MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 7, 2026, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
Nadia Dahab
Hon. Christopher L. Garrett
Barry J. Goehler
Hon. Jonathan R. Hill
Melissa Hopkins
Ryan Jennings
YoungWoo Joh
Lara Johnson
Eric Kekel
Derek Larwick
Hon. Michelle McIver
Hon. Melvin Oden-Orr
Hon. Robert Raschio
Michael Shin
Hon. Scott Shorr
Tom Spooner
Hon. Todd Van Rysselberghe
Bryce Whitman Passadore
Alicia Wilson

Members Absent:

Hon. Andrew Erwin
Hon. Thomas A. McHill
Julian Marrs

Guests:

John Adams, Oregon Tax Court

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted on this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 24 • ORCP 36 • ORCP 37 • ORCP 38 • ORCP 47 • ORCP 67	• ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Clarity • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery • Ex Parte	• Federalization • Guardians Ad Litem • "How To" Guides • Offers of Judgment • Pleadings • Receiverships • Remote Appearance • Security Bonds • Self-Represented Litigants • Subpoenas • Summary Judgment	• Timelines • Trial Practice • Uniform Collaborative Law Act • UTCR		

I. Call to Order

Mr. Goehler called the meeting to order at 9:30 a.m.

II. Approval of January 10, 2026, Minutes

Mr. Goehler called the Council's attention to the draft minutes from the January 14, 2026, meeting (Appendix A) and asked whether there were any suggestions for corrections. Judge Raschio stated that he would like to correct the record to reflect his attendance at the meeting.

Mr. Goehler asked for a motion to approve the minutes with Judge Raschio's correction. Judge Raschio made such a motion, Ms. Dahab seconded, and the motion was approved by voice vote.

III. Administrative Matters

A. Staff Comments

This topic was carried over to the March agenda.

IV. Old Business

A. Committee Reports

1. Declaration of Expert Opinion/Rule 47 E

Mr. Joh stated that he had not followed up the committee's last meeting with a memo to the Council, but that he intends to do so in the future. He reported that the committee had met on January 26 with six members in attendance. Mr. Joh noted that there was some confusion on the part of at least two committee members as to why the committee exists. Their understanding was that, in a prior Council meeting, the issue of Rule 47 was brought up and the Council had decided that no Rule 47 committee should be created. Other committee members had indicated that the decision to not create a committee at one point during the biennium does not necessarily prevent the creation of a committee at a later point. Mr. Joh wanted to let the Council know that there is perhaps some disagreement about whether there should be a committee discussing these issues at all.

Mr. Joh stated that the committee began its meeting by discussing the scope of the committee's mission with respect to Judge Eric Dahlin's emails. They came to an agreed understanding that the issue is that Rule 47 states that a party is "required" to provide the opinion of an expert to establish a genuine issue of material fact; however, as interpreted by the Court of Appeals, the word "required" has expanded in meaning. This is partially because the rule does not

require a non-movant to identify the required facts for which an expert is needed and, therefore, when the Rule 47 E declaration states that there is an unidentified expert and does not identify any particular facts, the declaration can appear to create a question of fact sufficient to defeat the Rule 47 motion. Mr. Joh stated that the courts then have to basically imagine what sort of facts or opinions an expert could offer in testimony that would defeat summary judgment. This is the committee's understanding of how the word "require" turns into "may" or "might."

Mr. Joh stated that the next step the committee considered is what, if anything, should be done. The committee raised the idea of surveying various parts of the legal community and decided that it made the most sense to survey trial court judges. Judge Oden-Orr drafted some initial questions, but the committee wanted to discuss the idea with the Council and get feedback before proceeding further. Mr. Joh asked committee members to chime in and let him know whether he had correctly represented the committee's discussion.

Ms. Dahab noted that she was unable to attend the committee meeting. She asked a clarifying question. She pointed out that the questions on the poll that Judge Oden-Orr circulated seem to be different from the question that Judge Dahlin had originally proposed. She asked about the goal of the survey. Mr. Joh stated that the goal of the survey is basically to understand whether there is a problem with Rule 47 E that the committee can work to address. If judges are not reporting any issues with Rule 47 E, there would be no reason to propose any changes. Even if judges report that there are some concerns with the operation of Rule 47 E, it does not necessarily mean an immediate move to proposing changes. It may mean considering surveying practitioners as well. Ms. Dahab asked whether the survey seeks to affirmatively ask judges whether there is anything else in Rule 47 E, other than what Judge Dahlin has identified, that needs to be changed. Mr. Joh stated that he is not sure that is the intention. It is more to check whether Judge Dahlin's concerns are shared more broadly.

Ms. Hopkins stated that her understanding of the survey is that it is an attempt to expand and allow judges to provide additional concerns that they would like the committee to look at, outside of what Judge Dahlin has already asked. She noted that this is why certain committee members were concerned and wanted to bring the issue back to the Council to ensure that the Council wants the committee to do more than just what Judge Dahlin has asked it to do. Her sense is that the survey is very expansive and will go to all judges.

Judge Raschio stated that, if there is going to be a survey, it might be helpful for Judge Oden-Orr to be able to present it at the April Oregon Circuit Court Judges Association (OCCJA) conference. He stated that he would be happy to set aside some time on Sunday, April 20, to discuss these issues and pass out the survey to judges to return by Tuesday, April 28. He noted that he is aware that this is

rather late in the Council's biennial process, but that it may be a better approach for getting responses than to send the survey out cold to judges. Mr. Goehler agreed that this might be a good approach. He thought that it was a good idea to look at the rule more broadly and that it is important for the Council to be responsive to issues that arrive later in its biennial process.

Judge Peterson pointed out that Judge Dahlin had also asked whether there should be some kind of document filed, effectively under seal, so that, when the summary judgment case gets resolved in a way other than a trial, there would be a way to check on whether an expert who could establish a genuine issue of material fact had in fact been retained. He did not have an opinion on whether this is a good idea or a bad idea, but stated that the committee should probably look into it. In terms of "mission creep," he noted that Judge Dahlin's proposal was not before the Council at the time the Council decided not to form a committee on Rule 47. In theory, the Council could get a really good idea in May, approve it in June, publish it in September, and promulgate it in December. The reason that the Council tries to get started on issues early is to have time for things to be fully considered in a deliberative process. This, however, does not preclude taking action at a later time.

Ms. Johnson noted that she was one of the committee members who had brought up the fact that the Council had neglected to form a committee on Rule 47 during the first two Council meetings during which an agenda was set. Judge Dahlin then wrote an email to Judge Peterson discussing the lack of uniformity of expert disclosures in and prior to trial, which was his initial concern. Judge Peterson reached out to Judge Dahlin and asked if he had any additional concerns, and those concerns are the ones that the committee is now addressing. Ms. Johnson stated that she has some concerns about process and an orderly structure for the thoughtful consideration and thorough deliberation of any changes, as it feels to her that this is going to be a little bit rushed. She also has concerns about what is actually being considered; has a problem been identified and what are the possible solutions to the problem? She thought that the Council, in its initial meetings, had clearly rejected changing the Rule 47 E substantive requirements, and she thinks that the last suggestion by Judge Dahlin would be a change to those substantive requirements. Ms. Johnson expressed concern about how amorphous the process seems to her and whether the Council can get anything proposed and well-considered before the end of its term.

Mr. Goehler stated that, if there is a consensus that something needs to be done, the Council will move forward, but it may be too late in the cycle to get anything done during this biennium. He noted that it would, however, be beneficial for the committee to talk through the issues and provide the considerations for taking action or not taking action, then come back to the Council with a recommendation. If the consensus is that there is no problem,

the full Council can have a discussion and decide affirmatively not to do anything about it. This will provide a really good record for the Council's legislative history to show that the comments were considered and deliberated before coming to a conclusion. Mr. Goehler stated that Ms. Johnson is correct about the initial decision not to form a broad Rule 47 committee based on broad feedback, but pointed out that this changed because of the specific feedback from Judge Dahlin. He thinks that it is the Council's responsibility to provide the judge with a deliberate response. If he should provide any guidance in his role as chair, he thinks that it is pushing the Council toward that process.

