MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 14, 2026, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin M. Bloom
Nadia Dahab
Hon. Andrew Erwin
Hon. Christopher L. Garrett
Barry J. Goehler
Hon. Jonathan R. Hill
Melissa Hopkins
Ryan Jennings
YoungWoo Joh
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Melvin Oden-Orr
Hon. Robert Raschio
Michael Shin
Hon. Scott Shorr
Tom Spooner

Members Absent:

Hon. Michelle McIver
Hon. Todd Van Rysselberghe
Bryce Whitman Passadore
Alicia Wilson

Guests:

Matt Shields, Oregon State Bar
Rachel Trickett, Oregon Judicial Department

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted on this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 7 • ORCP 9 • 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 February 7, 2026, Minutes

Mr. Goehler called the Council's attention to the draft minutes from the February 7, 2026, meeting (Appendix A) and asked whether there were any suggestions for corrections. Hearing none, he asked for a motion to approve the minutes. 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 April agenda.

IV. Old Business

A. Committee Reports

1. Declaration of Expert Opinion/Rule 47 E

Mr. Joh reported that the committee had not met since the February Council meeting. He reminded the Council that Judge Odin-Orr had drafted a survey with the intent of having the Council consider it and, at the last Council meeting, some Council members had suggested having the Council approve any survey with the intent of distributing it to judges at the Oregon Circuit Court Judges Association April conference. There was also a suggestion that the committee spend more time considering Judge Dahlin's concerns before even proposing a survey. Mr. Joh stated that he expects that the committee will discuss those issues at the next meeting and, with that in mind, it may be that there will not be a survey to propose to the Council at the April meeting. Mr. Goehler stated that it is important to make sure to be deliberate in what we are doing. He opined that it is more important to get things right than to have a survey ready in time for the judges' conference. The Council agreed.

2. Joinder/Rule 24

Judge Peterson stated that the Council had previously voted to put a draft amendment to Rule 24 on the September publication agenda, but that there had subsequently been feedback by Judge Susie Norby, who had originally suggested changes, so a revised amendment (Appendix B) had been approved for the September agenda. He explained that Council staff wanted to keep the draft on the agenda so that the Council could again review it to ensure that the

changes do no unintended harm.

Mr. Goehler reminded new Council members that each draft that is approved for the September agenda will be essentially in final form and will be part of the September meeting packet to be voted on for publication.

3. Judgments/Rule 67

Mr. Kekel reported that the committee had met. He reminded the Council that the committee had originally provided two alternative draft amendments to Rule 67 that would require including in a judgment any previous judgments that had been entered in the case. During the last committee meeting, the committee agreed that the language in Appendix C was preferable, and that is the language being recommended to the Council for feedback.

Mr. Kekel acknowledged some concern with trust and estate cases. He stated that he had checked with his partners who practice in that area and, at the end of the day, those practitioners do not necessarily follow Rule 67 because the probate statutes have their own requirements when it is time to close an estate. He noted that there may be an issue with respect to protective proceedings and that is probably something that the committee needs to look at a little further.

Mr. Goehler asked whether there are other concerns that need to be addressed, aside from the potential burden of needing to list a large number of prior judgments. Judge Peterson stated that he had contacted former Council chair Brooks Cooper, who specializes in probate. Mr. Cooper checked with his law partner, and they expressed no concern with regard to probate. There was some concern that Oregon Revised Statute (ORS) 111.200(2) and 111.200(3) make certain of the ORCP explicitly applicable or inapplicable to probate practice, so some follow up may need to be done by the committee with regard to that. There is also the question of whether the proposed change would be burdensome in family law cases.

Mr. Goehler asked whether there are a lot of judgments in protective proceedings or whether things are mostly handled by orders. Judge Bloom replied that guardianship cases are resolved by judgment. He stated that there may be many judgments in the domestic relations area; however, he thinks that this would be a good change to Rule 67. Too many times, a judge is looking at a supplemental judgment that just changes a couple of things and, inherent in that silent language, is the fact that the other judgments remain in effect to the extent they have not been altered. There is no way of knowing without searching the entire docket. Of course, the length of the case will dictate how many judgments there are, but he opined that the amendment is appropriate.

Judge Hill stated that he does have some concerns about the draft amendment

in both domestic relations cases and guardianship cases, but he also thinks that the change would make things easier for judges. He stated that, in his opinion, the Council should approve the draft and send it out for comment. Overall, he thinks that it would be a positive change, but there could be a workload impact in domestic relations cases. Mr. Goehler asked whether Judge Hill was referring to practitioner or court workload. Judge Hill stated that he was referring to practitioner workload, as he believes that the change would make things easier for judges.

Mr. Joh wondered whether there is a danger of parties arguing that reciting the previous judgment supersedes the previous judgment. If there is an inconsistency in the recitation of the previous judgment entered, which wording controls? Mr. Joh asked whether some wording could be added to the draft language to clarify this. Ms. Hopkins agreed with Mr. Joh. She stated that she had something like this happen to her in a civil case in which many limited judgments had been entered along the way. She made an attempt to include past judgments to keep the court apprised and to track how the case was moving along, and it was an actual battle with defense counsel to include them, even though she used the exact language on the prior partial judgments. Mr. Goehler agreed that the language in the draft, "recite any previous judgment," might be a little vague. He wondered whether that means a verbatim recital or just the date entered.

Judge Bloom noted that the Oregon Judicial Department (OJD) provides judgment forms for self-represented litigants. The form includes a space for judgments, and he thinks that all that is required is the number and the date. He stated that this is enough to help the court figure out what limited judgments have been entered. He stated that he thinks that the language in the draft requires that only the date of entry of the judgment and each judgment entered thereafter needs to be recited. He recognized what Ms. Hopkins said about disputes, but pointed out that there is no rule now. If Rule 67 is amended, it should alleviate that problem and hopefully make things easier.

Mr. Kekel stated that any judgment needs to be ultimately approved by both parties, if they can agree. If not, then competing judgments are submitted and the court decides which one is most appropriate. He thinks it is a fair point that the language "recite any previous judgment," probably does need to be more specific. He asked if it would be helpful to change the language to, "recite the date and effect of any previous judgment." Judge Bloom disagreed with that language. Mr. Goehler stated that the word "effect" might lead more to the fear that Mr. Joh expressed about changing the substance of a judgment. Judge Bloom stated that he thinks that the current language in the draft is simple and easy to understand. It is designed to provide notice and prevent the problem of shuffling through the case file to figure out what provisions remain in effect.

Mr. Goehler noted that the last sentence of the proposed language provides specifics for a supplemental judgment. He wondered what the scope of the recital is and whether it should be broader, considering that there could be both limited and general judgments. He also wondered why the last sentence is limited to supplemental judgments. Judge Hill also wondered why the last sentence is limited to supplemental judgments.

Judge Peterson stated that, frequently, a supplemental judgment is for costs and attorney fees. In his mind, any general judgment that is recited in the document ratifies that the general judgment remains in effect, except to the extent, if any, that this particular judgment form changes it. His thought was that, with supplemental judgments, rather than go back to year one, we could just go back to the general judgment, which theoretically resolved all claims as to all parties. It was just a thought to make it a little easier to do supplemental judgments in situations such as costs and fees.

Ms. Nilsson noted that it is unclear in the first sentence of the draft language whether the intent is to have the *language* of any previous judgment recited, or just the date. Mr. Goehler pointed out that it is specified what a recital is for a supplemental judgment, but stated that there is a potential ambiguity for anything that is not a supplemental judgment. He stated that this would be good thing to nail that down for a final draft. Mr. Kekel agreed with Ms. Nilsson that the language is unclear. Judge Bloom pointed out that including limited judgments in the supplemental judgment would be burdensome and not really necessary or helpful. However, in the context where general judgments come into play, either in civil or domestic relations cases, it is helpful to know. This is why he thinks that the existing draft language requiring date of entry is sufficient.

