N O T I C E

TO: ALL MEMBERS, COUNCIL ON COURT PROCEDURES
NEWS MEDIA
OREGON STATE BAR BULLETIN

3/9/78

FROM: COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON LAW CENTER
EUGENE, OREGON

The next meeting of the Council on Court Procedures will be held in the Courtroom of The Honorable William M. Dale, Room 318, Multnomah County Courthouse, Portland, Oregon, on Saturday, April 1, 1978, commencing at 9:30 A.M. At that time, the Council will discuss and consider various suggested revisions to the Oregon pleading, practice and procedure rules.

FRM:gh

AGENDA

COUNCIL ON COURT PROCEDURES

APRIL 1, 1978

JUDGE DALE'S COURTROOM

PORTLAND, OREGON

1. Reports of subcommittees
2. Discovery of experts
3. Interrogatories
4. Pleading
   a. Draft of rules
   b. Rule 15(c), Relation back of amendments
5. Dismissals and directed verdicts
6. New business

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of April 1, 1978

Multnomah County Courthouse, Portland, OR

Present:	E. Richard Bodyfelt	Laird Kirkpatrick
	Anthony L. Casciato	Berkeley Lent
	John M. Copenhaver	Donald W. McEwen
	Alan F. Davis	Charles P. A. Paulson
	Ross G. Davis	Val D. Sloper
	James O. Garrett	William W. Wells
	Wendell E. Gronso	
Absent:	Darst B. Atherly	Harriet Meadow Krauss
	Sidney A. Brockley	James B. O'Hanlon
	William M. Dale, Jr.	Gene C. Rose
	Lee Johnson	Roger B. Todd
	Garr M. King	Wendell H. Tompkins

Chairman Don McEwen called the meeting to order at 9:35 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse. The minutes of the last meeting were approved as submitted.

The Executive Director reported that a draft of discovery rules was being submitted to the discovery subcommittee. Judge Sloper reported that the process subcommittee would meet again it received a draft of proposed process rules.

The Council again discussed the procedure in voting on rules. It was agreed that all decisions being made were tentative and that a proposed draft of the final rules, incorporating all tentative decisions, would be prepared in September and the public and members of the Bar would be notified of the contents of those proposed rules, and copies would be made available.

The Council discussed the proposed rule relating to discovery of information held by experts which was previously submitted by Dick Bodyfelt. Questions were raised about the necessity of such a rule, whether the procedure was mandatory or permissive, and whether people would delay in deciding on expert witnesses until just before trial. It was indicated that the proposed rule covered only experts to be called at trial and was necessary for preparation for adequate cross examination of such experts; the rule as drafted allows a party to either secure reports or take a deposition of the trial expert but does not require any discovery

If a party does not seek a report or a deposition and requires payment of expenses by the discovering party which would discourage frivolous discovery; and, upon request, a party would have to reveal and allow discovery of all experts at least 30 days before trial unless there was some unusual situation requiring the late selection of an expert. The Council then voted to adopt a rule that would cover discovery of trial experts. Don McEwen, Laird Kirkpatrick, Dick Bodyfelt, Judge Wells, Justice Lent, Judge Sloper and Judge Davis voted in favor of the proposal. Dick Bodyfelt and the Executive Director were asked to submit a final draft of language for the rule.

The Council discussed interrogatories. It was first proposed that the Council adopt unlimited interrogatories. This proposal failed, with Don McEwen and Justice Lent voting in favor of the proposal. The Council next considered whether a rule allowing a limited number of interrogatories, with some language defining what constitutes an interrogatory, should be adopted. The Council voted in favor of this proposal, with Justice Lent, Judge Sloper, Judge Wells, Dick Bodyfelt, Jim Garrett, Don McEwen, Laird Kirkpatrick, and Judge Davis voting in favor of the proposal. The Executive Director was asked to submit a suggested rule containing limiting language.

The Council then discussed adoption of Federal Rule 15(c), relation back of amendments. The Council voted unanimously to adopt Rule 15(c) as previously submitted.

The Council then discussed whether a new rule governing dismissals and non-suits should be adopted. It was proposed that the Council adopt a rule that made any involuntary dismissal during a jury or non-jury trial, based upon insufficiency of evidence, a dismissal with prejudice unless the trial judge "for good cause" indicated that the dismissal was to be without prejudice. The proposal passed, with Charles Paulson voting against the proposal.

The Council then discussed the draft of pleading rules submitted by the Executive Director. Council members made the following suggestions:

1. That a reply only be mandatory to a counterclaim or when ordered by a court, but a reply be allowed if a party wished to file one. If a party chose not to file a reply, affirmative allegations in the answer would be taken as denied.

2. That proposed Rules C(2), C(3) and C(4) be deleted and left to local court rules.

3. That proposed Rule D(4), relating to notice of appearance, be eliminated.

4. That a party be required to indicate, on any pleading asserting a claim, whether the party considered the claim to be one to be tried before a jury or the court.

5. That the provision for separate statements of claims and defenses conform to the existing rules in Oregon.

6. That the word, "specify", in the ninth line of Rule H(1) be changed to "admit".

7. That, if possible, "poor workmanship" be included as a specifically listed affirmative defense under Rule H(2).

8. That the Executive Director check whether a "private statute" existed in Oregon and, if not, that I(3) be eliminated.

9. That Rule I(6) be eliminated.

10. That Rule I(7) relating to pleading capacity be eliminated and that the pleading rules for capacity be left to case law.

The Executive Director indicated that he would revise the proposed rules to conform to Council suggestions and asked the pleading subcommittee to study the revised rules carefully and recommend further changes and report a final set of proposed pleading rules to the Council for action by the Council.

The Chairman announced that the next meeting of the Council would be held at 9:30 a.m. on Saturday, May 6, 1978, in Judge Dale's Courtroom.

The meeting was adjourned at 12:35 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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DISCOVERY

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OREGON RULES OF CIVIL PROCEDURE

DISCOVERY

INTRODUCTION

With the exception of interrogatories, Oregon has adopted much of the federal discovery rules. The Oregon assimilation of the federal discovery rules began in 1955 and continued through the last Legislature. This piecemeal adoption has resulted in:

(a) Minor language differences and some missing background provisions because each rule was being treated as a separate unit.