Ms. Dahab stated that it is still not clear to her whether the proposed survey is being used to address the specific questions that Judge Dahlin had or whether it is intended to ask whether there is anything else that judges want to change with regard to Rule 47 and to invite other specific comments. She noted that the latter feels a little bit contrary to the process that the Council has traditionally undertaken, and does give her some concern about mission creep.

Judge Oden-Orr stated that, when he drafted the survey, his thoughts were to try to see if anyone perceived there being a problem with that portion of the rule, so he tried to use neutral language. He stated that he may have missed the mark in terms of not being more specific to the expert portion of Rule 47, but that the survey could definitely be more focused on the issue related to the experts. Ms. Dahab stated that, if the goal is to determine whether the concern that Judge Dahlin raised is valid and needs a solution, narrowing the terms of the survey to reflect that makes sense so her. She wanted to ensure that the survey does not invite more feedback than the Council has been tasked to look at.

Judge Hill asked whether sending the survey to trial court judges would be focusing on the correct audience. From his point of view, the right audience may not be trial court judges. He asked the practitioners on the Council whether they feel the same. Mr. Goehler noted that this brings us back to the whole Council structure. He reminded the Council that having practitioners on the plaintiffs' and defense side, as well as judges, working on the issue internally is the meaning of the Council.

Mr. Joh stated that he does not envision the committee coming up with a proposed change to Rule 47 this biennium. Any change to Rule 47 E would necessarily be big enough, and with enough strong opinions, that it might not be successful in the time remaining. He apologized to committee members if it seemed like he was trying to push the committee toward a fast resolution, as that was not his intention. His sense was that the committee did not agree with Judge Dahlin's proposal to require filing an expert opinion in camera. The way the survey was framed was an attempt to identify whether the judge's underlying concern about whether the good faith assertion of a Rule 47 E

declaration is a problem.

Judge Peterson noted that the Council had made some changes to Rule 57 that took two biennia, so it is not unprecedented for a rule to take time to be properly considered. He agreed that it looks like it might be a heavy lift to get anything done this cycle, but that the survey might be a good start. He noted that he does not have a vote, but it seems to him that a survey that is sent out to the bench or bar should probably be approved by the Council rather than just by a committee within the Council. Judge Oden-Orr stated that his thinking was that it would be approved by the entire Council. Mr. Goehler noted that the next Council meeting is on March 14, which would allow the Council time to discuss any survey before the April OCCJA conference. Judge Raschio pointed out that the Council would actually have two meetings prior to the conference.

Judge Raschio agreed with Judge Hill that judges may not be the right audience for the question of the expense around hiring an expert to write an opinion that then gets put in camera. He stated that, in his view, it is a very complicated civil question, and certainly one that needs to be addressed not only by the bench in terms of what information they think they need, but also from both the defense and the plaintiffs' bar around what they need. It is probably not an issue that can be resolved this biennium. He stated that he is happy to deploy this survey and any surveys moving forward that the Council would like to deploy regarding what judges are concerned about.

Ms. Johnson agreed that the survey audience should probably be broader than just judges. However the survey is framed and whatever the Council approves in terms of the survey, there will be members of both sides and the bench that are going to have significant contributions to those questions. She stated that she did not know if now is the time to ask the Council to help determine the scope of the questions, and wondered whether the committee is asking the Council to consider having the bench and the bar consider uniformity on disclosure of expert files and whether clarification is needed on the word "require" in the statute, or whether the question is about changing the substantive requirements of Rule 47 E. She posited that the latter would likely draw debate and opposition and, while she does not mean to debate the merits in advance, she thinks that is probably one of the reasons the Council has declined to consider it in the past. She noted that the case that Judge Dahlin had a concern about was one where there were concerns about the good faith representations of the counsel submitting the Rule 47 E affidavit. She stated that she worried about making changes to the ORCP based on an assumption that a member of the Oregon bar would be acting in bad faith.

Mr. Goehler agreed wholeheartedly. He stated that, around the country, many rules basically assume that lawyers are dishonest and rely heavily on sanctions. Oregon's rules are different and assume that Oregon lawyers are ethical and

follow rules. He feels that it is a bad idea to shift that assumption toward one of misconduct.

Judge Peterson noted that Judge Dahlin had stated that a bad declaration would certainly come out at trial on cross-examination of the witness. However, for the vast majority of cases that get resolved by settlement, that opportunity may not exist. Judge Peterson stated that he absolutely shares the concerns about writing rules focused on bad actors, but opined that the Council should at least be clearheaded about the fact that a bad actor could cost the other side a lot of money for very little. Mr. Larwick noted that Rule 47 G already provides severe penalties for anybody making a false declaration or any kind of statement made for purposes of delay or in bad faith. Mr. Goehler agreed that the rule is not toothless.

Mr. Joh stated that it would be helpful to him as committee chair to get some direction from the Council on the committee's next steps. He noted that he did not hear that the Council believes that the committee should be dissolved, and it did not sound to him like there is a strong opinion against developing a survey, although there may be some opinions on who ought to be surveyed. He stated that perhaps it would be helpful for the committee to refine some questions and agree on something to present to the Council for approval. Mr. Goehler agreed that this seems like a good path. He asked the committee to consider whether the rule needs to be clarified in terms of the word "require" or whether the Council is satisfied with how the issue has been developed in case law. He also asked the committee to consider whether more teeth are needed in the requirement to actually have an expert. The Council can then talk it through at the next meeting.

Mr. Passadore asked for clarification about whether the main issue is that the current practice is not written down anywhere. Mr. Goehler explained that several issues have been discussed, and one tangential issue is the disclosure of expert files before the expert takes the witness stand, which is not written anywhere, but the practice is by agreement of the parties or by pretrial order. Mr. Passadore stated that, from the public's perspective, it may be tangential but it is important to a self-represented party. If a rule is not written down, it feels almost like an insider's club and, as the public member, he would prefer as much transparency as possible. Mr. Goehler stated that there is a tension in the rules, because the rules cannot contain every single thing that a lawyer does in an effort to help self-represented parties. At the same time, the rules should not be so complex or convoluted or hidden that they obstruct self-represented litigants. He thanked Mr. Passadore for raising the issue.

Ms. Hopkins asked that the Council make the decision today to put any survey on hold until the committee can address the actual concerns in Judge Dahlin's email, and only those concerns, and to decide whether or not any of his

concerns are something that the Council wants to address. She expressed concern that the Council might inundate itself because there were many suggestions relating to Rule 47 on the biennial survey, so an additional survey might be inviting more than it can handle. As a member of the committee, she also wanted to make crystal clear that the committee will only review the concerns that Judge Dahlin wrote in his email. Mr. Goehler noted that nothing happens quickly with the Council, so no survey will be blasted out, particularly without the advice of the Council.

Ms. Johnson thanked the Council for helping the committee determine the scope of its work. With the guidance of the Council, the committee will decide whether one of the issues requires clarification, as well as determine how the survey is written and to whom it is sent.

Judge Shorr stated that he has mentioned this in the past, but wanted to circle back to it, because of the discussions about an expert witness requirement. He noted that the rule itself never requires an expert witness or an expert witness declaration. It says, "If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact. . . ." To him, that is a substantive law issue. There are certain cases for which an expert witness is likely required, perhaps to establish the standard of care in a medical negligence action. For the vast majority of summary judgment issues, these are just simple fact disputes and an expert witness is not required. He expressed concern about surveying bench and bar about that issue, as it is a substantive issue rather than a procedural issue. The separate concern that Judge Dahlin raised about whether attorneys should retain the affidavit when an expert witness is required may be a procedural issue, but that seems separate to him. He thought it unlikely that judges have a huge stake in that, or want to get involved in that, outside of the rare instance where they think there is someone constantly abusing the system.