Mr. Joh pointed out that there is ambiguity because there is a difference in the wording of the first sentence and the second sentence. Unlike the second sentence, the first sentence suggests that to recite the previous judgment is something different than reciting the date of entry of each judgment. He suggested that making the language parallel to the supplemental judgment wording might help with clarifying that. Judge Bloom agreed. Ms. Nilsson suggested the following language:

> "The first paragraph of any form of judgment submitted by a party must recite the type and date of entry of any previous judgment entered in the action that has not been vacated and the date of entry of each such judgment."

Judge Bloom stated that this language looked good and that consistency is important.

Judge Peterson asked the Council about another issue the committee had discussed. He noted that it may be helpful in some courts to include in the rule a requirement to identify the judge who is to sign the judgment. He stated that Multnomah County has a Supplemental Local Rule [SLR 5.035(3)] requiring the name of the specific judge to be included in the caption; however, that SLR is apparently not very often followed. He had a cursory look, but did not find a similar SLR in other counties. Judge Hill stated opined that this is an issue that is better handled in SLR. Judge Erwin agreed. He stated that Washington County does not have this problem because all cases are individually assigned.

Mr. Goehler also pointed out a typographical error in the last sentence of the proposed language: the word judgment has an extra "e." Ms. Nilsson stated that she would correct the error.

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

Judge Peterson reminded the Council that, at the February meeting, he had suggested that a simple change to Rule 38 C could make it a bit clearer that a party must do a little bit of looking to find out whether they can use the streamlined procedure for those states that have signed on to the Uniform Interstate Discovery and Depositions Act (UIDDA) or the slightly different procedure provided for cases filed in the outliers, such as Missouri. He referred the Council to an amendment he drafted (Appendix D). He noted that Council staff had also made some stylistic changes not intended to affect the operation of the rule.

Judge McHill stated that the committee had not met, but that this sounds like a reasonable clarification. Mr. Goehler asked whether the Council would like to vote on the draft now or whether the matter should be carried over to the April meeting. Judge Peterson suggested that, since Ms. Wilson was not present at the meeting, the matter be carried over to April to give her a chance to review the draft amendment. The Council agreed.

5. Post-Judgment Subpoenas/Rule 55

Judge Peterson reported that the committee had not met since the February Council meeting. He stated that, after reading the minutes from that meeting, he realized that the change that the committee had proposed to Rule 36 could be further improved. He referred the Council to a new draft (Appendix E).

Judge Peterson stated that he thinks that the Council generally agreed on making clear that post-judgment discovery is available. However, the person who raised this issue in the Council survey pointed out that Rule 36 and Rule 55 could conceivably be, and have been, read to not permit it, although there is a statute that permits such discovery. At the February Council meeting, Judge

Shorr raised the issue of bonded appeals. Judge Peterson stated that it does seem that discovery probably should not be obtained if execution on the judgment has been stayed. In that case, it may not make a lot of sense to allow non-parties to be hailed in for discovery. There is an attempt to address that concern in the new draft, which may or may not have been successful.

Judge Peterson noted that Mr. Joh had suggested that there are two kinds of relief, monetary and injunctive, and had wondered whether this kind of discovery can be used in post-judgment enforcement in an injunctive relief case. Judge Peterson also wondered whether the lead line "Discovery in aid of judgment," which was taken directly from the federal rule, could be a little more clear. He stated that those are the remaining issues on which he would like to have input from the Council.

Mr. Goehler stated that, if that federal language is being borrowed, it would be nice to know what the scope is. Are we basically adopting federal case law, or do we want to define it differently? He stated that the scope may be fine, but the Council needs to know what that scope is in order to make that determination.

Judge Peterson also raised another issue. The new draft language indicates that discovery may be obtained "as provided in these rules." The person who raised the concern in the biennial survey mentioned that Rule 55 could also be read not to permit post-judgment subpoenas. He observed that the draft language should perhaps also include language about obtaining a subpoena. Mr. Goehler asked whether there is any discovery that would not apply. He stated that we could spell out the rules that apply if there are some that we want to leave out, or include a "notwithstanding" clause, rather than making any changes to Rule 55.

Judge Peterson stated that the committee would meet again to consider these issues and report back to the Council at the April meeting.

6. Service/Rules 7, 9, & 10

Judge Raschio referred the Council to Appendix F and focused on the proposed changes to the summons in Rule 7. He stated that he had worked with Council staff to come up with some cleaner and more succinct language for the summons and to ensure that, even with the change from a minimum 8-point font to a minimum 12-point font, it still can fit on one page. He noted that this was a concern at the February Council meeting. Judge Peterson stated that Ms. Nilsson had prepared a summons with the proposed draft language in both 8-point and 12-point font so that the Council could see the difference. Mr. Goehler stated that the difference is so stark that he wondered why 12-point font was not required before.

Mr. Spooner stated that he agrees with requiring 12-point font. He pointed out that his firm and many other firms have historically prepared summonses in a two-column format, with the required Rule 7 language in 8-point font in one column and other information in a larger font in the other column. That is perhaps a more historical context of why 8-point font was used. Judge Peterson stated that he and Ms. Nilsson had formatted the summons to comply with the UTCR 2.010 standards for pleadings, although UTCR 2.010(4) does not require the same things of documents other than pleadings and motions. It was an exercise to see if a summons could still fit on one page with a 2-inch top margin and a large caption and with double spacing on pleading paper, which it could.

Judge Peterson stated that staff also looked through Rule 7 and found some other suggested changes, many of which had to do with replacing the word "shall" with other appropriate words. He asked that Council members take a close look at the draft amendment to make sure that all of the suggested changes do not do harm or alter how the rule is intended to be used. He stated that the committee would benefit from having another meeting to look at any Council feedback.

Mr. Spooner stated that the proposed changes of the word "shall" to the word "will" in subsection F(4) and section G caught his attention. He stated that there are a number of appellate cases on how trial courts are to deal with actual notice, and noted that "shall" is a fairly clear word, for the most part, with lawyers. With that appellate history, he had concerns about whether using the word "will" would open up a new round of appellate cases about what a trial court should do when there is not perfect service. Judge Peterson noted that the word "shall" has been interpreted as "may" in some cases, which is a bit of a shock, and that is one of the reasons that it has been disfavored in legislative drafting. He pointed out that the deliberations of the Council and the staff comments on any rule changes would make clear that the changes would be to clarify the existing practice and not to change anything in terms of how the rule is applied. Ms. Nilsson asked if changing "shall" to "does" would make more sense in some instances. Mr. Goehler and Mr. Spooner agreed. Mr. Goehler did suggest that the committee take a closer look at the instances of "shall" in the rule during its upcoming meeting. Ms. Hopkins stated that she currently has a case in front of the Court of Appeals that addresses the word "shall." She was unsure when oral argument would be scheduled and when an opinion would be rendered; perhaps next year. Ms. Nilsson asked that the Council take a look at all drafts where the word "shall" was replaced with another word to make sure that they were appropriately changed.

Judge Peterson pivoted to a discussion of the "three-day rule." Although the committee had reached the consensus not to remove the three-day extension from Rule 10 B, he stated that one of the significant complaints about that extension is that, whereas email service usually is serviceable, there are

sometimes disputes over whether a request for production of documents has been received by email. He stated that he had made a suggestion at the last Council meeting to which the Council did not seem opposed, so he had drafted a proposed amendment to Rule 9. Currently, notices of deposition, as well as Rule 43 requests and responses to such requests, are not to be filed with the court. (The reason for excluding Rule 43 from the requirement to file was concern, back in the paper documents era, over filing space for responses.) Judge Peterson pointed out that the storage space required for requests for production under Rule 43 is typically pretty minimal. He stated that he had asked the court processing staff in Multnomah County whether it would cause difficulty for Rule 43 requests to be filed with the court. His thought is that, if Rule 43 requests for production are filed with the court, parties cannot complain that this is the one email that they did not receive. He stated that this would address the concern that was raised by one of the attorneys who addressed the Council in the September and October meetings about how the 3-day extension and email communication causes disputes and additional litigation expense.