(b) Duplication and confusing provisions relating to scope of discovery, control of abuse and sanctions.

(c) Failure to adopt changes in the federal rules as they occurred; all the federal discovery rules were substantially reorganized in 1970, and only part of this revision was picked up by the 1977 Oregon Legislature.

(d) No logical organization.

The draft seeks to reorganize the existing statutes into a set of rules in logical sequence with appropriate cross-references and background provisions. Since the Oregon statutes come from the federal rules, the sequence used is that of the federal rules. When language differences existed, an attempt was made to choose the best rule, with some deference to recent legislative enactment.

Each provision was compared with a number of other state rules having the federal rules of discovery. In addition, changes recommended in the Report of the Special Committee for the Study of Abuse, Section on Litigation, American Bar Association, October 1977

(hereinafter referred to as the ABA Committee), was examined, and if the changes advocated by that committee were desirable, they were incorporated into these rules.

The most difficult problems presented for the Council are interrogatories and discovery of experts. These are treated in separate memoranda.

There also is a problem presented by some of the statutes in the discovery area that refer to the admissibility of the fruits of discovery in evidence. Statutes that relate to the discovery process but have an incidental effect on the rules of evidence are incorporated into these rules, but statutes which are true rules of evidence, that is, relate purely to the admissibility of the fruits of discovery, will have to be retained as they are beyond the rule-making power of this Council.

The numbering system used for these rules is temporary, and the rules would be renumbered when incorporated into the general Oregon rules.

101 **GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; ~~written interrogatories~~; 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. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(if adopted "written interrogatories")

(If interrogatories rule limits use, this would be modified)

Comment:

This does not appear in the Oregon statutes. Taken from Federal Rule 26(a).

101 **(b) Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

Comment:

Not in present Oregon statutes. Introduction to 26(b).

101

(1) In General.

~~41.635 Scope of discovery.~~ For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ~~suit~~ or proceeding, whether it relates 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 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.

Comment:

This is identical to existing ORS 41.635 with the reference to "suit" removed. The wording of Federal Rule 26(b)(1) is slightly different in the first few words (parties may obtain discovery regarding any matter....). The ABA Committee recommended the following changes in this section:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~subject matter involved in the pending action, whether it relates to the~~ *issues raised by the* ~~claim or defense~~ *claims or defenses* of ~~the~~ *any* party. ~~seeking discovery or to the claim or defense of any other party, including~~ *The discovery may include* 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; *and the oral testimony of witnesses.* It is not 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.

* * *

Committee Comments

The changes proposed in this Rule are the most significant revisions suggested by the Committee.

Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy. Nonetheless, the Committee recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery.

The Committee determined to narrow the scope of permissible discovery. It concluded that sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case (existing Rule 26 language) rather than limiting it to the "issues" presented. For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the "subject matter" of an action, even though only specified industry practices raise the "issues" in the case. The Committee believes that discovery should be limited to the specific practices or acts that are in issue.

> With respect to the question of defining the "issues" presented, the Committee believes that the parties should be able to agree upon their definition, but if agreement cannot be reached, recourse can be had to the discovery conference provided for in proposed Rule 26(c).
>
> Although the Committee has retained intact the language of the last sentence of present Rule 26(b), it intends that the rubric "admissible evidence" contained in that sentence be limited by the new relevancy which emerges from the term "issues," rather than from the more comprehensive term "subject matter."
>
> The other linguistic changes proposed in Rule 26 are designed for stylistic reasons alone.

These changes were not incorporated for several reasons. The definition of "scope" in the Oregon statute was adopted after serious consideration by the last Legislature. It seems inappropriate to modify it without a strong indication of need for such modification in Oregon practice. Secondly, as indirectly recognized in the ABA comment, the language chosen will create more problems than it solves. Under the language suggested by the ABA Committee, any court which wishes to "err" on the side of expansive discovery will continue to do so, as the "issues" presented and "relevant to the subject matter" are not capable of a precise interpretation. Under the suggested ABA language, the parties would simply end up with a new area for argument and no substantial gain. The ABA Committee rationale for the change is unimpressive. The only concrete

example given is of limited application and could as easily be controlled by saying the "subject matter of an action" relating to specific industry practices does not include the entire business and industry. Finally, the ABA Committee appears to basically feel that expansive discovery is a bad thing. This is contrary to the entire philosophy of the federal rules and the Oregon statutes in practice. There is nothing basically wrong with broad discovery. Abusive and useless discovery is wrong, but this is better controlled either by limiting the discovery devices or court control under the general protective provisions of the discovery rule.

101(b)(2)

Insurance agreements.

(a) In a civil action, a party, upon the request of an adverse party, shall disclose 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 may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) The obligation to disclose under this section 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 section as provided in ~~ORS 41.621~~ Section (c) of this rule.

(c) Information concerning the insurance agreement or policy is not by reason of disclosure under this section admissible in evidence at trial.

(d) As used in this section, "disclose" means to afford the adverse party an opportunity to inspect or copy the insurance agreement or policy. For purposes of this section, an application for insurance shall not be treated as part of an insurance policy agreement. *

Comment:

This is ORS 41.622. This statute was adopted by the 1977 Legislature. In substance, it is identical to Federal Rule 26(b)(2), although the language is slightly different, and (b)(a)(b) and the first sentence of (b)(2)(b) does not appear in the federal rule. This language apparently limits the form of disclosure to production and inspection areas. The federal rules allow discovery of insurance agreements by any means.

The last sentence of (b)(2)(d) is the last sentence of Federal Rule 26(b)(2) but did not appear in ORS 41.622. It seems to be reasonable clarifying language.

Rule (b)(2)(c) is arguably a rule of evidence but seems to bear more directly on the discovery process. The insurance agreement is no more or less admissible; what the rule says is this procedure is not a waiver.

(b)(3) Trial preparation materials. Subject to the provisions of Rule 110 (and subsection (b)(4) of this rule)

A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (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 his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he 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.

Rule 112 (a)(4)

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person 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 may move for a court order. The provisions of Rule ~~37(a)(4)~~ apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) 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 is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Comment:

The first paragraph of this is based on ORS 41.616(4). It is identical to Federal Rule 26(b)(3) except for the first clause in the first sentence. The language difference appears to be insubstantial, and the federal language was used.