Mr. Shin agreed with Judge Shorr. He noted that the committee had pretty quickly divided the issues: is the rule clear; does the case law from the Court of Appeals provide some guidance; what role would the Council have as to that issue; do practitioners understand the rule; is the rule being abused; are other safeguards required? He stated that he thinks that the committee understands the substantive versus the procedural issue.

Mr. Jennings stated that he was not trying to be difficult, but he felt like expert discovery is a slippery slope, as the rule specifically says it is not supposed to be an expert discovery rule. He thinks that the rule could be abused as a discovery tool if the Council continues discussing the issue. He almost thinks the Council should discontinue the committee, because it has already decided not to federalize the Oregon rules and have expert discovery. He stated that he is not sure why a committee exists after the full Council discussed and decided they

were not going to require more substantive submissions from a party. If someone is just straight-up lying, it does seem like there is a process to vet that, and the rule has penalties for that. He stated that he did not know if he was making a motion to stop talking about the issue. The question is, when do you have to disclose an expert? Everybody knows that you have to disclose them before you start picking a jury, because they have to list the witnesses, and everybody knows that you provide the expert file the day before the expert testifies. He stated that he does not know that there is not uniformity on that either.

Ms. Hopkins seconded Mr. Jennings' comments and stated that, if he really did want to make a motion to disband the committee, she would second it. Mr. Goehler asked if Mr. Jennings was making that motion. He noted that it is important for the Council to deliberate and have a record, so pulling the plug may not give us the best record. However, if someone would like to make that motion, the Council can consider it and vote on it. Judge Peterson stated that, from experience, he can say that sometimes when there are ideas with differences of opinion, a committee working it through and providing a report sort of settles the matter for a decade or so. Mr. Jennings did not make the motion.

Judge Hill opined that the Council should look at developing a survey for both the bench and bar to ask whether the narrow expert issue is a problem. He agreed with Mr. Goehler and Judge Peterson that it is better to develop a record, even if ultimately no action is taken.

Mr. Goehler stated that he thinks the committee has a good idea of what kind of deliverable they should have for the Council at its next meeting.

2. Joinder/Rule 24

Judge Peterson reminded the Council that the original suggestion for a potential amendment to Rule 24 came from Clackamas County Judge Susie Norby. He stated that he had circulated his original draft amendment to a number of attorneys on both the plaintiffs' side and defense side and did not get an overwhelming response. At the end of the last Council meeting, where the Council voted to put the draft amendment on the September publication agenda, Judge Peterson had remarked that this does not mean that the Council cannot reexamine the proposed amendment between now and September. In fact, Judge Norby looked at the approved draft and provided Judge Peterson with some input. Judge Peterson believes that her suggestion (Appendix B) is an improvement to his original language, which could have arguably caused a problem. The suggested change makes clear that, if the plaintiff wants to bring a claim for possession along with a claim for almost anything else under the sun, legal or equitable, their case will be on the slow track. The only way a plaintiff

can take advantage of the summary forcible entry and detainer (FED) procedures is if their claim is simply a claim for possession. Judge Peterson asked whether the Council had any thoughts about the revised language.

Mr. Goehler noted that, as previously written, it was implied that the plaintiff in an FED action would be the one asking for this relief, but it was not specified. Judge Peterson agreed that the new draft makes it very clear that this applies to the plaintiff filing the case and, if they decide to join any other claims, it will become a regular civil action. It does not, by implication, present a question as to whether the defendant can file counterclaims, as defendants are permitted to litigate certain counterclaims in an FED action. Judge Peterson also noted that statute numbers may change from time to time, so that there is always a risk of including statute numbers in rules. Council staff thought that it would be wiser to use the language "ORS 105.100 et. seq.," instead of listing the range of statutes under which the current FED procedures currently reside.

Judge Oden-Orr made a motion to put the revised draft of Rule 24 on the publication agenda for the September Council meeting. Judge Hill seconded the motion, which was approved by voice vote.

3. Judgments/Rule 67

Mr. Kekel reported that the committee had been unable to meet since the last Council meeting. The next step will be for the committee to meet again and try to come up with some language to propose to the Council. He noted that some concerns had been raised with respect to final judgments as they would relate to family law practitioners and those in the trust and estates area, as well as protective proceedings. He stated that he had reached out to a few trust and estates practitioners who also do protective proceedings, and the message he received was, in essence, that what is required with respect to final judgments in those cases is laid out in the statutes. Those cases are basically operating under the statutes rather than ORCP 67, so there may need to be an exception made with regard those cases if a rule change occurs. Another concern that was raised with respect to protective proceedings was, because they can last years, there may be multiple limited judgments entered throughout the years, which might create additional work. Judge Peterson stated that he had also reached out to family law and protective proceedings practitioners but that he had not yet received any responses.

Mr. Goehler stated that he looked forward to the committee's report at the next Council meeting.

4. Out-of-State Depositions/Rule 38 C

Mr. Goehler called the Council's attention to the memo from the Rule 38 committee (Appendix C) that provides a summary of the discussion from the last Council meeting with some additional information that was requested by Judge Peterson. Ms. Wilson asked if the Council had any questions or concerns.

Judge Peterson stated that he appreciated the material that Ms. Wilson had put together. He noted that it appears that New Hampshire, rather than Maine, is an outlier, along with Massachusetts and Missouri. With regard to Rule 38, he pointed out that attorney Kevin Sasse, who had brought the issue to the Council's attention, does have a point that the rule, as it currently reads, is perhaps not as clear as it could be. Rule 38 C(1)(b) defines states and, under that definition, even those states that have not adopted the Uniform Interstate Depositions and Discovery Act (UIDDA) are included. That is confusing for someone trying to figure out the interstate deposition process. In addition, Section 3 of the UIDDA includes some things that Rule 38 does not cover: in addition to the foreign subpoena, one is supposed to submit a document, either in it or attached to it, listing the names and addresses of all attorneys of record, as well as the names, addresses, and telephone numbers of all unrepresented parties. That seems like a procedural aspect that could be included in Rule 38. Finally, Section 3 of the UIDDA states that, when a foreign subpoena is submitted to an Oregon court, it is not an appearance in an Oregon court. That is not stated in Rule 38, and perhaps it should be.

Ms. Wilson asked Judge Peterson if he would like the committee to take a look at those differences. Judge Peterson stated that the issues seem clearly procedural, and that he agrees with Mr. Sasse that the rule, as written, does not necessarily indicate that the outlier states do not get the easier treatment received by states that have adopted the UIDDA. Ms. Wilson asked whether Judge Peterson thinks that Oregon is relying too much on the Uniform Trial Court Rules (UTCR) for clarification on what should occur. Judge Peterson noted that he is not overly fond of the UTCR's handling of the matter either, but pointed out that it would be a fairly easy fix to the ORCP. Ms. Wilson noted that a copy of the subpoena the way it would be in the foreign jurisdiction must be included, and that almost always includes the name and address information so, as a practical matter, that change to Rule 38 may not be necessary. Judge Peterson agreed but also noted that there are 53 jurisdictions and this may not be the case for all of them. Ms. Wilson stated that the committee could take a look at it.

5. Post-Judgment Subpoenas/Rule 55

Judge Peterson stated that the committee had met and that he had submitted a report (Appendix D). He noted that the point of the ORCP is to promote the speedy, just, and inexpensive determination of every action, but that may be thwarted because someone is using the language in the rules cleverly in a way that is neither speedy, just, nor inexpensive. Ms. Johnson had suggested including language similar to Rule 69(a)(2) of the Federal Rules of Civil Procedure in Rule 37, but it made sense to him to put the explicit language in Rule 36. He wanted to get the Council's thoughts as to whether the problem is one that should be addressed and whether one of those approaches makes sense, or whether any Council member has a different suggestion.