Mr. Goehler pointed out that everything that gets filed in the Odyssey court filing system has to be clerk approved, so that would be an extra touch point for court staff. He stated that this is a consideration when making such a rule change. Judge Raschio stated that the committee can discuss this at its next meeting. He posited that, instead of the entire filing, perhaps there could be a requirement that a notice be filed with the court that a request for discovery has been filed and that there has been a response to discovery, as opposed to having those massive documents filed within the case.

7. Third Party Practice/Rule 22

Mr. Goehler thanked the Rule 22 committee for the compressive materials it provided to the Council (Appendix G) which include a history of the rule. He stated that this information changed his view on what the Council should do this biennium. Ms. Dahab stated that the committee had met once since the last Council meeting. She noted that the suggestions presented by the committee in its materials are a work in progress and that the committee is not ready for a full Council vote at this point. The committee was hoping to get some feedback on where the Council might be leaning.

Ms. Dahab explained that the first document in Appendix G is a history of Rule 22, particularly Rule 22 C on third-party practice, as it has existed over the years. She stated that the committee wanted the Council to see the number and type of reviews and amendments the Council has undertaken, specifically with regard to the consent requirement. She stated that the committee had learned a few things, one being that the committee's cross-jurisdictional research made clear that the consent requirement in ORCP 22 C is unique to Oregon. Another thing learned is that there is very little Oregon case law about the consent

requirement. One case from the Court of Appeals touches on the right that the plaintiff has as "master of the complaint," which is sort of at the heart of the consent requirement that Rule 22 C reflects. The consent requirement has been reviewed by the Council a few times over the years, most recently in 2018 when the Council undertook a review and published an amendment that would have eliminated the requirement. The published amendment did not receive a supermajority vote of the Council for promulgation. Prior to that, committees were convened a few times to look at the rule, but never got as far as a published amendment.

Ms. Dahab called the Council's attention to the second document in Appendix G, which is a series of potential options for actions the Council might consider taking with regard to Rule 22 C. One option is making no change at all. The other options are various iterations of potential changes that the committee has discussed. The committee has not reached any consensus about a recommendation, and is currently split about whether the rule should be changed at all, and is hoping for feedback from the Council to help narrow the options to come to a recommendation.

Mr. Joh asked whether the defendant who is trying to bring in a third party would still have a claim, even if it is not within that case. Ms. Dahab stated that there would still be a claim and that the defendant can file a separate case, which can sometimes be consolidated, sometimes not, depending on the status of the case and the decision of the court. Mr. Goehler stated that, many times, this might take the form of a standalone indemnity or contribution claim.

Judge Peterson congratulated the committee on ferreting out so many possible permutations and sub-permutations of a change. Including the costs and benefits of a separate action and consolidation might be a good addition, but otherwise the document is a marvelous trip through history and a recount of what options might be available. Ms. Dahab thanked Ms. Johnson for combing through the Council's history, looking through every biennium on the website. Ms. Nilsson stated that a future goal is to better link all materials on each rule on the website so that research is easier.

Ms. Johnson stated that her research had found that, many years ago, the Oregon State Bar had a Practice and Procedure Committee (PPC) that sent out a pretty extensive survey to trial court judges. The PPC wrote an extensive memo after sending out the survey, and something like 73% of trial court judges at the time wanted to get rid of third-party practice. That number was pretty astonishing to her, and a strange concept to contemplate. As a result, there was some back and forth in the PPC about the rights of existing parties, and they suggested the language that is in proposal number 2 of Appendix G to help set some guardrails as to when trial courts should allow late third-party practice.

Mr. Goehler reiterated that his personal view had changed after reading through the materials. He had previously thought that a change to require either consent of the parties or leave of court would be advisable. However, reading through the history and discussion by former Council members, he thinks that the issue has been pretty well reviewed and compromises have been made, and he is currently leaning toward the view that no change is needed. Ms. Hopkins seconded this view. As a practitioner, she could only foresee problems if a change were made. She opined that the current rule works.

Judge Peterson recalled that, when he first became Executive Director of the Council, outgoing Executive Director Maury Holland was helping with his transition. A change to Rule 22 C was proposed and Mr. Holland had opined that it was a rock too heavy to lift. The suggestion did not get much traction at that time, but it has gotten traction since. While Judge Peterson does not think that the Council should publish draft amendments simply to have them consigned to the trash can of history, he noted that sometimes publishing a controversial draft amendment receives sufficient pushback that the issue does not get raised again for a while.

Mr. Joh asked for a refresher on the impetus for considering a change to the rule. Ms. Johnson recalled that it was one of Mr. Kekel's partners who raised the issue. Mr. Kekel agreed, and stated that not only people in his firm, but many people in the defense bar agree that they have run into issues with needing consent of the plaintiff as required in Rule 22 C. He thanked Ms. Johnson and Ms. Dahab for their work in putting the materials together, as well as Mr. Shin, who helped come up with various alternatives based on what some of the other states have done. He noted that Mr. Shin also has some opinions with respect to the rule and asked him to speak on those.

Mr. Shin stated that he agrees that there is a history and that the rule has been looked at a number of times. Part of his concern is that the rule should be looked at further in the context of some of the changes to the contributory versus comparative negligence scheme. Mr. Shin stated that many of times that the Council considered Rule 22 were prior to *Eclectic Inv., LLC v. Patterson* [357 Or 25 (2015)] and *Lasley v. Combined Transport* [351 Or 1 (2011)], which substantially changed how comparative fault claims are brought into a case and can be considered. In his opinion, the rule served a different purpose prior to that time. A third-party claim that was separately brought as an indemnity or a contribution claim prior to the comparative fault scheme as it stands today may have been acceptable, and one could either consolidate or not consolidate. He noted that, the last time this issue was considered, former Council member Jay Beattie had brought up the scenario of a defendant who is primarily at fault in a case but who does not have much money. A plaintiff could decide late in the case, after the 90-day period has passed, to dismiss this defendant. The remaining defendant would then have no way to bring a third-party claim and,

on the comparative fault verdict form, there would be no consideration of that now-dismissed party. Mr. Shin noted that this is a bit of a gaming situation that may be so far from reality that it is not an issue. However, he pointed out that there are certainly instances in complex cases where an additional defendant is discovered after 90 days and there is currently no way to bring them into the case unless the plaintiff agrees, and there are many circumstances where the plaintiff would not do so. He noted that no other jurisdiction has a similar rule. While there were historical reasons for it, given some of these counterbalances and pitfalls for defendants, he thinks that there is some reason to again consider it. He also mentioned that the committee has provided some alternatives that past Councils have not considered.

Judge Bloom stated that there are concerns from both the defense and the plaintiff perspective to making a change to Rule 22 C. There are also concerns from the court's perspective in wanting to keep control of dockets. He stated, however, that he thinks that those concerns should be left to the sound discretion of the trial court. He noted that there is no other rule like this that puts a stop on something because one party has not consented. He did not think that expanding the 90-day timeline would remedy the situation. In his opinion, it should still be handled by motion. In their response, the party opposed to the third-party practice can raise the reasons why the motion should not be granted. Judge Bloom noted that there may be substantial reasons, in some cases, to add a third party, and the party who wants to bring in that third party should be able to provide those reasons and it should be left to the court's discretion. The "gotcha" part of the rule, which no other jurisdiction has, seems wrong in light of the changes in comparative fault, and forcing people to file separate actions and argue about consolidation seems unnecessary. That issue can be addressed in the motion, and the courts can decide by balancing issues, like it always does. He opined that the hard and fast 90-day "gotcha" is inappropriate and is not serving the interest of justice in all cases.

