2022 PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

To receive full consideration by the Council, written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure should be received by the Council no later than the close of business on December 2, 2022. Written comments may be sent by mail or by e-mail to:

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

Council on Court Procedures
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The Council meeting at which the Council will consider written comments and receive oral comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 10, 2022 — ZOOM MEETING:

https://us02web.zoom.us/j/85876809199?pwd=cG96b2FPMElMQjkvek03djNSY2JRdz09
Teleconference option: 1-253-215-8782
Meeting ID: 858 7680 9199
Passcode: 026350

The Council will take final action on the proposed amendments at its December 10, 2022, meeting.

2022 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

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SUMMONS

RULE 7

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

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

C Contents, time for response, and required notices.

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

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

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

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

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

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

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

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

_____

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

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

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

D Manner of service.

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

D(2) **Service methods.**

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

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

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

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

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

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

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

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

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

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

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

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

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

agent receives mail for the tenant, provided that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Return; proof of service.

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

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

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

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

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

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

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

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

_____

Affidavit of Publication

State of Oregon)

) ss.

County of)

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

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

_____

Notary Public for Oregon

My commission expires

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

_____

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

_____

Declaration of Publication

State of Oregon)

) ss.

County of)

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

_____

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

_____

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

affidavit.

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

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

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

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

VEXATIOUS LITIGANTS

RULE 35

A Definitions.

A(1) For purposes of this rule, "vexatious litigant" includes:

A(1)(a) A person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, relitigates, or attempts to relitigate, either:

A(1)(a)(i) The validity of the decision against the same party or parties who prevailed in the litigation; or

A(1)(a)(ii) The cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final decision against the same party or parties who prevailed in the litigation;

A(1)(b) A person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary expense or delay; or

A(1)(c) A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transaction, or occurrence.

A(2) For purposes of this rule, an action is deemed to be "finally decided" or to have reached a "final decision" after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed.

A(3) For purposes of this rule, "pre-filing order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

A(4) For purposes of this rule, "security" means an undertaking by a vexatious litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

B Issuance of pre-filing order. The court in any judicial district may, on its own motion or on the petition of any interested person, initiate an expedited administrative process to determine whether to enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that district without first obtaining leave of the presiding judge, as follows:

B(1) If the litigant meets the definition in paragraph A(1)(c) of this rule, then the process is limited to judicial notice of the existence of a prior state or federal court order designating the litigant to be vexatious.

B(2) If the litigant appears to meet the definition in paragraph A(1)(a) or paragraph A(1)(b) of this rule, then the process must include notice to the litigant and an opportunity for the litigant to be heard at an expedited hearing on the question of whether the litigant meets the definition. At the hearing, the presiding judge will consider the factors listed in subsection D(1) of this rule to determine whether the pre-filing order is just and proper. If the court concludes that the litigant is a vexatious litigant, the court will identify its reason or reasons in the pre-filing order.

B(3) On entry, a copy of the pre-filing order, signed by the presiding judge, will be sent by the court to the person designated to be a vexatious litigant at the last known address listed in court records, and to the opposing parties, if any, in any pending litigation in which the litigant is a party. Disobedience of such an order may be punished as a contempt of court.

B(4) A determination made by the presiding judge is not admissible on the merits of any subsequent action filed by the vexatious litigant, nor deemed to be a decision in any subsequent action that the vexatious litigant receives permission to file under section C of this rule.

C Applications to commence new actions. A vexatious litigant's request to commence a new action or claim may be made by an ex parte application accompanied by an affidavit or a declaration and must include as an exhibit a copy of the complaint or other case-initiating

document that the litigant proposes to file. Applications are not subject to a filing fee.

C(1) The application for leave to file the action will only be granted on a showing that the proposed action or claim is not frivolous and is not for the purpose of unnecessary expense or delay, or harassment. A determination made by the presiding judge is not admissible on the merits of the action, nor deemed to be a decision in any issue in the action.

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

C(3) If the application for leave to file the action is allowed, whether by the presiding judge or an appellate court, then the applicant must submit the complaint or other case-initiating document to the court anew with the appropriate filing fee. The filing date of the complaint or other case-initiating document relates back to the filing of the application requesting leave to file.

