. The words "rental due" may mean the rental property itself, or the rent paid. Also, the timeline topic may not take into account recent law changes that focus directly on the link between eviction cases and rent issues. This section of the rule may need to be deleted or modified.
Offers of Judgment			ORCP 54 E	Offer of Judgment Rule should reverse attorney fees if not accepted.
Pleadings	Motion to amend for punitive damages		ORS 31.725	Remove motion to amend for punitive damages. Time intensive and burden on attorneys and the courts.
Pleadings			ORCP 23 A FRCP 15(a)(1)	I would like to see Oregon follow the FRCP change to allow one amendment to a complaint "of right" regardless of whether or not an answer has been filed. This improves efficiency and reduces gamesmanship. There is no good justification to deny one amendment of right.
Receivership Cases			ORCP 80 ORCP 81 ORCP 82	The ORCPs should include much more detailed rules governing receivership cases
Remote Appearance			UTCR 5.050 CJO 23-028	It would be extremely helpful if the ORCP codified the ability of attorneys/parties to appear via remote methods for any kind of hearing or appearance. Thank you!
Remote Testimony, Discovery, Depositions			ORCP 39 ORCP 58	Rules for remote testimony, discovery, and depositions should be updated.
Security Bonds		ORCP 82 ORS 19		The ORS Chapter 19 could be combined with ORCP 82 or elsewhere in the ORCP to help simplify and clarify the rules concerning security and undertaking requirements on appeal.
Self-Represented Litigants	Domestic relations, discovery			Procedures related to pro se parties needs work, especially in domestic relations and discovery.
Self-Represented Litigants	Generally		ORCP 7 ORCP 9	The ORCPs work well for attorneys, but are difficult for self-represented people to navigate, especially with regard to service of process and motions. I think it would be helpful to have more pro se forms, especially with evictions and with service of process,
Self-Represented Litigants	Landlord-tenant matters, summons		ORCP 7	I would like to see an effort to reconsider some rules from the perspective of self-represented litigants. The reality is that a large volume of civil cases involves self-represented litigants (landlord-tenant matters and debt collection matters typically have at least one self-represented party). With this in mind, I would particularly like to see a revision of the Summons form.

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Self-Represented Litigants	Service rules		ORCP 7 ORCP 9	Service rules DESPERATELY need to be reviewed by someone willing to see through a self-represented litigant's eyes. Preferably someone with an understanding of how the rules are used by servers (and sheriffs in particular).
Service	Electronic file & serve for registered businesses	ORCP 7	ORCP 7 D(3)(d)(ii)(D)	Electronic service of process option under ORCP 7 of businesses registered through the Secretary of State. Ideally, something akin to OJD File&Serve. Would necessarily require coordination with the Secretary of State office, but it seems that Oregon is ready for e-service, at least at the organization-litigant level.
Service	Electronic service		ORCP 9 G	Allow for electronic service as a matter of right
Service	Email service	ORCP 9 G		ORCP 9(g) - get rid of the "agree to email service" requirement, and make it where all email service is good service for the email on record (of course except for complaints and summons). It's 2025, and that rule allows attorneys to play games, and cause needless motion practice just to have a judge yell at the other attorney and agree with me.
Service	Email service	ORCP 9 G UTCR 21.100(2)		Maybe provide for email service to be effective on an attorney of record if they have failed to input service contact as required by UTCR 21.100(2). Without a ORCP 9G agreement, only fax or first-class mail remain to be sure that service is accomplished an a date specific instead of on return email confirming receipt. I would like to stop using fax.
Service	Email service		ORCP 9 G	Permit service by email in a more seamless/realistic way to how people actually practice.
Service	Reconsider additional 3 days	ORCP 10	ORCP 10 B	ORCP 10 - reconsider the +3 days for mailing when service is complete via electronic means. Besides the fact electronic service is immediate, USPS needs more than 3 days now to get mail from one side of portland to the other. OR amend the ORCP to state that Odyssey file and serve is good service (which also is a UTCR rule).
Service	Reconsider additional 3 days		ORCP 10 B	Service of process needs to be updated to reflect modern technology and communications. The timelines should be clarified so there isn't 3-days for mailing--which most attorneys don't even do anymore.
Service	Remove additional 3 days except for mail	ORCP 10	ORCP 10 B	ORCP 10 - eliminate added 3 days for service by mail and just extend certain deadlines by 3 days regardless of how such pleading/document was served.
Service	Remove additional 3 days except for mail	ORCP 10 B		I have never understood why ORCP 10b includes service by fax (which never happens now anyway) or email. An additional 3 days to account for mail makes sense. My preference would be to remove the additional 3 days for other forms of service. I don't lose sleep over this, but it's a nagging irritation.
Service	Remove additional 3 days except for mail	ORCP 10 B		Remove ORCP 10 B. Post-COVID, a lot of firms have gone fully remote. They can hand deliver a document but you cannot do the same. It is also problematic with punitive damages motions that must be heard within 30 days (the reply time is often cut short with the extra 3 days for the motion and response) and with how certain counties automatically schedule hearings (Lane County often does not seem to account for the full time to respond and reply if 3 days are included for each). FRCPs got rid of it, we should too.