The federal rule also subjects this provision to the limitations on expert discovery in subdivision (b)(4) of the federal rule. If an Oregon rule is adopted relating to discovery from experts, equivalent language will be required in this rule. Reference to the rule relating to the exchange of medical reports does not appear in Rule 26(b)(3), but generally the specific provisions relating to medical examinations of parties override trial preparation limits, and this should be specifically covered.

The second paragraph does not appear in the present Oregon rules, but does appear in the federal rule. This is a reasonable exception for a party's own statements and gives a witness access to the witness' own statements. The Federal

Rules Advisory Committee comment on this subparagraph is as follows:

> *Party's Right to Own Statement.*—An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. * * *
>
> Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. * * *
>
> *Witness' Right to Own Statement.*—A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

(4) Trial preparation; experts. (SEE SEPARATE MEMO).

(c) **Court order limiting extent of disclosure; expenses and attorney fees.** (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party or a witness upon whom a request for any type of discovery has been made 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 trade secret or other confidential research, development or commercial

information not be disclosed or be disclosed only in a designated way;

(7) That the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court; or

(8) 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.

(9) 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 provide or permit discovery. The provisions of ~~subsection (3)~~ of this section apply to the award of expenses incurred in relation to the motion.

→ Rule 112(a)(4)

Comment:

This is the first two sections of ORS 41.631. Due to a codification error, there are two separate general provisions relating to limiting abuse of discovery, ORS 41.618 and 41.631. Apparently, the Oregon State Bar Committee proposing the new request for production statute and the new admissions statute was afraid that both might not pass the Legislature, and each bill contained a very similar control of abuse provision based on Federal Rule 26(c). Both bills did pass the Legislature, and the almost identical protective order provisions were codified as separate statutes.

The two statutes and Federal Rule 26(c) have two main areas of difference. The federal rule provides that the person from whom discovery is sought, as well as a party, can move for a protective order. ORS 41.618 allows only a party to seek protection for his or her own interests. ORS 41.631, which is

the language used, allows a party to move for protection both for the party's own interest and for the witness' protection. It is possible this difference was simply inadvertent, and perhaps the Council could consider using the federal language to allow a witness to make a motion for a protective order. Secondly, the reference to expense awards differs between the federal rules and the three statutes. The federal rule scheme simply makes reference to the expense award provisions of a general sanction rule. The net effect of the two Oregon statutes is the same since these rules will have a general sanctions rule similar to that of the federal rules; the federal rule approach was used.

> **(d) Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Comment:

This is presently not covered by the Oregon statutes. It seems to be one of the background provisons that inadvertently was never included in the Oregon statutes. It is potentially important because it was included in the federal rules to eliminate the elaborate priorities rules for discovery. There are no priority cases in Oregon, and this provision would avoid development of a "race of diligence" with parties engaging in elaborate schemes to achieve discovery priority. If interrogatories are adopted and limited in use, this rule may have to be modified to make a specific provision for limits on interrogatories.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Comment:

This is part of Rule 26(d) of the federal rules. There is no present Oregon statute relating to supplementation duty, although this is always a potential problem with any discovery.

The supplementation duty in the recommended rule is fairly limited and specific. The inclusion of subpart (b) depends upon the Council's decision relating to expert discovery. The federal rules contain a more general supplementation duty in addition to that in the recommended Oregon rule as follows:

> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

This was not included in the recommended Oregon rule because some of the distinctions are extremely unclear, e.g., when is a failure to supplement a knowing concealment? The duty imposed also seems to be extremely burdensome although interrogatories present the most difficulty. The Advisory Committee recommending this rule so recognized:

"Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. * * * On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information * * *"

RULE 102

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) Petition. A person who desires to perpetuate their testimony or to obtain discovery under Rule 109 or Rule 110 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petitioner, or petitioner's agent, shall verify that the petitioner believes that the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or his personal representatives, heirs, beneficiaries, sucessors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the

persons petitioner expects will be adverse parties and their addresses so far as is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each, and shall ask for an order authorizing the petitioner to take the deposition of the person to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 109 or Rule 110 from the persons named in the petition.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state and within the time and in the manner provided for service of summons in Rules _____ (rules relating to personal or substituted service), but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rules _____ (personal or substituted service), an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected

expected adverse party is a minor or incompetent, the provisions of Rule ____ (guardian ad litem rule) apply.

(3) Order and Examination. If the court is satisifed that the perpetuation of the testimony or other discovery may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 109 and specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 110. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

(b) Pending Appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 109 or Rule 110 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action

was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in paragraph (3) of section (a) of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

(c) Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(d) Filing of depositions. Depositions taken under this rule shall be filed with the court in which the petition is filed or the motion is made.

(e) Costs. The party taking any deposition or engaging in any discovery under this rule shall pay the costs thereof and of all proceedings hereunder unless otherwise ordered by the court.

COMMENT:

This rule covers depositions to perpetuate testimony before a case is filed. The existing Oregon statutes in this area are ORS 45.410 to 45.470. These statutes were the original Oregon deposition statutes providing both for depositions before a case is filed and during the pendency of the case. Use of these statutes after a case has been filed has been superseded by the provisions of ORS 45.151 to 45.280 which adopted the federal rules deposition procedure. This new rule would cover the situation before a case is filed and completely replace the original statutes.

The rule in most respects would not change the existing perpetuation deposition procedure. It is generally based on Federal Rule 27 and the federal rule structure was used because it is more specific as to procedure, covers depositions pending appeal and also makes provision for perpetuation of evidence by production and inspection and medical examination where this is necessary.

Rule 27, however, is one of the federal rules which is heavily modified by the states. The rule was amended in 1948 to include the possibility of production, inspection and medical examinations prior to filing the case, but the amendment was passed in an awkward form because most of the rule continues to make reference to "testimony". See 8 Wright and Miller, Federal Practice and Procedure, § 2074. Vermont and Alabama have

refined the language of the rule to avoid this and generally the language used by those states was followed. There is also a Uniform Perpetuation of Testimony Act, promulgated by the National Conference of Commissioners on State Laws in 1959. The Act is generally modeled on Rule 27, but is specifically designed to take care of the situation where a testator seeks to perpetuate evidence of mental capacity and this language was incorporated. In one case, existing language from the Oregon statutes was also retained.