C(4) The pre-filing order granting or denying the application must be in writing, signed by the presiding judge.

D Designation and security hearing. In any case pending in any court of this state, including small claims cases, a litigant may move the court for an order to recognize an opposing party as a vexatious litigant and to require the posting of security. At the hearing on the motion, the court may consider any written or oral evidence that may be relevant to the motion, whether given by witness, affidavit, declaration, or through judicial notice.

D(1) Determining whether a litigant is vexatious. To determine whether a litigant is vexatious, the court may consider:

D(1)(a) the litigant's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;

D(1)(b) the litigant's motive in pursuing the litigation;

D(1)(c) whether the litigant is represented by counsel;

D(1)(d) whether the litigant has caused unnecessary expense to opposing parties or

placed a needless burden on the courts;

D(1)(e) whether other sanctions would be adequate to protect the courts and other parties; and

D(1)(f) any other considerations that are relevant to the circumstances of the litigation.

D(2) If, after considering all of the evidence, the court determines that the litigant is vexatious and not reasonably likely to prevail on the merits against the moving party, then the court must enter an order designating the litigant to be vexatious and requiring the posting of security in an amount and within such time as the court deems appropriate. A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

E Failure to deposit security; judgment of dismissal. If the vexatious litigant fails to post security in the time required by an order of the court under subsection C(2) or subsection D(2) of this rule, the court will promptly issue a judgment dismissing the action or claim as to any party for whose benefit the security was ordered.

F Motion for hearing stays pleading or response deadline. If a motion for an order to designate a vexatious litigant and to deposit security is filed in an action:

F(1) If the motion is denied, the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within 10 days after service of the order that rules on the motion, whichever period may be longer, unless the court directs otherwise; or

F(2) If the motion is granted, the moving party must plead or otherwise respond within the time remaining for response to the original pleading or within 10 days after the required security has been deposited, whichever period may be longer, unless the court directs otherwise.

G Cases filed without leave of the presiding judge. A vexatious litigant may not file any new action or claim unless the vexatious litigant has obtained an order granting leave to file

the action or claim from the presiding judge. If the vexatious litigant files an action or claim without obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the vexatious litigant is subject to a pre-filing order. The notice must be served on all parties who have been served or who have appeared in the action or claim. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim within 10 days after the filing of such a notice unless the vexatious litigant files an application for leave to file under subsection C(1) of this rule. If the presiding judge issues an order granting leave to file, then the vexatious litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading or within 10 days after the date of service of that order, whichever period may be longer, unless the court directs otherwise. If the presiding judge issues an order denying the application for leave to file, then the case filed without leave will be promptly dismissed.

DEPOSITIONS [*UPON*] ON ORAL EXAMINATION

RULE 39

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

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

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

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

C Notice of examination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C(7) Deposition by remote means.

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

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

D Examination; record; oath; objections.

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

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

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

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

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

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

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

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

E Motion for court assistance; expenses.

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

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

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

F Submission to witness; changes; statement.

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

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

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

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

G Certification; filing; exhibits; copies.

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

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

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

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

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

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

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

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

I Perpetuation of testimony after commencement of action.

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

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

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

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

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

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

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

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

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

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

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

SUBPOENA

RULE 55

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

A(1) Form and contents.

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

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

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

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

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

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

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

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

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

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

A(1)(a)(vi)(A) that the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a

right not to testify;

A(1)(a)(vi)(B) that compliance with a subpoena is mandatory unless a judge orders otherwise, and

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

A(1)(a)(vii) A motion to quash must be included with the subpoena in substantially the following form:

_____

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

	)	
	)	**Case No. _____**
(Case Caption to be Inserted	)	**MOTION AND DECLARATION**
by Party Issuing Subpoena)	)	**TO QUASH SUBPOENA**
	)	

MOTION

The subpoenaed witness whose signature appears below respectfully asks this court to issue an order quashing the subpoena received on this date: _____ for the reasons given in the DECLARATION included below. (Attach a copy of your subpoena.) Before filing this motion, I tried to resolve this issue by contacting the attorney (or person) who sent the subpoena. The dates, times, and methods of outreach that I tried are:

_____

(If no reasonable effort was made to resolve the issue before filing, the motion will be denied.)