Mr. Goehler stated that he thinks that it makes more sense to include language in Rule 36 than in Rule 37, as it seems to be a scope of discovery issue that needs broad application. Judge Bloom agreed with Mr. Goehler that the language fits better in Rule 36. Judge Peterson noted that he had basically inserted language from the federal rule, but that he would like to look more closely at it and see how it reads with the whole rule. He asked whether any Council member thinks that the language is unnecessary or that it is a bad idea to make it clear in the ORCP that subpoena and discovery devices may be used post judgment against non parties. Mr. Goehler stated that this is a good threshold issue. He stated that it is one of those things that certainly ought to be able to happen once a judgment has been obtained, so clarification is a good thing.

Mr. Joh stated that the addition of language in Rule 36 makes sense to him. The only caveat he has is that, while it may be obvious in context, it might make sense to add language indicating that this additional discovery is limited to the purposes of enforcing a judgment. Mr. Goehler pondered whether the language "in aid of a judgment or execution" would be enough to limit it, and thought that additional wordsmithing to make sure that it is clear might be in order.

Judge Shorr wondered what would happen in the case of someone bonding their appeal. Understanding that the trial court judgment may be reversed, he asked whether the prevailing party should be able to pursue discovery on a third party, or if they must wait until the appeal is resolved. Mr. Goehler stated that he had not encountered that before, so he was uncertain. Judge Shorr stated that it would seem that it might be unfair to allow discovery to proceed against a third party on a bonded appeal, and that everyone should wait until it is known that the case is resolved. Mr. Goehler stated that perhaps the bond is enough to stay discovery against third parties. Ms. Dahab stated that it seems like, if it is enough to stay execution of the judgment, it should stay any discovery associated with it. Mr. Goehler noted that this would be a good thing to not have people guessing about.

Along those same lines, Mr. Joh asked whether additional discovery should be limited to enforcement of money judgments. He noted that there are judgments for injunctive relief as well. Mr. Goehler stated that this is a good thing to discuss, and that he was unsure whether discovery would aid an injunction. He stated that he thinks that the main issue is that the Council has found a place for the language and a consensus on doing something. The fun part is the wordsmithing and the drafting to make sure that we get it right. Hopefully the committee can take this draft and come back to the Council with a new proposal.

Ms. Nilsson stated that, during the process of looking at both Rule 36 and Rule 37 to determine where to insert the language, Council staff had a closer look at Rule 37. The rule has not been amended in a very long time and is in desperate need of cleanup in terms of organizing paragraphs to conform with Council style. She asked if anyone would be opposed to staff making purely stylistic changes to Rule 37 and bringing it back to the Council next month. The Council did not object.

Ms. Johnson noted that she is currently on three committees and asked whether anyone on the plaintiffs' bar would be willing to take her place on this one. Mr. Larwick agreed to do so.

6. Service/Rules 7, 9, & 10

Judge Raschio reported that the committee had met and discussed a number of issues and had suggested changes to the summons form (Appendix E). He noted that Judge Hill had pointed out that Rule 7 provides for a minimum type size of 8-point on the summons, as opposed to a more typical 12-point font, and there was no understanding of whether there is a historical reason for that requirement. The committee wanted to get the Council's feedback on whether they are aware of a reason for the 8-point font. Mr. Spooner stated that he has never researched the historical background of the 8-point font but that his firm and many law firms love the idea of a single-page summons, which the 8-point font allowed them to facilitate from a formatting perspective. With a multi-page summons there is a concern that important instructive language might be missed by someone who does not flip to page 2 or page 3. He also recognizes, however, that tiny type may not be helpful for people to notice important information that should be read. He therefore thought that looking at a change to the 8-point font and requiring something of a more normal size is something to consider.

Mr. Goehler posited that the one-page form was probably driven by Stevens-Ness Law Publishing company back in the day when forms were purchased and typed on. Ms. Hopkins noted that the language reads, "at least 8-point font," meaning that it cannot be smaller, so 12-point font can be used. She expressed

similar concern about 12-point font not allowing the form to be on one page.

Judge Peterson stated that he had Ms. Nilsson do some research in both the ORCP and the UTCR regarding font size. Rule 7 C is the only place in the ORCP with a type size requirement. In the UTCR, Rule 9.160 relating to Motor Vehicles requires 10-point font, and UTCR 10.030 requires pica-sized font, which is essentially 12-point. He stated that he had done an experiment that morning by typing his name in both 8-point and 12-point font, and he was not able to read it in the 8-point font. The downside with 12-point font might be two-page summonses. The upside might be that they are readable.

Judge Hill noted that the reason he raised the issue is that many people would have trouble seeing an 8-point font. As far as public perception of documents, if someone receives a summons that is really hard to read, he frankly thinks that it may be an access to justice issue. There is also the notice issue: if you are sending something that a person cannot read, is that really notice? He noted that a two-page summons may be inconvenient but, if the recipient is able to more easily read it, that is probably a better solution.

Mr. Passadore agreed that, from the public's perspective, receiving a form with tiny type would not be appreciated. Even if the form were more than one page, if the font were large enough to read it would be easier to understand. It would be especially appreciated by those who do not have good vision or who cannot afford glasses.

Judge Peterson noted that the draft is preliminary and only made a change to the first of the three summons forms in Rule 7 C(3) in an attempt to make it a little more user friendly. The summons is a document that is, by definition, served on people who are not lawyers. The new language attempts to make it more directive and less passive. It gives a definition of "proof of service." He could not think of a way to define "proper form," but included a link to the Oregon State Bar's Law Help website so that recipients could hopefully find more assistance than the current form provides.

Judge Raschio stated that it would be nice to create a notice that could be in 12-point font and still fit on one page. He suggested that certain things could be eliminated, such as keeping both the bar's statewide and local numbers, which seem to be a residue of a different time when one actually had to pay for long-distance calling. He suggested that there could be other ways to edit the language so that the form could still be in larger type and fit on one page. He suggested that he and Ms. Nilsson work on doing that.

Mr. Spooner stated that he shares Judge Peterson's concern about the expression "proper form." He pointed out the tension between readability and being brief, and also being informative to the general public about what these

legal papers are. The expression "proper form" does not give the general public a definition or even a signal of where to find what would be the proper form. However, in toying around with different ways to add clarifying language to that, it starts to become quite lengthy, and length adds confusion for a lot of readers. To include everything with regard to proper form, citations to specific ORCP and UTCR sections would be required: ORCP 13, 16, 17, and UTCR 2.010 at a bare minimum, and those citations would not even address filing motions. Perhaps just mentioning the ORCP and the UTCR as bodies of information might work, but he did not know how helpful that would be.

Mr. Joh stated that he is in favor of 12-point type for the reasons that have already been stated. With respect to the concern about multiple pages, he wondered whether one possible solution is to expressly allow for less than double spacing, which could help keep things to one page. He stated that he also understands that there is a proposed UTCR change to remove the requirement for numbered lines.

Mr. Goehler stated that he looked forward to the committee's revised summons language. He asked whether the committee had decided not to pursue changes to the actual service rules and e-service. Judge Raschio stated that he believes that is the general consensus, but that the committee would continue to talk about any issues that bubble up as it moves forward.

7. Third Party Practice/Rule 22

Ms. Dahab stated that the committee was not quite ready to report, as it had not met since the last Council meeting. The committee's goal is to have a written report for the Council to consider so that it can have a more robust discussion about all of the options that the committee has discussed regarding potential changes, or no changes, to ORCP 22.

V. New Business

A. Jury Trials in FED Cases

Judge Peterson stated that Clackamas County Judge Susie Norby, a former Council member, had brought a new issue to the Council (Appendix F). Judge Norby had been asked by a justice of the peace how many jurors should be seated for an FED trial. She searched the ORCP and the FED statutes and was unable to find that information anywhere. Judge Peterson noted that FED trials used to be held in Oregon's district courts, which used six-person juries. He stated that a possible fix would be to make an amendment to Rule 56 B that provides for 6-person juries for smaller monetary value (less than $10,000) claims to also include FED trials. However, this might impact any other case types that have historically been accorded a six-person jury if these cases were inadvertently left out of such an amendment.