(a)(1) It is clear from the language and the interpretation of the rule that it can only be used to perpetuate testimony and preserve evidence in a situation where a party cannot bring an action or force the action to be brought. It is not then a true discovery device and cannot be used to fish for information necessary to file the case. Even with the possibility of production and inspection and medical examinations, "discovery" can only be used upon specific indication of the facts to be secured and a good reason why they must be obtained prior to filing the case. The production and inspection and medical examination possibilities would be new to Oregon. An example close to home, illustrating the need for such a procedure, is Martin v. Reynolds Metal Company, 297 F.2d 49 (1961), where a company was being threatened with a suit for fluoride emission injuring cattle and land but the action had not been filed. The company secured permission to go on the prospective plaintiff's land to inspect cattle claimed injured because the landowner frequently disposed of cattle and, without the production and inspection order, the company would not have had

access to evidence necessary to defend itself.

The present Oregon statute refers to either the Supreme Court or any circuit court granting the order. The procedure seems inappropriate for the Supreme Court and the rule specifies the proper circuit court. In accordance with the federal rule, verification is required for this form of petition.

The types of controversy where this rule can be used, in subsection (a) of (a)(1), are based upon section (1)(a) of the Uniform Act and ORS 45.420(1). The requirement for attaching a written copy of an instrument is also from the Uniform Act. The Commissioners' Comment on this is as follows:

> "This section follows section (a)(1) of Rule 27 of the Federal Rules of Civil Procedure except for additional language in subsections (a) and (b) of this act. Subsection (a) would permit the petitioner to anticipate an action after his death or after he had assigned his interest in the subject matter. It would, for instance, permit a testator to perpetuate testimony relating to his mental capacity to execute a will and to the circumstances surrounding its execution. The same would be true with respect to the execution of any other kind of written instrument. But subsection (b) would require the petitioner to attach a copy of the instrument to the petition. In the case of a will it is perfectly obvious that unless the contents of the will were revealed the heirs and beneficiaries would have no way of knowing the nature of their interest and would be completely in the dark as to whether they should be proponents or contestants. To give them notice so that they might have the right to cross examine the witnesses whose depositions are to be taken would be an empty gesture indeed if they were not given an opportunity to know in what manner their interests were affected by the will."

The federal rule says the petitioner must allege that he cannot bring an action or "cause it to be brought". This was changed to "defend it" to more clearly cover prospective defendants. The change is suggested by the Uniform Rule.

ORS 41.420 requires a statement that the testimony of a witness is material to the prospective action. The rule is slightly more flexible in requiring only a statement of the reasons for desiring to perpetuate.

(2) Existing ORS 45.430 gives the judge the discretion to use publication if the expected party is outside the state. This is of doubtful validity. This rule requires actual notice, but allows publication where the expected party cannot be given actual notice, provided that an attorney is appointed to look after the interests of such person. The rule varies from the federal rule by specifying that the petitioner shall pay for counsel for a party served by publication.

(3) When the order is granted, the procedure followed for the deposition, production and inspection and medical examination is that specified in the rules appropriate to those procedures. This replaces the entirely separate specification of procedures for a perpetuation of testimony in the existing Oregon statutes. This provision of the rule varies slightly from Federal Rule 27(a)(3) in that it makes clear that an order for production, inspection or medical examination to perpetuate may be given without being coupled with an order for a deposition.

(4) The federal rule has a subdivision (4) relating to use of depositions at trial, as does ORS 45.450. This probably would classify as a rule of evidence and is not included in the rule and will have to be retained as a statute. We perhaps could recommend to the Legislature that it be combined with ORS 45.250-280, which are the general use of deposition statutes and are more clearly drafted.

(b) The possibility of a deposition pending appeal should be available. The rule as drafted is almost identical to Rule 27(b).

(c) This is based on Rule 27(c).

(d) This is not covered by the federal rule, but ORS 45.440 provides for filing of the deposition. The Oregon statute, however, requires filing in the county where the deposition is taken along with a copy of most of the file from the county where the order was issued. This seems like a wasteful procedure, and the suggested rule simply specifies filing in the court where the order was granted as part of that proceeding. The language was taken from the Uniform Rule.

(e) This is not included in either the federal rule or the Oregon statutes but is included in the Uniform Act and is a reasonable provision.

RULE 103

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

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

(b) Outside the State. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of his appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority

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

(c) Disqualification for Interest. No oath shall be administered to initiate a deposition by a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or who is financially interested in the action, except for a deposition taken by non-stenographic means under Rule 105(c)(4), where the oath may be administered by an attorney or counsel of any of the parties or an employee of such attorney or counsel.

(d) Foreign Depositions.

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

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

COMMENT:

This rule is roughly based on Federal Rule 28 adapted to fit state practice. Maine, Rhode Island and Vermont have essentially similar adaptions of this rule and were used as models. As discussed under the specific sections, some modifications were made to conform to the possibility of non-stenographic depositions under the oral examination rule.

For depositions within the state, the rule provides that anyone authorized to administer oaths may do so for purposes of the deposition. This is consistent with existing Oregon law under ORS 45.161. The rule adds the possibility that the court may specially appoint a person for the deposition who is not ordinarily authorized to administer oaths. This would be new to Oregon. The Oregon statutes did contain the possibility of an issuance of a commission within the state for depositions on written questions under ORS 45.325-330, but the commission could only be issued to a person already authorized to administer an oath. The written question deposition is covered under Rule 106.

For depositions outside the state, the rule is designed to allow maximum flexibility for Oregon litigants in complying with the requirements of the jurisdiction where the deposition is to be taken. These rules cannot affect foreign law, but they can provide the Oregon litigant with any possible procedure that might be required to effectuate the taking of the deposition in a foreign jurisdiction.

The rule provides three alternatives:

(a) Simple notice procedure before any person authorized to administer oaths in the jurisdiction where the deposition is being taken or by the laws of the United States. ORS 45.161 would generally allow this but did not specifically mention the United States law. This might be of importance as in foreign countries the most accessible person for a deposition may be a U. S. consul or official.

(b) By a person appointed or commissioned to take the deposition. ORS 45.320 presently provides for the issuance of a commission to take a deposition outside the state. The difference between an appointment and a commission is one of formality; the commission would be a more formal document bearing the court's seal. The distinction, however, may be meaningful to some foreign tribunal and both methods are provided.