Mr. Spooner stated that he is now somewhat removed from regular third-party practice but, from his experience in his defense practice, when there were multiple defendants in a case and he was representing a defendant that was pointing the finger at other defendants, he could and would file cross-claims for contribution indemnity. That would prevent a plaintiff from unilaterally settling and dismissing that person from the case and would still deal with division of liability as the case progresses. He stated that there were still times where, for a variety of reasons, he filed a separate action for contribution indemnity against a responsible party that was not known early on. He pointed out that, even if other defendants are known early on, a third-party complaint can be filed for contribution and indemnity. As far as the nature of the claims that he used to deal with, he did not see a need for a procedural change.

Ms. Johnson responded to Mr. Shin's comment about the rule not having been

considered prior to changes in the law regarding joint and several liability. She pointed out that a 2000 committee that included then-lawyer (and current Council member) Judge Bloom and lawyer William Gaylord specifically looked at the issue of how comparative fault and joint and several liability affected the rule. She stated that one possible change that was not included on the committee's list of possible changes is allowing a late addition by plaintiffs of parties who would be liable or responsible to them.

Mr. Joh stated that it seems like there are good arguments for leaving the rule in its current form. At the same time, he shared Judge Bloom's and Mr. Shin's concerns that, in the case of late-discovered tortfeasors, the 90-day limitation can serve to really constrain the discretion of the court in making sure that the case is fairly presented. It seems to him that, given those considerations, the second option presented by the committee is the least harmful proposal in terms of giving the court a valve for appropriate situations while also respecting the considered deliberation of former Council members.

Mr. Goehler stated that, in his practice, when he is outside of the 90-day time frame and he wants to add a third party, he usually picks up the telephone and talks with opposing counsel. He thinks that the rule in its current form promotes that. Most of the time, for a plaintiff that is looking for a monetary recovery, it is good to have additional pots of money, so bringing more people to the party is sometimes beneficial. Having to get consent drives the conversation and potentially leads to more collaboration, which is generally a good thing.

Ms. Dahab thanked the Council for the valuable discussion and perspectives. She stated that the committee would meet again with the aim of narrowing down the options, in the hope of a Council vote at the April meeting.

B. Jury Trials in FED Cases

Judge Peterson referred the Council to a memorandum he had written regarding the issue of jurors in forcible entry and detainer (FED) trials (Appendix H). He recalled that, during the last Council meeting, there did not seem to be a lot of momentum to amend Rule 56 B to include information regarding the number of jurors that should be impaneled in such cases. Based on the Council's input, Judge Peterson thought that this information might be better placed in a statute. He stated that he is a member of an OJD committee that is making recommendations on FED practice, including substantial changes to ORS Chapter 105. He noted that a change could be made to ORS 105.130, as proposed on page 3 of his memo, to make it clear that parties in an FED trial are entitled to a six-person jury.

Judge Peterson opined that it should be written down somewhere that there is a right to a jury trial in FED cases. He pointed out that there should be virtually no jury trials in these cases, as most of the cases would be taken away from the jury because there are

legal issues that do not go to a jury. Some cases also have equitable issues, but most eviction cases are decided basically on whether the tenancy has been terminated, and the judge is frequently going to decide that issue on undisputed facts. He stated that he does not anticipate an increase in jury trials if this statutory change were to be made.

Judge Peterson stated that people commonly think that a party has to demand a jury trial, when they are entitled to one, in the party's first pleading; however, in Oregon state court, that formal demand is not required. The advantage of his proposed statutory language would be that a party, typically a defendant, would need to make the demand for a jury known at the time the case is set for trial, rather than in an answer that comes later. Often, these cases will be assigned to a judge and receive a time and date of trial at that point, although every county probably does it differently. A demand for a jury after the trial is set would cause administrative issues in many courts.

Judge Oden-Orr pointed out that the ORCP do not talk about the right to a jury trial. Judge Peterson agreed that this is a substantive right and that one would expect to have the right to a jury trial on a claim at law but not on an equitable claim. That right goes back a long way. In certain cases, statutes can change that. Judge Oden-Orr and Ms. Dahab stated that they liked the idea of any change being in the statutes, and there was general agreement by the Council. Judge Peterson stated that he was glad that he had correctly interpreted the Council's sentiments at the last meeting. Mr. Goehler asked whether this is an issue for the Council to raise with the Legislature or perhaps a suggestion to make to the landlord-tenant section of the Bar. Judge Peterson noted that the Council does not need to make any recommendations, as the suggestion outlined in the memorandum has already gone to the OJD's general counsel. If approved, it will be part of the OJD's legislative package for changes to Chapter 105 of the ORS.

C. Recommendation to Legislature re: ORS 46.415

Judge Peterson noted that, as mentioned at the last Council meeting, if the Council wants to suggest to the Legislature an amendment to ORS 46.415 so that Rule 35 applies to small claims cases, it would be wise to ask the Bar to include this suggestion in its law improvement package. The suggestion that the Council made to the Legislature last biennium (Appendix I) was not picked up by the Legislature.

Mr. Goehler asked whether the Council would like to resubmit that proposal. Judge Peterson noted that the Bar has a deadline of April 1, 2026, for inclusions in its law improvement package. He pointed out that there is a fair amount of mischief that goes on in the small claims department and that someone was recently indicted for filing a large number of cases in that department that had no merit whatsoever.

Mr. Shields stated that he thought that, if the Bar included the suggestion in its law reform package, it would be likely to succeed. He noted that the Bar would probably

check with OJD just to make sure they do not want to make the suggestion themselves. He recalled that, last biennium, the suggestion did not make it in front of the Board of Governors (BOG) in time to be included in the Bar's package, and they did not find a bill to amend it into during the last long legislative session. He stated that, if the Council votes to approve the suggestion today, the Bar can get it on the calendar for the BOG meeting next month.

Judge Hill made a motion to ask the Bar to include the suggestion in its law reform package to the Legislature. Mr. Joh seconded the motion. The motion carried by voice vote with one opposing vote and one abstention.

D. Rule 37

Judge Peterson reminded the Council that the post-judgment discovery committee had considered inserting language into either Rule 36 or Rule 37. Although the committee had decided on Rule 36, Council staff had taken a look at Rule 37 and decided that it had some room for improvement in terms of style. At the last Council meeting, the Council agreed that staff could make a proposal for stylistic changes to the rule, and that proposal is contained in Appendix J. The intent is to make Rule 37 conform with the rest of Council's rules, including proper subparagraphs, parts, subparts, and lead lines. Ms. Nilsson suggested that the proposal be left on the agenda for the April meeting so that Council members can take a close look to ensure that the changes do not do any unintentional damage. The Council agreed that this is a good idea.

V. Adjournment

Mr. Goehler adjourned the meeting at 11:02 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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

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.

JUDGMENTS

RULE 67

A Definitions. "Judgment" as used in these rules has the meaning given that term in ORS 18.005. "Order" as used in these rules means any other determination by a court or judge that is intermediate in nature.

[***B Judgment for less than all claims or parties in action.*** *When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may render a limited judgment as to one or more but fewer than all of the claims or parties. A judge may render a limited judgment under this section only if the judge determines that there is no just reason for delay*.]

B Judgment for less than all claims or parties in action.

B(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may render a limited judgment as to one or more but fewer than all of the claims or parties. A judge may render a limited judgment under this section only if the judge determines that there is no just reason for delay.

B(2) The first paragraph of any form of judgment submitted by a party must recite any previous judgment entered in the action that has not been vacated and the date of entry of each such judgment. A supplemental judgment must recite only the date of entry of the general judgment and any judgement entered in the action thereafter.