DECLARATION

The subpoena creates an unjustifiable burden or violates a right not to testify because: (subpoenaed witness MUST fill in a specific explanation here.)_____

_____.

I declare that the statements above are true and are intended to be used as evidence in court, under penalty of perjury. I understand that making a motion that is not supported by facts and law may result in a judgment against me for any attorney fees paid to oppose my motion.

DATED:_____ **SIGNATURE:**_____

PRINTED NAME(S):_____

ADDRESS:_____

PHONE NUMBER:_____ **EMAIL ADDRESS:**_____

[Court Name and Address to be Inserted by Party Issuing Subpoena]

NOTICE: IF YOU FILE THIS MOTION WITH THE COURT, YOU MUST ALSO GIVE A COPY OF THE FILED MOTION TO THE PERSON WHO INITIATED THE SUBPOENA.

_____

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

A(3) Who may issue.

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

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

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

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

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

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

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

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

A(6) Recipient obligations.

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

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

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

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is

required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one

day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

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

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

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

court orders less time;

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

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

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

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

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

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

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

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

D(4) Conditions on service of subpoena.

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

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

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

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

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

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

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

_____

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil

Procedure 55 D(8) is insufficient for this subpoena.

_____

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

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

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

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

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

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

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

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

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

subpoena on the custodian or keeper of the records.

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

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

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

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

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

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

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

responsive to the subpoena; and

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

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

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

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

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

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

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

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

JURORS

RULE 57

A Challenging compliance with selection procedures.

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

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

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

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

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

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

D Challenges.

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

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

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

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

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

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

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

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

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

separately or jointly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Alternate jurors.

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

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

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

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

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

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

OREGON COUNCIL ON COURT PROCEDURES
DRAFT RECOMMENDATION REGARDING ORCP 57 D(1) – FOR-CAUSE CHALLENGES

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

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

However, because the Council is made up of both plaintiffs' and defense lawyers, as well as judges from around the state, the Oregon Supreme Court, and the Oregon Court of Appeals, the Council makes these recommendations to assist the legislature.

The Council does not include attorneys who practice criminal law, though, and there are strong implications for criminal litigants, as well as other interest groups, in any amendment to ORCP 57 D. With that in mind, in the 2021-2023 biennium, the Council put together a workgroup comprised of the representatives listed below, including members of the criminal defense bar and other stakeholder groups:

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

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

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

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

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

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

If a party believes that the other party has made a "peremptory challenge" for a discriminatory reason, that party may object to the challenge. The current rule has a presumption that challenges are non-discriminatory. That presumption is not consistent with current research or caselaw regarding what are called *Batson*[1] challenges, and these recommendations recognize that. Current research and caselaw, instead, recognizes that facially neutral reasons may be pretext for discrimination or unconsciously discriminatory. This amendment recognizes that every party making a peremptory challenge should already be examining whether bias may play a part in the desire to exclude the juror, or whether they believe there is a legitimate reason for the exclusion. While this is an important change, its importance largely lies in conforming with current caselaw and research.

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

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

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

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

Many interest groups requested that the protected characteristics under ORCP 57D(4) be expanded. Oregon's Public Accommodation Law, ORS 659A.403 reflects these additional protections, and these amendments expand ORCP 57D(4) to protect "race, color, religion, sex,

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

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

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

[4] *Id.*

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

sexual orientation, gender identity, or national origin," reflecting the statutory protections other than marital status and age.

One of the purposes of allowing parties or the court to exclude jurors from service is to prevent litigants from being harmed by a juror's unfair bias. Current research shows, however, that bias on the part of the parties or the court may perpetuate unlawful discrimination through the process of jury selection, even where the person perpetuating the bias may be unaware of the bias.

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

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

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

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

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

The Council recommends amendment of ORCP 57D as shown in the attached draft.

TRIAL PROCEDURE

RULE 58

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F Testimony by Remote Means

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

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

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

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

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

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

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

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

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

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

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

C Motion for order of default.

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

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

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

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

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

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

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

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

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

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

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

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

D Motion for judgment by default.

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

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

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

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

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

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

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

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

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

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

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

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