2016 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.

Written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail or by e-mail to:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Executive Assistant

Council on Court Procedures
c/o Lewis and Clark Law School
10015 SW Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu
www.counciloncourtprocedures.org

The Council meeting at which the Council will 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 3, 2016 — Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 3, 2016, meeting.

2016 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

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SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS
RULE 9

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

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

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

C(1) Proof of service by facsimile communication. If service is made by facsimile communication [*or by e-mail,*] **under section F of this rule,** proof of service shall be made by affidavit or by declaration of the person making service, or by certificate of an attorney [*or sheriff*. *If service is made by facsimile communication under section F of this rule,*] **and** the person making service shall attach to the affidavit, declaration, or certificate printed confirmation of receipt of the message generated by the transmitting technology.

C(2) Proof of service by e-mail. If service is made by e-mail under section G of this rule, [*the person making service must certify*] **proof of service shall be made by affidavit or by declaration of the person making service, or by certificate of an attorney, stating either that the other party has consented to service by e-mail or** that he or she received confirmation that the message **and attachment** [*was*] **were** received[, *either by return e-mail, automatically generated message, facsimile communication, or orally; however, an*] **by the designated recipient and specifying the method by which the sender received confirmation. An** automatically generated message indicating that the recipient is out of the office or is otherwise unavailable cannot support the required certification**, nor can an automatically generated e-mail delivery status notification. Service by e-mail is effective at the time of receipt of the message and any attachment by the designated recipient**.

C(3) Proof of service by electronic service. If service is made by electronic service under section H of this rule, proof of service shall be made by affidavit or by declaration of the person making service, or by certificate of an attorney, specifying that service was completed by electronic service.

C(4) Proof of service on a party without a service address. Service on a party who has appeared without providing an appropriate address for service shall be by affidavit or by declaration of the person filing the document, or by certificate of an attorney, that service by filing as provided in section B of this rule is appropriate.

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

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

F Service by facsimile communication. Whenever under these rules service is required or permitted to be made [*upon*] **on** a party, and that party is represented by an attorney, the service may be made [*upon*] **on** the attorney by means of facsimile communication if the attorney has such technology available and said technology is operating at the time service is made. Service in this manner shall be subject to Rule 10 [*C*]**B**. Facsimile communication

includes: a telephonic facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via e-mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing e-mail account.

G Service by e-mail. [*Service by e-mail is prohibited unless attorneys agree in writing to e-mail service.*] **Whenever under these rules service is required or permitted to be made on a party, unless the party or the party's attorney is exempted from service by e-mail by an order of the court, the service may be made by means of e-mail. Service is complete under this rule on confirmation of receipt of the email or, if the receiving party has consented to service by email, on transmission of the email.** [*This agreement*] **Any party or any party's attorney** must provide the [*names*] **name** and e-mail [*addresses*] **address** of [*all attorneys*] **that party or that attorney** and [*the attorneys' designees,*] **that attorney's designee,** if any, [*to be*] **on any document** served **by e-mail**. Any **party or** attorney who has [*consented to*] **communicated by** e-mail **or by electronic** service must notify the other parties in writing of any changes to [*the*] **that party or that** attorney's e-mail address. [*Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. Subject to Rule 10 C, service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or is otherwise unavailable.*] **Service in this manner shall be subject to Rule 10 B.**

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

COUNTERCLAIMS, CROSS-CLAIMS, AND [*THIRD PARTY*] THIRD-PARTY CLAIMS
RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as [*such*] **that** defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in [*such*] **that** defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action**,** and shall be[: *(a)*] one arising out of the occurrence or transaction set forth in the complaint[*;*] or [*(b)*] related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served [*upon*] **on** the parties who have appeared.

C [*Third party*] Third-party practice.

C(1) After commencement of the action, a defending party, as a [*third party*] **third-party** plaintiff, may cause a summons and complaint to be served [*upon*] **on** a person not a party to the action who is or may be liable to the [*third party*] **third-party** plaintiff for all or part of the plaintiff's claim against the [*third party*] **third-party** plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the [*third party*] **third-party** plaintiff must obtain agreement of parties who have appeared and leave of court. The person served with the summons and [*third party*] **third-party** complaint, hereinafter called the [*third party*] **third-party** defendant, shall assert any defenses to the [*third party*] **third-party** plaintiff's claim as provided in Rule 21 and may assert counterclaims against the [*third party*] **third-party** plaintiff and cross-claims against other [*third party*] **third-party** defendants as provided in this rule. The [*third party*] **third-party** defendant may assert against the plaintiff any defenses [*which*] **that** the [*third party*] **third-party** plaintiff has to the plaintiff's claim. The [*third party*] **third-party** defendant may also assert any claim