C Relief granted. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

D Judgment in action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession of the

property, or for the value of the property in case a delivery cannot be had, and for damages for the detention of the property. If the property has been delivered to the plaintiff and the defendant claims a return of the property, judgment for the defendant may be for a return of the property, or the value of the property in case a return cannot be had, and damages for taking and withholding the property.

E Judgment in action against partnership, unincorporated association, or parties jointly indebted.

E(1) **Partnership and unincorporated association.** Judgment in an action against a partnership or unincorporated association that is sued in any name that it has assumed or by which it is known may be entered against that partnership or association and shall bind the joint property of all of the partners or associates.

E(2) **Joint obligations; effect of judgment.** In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all of those parties and a default, dismissal, or judgment in favor of or against less than all of those parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties.

F Judgment by stipulation.

F(1) **Availability of judgment by stipulation.** At any time after commencement of an action, a judgment may be given upon stipulation that a judgment for a specified amount or for a specific relief may be entered. The stipulation shall be by the party or parties against whom judgment is to be entered and the party or parties in whose favor judgment is to be entered. If the stipulation provides for attorney fees, costs, and disbursements, they may be entered as part of the judgment according to the stipulation.

F(2) **Filing; assent in open court.** The stipulation for judgment may be in a writing signed by the parties, their attorneys, or their authorized representatives. That writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a

proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G Judgment on portion of claim exceeding counterclaim. The court may direct entry of a limited judgment as to that portion of any claim that exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if the party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

PERSONS WHO MAY ADMINISTER

OATHS FOR DEPOSITIONS;

FOREIGN DEPOSITIONS

RULE 38

A Within Oregon.

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

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

B Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken:

B(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

B(2) before a person appointed or commissioned by the court in which the action is pending, and such a person [*shall*] **will** have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony; or

B(3) pursuant to a letter rogatory. A commission or letter rogatory [*shall*] **will** be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)."

Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

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

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.*] **States that has enacted the Uniform Interstate Depositions and Discovery Act.**

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

C(2)(a) To request issuance of a subpoena under this section, a party or attorney [*shall*] **must** 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*] **will** 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.

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

C(2)(c)(i) Conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55 A(1) but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; and

C(2)(c)(ii) 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.

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

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

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

C(6) **Uniformity of application and construction**. In applying and construing this section, consideration [*shall*] **will** be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it.

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*] **must** 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.

B(2)(b) **Procedure for disclosure**. The obligation to disclose under this subsection [*shall*] **must** 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*] **is not** 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*] **will** 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,*] **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. If a satisfactory undertaking securing the judgment has not been approved by the court, a judgment creditor or a successor in interest whose interest appears of record may obtain discovery as provided in these rules from any person, including the judgment debtor, for the purpose of collection or enforcement of the judgment.

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.

SUMMONS

RULE 7

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

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

C Contents, time for response, and required notices.

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

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

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

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

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

summons. The date so stated in the summons [*shall be*] **is** the date of the first publication.

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 **as required by the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules** 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 on the plaintiff. **Proof of service is a signed statement describing when and how the document was served as required by Rule 7 D of the Oregon Rules of Civil Procedure.**

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

www.oregonstatebar.org / (800) 452-7636

For more information you may find helpful in understanding this case, visit:

www.oregonlawhelp.org

C(3)(b) **Service for counterclaim or cross-claim**. A summons to join a party to respond to

a counterclaim or a cross-claim pursuant to Rule 22 D(1) [*shall*] **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" to protect your rights in this matter. To [*"appear"*] **appear** you must file with the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a cross-claim. [*The "motion," "reply," or "answer" must be given*] **You must give your motion, reply, 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, reply, or answer** must be in proper form **as required by the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules** and [*have*] **include** [*proof of service*] **"proof of service"** on the [*defendant's*] attorney **for the party that signed the summons** or, if [*the defendant*] **that party** does not have an attorney, proof of service on the [*defendant.*] **party that signed the summons. Proof of service is a signed statement describing when and how the document was served as required by Rule 7 D of the Oregon Rules of Civil Procedure.**

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

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For more information you may find helpful in understanding this case, visit:

www.oregonlawhelp.org

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C(3)(c) **Service on persons liable for attorney fees**. A summons to join a party pursuant to Rule 22 D(2) [*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 may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To [*"appear"*] **appear** you must file with the court a legal document called a "motion" or "reply." [*The "motion" or "reply" must be given*] **You must give your motion or reply** 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 reply** must be in proper form **as required by the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules** and [*have*] **include** [*proof of service*] **"proof of service"** on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant. **Proof of service is a signed statement describing when and how the document was served as required by Rule 7 D of the Oregon Rules of Civil Procedure.**

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

www.oregonstatebar.org / (800) 452-7636

For more information you may find helpful in understanding this case, visit:

www.oregonlawhelp.org

_____

D Manner of service.

D(1) **Notice required**. Summons [*shall*] **must** be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the

defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or on an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint on defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or service by publication.

D(2) **Service methods**.

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

D(2)(b) **Substituted service**. Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, [*shall*] **must** cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service [*shall be*] **is** complete on the mailing.

D(2)(c) **Office service**. If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, [*shall*] **must** cause to be

mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or any other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service [*shall be*] **is** complete on the mailing.

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

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

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

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

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

D(3)(a)(i) **Generally**. On an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made on an individual defendant or other person authorized

to receive service to whom neither subparagraph D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service [*shall be*] **is** complete on the date on which the defendant signs a receipt for the mailing.

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

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

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

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

D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint. Service [*shall be*] **is** complete on the latest date resulting from the application of subparagraph

D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

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

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

D(3)(b)(ii) **Alternatives**. True copies of the summons and the complaint may be served:

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

D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation;

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

D(3)(b)(ii)(D) on the Secretary of State in the manner provided in ORS 60.121 or 60.731.

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

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

D(3)(c)(ii) **Alternatives**. True copies of the summons and the complaint may be served:

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

D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company;

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

D(3)(c)(ii)(D) on the Secretary of State in the manner provided in ORS 63.121.

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

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

D(3)(d)(ii) **Alternatives**. True copies of the summons and the complaint may be served:

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

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

D(3)(d)(ii)(C) on the Secretary of State in the manner provided in ORS 70.040 or 70.045.

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

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

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

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

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

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

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

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated on the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be

operated on the defendant's behalf, by a method authorized by subsection D(3) of this rule except service by mail pursuant to subparagraph D(3)(a)(i) of this rule and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

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

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

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

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

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

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

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

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

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

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

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

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

D(6)(b) **Electronic alternative service**. Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or posting to a social media account. The affidavit or declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to accomplish service; the reason that plaintiff believes the defendant has recently sent and received transmissions from the specific e-mail address or telephone or facsimile number, or maintains an active social media account on the specific platform the plaintiff asks to use; and facts that indicate the intended recipient is likely to personally receive the electronic transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

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

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

D(6)(c) **Unknown heirs or persons**. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in Rule 20 I and J, the action will proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of the commencement of the action, and who are served by publication, will be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought against those defendants by name.

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

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

E **By whom served; compensation**. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and

is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260. However, service pursuant to subparagraph D(2)(d)(i), as well as the mailings specified in paragraphs D(2)(b) and D(2)(c) and part D(3)(a)(iv)(B) of this rule, may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons [*shall be*] **is** prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation [*shall be*] **is** part of disbursements and [*shall be*] **is** recovered as provided in Rule 68.

F **Return; proof of service**.

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

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

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

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

the circumstances of mailing and the return receipt, if any, [*shall*] **must** be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy**. If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate [*shall*] **must** state the circumstances of mailing and the return receipt, if any, [*shall*] **must** be attached.

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

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

_____

Affidavit of Publication

State of Oregon)

) ss.