(c) By the issuance of the letters rogatory. Letters rogatory are a form of communication addressed by the Oregon court or its clerk to a designated foreign tribunal pointing out facts reflecting the need for the deposition and seeking aid in procuring attendance on the basis of comity. See 8 Wright and Miller, Federal Practice and Procedure, § 2083, pp. 350-351. Letters rogatory are presently not covered by the Oregon statutes, but the Oregon courts probably have inherent power to issue them.

In addition to the methods specified, the parties may, of course, proceed in any other manner for the deposition by stipulation under Rule 104.

In most cases, a deposition by simple notice is sufficient for a foreign deposition. The elaborate procedures relating to commission and letters rogatory, however, are necessary because in some cases there may be a problem of procuring attendance in a foreign jurisdiction or perhaps taking the deposition at all.

As long as a party is involved or a non-party witness has consented to appear, nothing beyond notice would be required. If, however, it is anticipated that a non-party witness would be reluctant to appear, a subpoena would be required. An Oregon subpoena is not effective outside the state. Most other states and a few foreign countries have a rule similar to part (4) of this rule which still would automatically provide process upon the notice procedure. For a few states, however, and most foreign jurisdictions, the commission or letters rogatory would be required to have the foreign court issue a subpoena.

Secondly, some foreign countries have peculiar rules and customs relating to depositions, and taking a deposition before a United States officer or even before a local officer on simple notice would be improper and may violate foreign law. To take any deposition at all, some more formal step may be required and this is where the commission or letters rogatory would be necessary.

The present Oregon statutes provide one further method of taking a foreign deposition; that is before a commissioner appointed by the governor. ORS 45.320 specifically refers to such commissioners appointed by the governor pursuant to ORS 194.210. The commissioner was an out-of-state notary public appointed by the

governor. Despite the fact that the cross reference to 194.210 still exists in Oregon statutes, that statute itself was repealed by the 1969 Legislature (see Chap. 394, § 5). Since the commissioners were only appointed for four years, neither the commissioners nor the deposition procedure specified were mentioned in this rule.

Specific matters appearing in the subsections of the rule are as follows:

(a) The language of this subsection varies from the federal rule which says that depositions shall be "taken before" an officer. The change comes from the ABA Committee recommendations and avoids ambiguity for depositions taken by non-stenographis means.

(b) The Oregon statutes make reference to the issuance of commissions and provide some procedures and limit the issuance of commissions to judges, justices of the peace, notaries public, and clerks. ORS 45.330. The federal procedure is much more flexible. The rule makes clear that the three methods of taking a deposition in a foreign jurisdiction are not alternatives but all three may be used simultaneously. For some foreign jurisdictions, it would be difficult to anticipate what method might be required and a litigant might wish to be prepared with a notice, commission and letters rogatory. Language of this subsection is closely parallel to the federal rule and was the result of a careful amendment of that rule in 1963 that was designed to eliminate many problems with depositions in foreign countries. For example, the flexibility in designation in the commission and

addressing the letters rogatory and the provision in the last sentence that would prevent a deposition from being unusable because some peculiar requirements on the taking of the deposition were imposed by a foreign jurisdiction.

It should be noted that this subsection of the rule still refers to depositions "taken before" persons authorized to administer oaths. The ABA Committee did not recommend any change in this subsection of the statute similar to that recommended for subsection (1). This may have been an oversight, but it seemed that the occurrence of a situation where one would wish to take a foreign deposition by non-stenographic means would be infrequent, and no change was required.

(c) For this subsection, even though the ABA Committee did not recommend conforming the language to section (1), the language was so changed and particularly the last clause was added to the federal rule language to provide that for a non-stenographic deposition the oath could be administered by the attorney or someone employed by the attorney. It would seem ridiculous for a non-stenographic deposition to call in a special notary or court reporter simply to administer the oath when the attorney or an employee in the attorney's office might be a notary public.

(d) This provision does not appear in Rule 28, but an equivalent provision is provided in most state rules, and the language is exactly that of existing Uniform Foreign Deposition Act, ORS 45.910. The only change from the statutory language was

elimination of section (1) of the statute which merely recited the title.

RULE 104
STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

COMMENT:

This is Federal Rule 29. Current practice includes substantial discovery by stipulation, both written and unwritten, and the rule may be unnecessary. It may be useful, however, to specifically encourage discovery without formal court procedures.

The last clause of Federal Rule 29 which reads, "except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court", was deleted from this rule. It seems inconsistent with present practice and unnecessary.

RULE 105

DEPOSITIONS UPON ORAL EXAMINATION

(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 the party, by deposition or oral examination. 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 ____ (service of process) to appear and answer after service of summons and complaint 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 ____. The deposition of a person confined in prison may be taken only by leave of court as provided in section (b) of this rule.

COMMENT:

This section is a combination of ORS 45.151 and Federal Rule 30(a). At the time ORS 45.151 was enacted, the procedure for oral depositions in the federal rules was split between Rules 26 and 30. Rule 30(a) contained a provision that was adopted for the Oregon statute. Rule 26(a) provided that leave of court was required when a plaintiff served a notice of deposition within 20 days after commencement of the action. The 20-day limit was not included in the Oregon statute and thus a

plaintiff in Oregon could notice and take a deposition immediately upon service.

In 1970 the leave of court provision in the federal rules was changed. All procedure relating to oral depositions was shifted to Rule 30, and plaintiff was prohibited from taking a deposition within 30 days of service of summons. The underlying reason for the time limit is to protect a defendant by giving the defendant time to secure counsel before any deposition is taken.

The specific sources of the rule suggested are as follows:

(1) The first clause of the first sentence comes from ORS 45.151. Federal Rule 30 says, "after commencement of the action". Since an action is not commenced in Oregon until service of summons, the net result is the same.

(2) The reference to special proceedings comes from ORS 45.151 and does not exist in the federal rule. There are special proceedings referred to in the Oregon statutes, and this variation may be necessary.

(3) The language referring to leave of court is from the federal rule except the federal rule says, "30 days after service of the summons and complaint on any defendant". Under the Oregon process statutes, some defendants might have up to six weeks to answer, and the rule is modified to provide protection for the full period of time.

The balance of the rule is identical to Federal Rule 30(a), except the reference to subsection (b) for prison inmates.