against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the [*third party*] **third-party** plaintiff. [*The plaintiff*] **Any party** may assert any claim against [*the third party*] **a third-party** defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the [*third party*] **third-party** plaintiff, and the [*third party*] **third-party** defendant thereupon shall assert the [*third party*] **third-party** defendant's defenses as provided in Rule 21 and may assert the [*third party*] **third-party** defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the [*third party*] **third-party** claim, or for its severance or separate trial. A [*third party*] **third-party defendant** may proceed under this section against any person not a party to the action who is or may be liable to the [*third party*] **third-party** defendant for all or part of the claim made in the action against the [*third party*] **third-party** defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a [*third party*] **third-party defendant** to be brought in under circumstances [*which*] **that** would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of [*Rules 28 and 29*] **Rule 28 and Rule 29**.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. [*Upon*] **On the** motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or [*third party*] **third-party** claim so alleged if to do so would[*: (1) be more convenient; (2) avoid prejudice; or (3)*] **be more convenient, avoid prejudice, or** be more economical and expedite the matter.

MINOR OR INCAPACITATED PARTIES
RULE 27

A Appearance of parties by guardian or conservator. When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought. The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B Appointment of guardian ad litem for minors; incapacitated or financially incapable parties. When a minor or a person who is incapacitated or financially incapable, as defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons; or

B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor, or other interested person;

B(3) when the plaintiff or petitioner is a person who is incapacitated or financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; **or**

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons or, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a

person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or financially incapable, as defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsections F(2) or F(3) of this rule.

E Notice of motion seeking appointment of guardian ad litem. Unless waived under Section H of this rule, no later than 7 days after filing the motion for appointment of a guardian ad litem, the person filing the motion must provide notice as set forth in this section, or as provided in a modification of the notice requirements as set forth in Section H of this rule. Notice shall be provided by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of notice prescribed in Section F of this rule.

E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the motion; and, if the minor has no living parents, to any person nominated to act as a fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

E(2) If the party is 18 years of age or older, notice shall be given:

E(2)(a) to the person;

E(2)(b) to the spouse, parents, and adult children of the person;

E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

E(2)(d) to any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

E(2)(e) to any person who has been nominated as fiduciary or appointed to act as

fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

E(2)(f) if the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the person;

E(2)(g) if the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a representative of the Department;

E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a representative of the Authority;

E(2)(i) if the person is committed to the legal and physical custody of the Department of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

E(2)(k) to any other person that the court requires.

F Contents of notice. The notice shall contain:

F(1) the name, address, and telephone number of the person making the motion, and the relationship of the person making the motion to the person for whom a guardian ad litem is sought;

F(2) a statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 14 days from the date of the notice; and

F(3) a statement indicating that the person for whom the guardian ad litem is sought may object in writing to the clerk of the court in which the matter is pending and stating the desire to object.

G Hearing. As soon as practical after any objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make any order that is appropriate.

H Waiver or modification of notice. For good cause shown, the court may waive notice entirely or make any other order regarding notice that is just and proper in the circumstances.

I Settlement. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of any settlement must be sought and obtained by a conservator unless the court, for good cause shown and on any terms that the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

GENERAL PROVISIONS GOVERNING DISCOVERY
RULE 36 (Version 1)

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

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

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

B(2) Insurance agreements or policies.

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

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

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

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

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

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

B(3) Trial preparation materials.

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

B(3)(ii) Prior statements. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. [*Upon*] **On** request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is [*(a)*] **either:** a written statement signed or otherwise adopted or approved by the person making it[*,*]**;** or [*(b)*] a stenographic, mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure.

C(1) Relief available; grounds for limitation. [*Upon*] **On** motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order [*which*] **that** justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: [*(1)*] that the discovery not be had; [*(2)*] that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [*(3)*] that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [*(4)*] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; [*(5)*] that discovery be conducted with no one present except persons designated by the court; [*(6)*] that a deposition after being sealed be opened only by order of the court; [*(7)*] that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; [*(8)*] that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or [*(9)*] that to prevent hardship the party

requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery. **In deciding what constitutes an undue burden, the court shall consider, among other things, the proportionality of the request for production to the needs of the case including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.**

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

GENERAL PROVISIONS GOVERNING DISCOVERY
RULE 36 (Version 2)

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

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

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

B(2) Insurance agreements or policies.

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

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

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

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

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

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

B(3) Trial preparation materials.

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

B(3)(ii) Prior statements. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. [*Upon*] **On** request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is [*(a)*] **either:** a written statement signed or otherwise adopted or approved by the person making it[*,*]**;** or [*(b)*] a stenographic, mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure.