County of)

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

Subscribed and sworn to before me this _____ day of _____, 2_____.

_____

Notary Public for Oregon

My commission expires

____ day of ____, 2____.

_____

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

_____

Declaration of Publication

State of Oregon)

) ss.

County of)

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

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

___ day of _____, 2____

_____

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

official seal, if any, of that person, [*shall be*] **is** prima facie evidence of authority to make and certify the affidavit.

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

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

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

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

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF GRANT

JOHN DOE, JANE DOE, MIKE ROE, ERIC ROE, Plaintiffs, v. JOHN SMITH AND ACME CORPORATION, Defendant	)	Case No. 99999xxxx SUMMONS

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the plaintiff will win automatically. To appear you must file with the court a legal document called a "motion" or "answer." 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. Your motion or answer must be in proper form as required by the Oregon Rules of Civil Procedure and the Uniform Trial Court Rules and include "proof of service" on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff. Proof of service is a signed statement describing when and how the document was served as required by Rule 7 of the Oregon Rules of Civil Procedure.

If you have questions, contact an attorney immediately. If you need help finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service:

www.oregonstatebar.org / (800) 452-7636

For more information you may find helpful in understanding this case, visit:

www.oregonlawhelp.org

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF GRANT

JOHN DOE, JANE DOE, MIKE ROE, ERIC ROE, Plaintiffs,	)	Case No. 99999xxxx
v.	)	SUMMONS
JOHN SMITH AND ACME CORPORATION, Defendant	)	

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SERVICE AND FILING OF PLEADINGS

AND OTHER DOCUMENTS

RULE 9

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

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

bring a party into contempt [*may be only on that party personally.*] **must be by personal service on that party.**

C Filing; proof of service.

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

C(2) **Proof of service by facsimile communication**. If service is made by facsimile communication under section F of this rule, proof of service [*shall*] **must** be made by affidavit or by declaration of the person making service, or by certificate of an [*attorney*] **attorney,** and the person making service [*shall*] **must** attach to the affidavit, declaration, or certificate printed confirmation of receipt of the message generated by the transmitting technology.

C(3) **Proof of service by e-mail**. If service is made by e-mail under section G of this rule, proof of service [*shall*] **must** be made by affidavit or by declaration of the person making service, or by certificate of an attorney, stating either that the other party has consented to service by e-mail or that [*he or she*] **the sender** received confirmation that the message and **any** attachment were received by the designated recipient and specifying the method by which the sender received confirmation. An automatically generated message indicating that the recipient is out of the office or is otherwise unavailable cannot support the required certification, nor can an automatically generated e-mail delivery status notification.

C(4) **Proof of service by electronic service**. If service is made by electronic service under section H of this rule, proof of service [*shall*] **must** be made by affidavit or by declaration of the person making service, or by certificate of an attorney, specifying that service was completed

by electronic service.

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

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

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

F Service by facsimile communication. Whenever under these rules service is required or permitted to be made on a party, and that party is represented by an attorney, the service may be made on the attorney by means of facsimile communication if the attorney has such technology available and said technology is operating at the time service is made. Service in

this manner [*shall be*] **is** subject to Rule 10 B. Facsimile communication includes: a telephonic facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via e-mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing e-mail account.

G Service by e-mail. Whenever under these rules service is required or permitted to be made on a party, unless the party or the party's attorney is exempted from service by e-mail by an order of the court, the service may be made by means of e-mail. Service is complete under this rule on confirmation of receipt of the e-mail or, if the receiving party has consented to service by e-mail, on transmission of the e-mail. Any party or any party's attorney must provide the name and e-mail address of that party or that attorney and that attorney's designee, if any, on any document served by e-mail. Any party or attorney who has communicated by e-mail or by electronic service must notify the other parties in writing of any changes to that party's or that attorney's e-mail address. Service in this manner [*shall be*] **is** subject to Rule 10 B.

H Service by electronic service. As used in these rules, "electronic service" means using an electronic filing system provided by the Oregon Judicial Department and in the manner prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court.

ORCP Rule 22 — Third-Party Practice – Summary of COCP History

Subcommittee members:
Lara Johnson
Nadia Dahab
Eric Kekel
Mike Shin
Hon. Benjamin Bloom

Oregon Rule of Civil Procedure 22 governs counterclaims, cross-claims, and third-party practice. Subsection C specifically addresses when and how a defending party may bring an additional party into an action—the process known as impleader or "third-party practice." The history of ORCP 22C reflects a persistent tension between two competing ideas: protecting plaintiffs and existing parties from prejudicial delay, on one hand, and ensuring that defendants have a fair opportunity to implead parties who may share liability, on the other. That tension has never been fully resolved, and the consent-of-parties requirement at the heart of the rule has ultimately survived several efforts to eliminate it.

Pre-1982: ORCP 22 Origins

ORCP 22 C and its predecessor statute, ORS 16.315, were modeled after Federal Rule of Civil Procedure 14(a). Third-party practice has been available in Oregon since 1975. Under the original rule, a defending party had ten (10) days after service of its original answer to file a third-party complaint as a matter of right, without obtaining leave of court. If that window closed, the defendant had to seek leave of court, with notice to all parties.

By the early 1980s, significant controversy had developed over whether third-party practice should be retained at all. Judges responding to a bar committee questionnaire were overwhelmingly in favor of abolishing it, citing delays, increased motion practice, discovery complications, and jury confusion. The practicing bar, by contrast, generally viewed it as an effective procedural device that facilitated settlement and avoided multiple trials. In 1981, the Council voted to abolish third-party practice entirely (a decision it later rescinded).

1982 Amendment

In May 1982, a deadlocked ORCP 22 C subcommittee referred the matter to the full Council, attaching a proposal from the OSB's Procedure and Practice Committee. That proposal recommended amending ORCP 22 C to address judicial concerns while preserving the mechanism. The key proposed changes included: requiring the third-party plaintiff to demonstrate "due diligence" in seeking late impleader; authorizing the court to refuse leave if the filing would substantially prejudice existing parties or unreasonably delay the trial; and allowing the court to impose terms and conditions on any leave granted.

At the Council's December 4, 1982 meeting, the Council adopted an amended version of Rule 22 C. Most significantly, the 10-day right-of-service window was replaced with a 90-day period running from service of the plaintiff's summons and complaint on the defending party. After 90 days, the rule required both (1) agreement of the parties who have appeared, and (2) leave of court. The version passed unanimously. A contemporaneous comment to the rule provided that within the 90-day window, third parties may be brought in as a matter of right; after 90 days, they may only be added by agreement of parties who have appeared and leave of court. This consent-plus-leave structure became the defining feature of ORCP 22 C(1) going forward.

1992 Challenge to Consent Requirement
The Council considered changes to ORCP 22 C in the 1991–1993 biennium, including whether to strike the consent-of-parties language added in 1982. The proposal was rejected. This was the first of a series of unsuccessful efforts to remove the consent requirement from the rule.

1993–1995 Challenge to Consent Requirement
At the May 14, 1994 meeting, the Council took up a proposal by member Rudy Lachenmeier to amend ORCP 22 C(1). His motion would have retained the leave-of-court requirement for post-90-day impleader but deleted the additional requirement of obtaining "agreement of parties who have appeared." A competing proposal discussed by the subcommittee would have eliminated both requirements and instead required only leave of court. After extensive debate, the Council voted on the motion to delete the agreement-of-parties requirement. The motion failed to carry.

The issue did not rest there within that biennium. Member John Hart later re-presented the same proposed amendment at the Council's December 10, 1994 meeting, with Executive Director Maury Holland also pressing for the change. No vote appears to have been taken at that meeting, and the amendment did not advance.