Judge Hill remarked that jury trials are seldom requested in FED cases, so he did not think it was an issue. While he does feel that the number of jurors should be stated somewhere, he was not sure that it belongs in the ORCP. Judge Peterson pointed out that Rule 56 is a relatively short rule and it does talk about 12-person juries and also 6-person juries with regard to the dollar amount of the claim. He stated that an amendment might fit nicely there, but that he was not necessarily advocating for placing it there. Mr. Goehler noted that few FED cases would have a value higher than that. He observed that, if it is a traditional action at law, it does get a jury trial. He asked whether Council members see this as an issue.

Judge Hill stated that it is an issue that comes up really rarely but, when it does, judges do need to figure it out. He wondered whether there are any collateral issues that could arise. Mr. Joh stated that the cleanest way to handle it may be to suggest to the Legislature an amendment to the FED statutes. Judge Bloom stated that he is wary of carving out a section of the rules specifically for juries in FED actions. Since the damages will always be for possession of property, and will always be under the economic threshold, it seems to him that it will be a 6-person jury by default. Mr. Spooner agreed that it seems like the Council would be entering the realms of legislative authority and potentially constitutional authority with such a change.

Judge Peterson stated that he is aware of a case where a smart judge denied a defendant a jury trial in an FED case because he did not see it as being available. He did note that there are a number of appellate decisions on jury verdicts in FED trials, so he believes that jury trials have been available for a long time, perhaps since statehood. If it is a fairly simple fix to mention it somewhere so that judges are aware of that authority, he thinks that it should be done. He stated that the Council could make a recommendation to the Legislature. Ms. Nilsson stated that Mr. Shields had mentioned to her that, if the Council would like to include any recommendations to the Legislature in the Bar's law improvement package, those would need to be received by the Bar by April 1. Judge Peterson agreed and stated that, if a recommendation does get included in the Bar's package, it would probably pass in the Legislature. Mr. Goehler expressed concern that there may not be enough time for the Council to deliberate on the issue and include it in the Bar's package. He suggested keeping the item on the agenda for the March meeting and asked Council members to think about it between now and then.

Judge Raschio agreed that he would like to have time to give this matter some thought. He noted that jury trials in Multnomah County are quite different from jury formation and trials in Grant County and Harney County. There, a justice of the peace impanels a jury for a year. If there were to be a substantial expansion of the right to a jury trial, it would have a major impact in rural communities in a different way than it would in urban communities. While he does not necessarily think this is a bad idea, he would definitely want the Council to have fuller discussions and for him to have a chance to talk it through with his two justices of the peace regarding whether it is something they can manage from a cost perspective as well.

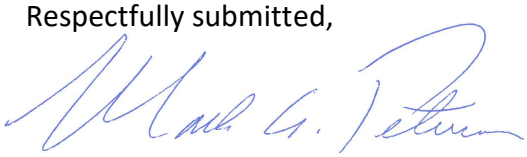
B. Making Rule 35 Applicable to Small Claims Cases

Ms. Nilsson asked whether the Council would like to include in the Bar's law improvement package the change it recommended to the Legislature last biennium regarding making Rule 35 apply to small claims court. It was approved by the Council, but went nowhere in the Legislature. She stated that she would put it on the agenda for the March meeting.

VI. Adjournment

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

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 10, 2026, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
Nadia Dahab
Hon. Andrew Erwin
Barry J. Goehler
Hon. Jonathan R. Hill
Ryan Jennings
YoungWoo Joh
Lara Johnson
Derek Larwick
Hon. Thomas A. McHill
Hon. Michelle McIver
Hon. Melvin Oden-Orr
Michael Shin
Hon. Scott Shorr
Hon. Todd Van Rysselberghe
Bryce Whitman Passadore
Alicia Wilson

Members Absent:

Hon. Christopher L. Garrett
Melissa Hopkins
Eric Kekel
Julian Marrs
Hon. Robert Raschio
Tom Spooner

Guests:

John Adams, Oregon Tax Court
Rachel Trickett, Oregon Judicial Dept.

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 9 • ORCP 10 • ORCP 22 • ORCP 24 • ORCP 38 • ORCP 43 • ORCP 45 • ORCP 47	• ORCP 60 • Abusive Litigants in Probate Proceedings • Arbitration • Clarity • Civil Motion Practice • Contempt • Default Orders/Judgments • Depositions • Disclosures • Discovery • Ex Parte	• Federalization • Guardians Ad Litem • "How To" Guides • Offers of Judgment • Pleadings • Receiverships • Remote Appearance • Security Bonds • Self-Represented Litigants • Subpoenas • Summary Judgment	• Timelines • Trial Practice • Uniform Collaborative Law Act • UTCR		

I. Call to Order

Mr. Goehler called the meeting to order at 9:30 a.m.

II. Approval of December 13, 2025, Minutes

Mr. Goehler called the Council's attention to the draft minutes from the December 13, 2025, meeting (Appendix A) and asked whether there were any suggestions for corrections. Judge Shorr stated that he would like to correct a sentence in the first full paragraph on page 11. He noted that the sentence currently reads, "He pointed out that the rule says that an expert is required to create the fact issue," but that it would more correctly read, "He pointed out that the rule says, 'if' an expert is required to create the fact issue, the party must present an ORCP 47 E affidavit."

Mr. Goehler asked for a motion to approve the minutes with Judge Shorr's correction. Judge Bloom made such a motion, Judge Shorr seconded, and the motion was approved by voice vote.

III. Administrative Matters

A. Staff Comments

This topic was carried over to the February agenda.

IV. Old Business

A. Committee Reports

1. Declaration of Expert Opinion/Rule 47 E

Mr. Joh reported that the committee had not yet met, but that he would schedule a committee meeting before the next Council meeting in February. Ms. Dahab, Judge Erwin, and Judge Oden-Orr joined the committee.

Mr. Goehler suggested that it might be a good idea for the committee to discuss when the expert materials are to be produced. He noted that he and Mr. Spooner have some experience on how it works at trial. Many times it is by agreement of the parties and, sometimes, it is handled by a motion in limine. Mr. Goehler stated that he has always thought of it as a trial management issue, or perhaps a rule of evidence issue as far as what is allowed for cross-examination, but not so much as a discovery issue. He wondered how other Council members see this issue and what they feel is the authority for disclosure of the expert's file before the expert testifies. Is it rooted in civil procedure, evidence, or trial practice?

Mr. Joh stated that he recalled this discussion from a previous meeting. His thought is that this situation is a bit of a malpractice trap for newer attorneys and for lawyers that come from outside of the state. In his experience, the practice has been inconsistent. It depends on the judge and the county, and the practice is not enumerated anywhere. There is no rule and no case law, at least with any level of clarity, to guide the practice. Mr. Joh stated that the e-mail chain with Judge Dahlin (Appendix B) has a subject line of "ORCP 47 E"; however, the issue goes beyond that portion of Rule 47. He does believe that some of the discussion that the committee will have about Rule 47 E is likely to overlap or be affected by any thoughts about the expert file. In his experience, with respect to the mechanism for producing an expert file, he has understood it to be a function of the rules of evidence, where there is a rule that provides for showing what the expert relied on. His understanding of the rule of evidence is that the last point at which the expert file can be protected is basically right after the expert goes on the stand and direct examination occurs. After that, the lawyer must turn over whatever the expert relied on for the other side to be able to do a cross-examination. Mr. Joh stated that he does not understand there to be any rules of discovery that require that. Personally, he would be interested in exploring a rule along those lines. He understands that this would come up against what he understands is the historical reticence by Oregon practitioners, as well as the Council itself, to make changes to the lack of expert discovery in Oregon.