C(1) Relief available; grounds for limitation. [*Upon*] **On** motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order [*which*] **that** justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: [*(1)*] that the discovery not be had; [*(2)*] that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [*(3)*] that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [*(4)*] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; [*(5)*] that discovery be conducted with no one present except persons designated by the court; [*(6)*] that a deposition after being sealed be opened only by order of the court; [*(7)*] that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; [*(8)*] that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or [*(9)*] that to prevent hardship the party

requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery. **In deciding what constitutes an undue burden, the court may consider, among other things, the proportionality of the request for production to the needs of the case including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.**

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

GENERAL PROVISIONS GOVERNING DISCOVERY
RULE 36 (Version 3)

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

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

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

B(2) Insurance agreements or policies.

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

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

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

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

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

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

B(3) Trial preparation materials.

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

B(3)(ii) Prior statements. A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. [*Upon*] **On** request, a person who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion. For purposes of this subsection, a statement previously made is [*(a)*] **either:** a written statement signed or otherwise adopted or approved by the person making it[*,*]**;** or [*(b)*] a stenographic, mechanical, electrical, or other recording, or a transcription [*thereof, which*] **that** is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C Court order limiting extent of disclosure.

C(1) Relief available; grounds for limitation. [*Upon*] **On** motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order [*which*] **that** justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: [*(1)*] that the discovery not be had; [*(2)*] that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [*(3)*] that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [*(4)*] that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; [*(5)*] that discovery be conducted with no one present except persons designated by the court; [*(6)*] that a deposition after being sealed be opened only by order of the court; [*(7)*] that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; [*(8)*] that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or [*(9)*] that to prevent hardship the party

requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery. **In deciding what constitutes an undue burden, the court may consider, among other things, the proportionality of the request for production to the needs of the case including the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the burden or cost of producing the information.**

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

PRODUCTION OF DOCUMENTS AND THINGS AND [*ENTRY UPON LAND*] ENTERING PROPERTY FOR INSPECTION AND OTHER PURPOSES
RULE 43

A Scope. Any party may serve on any other party [*a request: (1)*] **any of the following requests:**

A(1) Documents or things. A request to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy any designated documents (including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices or software into reasonably usable form) or to inspect and copy, test, or sample any tangible things [*which*] **that** constitute or contain matters within the scope of Rule 36 B and [*which*] **that** are in the possession, custody, or control of the party [*upon*] **on** whom the request is served; [*or (2)*]

A(2) Entering property. A request to enter [*to permit entry upon designated*] land or other property in the possession or control of the party [*upon*] **on** whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B Procedure.

B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property [*upon*] **on** which entry is requested, and shall specify a reasonable place and manner for the inspection, copying, entry, and related acts.

B(2) **Time for response.** A request shall not require a defendant to produce or allow inspection, copying, entry, or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or **to which** the parties may agree [*upon*] in writing, a party shall serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, [*which items*] **and that the items are or** shall be organized and labeled to correspond with the categories in the request;

B(2)(b)[*as to*] **a statement that, except as specifically objected to, a reasonable effort has been made to obtain** any requested item not in the party's possession or custody, [*a statement that reasonable effort has been made to obtain it, unless specifically objected to,*] or that no such item is within the party's control;

B(2)(c) [*as to*] **a statement that, except as specifically objected to, entry will be permitted as requested to** any land or other property[*, a statement that entry will be permitted as requested unless specifically objected to*]; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to [*which*] **that** comes into the party's possession, custody, or control.

B(5) **Seeking relief under Rule 46 A(2).** A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so within a reasonable time.

C Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter [*upon*] land.

E Electronically stored information ("ESI").

E(1) Form in which ESI is to be produced. A request for [*electronically stored information*] **ESI** may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

E(2) Meetings to resolve issues regarding ESI production; relevance to discovery motions. In any action in which a request for production of ESI is anticipated, any party may

request one or more meetings to confer about ESI production in that action. No meeting may be requested until all of the parties have appeared or have provided written notice of intent to file an appearance pursuant to Rule 69 B(1). The court may also require that the parties meet to confer about ESI production. Within 21 days of the request for a meeting, the parties must meet and confer about the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues pertaining to metadata; and any other issue a requesting or producing party deems relevant to the request for ESI. Failure to comply in good faith with this subsection shall be considered by a court when ruling on any motion to compel or motion for a protective order related to ESI. The requirements in this subsection are in addition to any other duty to confer created by any other rule.

REQUESTS FOR ADMISSION
RULE 45

A Request for admission. After commencement of an action, a party may serve [*upon*] **on** any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served [*upon*] **on** the plaintiff after commencement of the action and [*upon*] **on** any other party with or after service of the summons and complaint [*upon*] **on** that party. The request for admissions shall be preceded by the following statement printed in capital letters [*of the type size*] **in a font size at least as large as that** in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."

B Response. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves [*upon*] **on** the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint [*upon such*] **on that** defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C, deny the matter or set forth reasons why the party cannot admit or deny it.

C Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the

motion.