* * * *

(b) ~~44.230~~ **Order for deposition or production of prisoner.** (1) If the witness is a prisoner confined in a prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

(a) By the court or judge in which the action, suit or proceeding is pending, unless it is a court of a justice of the peace.

(b) By any judge of a court of record when the action, suit or proceeding is pending in a justice's court, or when the witness' deposition, affidavit or oral examination is required before a judge or other person out of court.

(2) The order shall only be made upon the affidavit of the party desiring it, or someone on his behalf, showing the nature of the action, suit or proceeding, the testimony expected from the witness and its materiality.

(3) If the witness is imprisoned in the county where the action, suit or proceeding is pending, and for a cause other than a sentence for a felony, or if he is a party plaintiff or defendant, his production may be required; in all other cases, his examination shall be taken by deposition.

COMMENT:

This is ORS 44.230. The provisions of the Oregon statute are very specific as to the proper court, etc. There are some intentional policy decisions involved in that statute relating to prison administration, and it was therefore retained.

The rule relates to trial procedure as well as discovery but seems to fit here better than in the trial procedure area.

In ORS 44.240 the statutes also contain detailed provisions relating to the duties of the warden, sheriff, expense awards, etc. This arguably could be included in the rule but seems to relate only tenuously to procedure and practice and should be left as a statute.

* * * *

(c) **Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall 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 him or the particular class or group to which he 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 be attached to or included in the notice. *A notice may provide for the taking of testimony by telephone. If necessary, however, to assure a full right of examination of any deponent, the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.*

COMMENT:

The first two sentences of the rule are identical to existing ORS 45.161. The third sentence is new and was added to the federal rules in 1970 and would improve notice when the deposition is being used to secure documents from a non-party. The last sentence does not appear in the federal rule but is suggested by the ABA Committee. The Committee comments state:

> This subsection would be amended to provide for the taking of testimony by telephone without court order. The Committee intends, by the use of the word "telephone," to embrace any other recognized form of telecommunication between distant points. The comments relating to changes in Rule 30(b)(4) apply equally to this proposed Rule change.
>
> The Committee is aware, however, that in appropriate cases, physical confrontation may be necessary for proper examination to protect against coaching, or to permit the exchange and reading of documents. The recipient of a notice calling for a deposition by telephone may apply to the court for an order requiring the noticing party to appear in the presence of the deponent for the taking of the deposition.

(105 c 4 below)

* * * *

(c) (2) 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 district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. ~~The sanctions provided by Rule 11 are~~ applicable to the certification.

If a party shows that when he was served with notice under this subdivision (c) (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

COMMENT:

This comes from the federal rule. It was added in 1970 to provide for an emergency situation when the 30-day leave of court provision was added. The last sentence of the first paragraph of the federal rule reads, "the sanctions provided by Rule 11 are applicable to the certification." This was deleted as our equivalent of Rule 11 does not mention any sanction other than striking a pleading.

* * * *

(c)(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(c)(4) The notice of deposition required under (1) of this subsection (b) may provide that the testimony be recorded by other than stenographic means in which event the notice shall 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.

COMMENT:

This is the ABA proposal to modify the rule to provide more flexibility and use of non-stenographic depositions. The Committee comments are as follows:

This proposal would reverse the presumption in the present Rule against non-stenographic recording and permit the party noticing a deposition to provide for it without court order. Existing Rule 30(b)(4) requires court intervention. The Committee rejects that requirement and the supporting result in *Colonial Times, Inc.* v. *Gasch*, 509 F.2d 517 (D.C. Cir. 1975) which involved the court in the needless minutiae of determining the number of electronic recorders to be employed to produce an adequate record.

Electronic recording is now reliably developed. A blanket requirement for live stenography will entail unnecessary expense in some cases.* Moreover, in many instances, the parties simply wish to know what a particular witness will say; they have no need for a transcript for trial. Accordingly, an automatic rule that requires transcription, or compels the parties to apply to court to lift that requirement, should be changed.

Under the proposed Rule, a party or witness aggrieved by the taking of a non-stenographic deposition can simply arrange for transcription at his own expense. In addition, an application may be made by a party to the court in which the action is pending or by a witness to that court or to the court in which the deposition is to be taken to compel stenography if there is a basis to believe that accuracy requires it.

* * * *

(4) (5) The notice to a party deponent may be accompanied by a request made in compliance with ~~Rule 34~~ Rule 109 for the production of documents and tangible things at the taking of the deposition. The procedure of ~~Rule 34~~ Rule 109 shall apply to the request.

(5) (6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.

COMMENT:

Both of these subsections were added to the federal rules in 1970. The Council has already approved incorporation of subsection (6).

* * * *

(d) Examination and Cross-examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The testimony of the witness shall be recorded either stenographically or as provided in subsection (c)(4) of this Rule. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

COMMENT:

This section covers the material in the first two sentences of ORS 45.171. It is the federal rule, as modified by the ABA Committee, to fit non-stenographic recording and as modified to fit state practice. Aside from the non-stenographic recording changes, the main other difference is that the rule does not automatically contemplate transcription of depositions but only provides for transcription of any deposition upon request of the parties.

The rule makes no reference to the requirement of the administration of oath, but that is covered under Rule 103(a).

* * * *

(e) [redacted] **Motion to terminate or limit examination.** At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any party, the court in which the action, suit or proceeding is pending, or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in ~~ORS 41.618~~. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action, suit or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 112(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 101 (c).

COMMENT:

This is existing ORS 41.185 which is identical to Federal Rule 30(d). The statute contains a provision specifically covering expense awards which was changed to refer to the general sanctions rule in conformance to the federal rule.

* * * * *

(f) Submission to Witness; Changes; Signing. 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 requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness within 30 days of its submission to him, the reasons for the refusal shall be stated under/on the transcription or in a writing to accompany the recording by the party requesting the filing of the transcription or recording.

COMMENT:

This would replace the last sentence of existing ORS 45.171. The draft basically is that of the ABA Committee modification to Federal Rule 30(e) and incorporates changes related to non-stenographic depositions.