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Service	Remove additional 3 days except for mail		ORCP 10 B	Time calculation for service: Email & fax, as immediate methods of transmitting information, should not be subject to the +3 days for mailing rule.
Service	Waiver of service	ORCP 7 FRCP 4(d)		(A) Amend ORCP 7 to include waiver of service provisions akin to FRCP 4(d)
Subpoenas	Allow post-judgment issuance		ORCP 55 A(1)(a)(i) ORCP 55 A(1)(b)	Specifically allow subpoenas to be issued post judgment to facilitate collection.
Summary Judgment		ORCP 47		ORCP 47 should be modified in a way that results in substantially more cases being dismissed on summary judgement.
Summary Judgment		ORCP 47 C		ORCP 47 C - Consider requiring motions for summary judgment to be filed at least 90 days before trial (to assist with scheduling).
Summary Judgment		ORCP 47	ORCP 47 E	Eliminate the ability of parties to avoid summary judgment under ORCP 47 by saying they have an expert who would testify to certain matters; parties should be required to actually offer expert evidence by affidavit or declaration
Summary Judgment		ORCP 47 E		Also, we need to eliminate ORCP 47 E, which is an affront to due process.
Summary Judgment		ORCP 47 E		(3) With the allowance of expert discovery, ORCP 47 E should be deleted.
Summary Judgment		ORCP 47 E		ORCP 47E needs to be revisited. It helps to insulate dubious claims from scrutiny in the hopes that defendants will merely settle prior to trial on the belief that the claims are stronger than they appear. It shifts the burdens of litigation almost exclusively to defendants, that when combined with Oregon's absurd negligence law subverts the truth seeking aspects of litigation in favor of quick and inflated settlements.
Summary Judgment		ORCP 47 E	ORCP 47 G	(B) Amend ORCP 47E to provide (1) a party electing to rely on an unnamed expert affidavit must specify the issue(s) on which the expert will testify to create a genuine issue of material fact, and; (2) Amend Rule 47E to provide that, if a party elects to rely on an unnamed expert affidavit under 47E and does not prevail at trial, that party is responsible for attorneys fees and costs (including expert costs) incurred by the MSJ moving party in responding to the issue(s) in the unnamed expert affidavit. A party that chooses to submit an affidavit from a named expert in responding to an ORCP 47 motion would not be subject to this rule
Timelines			UTCR 2.030	Timelines should be truncated in some cases to prevent unnecessary delay. Judges should have stricter deadlines in which to issue opinions.

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Trial Practice	Expert files, work product protection	ORCP 42 [*sic*] ORCP 47 E ORCP 58 FRCP 26(b)(4)(c)	ORCP 43 FRCP 26(b)(4)(d)	At ORCP 42, 47E, 58, or elsewhere, Oregon's practice of requiring the production of full expert files and not extending work product protection (contra FRCP 26(b)(4)(C)) should be codified. In my last three state trials, opposing counsel was unaware of this practice, and it is not documented in any authority outside of the tradition of Oregon trial practice.
Uniform Collaborative Law Act				The Uniform Collaborative Law Act (unanimously approved by the Uniform Law Commission in 2009 when Justice Martha Walters was a member) needs to be enacted in Oregon. Family law litigants are opting out of the court process, but they are doing so by cobbling together private contracts to take the place of the ORCP and UTCRs. Adopting rule changes in Oregon consistent with the act would provide meaningful protections for these folks, making it easier to resolve family disputes outside of courts, and free the courts up to focus on other cases.
UTCR		UTCR 5.100		Fix UTCR 5.100 - creates more issues than it solves, especially with over-aggressive litigants re-litigating issues previously decided.