D Effect of admission. Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be [*subserved thereby*] **furthered** and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice [*such*] **that** party in maintaining [*such*] **that** party's case or [*such*] **that** party's defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending action only, and neither constitutes an admission by [*such*] **that** party for any other purpose nor may be used against [*such*] **that** party in any other action.

E Form of response. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably calculated to enable the answering party to insert the admissions, denials, or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials, or objections and refer to them in the space provided in the request.

F Number.

F(1) Generally. Excluding requests identified in subsection F(2) of this rule, a [*A*] party may serve more than one set of requested admissions [*upon*] **on** an adverse party[*,*] but the total number of requests shall not exceed 30, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined, or arranged.

F(2) Requests related to admissibility of business records. Notwithstanding subsection F(1) of this rule, and in addition to any requests made under that subsection, a party may serve a reasonable number of additional requests for admission to establish the authenticity and admissibility of documents under Rule 803(6) of the Oregon Evidence Code.

SUMMARY JUDGMENT
RULE 47

A For claimant. A party seeking to recover [*upon a claim, counterclaim, or cross-claim*] **on any type of claim** or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor [*upon*] **as to** all or any part [*thereof*] **of any claim or defense**.

B For defending party. A party against whom [*a claim, counterclaim, or cross-claim*] **any type of claim** is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part [*thereof*] **of any claim or defense**.

C Motion and proceedings thereon. The motion and all supporting documents [*shall*] **must** be served and filed at least 60 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits or declarations and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The court shall grant the motion if the pleadings, depositions, affidavits, declarations**,** and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based [*upon*] **on** the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit or a declaration under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D Form of affidavits and declarations; defense required. Except as provided by section E of this rule, supporting and opposing affidavits and declarations [*shall*] **must** be made on personal knowledge, [*shall*] **must** set forth such facts as would be admissible in evidence, and [*shall*] **must** show affirmatively that the affiant or declarant is competent to testify to the matters stated therein. Sworn or certified copies of all [*papers*] **documents** or parts thereof referred to in an affidavit or a declaration [*shall*] **must** be attached thereto or served therewith. The court may permit affidavits or declarations to be supplemented or opposed by depositions or further affidavits or declarations. When a motion for summary judgment is made and supported as provided in this rule**,** an adverse party may not rest [*upon*] **on** the mere allegations or denials of that party's pleading[*, but*]**; rather,** the adverse party's response, by affidavits, declarations**,** or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, the court shall grant the motion**,** if appropriate.

E Affidavit or declaration of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed**,** qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact[*,*] will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit or declaration [*shall*] **must** be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney**,** who is available and willing to testify**,** and who has actually rendered an opinion or provided facts [*which*] **that**, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment.

F When affidavits or declarations are unavailable. Should it appear from the affidavits or declarations of a party opposing the motion that [*such*] **the** party cannot, for reasons stated, present by affidavit or declaration facts essential to justify the opposition of that party, the court may deny the motion or may order a continuance to permit affidavits or declarations to be obtained or depositions to be taken or discovery to be had, or may make [*such*] **any** other order as is just.

G Affidavits or declarations made in bad faith. Should it appear to the satisfaction of the court at any time that [*any of the affidavits or declarations*] **an affidavit or declaration** presented [*pursuant to*] **under** this rule [*are*] **was** presented in bad faith or solely for the purpose of delay, the court shall [*forthwith*] order the party [*employing them*] **filing the affidavit or declaration** to pay to the other party the amount of the reasonable expenses [*which*] **that** the filing of the [*affidavits or declarations*] **affidavit or declaration** caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be subject to sanctions for contempt.

H Multiple parties or claims; limited judgment. If the court grants summary judgment for [*less*] **fewer** than all parties [*and*] **or fewer than all** claims **or defenses** in an action, a limited judgment may be entered if the court makes the determination required by Rule 67 B.

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 under subsection (1) of this section 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 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 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 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 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 more than one person at a time from the bystanders, or from the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall 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 be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Challenges for cause; grounds. 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 satisfies the court that the challenged person is incapable of performing the duties 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 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 which the court shall exclude such 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 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 exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall 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 not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall 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 be confined, in that party's proper turn, to such 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 be construed to increase the number of peremptory challenges allowed.

D(4) Challenge of peremptory challenge exercised on basis of race, ethnicity, or sex.

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, or sex. 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, the 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.

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.

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.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall 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 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 any other rule or statute, each party is entitled to: [*(a)*] one peremptory challenge if one or two alternate jurors are to be empanelled; [*(b)*] two peremptory challenges if three or four alternate jurors are to be empanelled; and [*(c)*] three peremptory challenges if five or six alternate jurors are to be empanelled. The court shall 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 be drawn in the same manner; shall have the same qualifications; shall be subject to the same examination and challenge rules; shall take the same oath; and shall 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 not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors shall 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 be instructed to begin deliberations anew.