2000 Subcommittee Review of Consent Requirement
In the 1999–2000 biennium, the Council assigned a subcommittee (Judge Richard Barron, (now Judge) Benjamin Bloom, and Bill Gaylord) to revisit ORCP 22 C(1). Three issues were before the subcommittee: (1) whether the 90-day period should be shortened; (2) whether the conjunctive agreement-of-parties-plus-leave-of-court requirement should be changed; and (3) whether the rule should be clarified to allow impleading a party liable to the plaintiff but not to the defendant.

The subcommittee did not recommend changing the 90-day period. On the consent issue, its consensus was that the requirement that a defendant obtain both agreement of the parties who have appeared and leave of court should not be changed—specifically, that the court should not be able to allow the filing of a third-party complaint if the plaintiff opposed it after the 90-day window had run. Bill Gaylord, in a written submission, argued for retaining the consent structure on the grounds that when all existing parties agree to a late joinder, there is no need to burden the court with a leave motion at all. The Council took no final action to change the rule at this time.

2018 Review – Published Amendment; Fails Supermajority
The 2017–2019 biennium saw the most sustained challenge to the consent requirement. At that time, the Council published a proposed amendment to ORCP 22 C(1) that would have eliminated the requirement that all parties who have appeared consent to a post-90-day third-party filing. Under the published amendment, a defendant would need only leave of court, not the agreement of existing parties, to bring in a third-party defendant after 90 days.

Proponents argued that the existing consent requirement gives the plaintiff a unilateral veto over a legitimate procedural motion—something that does not exist anywhere else in the ORCPs—and that it improperly restricts the trial court's discretion. Defense-side members noted that, as a practical matter, it is often impossible to identify all relevant parties within 90 days, particularly in medical malpractice and complex multi-party cases. They further argued that changes to Oregon's tort law (including the elimination of joint and several liability under ORS 31.600) had fundamentally altered the strategic context since 1982.

Opponents countered that the rule reflects a deliberate historical compromise between the plaintiffs' bar and the defense bar—the defense secured an extended 90-day window in exchange for the consent requirement thereafter. They emphasized that late joinder prejudices plaintiffs by diluting verdict forms, complicating discovery, and threatening case timelines. They also noted that two prior attempts to remove the consent requirement (in 1992 and 1999) had failed.

At the December 8, 2018 meeting, the Council voted on whether to promulgate the published amendment. The motion received 11 votes in favor and 9 votes opposed. Because the Council requires a supermajority of affirmative votes to promulgate, the motion failed. The consent-of-parties requirement was retained.

Oregon Rule of Civil Procedure 22C(1). Third-party practice.

1. No Change

Change: None. The rule is retained as currently written.

Impact: The 90-day as-of-right window is preserved, and after that period a third-party plaintiff must obtain both the agreement of all appearing parties and leave of court. Plaintiffs retain an absolute veto over late third-party complaints.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court.

2. Consent with Judicial Override

Change: Retains the current conjunctive requirement of party agreement and court leave after the 90-day window, but adds an explicit judicial override. The court may grant leave over a party's objection only upon express findings on all three prongs: late discovery of the claim despite reasonable diligence, prompt filing after discovery, and no substantial prejudice to any appearing party or unreasonable delay to trial.

Impact: Preserves the plaintiff's practical ability to block late impleader in the ordinary case while eliminating the absolute veto that has been the central objection to the current rule. The narrow override addresses the concern — raised in the 2018 debate — that the 90-day window is insufficient in complex cases where the basis for third-party liability does not emerge until later in discovery. Because all three findings are required and must be express, circuit courts have a clear and reviewable standard, resolving the trial court split identified in current practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and

complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court. **Notwithstanding a party's objection, the court may grant leave only upon an express finding that: (a) the basis for the third-party claim could not have been discovered through reasonable diligence within the 90-day period; (b) the motion was filed promptly after the basis for the claim was or should have been discovered; and (c) granting leave will not substantially prejudice any appearing party or unreasonably delay the trial.**

3. Eliminate "Agreement of the Parties"

Change: Removes the requirement to obtain party agreement after the 90-day window; court leave alone is sufficient for a late third-party complaint.

Impact: Eliminates the plaintiff's unilateral veto over late impleader and gives courts sole discretion to permit or deny it. Aligns Oregon with the federal rule and most other states, which require only court leave after the initial as-of-right window.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court.

4. Either "Agreement" or "Leave of Court"

Change: Replaces the conjunctive requirement of both party agreement and court leave with a disjunctive requirement of either party agreement or court leave after the 90-day window.

Impact: Reduces the burden on the third-party plaintiff — party consent alone suffices (without a court motion), but the court can also override an objecting party.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared [*and*] **or** leave of court.

5. Similar to the Federal Rule

Change: Shortens the as-of-right window from 90 days to 14 days, and replaces all requirements after that period with a simple court-leave requirement by motion, eliminating party consent entirely.
Impact: Substantial departure from current Oregon practice; aligns the rule with FRCP 14. The shorter window ensures earlier judicial oversight but may disadvantage defendants who do not identify third-party claims within 14 days of answering.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than [*90 days after service of the plaintiff's summons and complaint on the defending party.*] **14 days after serving its original** answer. Otherwise the third-party plaintiff must [*obtain agreement of parties who have appeared and*] **, by motion, obtain leave of court before filing the third-party complaint**.

6. Extended Time Period

Change: Extends the as-of-right window (e.g., from 90 to 180 days) while retaining the current conjunctive requirement of both party agreement and court leave for late impleader.

Impact: Addresses the concern — raised at the 2018 Council meeting — that the 90-day window is insufficient in complex cases such as medical malpractice, while preserving the existing consent structure. Alternatives such as a trial-date-based trigger offer additional flexibility where no trial date has been set.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than [90] **180** days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court.

Possible alternatives:

- Shorter/longer period (e.g., 120/270 days)
- Deadline based on time before trial (e.g., 120 before the date set for trial)
- Matter of right until trial date set (e.g., [not later than 90 days after service of the plaintiff's summons and complaint on the defending party] any time before a trial date has been set)

7. Discovery Rule

Change: Replaces the fixed 90-day clock with a discovery-based trigger: the as-of-right period runs from when the third-party plaintiff discovers or reasonably should have discovered the substantial possibility of the third-party defendant's liability.

Impact: Addresses cases where the basis for third-party practice does not become apparent within 90 days of service. Introduces uncertainty about when the clock starts, which may itself generate litigation. The consent requirement after the discovery-based window is retained.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after [*service of the plaintiff's summons and complaint on the defending party*] **the third-party plaintiff discovers, or reasonably should have discovered, the substantial possibility of the third-party defendant's liability.**

Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court.

Possible alternatives:

- discovers, or in the exercise of reasonable care should have discovered, the substantial possibility of the third-party defendant's liability
- knew, or should have known the substantial possibility of the third-party defendant's liability

MEMO

To: Council on Court Procedures

From: Hon. Mark Peterson, Executive Director

Date: 3/11/26

Re: Jury Trials in FED Actions

There is confusion over the procedural handling of different kinds of FED actions and that confusion becomes clear in the creation of some FED forms, e.g., the summons. ORS 105.130 specifies how FED actions are to be conducted but that statute is an incomplete statement. Personal jurisdiction is conferred in all FED actions by service of the summons utilizing the unique procedures set out in ORS 195.135. The great majority of FED cases involve residential tenancies under chapter 90 and are subject to continued summary procedures as specified in ORS 105.137. However, after the first appearance, that summary path to trial is reserved for cases involving chapter 90 tenancies and an incomplete sample of non-chapter 90 cases. Indeed, ORS 105.130(1) provides that (excepting ORS 105.135, 105.137, and 105.140 to 105.161) actions "pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state." Instead of an ORCP 7 summons, the more summary service of the summons and first appearance procedures in ORS 105.135 apply to all FED actions. However, the summary trial scheduling common to FED cases as specified in ORS 105.137 applies only "[i]n the case of a dwelling unit to which chapter 90 applies." Well, those summary trial procedures also apply to a few other enumerated kinds of FED cases. See, ORS 105.130(6). So, post-foreclosure cases get fast tracked into ORS 105.137. So does the new "squatter" remedy. But other cases that we routinely move to trial within 15 days of the first appearance are not mentioned as subject to ORS 105.137. For example, an employee whose housing is conditioned on employment can have his or her occupancy terminated with a 24-hour notice per ORS 91.120, and it makes no sense to then place such cases on a track where trial may be a year into the future. If someone parks their RV on private property without permission, no notice to quit is required (ORS 105.115(1)(c)), but there is no statutory door-opener to scheduling trial any sooner than any other civil action.