The ABA draft, however, was modified slightly. The ABA draft says examination by the witness would take place only when a deposition "is to be used at any proceeding in the action." It also says the reason for refusal to affirm should be submitted by the "party desiring to use the deposition." The ABA revisions

do not contemplate that any discovery papers, including depositions, will be filed with the court and suggest modification of Federal Rule 5 to this effect. At this point, a decision to that effect has not been made by the Council, and the draft of these rules contemplates filings, at least if requested by one of the parties. This option should be available to the parties if there is some desire to assure adequate preservation of the deposition. On the other hand, the rule would allow filing of either a transcript or the actual recording for a non-stenographic deposition, and this might be burdensome to the court. The ABA draft says the reasons for refusal to sign must be stated "under penalty of perjury". This seems too strong and unnecessary.

The federal rule has a last sentence as follows:

> "The transcription or recording may then be used as fully as though affirmed in writing by the witness, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part."

This was not included as it appears to be an evidentiary rule.

* * * *

(9) (1) Certification and filing; Exhibits; Copies; Notice of Filing. *When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in his presence 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 ~~30(b)~~(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. When a recording or a non-stenographic deposition is filed with the court, the party taking*

the deposition shall certify that such is a true, complete and accurate recording of the deposition of the witness and the recording has not been altered. A deposition so certified shall be considered prima facie evidence of the testimony of the witness.

(g)(2) If requested by any party, the transcript or the recording of the deposition shall 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 enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending, or such other person as may by writing be agreed upon, and deliver or forward it accordingly, by mail or other usual channel of conveyance.

(g)(3) Documents and things produced for inspection during the examination of the witness, shall, upon 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, he 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 be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall 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) Upon 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 furnish a copy of the deposition to any party or to the deponent.

(g)(5) The party requesting filing of the deposition shall give prompt notice of its filing to all other parties.

COMMENT.

This replaces ORS 45.230 and 45.240. It generally is the ABA modification of Federal Rule 30(f). Subsection (1) was modified by addition of the next to the last sentence. Since the ABA does not contemplate filing the deposition, no provision was included for certification of the recording itself. Presumably, this would be done by authentication at trial. These rules provide for filing, including filing of the recording, and the provision was added to guarantee that an accurate recording is filed.

Subsection (2) was added to provide for filing as discussed above. The filing, however, is not automatic but only required if requested by a party and would be done by the court reporter or in the case of a non-stenographic deposition, by the party taking the deposition. In the case of a non-stenographic deposition, either the recording or a transcript (or both) would be filed, depending upon the request. Subsection (5) differs from the federal rule in requiring the party requesting filing, rather than the party taking the deposition, to give notice of filing. The Council might consider the desirability of even having such a notice. A number of states have abandoned this requirement.

(h) **Payment of expenses upon failure to appear.** (1) 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, ~~suit or~~ proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) (2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he 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 him and his attorney in so attending, including reasonable attorney's fees.

COMMENT:

This is ORS 45.200. It is almost identical to Federal Rule 30(g).

RULE 106

DEPOSITIONS UPON WRITTEN QUESTIONS

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in ~~Rule 45~~ Rule —. The deposition of a person confined in prison may be taken only ~~by leave of court on such terms, as the court prescribes~~ as provided in Rule 105(b).

(subpoena rule)

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule ~~30(b)(6)~~ 105(c)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by ~~Rule 30(c), (e), and (f),~~ Rule 105(d), (f) and (g) to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of Filing. The party requesting filing of the deposition shall promptly give notice of its filing to all other parties.

COMMENT:

Depositions on written questions may now be taken in Oregon pursuant to ORS 45.320 and 45.350. The procedure for such a deposition is unnecessarily cumbersome. A special commission is required, and the court has to settle the questions. The procedure is not used frequently but is useful as a cheap method of securing a deposition for simple matters.

The language is based on Federal Rule 32. The procedure is relatively simple and consistent with the oral deposition rule. Subsection (c) was modified to conform to Rule 105 and again might be eliminated.

RULE 107

EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

(a) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer ~~before whom it is to be taken~~ administering the oath is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to Taking of Deposition.*

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(d) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules ~~30~~ 105 and ~~31~~ 106 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

COMMENT:

This replaces the waiver provisions of ORS 45.280. The language is that of Federal Rule 32(d). It could be argued that this is an evidentiary rule, but it specifically refers to waiver of the procedures specified for taking depositions in Rules 105 and 106 and was therefore included as relating to the deposition procedure and not an evidentiary rule.

ORS 45.250-270, which are the equivalent of Federal Rule 32(a) and (b) and which relate to use of a deposition at trial, were not included in these rules because they clearly are rules of evidence.

Sections (a), (b) and (d) of the rule are not presently covered by the Oregon statutes. Section (b) was modified to conform to the language of Rule 103(a). Subsection (c)(1) and (2) are identical to ORS 45.280(1) and (2). Subsection (c)(3) differs slightly from ORS 45.280(3) because of the change in written deposition procedure of Rule 106.

RULE 108

INTERROGATORIES

(SEE SEPARATE MEMO)

ALTERNATIVE

ACCOUNT

A party may set forth in a pleading the items of an account alleged ~~therein~~ or file a copy ~~thereof~~ with the pleading, ~~filed by himself or by the party's agent or attorney.~~ If the party does neither, the party shall deliver ~~to the adverse party within~~ 5 ~~days after demand~~ a copy of such ~~signed~~ account. ~~Any other party may move for an order under Rule 112(a) with respect to any~~ failure to furnish an account when demanded or when the account filed is ~~incomplete or defective~~.

COMMENT:

If the Council does not adopt interrogatories, the bill of particulars could be retained. The procedure is more related to discovery than pleading. This rule is based on ORS 16.470 but modified to eliminate the harsh sanctions of the statute and to conform enforcement to other discovery devices by reference to the sanctions rule.

RULE 108

INTERROGATORIES

(SEE SEPARATE MEMO)

ALTERNATIVE

ACCOUNT

A party may set forth in a pleading the items of an account alleged therein or file a copy thereof with the pleading filed by himself or by the party's agent or attorney. If the party does neither, the party shall deliver to the adverse party within 5 days after demand a copy of such signed account. Any other party may move for an order under Rule 112(a) with respect to any failure to furnish an account when demanded or when the account filed is incomplete or defective.

COMMENT:

If the Council does not adopt interrogatories, the bill of particulars could be retained. The procedure is more related to discovery than pleading. This rule is based on ORS 16.470 but modified to eliminate the harsh sanctions of the statute and to conform enforcement to other discovery devices by reference to the sanctions rule.