Judge Peterson agreed with Mr. Joh that practitioners from other states may not be aware that Oregon is unique with regard to expert discovery. He stated that he believes that some part of this issue is procedural, and that it might be helpful to include in the rule a requirement for a motion or some sort of procedure to lay out what the practice is going to be for the timing of the production of the expert file.

Mr. Goehler stated that it is a good point to keep in mind that Rule 47 E does not exist on its own but, rather, within the context of Oregon's limitations on expert discovery. He agreed that it would be good for the committee to talk about expert discovery as well as the expert affidavit rule.

2. Joinder/Rule 24

Mr. Goehler reminded the Council that the committee had provided a draft amendment to Rule 24 for the Council's review (Appendix C). The Council was to decide whether any changes were needed or whether the draft could be placed on the agenda for the September publication meeting.

Judge Peterson noted that he has unintentionally developed some expertise in forcible entry and detainer (FED) practice, although this was not his intention when he went to law school. The suggestion for changes to the joinder rule

came from a former Council member, Judge Susie Norby. She opined that the rule does not read very well. Judge Peterson observed that the rule has not been amended since it was promulgated. Section B of the rule has a carve-out for FED practice, but the terminology is not very precise. House Bill 2001 (2023) made a change to the FED statutes that made very clear what constitutes "non payment" in the landlord/tenant context to include rent, late charges, fees, and charges described in the lease or the Oregon Residential Landlord and Tenant Act. However, Rule 24 only mentions "rental due." If a plaintiff chooses to ask for additional relief other than simply for possession of the premises, that would make the case a regular civil action. The plaintiff would therefore not be entitled to use the summary procedures that are provided in an FED action: the short summons, with its command that the defendant appear at a first appearance within 8 days, and go to trial within 15 days.

Judge Peterson reminded the Council that he did send the draft amendment to about 15 firms or practitioners that he knows have expertise in this area, both on the plaintiffs' side and the defense side. He only received two responses. One said that the draft amendment looked fine. The other asked whether it might cause any preclusion problem. Since he did not receive any comments back from the remaining practitioners, he assumes that they did not perceive any problems with the draft. Mr. Goehler pointed out that the rule is about permissive joinder, so he did not believe that issue preclusion would be a problem.

Judge Hill made a motion to place the draft amendment to Rule 24 on the September publication agenda. Judge Oden-Orr seconded the motion, which was passed by voice vote. Judge Peterson asked that all Council members take an extra look at the draft between now and September. If anyone notices something wrong with the draft between now and September, they are absolutely entitled to bring it up again.

3. Judgments/Rule 67

Judge Peterson reported that the committee had not met since the last Council meeting.

4. Out-of-State Depositions/Rule 38 C

Ms. Wilson reported that the committee, consisting of herself and Judge McHill, had met in December. She stated that, looking at ORCP 38 C, it is clear that Oregon has adopted a rule that is intended to encompass the Uniform Depositions and Discovery Act (UDDA), which most other states have adopted, as a more streamlined foreign deposition process. From her and Judge McHill's experience, the UDDA process does not occur that often. It is a process where one uses a subpoena in the form of the foreign jurisdiction, then also completes a subpoena that would comply with Oregon law. Ms. Wilson noted that the

UTCR (Rule 5.130) contains two processes for foreign depositions. One is the more streamlined process that tracks ORCP 38 C, and the second is for jurisdictions that have not adopted the UDDA, where a commission or letters rogatory from the other jurisdiction may be required.

Ms. Wilson stated that the committee's conclusion is that, if there is an issue, it is a UTCR issue. However, she stated that it seems to make sense that there is a more streamlined process if the other state has adopted the UDDA, as that is the purpose of the agreement of the different jurisdictions. The committee did not see a reason to make a change to the ORCP.

Judge Peterson wondered exactly how many states have adopted the UDDA. Ms. Wilson stated that she thought that it may be 48 states but that she could not find the exact number. Judge Peterson noted that it might be helpful for Council history to have the exact number and to know which states are outliers. Before making any decisions, he suggested deferring the matter to the next Council meeting, as Mr. Kekel was not present today and it was his partner who brought the matter to the Council's attention. He wanted to ensure that all relevant input had been presented to the Council. Judge Peterson also agreed that is not unreasonable to have consequences for the jurisdictions that do not adopt the UDDA, if that is what the intent of the Act is.

Ms. Wilson stated that the committee could check in with the UTCR Committee on those two different procedures, but she noted that there is case law recognizing that the process in ORCP 38 C is based on the UDDA. Mr. Goehler asked Ms. Wilson to prepare a memo summarizing the committee's actions and enumerating the jurisdictions where the UDDA has not been adopted. Ms. Wilson agreed to do so.

5. Post-Judgment Subpoenas/Rule 55

Mr. Passadore reported that the committee had not met since the last Council meeting but stated that he would schedule a committee meeting before the February Council meeting.

6. Service/Rules 7, 9, & 10

Judge Peterson reported that the committee had not met since the last Council meeting. He noted that the committee intends to continue to discuss the 3-day extension in Rule 10 B. The committee's preliminary thought is that it is a good idea to keep the 3-day extension in the rule. The committee will also continue to discuss whether clarity might need to be added regarding email service, because some attorneys have varying understandings as to whether such service is effective and, if so, when it is effective. Judge Peterson explained that the committee intends to discuss the Rule 7 summons form and whether it can be

made more readable for the laypeople who are most often the recipients of summons forms. Finally, Judge Peterson remarked that, at the last Council meeting, he had suggested requiring Rule 43 and Rule 45 requests to be filed. There is currently a carve-out in Rule 9 exempting them from filing; however, now that everything is electronic, the requests could be filed with the court to perhaps help avoid contentions of practitioners that they did not receive a request for production of documents or a request for admissions. He stated that he believes that is the final issue on the committee's agenda.

Mr. Goehler stated that he thought that the trending view among committee members was toward leaving the service rules alone, but he agreed that it will be helpful for the committee to discuss the issues further to ensure that the Council is confident that the rules are keeping up with the times and how practices like e-service are currently happening.

7. Third Party Practice/Rule 22

Ms. Dahab reported that the committee is still considering changes to Rule 22 regarding the consent requirement of all parties for the addition of third-party defendants after the 90-day period runs. She stated that the committee is still working to determine the original intent of the rule, the legislative history as changes were considered and rejected over the course of history, what happens in other jurisdictions, and, specifically, the evolution of other laws affecting third-party practice, like comparative fault, that have changed the development of the law since Rule 22 was initially adopted. Ms. Dahab stated that the committee's goal is to have a memo and a summary of potential options for either modifications or no modifications to Rule 22. She stated that she does not expect the committee to reach any consensus on the question. However, members will talk through potential options and put them in writing for the Council's consideration.

Mr. Goehler summarized that the options would be to leave the rule alone, to not require consent of all parties, or to tinker with the timing of the rule. Ms. Dahab stated that the committee has discussed all three of these options, as well as a potential fourth option, which is to add some sort of newer, "should-have-known" discovery-type wording into the rule. She reemphasized that the committee has been researching other jurisdictions and comparing them to existing Oregon law to the extent that it provides any clarity on the question, and that this will be included in the memo to the Council as well.

V. New Business

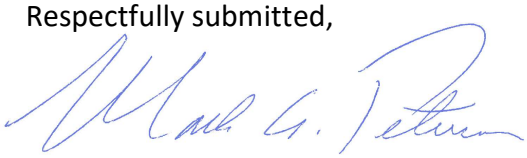
No new business was raised.