If the ACCJ is recommending amendments to chapter 105 to remove the FED forms embedded in the statute, as if they were carved in granite, it makes sense to include an

COCP Meeting Packet
March 14, 2026
Attachment H-1

amendment to ORS 105.130 to provide statutory authority for the cases that we routinely fast track to trial to in fact be subject to those summary trial procedures. There remains a class of FED actions that are truly "commercial" evictions, not to mention agricultural evictions, where the traditional 30 days to respond to a summons is appropriate and where the issues are complex and significant resources will be applied to robust discovery. These are a small minority of FED cases but there is no statutory authority to require an answer to the complaint on the day of the first appearance and to force a trial within 15 days of that first appearance. (If the defendant is attempting to delay justice, a rule 47 motion will move the case to a conclusion.)

While we are at it, there is occasional confusion over whether a jury is available in FED trials and if so, how many jurors. We know trial by jury is available, but can anyone find legal authority for how many jurors? When Oregon had district courts, where FED cases were filed, a six-person jury was available. Since the bulk of chapter 46 was repealed in 1995, some authority for the number of jurors appears to have been missing for more than 30 years. ORCP 56 B could be amended to provide authority for six-person juries in FED cases, but the Council on Court Procedures appears to be disinclined to amend Rule 56 this biennium. Further, when must the jury demand be made? Sometimes a party, usually a defendant, will file a demand for a trial by jury after the trial has been set. Even if the jury demand is included in the answer filed on the day of the first appearance, judicial resources have already been allocated for a bench trial. It is not unreasonable to require that either party demand a jury at the time that the trial is scheduled. See proposed new paragraph (7) of ORS 195.130.

The proposed amendments:

105.130 How action conducted; fees. (1) Except as provided in this section and ORS 105.135, 105.137 and 105.140 to 105.161, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

(2) Upon filing a complaint in the case of a dwelling unit to which ORS chapter 90 applies, the clerk shall:

(a) Collect a filing fee of $88;

(b) Collect any other fee authorized by law or ordinance; and

(c) With the assistance of the plaintiff or an agent of the plaintiff, complete the applicable summons and provide to the plaintiff or an agent of the plaintiff sufficient copies of the summons and complaint for service.

(3) The court shall collect a filing fee of $88 from a defendant that demands a trial under this section.

(4) An action pursuant to ORS 105.110 shall be brought in the name of a person entitled to possession as plaintiff. The plaintiff may appear in person or through an attorney. In an action to which ORS chapter 90 applies, the plaintiff may also appear through a nonattorney who is an agent or employee of the plaintiff or an agent or employee of an agent of the plaintiff.

(5) Notwithstanding ORS 9.160, 9.320 and ORS chapter 180, a state agency may appear in an action brought pursuant to ORS 105.110 through an officer or employee of the agency if:

(a) The Attorney General consents to the representation of the agency by an officer or employee in the particular action or in the class of actions that includes the particular action; and

(b) The agency, by rule, authorizes an officer or employee to appear on its behalf in the particular type of action being conducted.

(6) An action brought under ORS 105.110 by a person entitled to possession of premises on the basis of circumstances described in **ORS 90.110(1),(2),(3),(4),(5),(6) and(7) or** ORS 105.115 (1)**(c),**)(d), (e), (f)**,(g)** or (h) is subject to the filing fees and other court or sheriff fees applicable to an action concerning a dwelling unit that is subject to ORS chapter 90. The procedure under ORS 105.100 to 105.168 that is applicable to an action concerning a dwelling unit subject to ORS chapter 90 shall also apply to an action brought under **ORS 90.110(1),(2),(3),(4),(5),(6), and (7) or** ORS 105.115 (1)**(c).**(d), (e), (f)**,(g)** or (h), except that the complaint must be in the form prescribed in ORS 105.126.

(7) In an action brought under ORS 105.110 by a person entitled to possession of premises, either party may elect a trial by a 6-person jury. The demand for a trial by jury must be made at the first appearance or at the first instance when the action is set for trial.

RECOMMENDATIONS

to the

OREGON LEGISLATURE

from the

COUNCIL ON COURT PROCEDURES

for amendments to the

OREGON REVISED STATUTES

December 14, 2024

COCP Meeting Packet
March 14, 2026
Attachment I-1

INTRODUCTION

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

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

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

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

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

Table of Contents

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

D R A F T

SUMMARY

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

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

A BILL FOR AN ACT

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

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

SECTION 1. ORS 45.400 is amended to read:

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

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

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

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

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

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

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

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

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

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

(E) Any other circumstances that constitute good cause.

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

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

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

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

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

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

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

counsel, parties and the witness.

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

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

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

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

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

(8) As used in this section:

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

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

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

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

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

SECTION 2. ORS 107.717 is amended to read:

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

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

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

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

SECTION 3. ORS 163.770 is amended to read:

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

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

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

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

hearings held by telephone under ORS 163.765.

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

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

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

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

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

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

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

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

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

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

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

PERPETUATION OF TESTIMONY OR EVIDENCE

BEFORE ACTION OR PENDING APPEAL

RULE 37

[*A Before action.*

A(1) ***Petition***.] **A Before Action.** 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.*]

A(1) Contents of Petition. The petition must be entitled in the name of the petitioner

and must show:

A(1)(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, that would be the subject of such action;

A(1)(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 that is connected with the subject matter of the expected action;

A(1)(c) the facts that petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate;

A(1)(d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as one is known;

A(1)(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 that petitioner expects to elicit and obtain from each; and,

A(1)(f) a request for an order:

A(1)(f)(i) authorizing the petitioner to take the depositions of the parties to be examined for the purpose of perpetuating their testimony; or

A(1)(f)(ii) allowing discovery under Rule 43 or Rule 44 from the persons from whom discovery is sought for the purpose of preserving evidence.

A(2) **Notice and service**. The petitioner [*shall*] **must** thereafter serve a notice [*upon*] **on** 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*] **must** be served either within or

without the state in the manner provided for service of summons in Rule **7.** [*7, but if*] **If** such service cannot with due diligence be made [*upon*] **on** 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*] **otherwise. The court must** appoint, for persons not served with summons in the manner provided in Rule 7, an attorney [*who shall*] **to** represent [*them and*] **them,** whose services [*shall*] **must** be paid for by petitioner in an amount fixed by the court, [*and, in case they are not otherwise represented, shall*] **to** cross examine the deponent. Testimony and evidence perpetuated under this rule [*shall*] **will** 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*] **discovery may be had in accordance with these rules on the court's order, which must:**

A(3)(a) designate or describe the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions [*shall*] **will** be taken [*upon*] **on** oral examination or written questions; [*or shall make an order designating or describing*]

A(3)(b) designate or describe the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or [*shall make an order*]

A(3)(c) set [*for*] a physical or mental examination as provided in Rule 44.

A(4) Applicable discovery 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*] **will** 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*] **on** 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.*]

B(1) Contents of motion. The motion must show:

B(1)(a) 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

B(1)(b) the reasons for perpetuating their testimony or seeking such other discovery.

B(2) Order of the court. 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 A(3) of this rule. 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 Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

D 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.