VI. Adjournment

Judge Peterson reminded the Council that there are just five Council meetings left before the September promulgation meeting. While that seems like a lot of time, it does go fast. He noted that making no change to a rule is absolutely an appropriate result, if the Council can document why it made no change. Research into the origins of the rule, comparison to federal practice, and comparisons to other jurisdictions are all helpful for a committee's conderation. He opined that Oregon's procedures are better than those of most jurisdictions, and stated that the Council's legislative history is helpful to litigants. To the extent that committees can provide, in the next few months, either a draft amendment or a report explaining why no change will be made, that will be very helpful. Ms. Nilsson reminded the Council that the February meeting will be held on the first, rather than the second, Saturday: February 7, 2026.

Mr. Goehler adjourned the meeting at 10:03 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

JOINDER OF CLAIMS

RULE 24

A Permissive joinder. A plaintiff may join in a complaint, either as independent or as alternate claims, as many claims, legal or equitable, as the plaintiff has against an opposing party.

B Forcible entry and detainer [*and rental due.*] actions. If **a plaintiff joins** a claim of forcible entry and detainer [*and a claim for rental due are joined*] **with any other claim for legal or equitable relief,** the defendant [*shall*] **will** have the same time to appear as is provided by rule or statute in **civil** actions [*for the recovery of rental due.*] **and the action will not be governed by the provisions of ORS 105.100 et seq.**

C Separate statement. The claims joined must be separately stated and must not require different places of trial.

Council on Court Procedures
February 7, 2026, Meeting
Appendix B-1

MEMORANDUM

TO: Council on Court Procedures

FROM: Alicia Wilson

DATE: 01/12/2026

RE: ORCP 38C Committee Update

Included in the 2025-2027 Biennium Rule Proposals is the suggestion clarifying and/or altering ORCP 38C regarding foreign deposition subpoenas. (See attached Exhibit 1).

ORCP 38C pertains to the issuance of any discovery subpoenas in Oregon regarding a foreign State case including deposition subpoenas.

ORCP and UTCR History

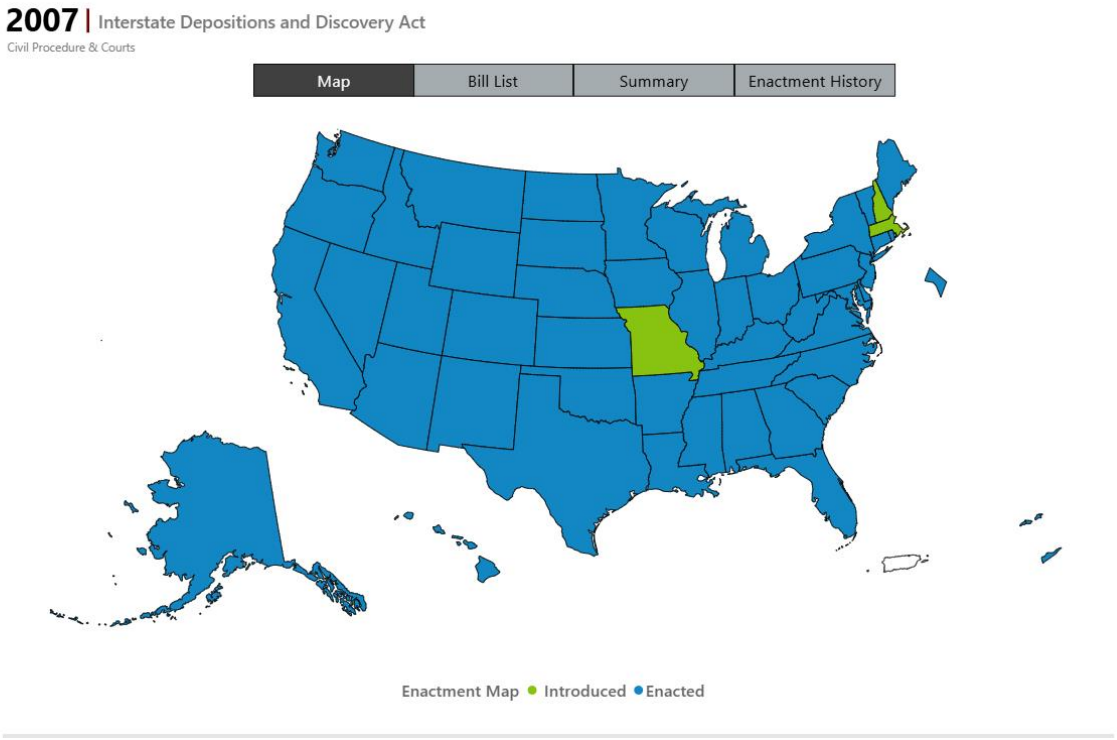
Previously the ORCPs and UTCRs required the party to a foreign case to register in Oregon Courts a "writ, mandate, commission, letter rogatory or order executed by the appropriate authority in the foreign jurisdiction with a circuit court of this state." (*See* attached Exhibit 2 – 2010 Versions of ORCP 38 C and UTCR 5.140)

Uniform Interstate Depositions and Discovery Act

The Uniform Law Commission has put forth legislation for the streamlined issuance of foreign subpoenas which has been enacted in 49 of 53 jurisdictions (made up of U.S. States and including District of Columbia, Virgin Islands and Puerto Rico). Jurisdictions enacting the Act are in the below map in blue and include all U.S. States except for Missouri, Maine and Massachusetts – although all three States have introduced bills in the 2026 legislative session. If those pass this year, the only jurisdiction that has not passed the UIDDA would be Puerto Rico.

ORCP 38C as currently drafted is an enactment of the Uniform Interstate Depositions and Discovery Act. (*See* and compare language and comment for the Uniform Interstate Depositions and Discovery Act attached as Exhibit 3).

The purpose of the Uniform Act as set forth in its commentary is to set forth a procedure that can be easily and efficiently followed, has a minimum of judicial oversight and intervention and that is cost-effective for the litigants. (*See* Exhibit 3, Page 4).



See Interactive Map here: https://www.uniformlaws.org/committees/community-home?communitykey=181202a2-172d-46a1-8dcc-cdb495621d35#LegBillTrackingAnchor

Committee Discussion

The issue that was brought to the Council was a situation where the practitioner had to use the more lengthy process of getting a commission, rogatory or order from the foreign jurisdiction as laid out in current UTCR 5.140(2) instead of the more streamlined UIDDA process found in ORCP 38C and UTCR 5.140(1). That occurred because the foreign jurisdiction (Missouri) had not adopted the UIDDA and the trial concluded that ORCP 38C was the process for other jurisdictions who have also enacted the UIDDA.

The committee did not see a reason to change ORCP 38C and concluded the current two avenues as set forth in the UTCRs are appropriate as reflecting the two ways that foreign discovery subpoenas can be issued in Oregon. Given the overwhelming number of jurisdictions that have adopted the UIDDA and potential future adoptions, this issue does not appear to be a frequent appearance in Oregon courts or an issue of concern.

EXHIBIT 1
tabbies
page 1 of 2

---------- 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!

EXHIBIT 1
tabbies
page 1 of 2

Kevin T. Sasse

ksasse@dunncarney.com

Direct 503.306.5339 | Fax 503.224.7324 | DunnCarney.com

DUNN CARNEY LLP

Dunn Carney Allen Higgins & Tongue LLP

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

Member of Meritas Law Firms Worldwide Meritas.org

Court Rules Suggestion.eml
20K

5.140 INTERSTATE DEPOSITION INSTRUMENTS—REGISTERING A FOREIGN COMMISSION IN OREGON

(1) To obtain discovery in the State of Oregon for an action pending in another jurisdiction, a party shall register a writ, mandate, commission, letter rogatory, or order executed by the appropriate authority in the foreign jurisdiction with a circuit court of this state. The party in the foreign action or an active member in good standing of the Oregon State Bar shall present in person at *ex parte* the original document or a certified copy from the foreign jurisdiction, a petition, and an order to register the document. (See Form 5.140.1 in the UTCR Appendix of Forms.) If approved by the court, upon payment of the appropriate filing fee the matter will be assigned a circuit court case number and appropriate process may be issued by the Oregon attorney.

(2) In the event that a foreign jurisdiction has no procedure to issue a writ, mandate, commission, letter rogatory, or order to authorize a deposition to be taken in Oregon pursuant to ORCP 38 C, at *ex parte* the party shall present a petition to compel the witnesses to appear and testify. The petition shall be supported by an affidavit that contains all of the following:

(a) The name of the foreign jurisdiction in which the litigation is pending.

(b) The name of the court in which the litigation is pending.

(c) The caption or other relevant title of the litigation.

(d) The case number assigned by the foreign jurisdiction to the litigation.

(e) The date of filing of the litigation in the foreign jurisdiction.

(f) A statement that the foreign jurisdiction has no process to issue a writ, mandate, commission, letter rogatory, or order to compel a witness to appear and give testimony if the witness is located outside its jurisdictional boundary.

(g) A statement that the affiant seeks authorization from the court to proceed upon notice or agreement to take the testimony of witnesses in this state as provided by ORCP 38C (1).

(h) The identity of witnesses in this state to be compelled upon notice or agreement to appear and testify.

depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

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

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

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

C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.

C(1)(b) "State" means 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.

C(2) Issuance of subpoena.

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

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

EXHIBIT 2
page 2 of 2

EXHIBIT
3

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

> *Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.*

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

> *[A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.*

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the discovery state, after which a subpoena will automatically issue. Still other states require a letter

rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means 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.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

Comment

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

SECTION 3. ISSUANCE OF SUBPOENA.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

(A) incorporate the terms used in the foreign subpoena; and

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

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistence to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

SECTION 4. SERVICE OF SUBPOENA. A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

SECTION 8. APPLICATION TO PENDING ACTIONS. This [act] applies to requests for discovery in cases pending on [the effective date of this [act]].

SECTION 9. EFFECTIVE DATE. This [act] takes effect ___.

TO: Council on Court Procedures

FR: Hon. Mark Peterson

DT: 2/4/2026

RE: POST-JUDGMENT DISCOVERY TOOLS FOR USE IN ENFORCEMENT/COLLECTION

The Rule 36/55/post-judgment committee met on February 2, 2026, with only three members: Johnson, Marrs, and Peterson.

In response to the Council's biennial survey was a suggestion to clarify the use of discovery tools and subpoenas directed to nonparties who might hold assets or have information to assist in locating assets in the collection/enforcement of judgments. Although the use of a subpoena to require a nonparty to appear for a deposition after a judgment has been entered is not typically challenged, the respondent noted that, sometimes a challenge is made using the existing verbiage in Rule 36 and Rule 55 as authority. Rule 36 (the general discovery rule) contains the phrase "relevant to the claim or defense...." in subsection B(1), defining the scope of discovery and it is argued that post-judgment matters are not a "claim or defense." Similarly, Rule 55 (subpoenas) uses the phrase "action is pending" five times in sections A and B and it can be argued that, once a general judgment has been entered, the action is no longer "pending." Section C(1) of Rule 36 also uses the phrase "action is pending."

The issue is whether an amendment to Rule 36, Rule 55, or elsewhere would facilitate more efficient and inexpensive enforcement of judgments, or whether any change would be beneficial.

Clearly a judgment debtor is subject to post-judgment enforcement/collection tools. A system that did not provide such tools would render judgments as suggestions and compliance would be voluntary. Writs of garnishment and attachment, among other tools, exist to secure compliance with a judgment that may be less than voluntary.

What of nonparties who may hold assets or have information leading to assets of the judgment debtor? As the survey respondent points out, ORS 18.268(1) provides that witnesses (as well as judgment debtors) may be summoned to appear for judgment debtor examinations. Likewise, writs of garnishment are directed to nonparties who may hold assets belonging to the judgment debtor. ORS 18.602. Subpoenaing nonparties in post-judgment proceedings and requiring responses to writs are authorized by law.

Substituting a different phrase for either "claim or defense" or "action is pending," that would avoid the argument that collection of a claim is not a "claim or defense," or that, after a

judgment is entered, an action is no longer "pending" did not present ready alternatives. Further, those phrases, especially "claim or defense" have been time-tested and are generally understood terms. This is not to suggest that an action is not pending once a judgment has been entered or that collection of a judgment does not relate to a claim or defense, but the arguments have been made.

The committee thought that inserting language from FRCP 69(a)(2), specifically authorizing discovery from" any person," as the respondent suggested, into the ORCP might be a more direct solution. It was suggested that Rule 37 provides a procedure to obtain discovery pre-litigation and during an appeal and the FRCP 69(a)(2) language could be inserted as a new section C (and redesignate existing sections C and D). After the meeting one committee member thought the FRCP 69(a)(2) language could also be inserted as a new subsection B(4) in Rule 36. Rule 36 has the advantage that it is where one finds the general scope of discovery. Rule 37 would seem to require a petition to be filed to authorize the discovery and, as nonparties are being required to respond, it would be a check against possible harassment or abuse of nonparties through the use of subpoenas and discovery tools

Please see the drafts of Rule 36 and Rule 37 showing how the FRCP 69(a)(2) language would appear.

GENERAL PROVISIONS

GOVERNING DISCOVERY

RULE 36

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

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

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

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

B(2)(a) **Requirement to disclose**. A party, on the request of an adverse party, shall disclose:

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

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

Council on Court Procedures
February 7, 2026, Meeting
Appendix D-3

B(2)(b) **Procedure for disclosure**. The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to ensure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.

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

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

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

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

B(3)(b) **Prior statements**. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. On request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the

person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is either: a written statement signed or otherwise adopted or approved by the person making it; or a stenographic, mechanical, electrical, or other recording, or a transcription that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B(4) Discovery in aid of a judgment. In aid of a judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules.

C Court order limiting extent of disclosure.

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

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

PERPETUATION OF TESTIMONY OR EVIDENCE

BEFORE ACTION OR PENDING APPEAL

RULE 37

A Before action.

A(1) **Petition**. A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule 43 or Rule 44 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors, or assigns are likely to be a party to an action cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action; (b) the subject matter of the expected action and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as one is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. The petition shall name persons to be examined and ask for an order authorizing the petitioner to take their depositions for the purpose of perpetuating their testimony, or shall name persons in the petition from whom discovery is sought and shall ask for an order allowing discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence.

Council on Court Procedures
February 7, 2026, Meeting
Appendix D-7

A(2) **Notice and service**. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7, an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A(3) **Order and examination**. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B **Pending appeal**. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in

which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show: (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; and (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C After entry of judgment. In aid of a judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules.

[*C **Perpetuation by action**.*] **D Perpetuation by action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

[*D **Filing of depositions**.*] **E Filing of depositions.** Depositions taken under this rule [*shall*] **must** be filed with the court in which the petition is filed or the motion is made.

SUMMONS

RULE 7

/ / / /

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

C(3)(a) In general. All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, [*shall*] **must** contain a notice printed in type size equal to at least [*8-point type*] **12-point type** that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the [*other side*] **plaintiff** will win automatically. To [*"appear"*] **appear** you must file with the court a legal document called a "motion" or "answer." [*The "motion" or "answer" must be given*] **You must give your motion or answer** to the court clerk or administrator **of the court that appears at the top of this summons** within 30 days along with the required filing fee. [*It*] **Your motion or answer** must be in proper form and [*have*] **include** [*proof of service*] **"proof of service"** on the plaintiff's attorney or, if the plaintiff does not have an attorney, [*proof of service*] **proof of service** on the plaintiff. **Proof of service is a signed statement describing when and how the document was served as required in Oregon Rule of Civil Procedure 7 D.**

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

www.oregonstatebar.org

(503) 684-3763 in Portland metropolitan area

Council on Court Procedures
February 7, 2026, Meeting
Appendix E-1

(800) 452-7636 statewide

If you would like more information that may be helpful in understanding this case, you may also contact:

www.oregonlawhelp.org

/ / / / /