RULE 109

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon 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 ~~26~~(b).

→ 101

(b) Procedure. The request may, ~~without leave of court~~, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection within 30 days after the service of the request. The court may allow a shorter or longer time. If objection is made to part of an item or category, the part shall be specified.

→ 112 (a)

The party submitting the request may move for an order under Rule ~~37(a)~~ with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Writings 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, he is not obliged to offer it in evidence.

(d) ~~(c)~~ **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMENT:

Since ORS 41.616 was amended as a result of an Oregon state Bar bill in 1977, it was used with only slight changes for this rule. The Oregon statute is virtually identical to Federal Rule 34. The specific differences between the statute and this rule are as follows.

The Oregon statute begins, "After commencement of an action, suit or proceeding,.." This does not appear in the federal rule and was omitted as unnecessary and perhaps inconsistent with Rule 102.

The second sentence of ORS 41.616(2) omits the federal rule language, "shall set forth the items to be inspected either by individual item or by category". Since the next to the last sentence of ORS 41.616(2) refers to objection to part of "an item or category", this must have been inadvertent and the language was included in section (b) of this rule.

The federal rule provides that a party upon whom the request is served responds by a written statement within 30 days indicating that they will comply with the request or by objecting. The Oregon statute says that the party shall simply comply with the request. The Oregon approach eliminates a useless intermediate step and was retained. However, if read literally, the statutory language would say that the party must comply with the request in 30 days, i.e., "shall comply with the request, unless objected to...⊙ within 30 days..." This is inconsistent with section (a) which provides the request shall specify the time for production. The problem is the circled comma, which makes the 30 days modify

compliance rather than objection. This offending comma was not in the Bar draft of the bill and was removed from this rule. The producing party must then comply at the time specified in the request or file objections within 30 days. If the time specified to produce is less than 30 days, no motion to compel production could be given until the 30-day period to file objections had run.

The last sentence of subsection (b) of this rule does not appear in ORS 41.616, but ORS 41.617 has detailed sanction provisions for failure to produce. Since these rules contain a general sanction rule for all discovery devices, the federal format of a reference to the general sanctions rule was used.

Subsection (c) is ORS 41.620. It does not appear in the federal rule. Although it refers to evidence, it is not an evidentiary rule because it refers to the conditions of discovery, not the admissibility of the fruits of discovery in evidence.

Subsection (d) of this rule is taken from the federal rule and does not appear in the Oregon statutes.

RULE 110

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court ~~in which the action is pending~~ may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

If requested by the party against whom an order is made under ~~Rule 35~~ section (a) of this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of ~~a~~ same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. This ~~subdivision~~ section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

(c) Reports of claimants for damages and injuries. ~~In~~ In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to him a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply.

(d) ~~44.360~~ **Effect of failure to comply.** If a party fails to comply with ~~ORS 44.610 and 44.610 to 44.640~~ sections (b) and (c) of this rule. or if a physician fails or refuses to make a detailed report the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

(e) Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.

rule (F) Discovery by other means. This ~~subdivision~~ does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule or any other form of discovery authorized by this rule.

COMMENT:

This rule is a combination of existing ORS 44.610 and Federal Rule 35. The most significant change from existing practice is the extension of medical examinations from personal injury cases to any situation where the medical and physical condition of a party is in controversy. The most common use of the examination would continue to be personal injury cases, but there are other situations where physical conditions are at issue and medical exams are desirable, e.g., negligence claim based upon a defective physical condition of the defendant.

The language of paragraph (a) comes from the federal rule. The language is similar to ORS 44.610. That statute referred to a party or person in the custody or legal control of a party but did not contain the requirement "to produce for examination the person in his custody and control". The custody and control language came into the federal rule in the 1970 revision because of problems related to physical examinations of children and wards. A proposed 1955 amendment to Rule 35 which was never adopted would have extended the rule to include "agents and employees of a party." This language has been picked up by a number of states but was not included here because it probably creates more problems than benefits received. The reference to blood group as a physical condition was also added in 1970 to clearly authorize orders for blood tests in paternity cases.

The language of section (b) is from Federal Rule 35(b)(1) and (b)(3). The Oregon statutes provide for an exchange of reports

but in a slightly different manner; ORS 44.620(1) provides for a delivery of a copy of a report on request of the examined party when the examination is pursuant to a court order, and ORS 44.620(2) (discussed below) provides for delivery of the claimant's reports but not related to any request for defendant's reports or even a court-ordered examination. This rule operates as follows. If an examination is ordered, the examining party can request a copy of the resulting report. By so doing, the examined party becomes subject to a request from the examining party for all medical reports which the examined party has as to the same physical or mental condition. If no request for a report is made by the examined party, no right to reports from the examined party arises for the examining party.

There is one aspect in which discovery under the existing Oregon statute is broader than this rule. ORS 44.620(1) provides that any party may secure the report from the examining party, but this rule only allows the examined party to secure the report. The federal rule limitation to examine a party was retained because allowing any party to request a report complicates the exchange provisions, and the need for access to the examining party's reports exist most strongly for the examined party who has consented or been subjected to the examination.

The language in section (b) describing the contents of the report is the same as existing ORS 44.620(1), and the last sentence of section (b) is the same as ORS 44.640, making the duty of exchange applicable to examinations by stipulation.

Subsection (c) is ORS 44.620(2) and does not exist in the federal rule. The 1973 Oregon State Bar bill, which became ORS 44.610, was expressly designed to create a duty on the part of plaintiffs in personal injury cases to furnish medical reports apart from any exchange with the defendant or any court-ordered examination. The practice and procedure committee's comment on the Bar bill are as follows:

> "Under existing case law the medical reports of a bodily injury claimant's physician are not subject to discovery. However, the report of the independent examining physician is subject to discovery. This creates a disparity in the pretrial exchange of information. It delays settlements. In many cases, it causes delay because of the length of time it takes to schedule an independent medical examination. It causes added expense. In many cases, an independent medical examination would not be necessary if defense counsel were supplied with detailed reports by plaintiff's treating doctors.
>
> The purpose of this bill is to require plaintiff to produce copies of the medical reports of his treating physician."

See Woolsey v. Durning, 268 Or. 233 (1974).

Section (d) is ORS 44.630. It has the same effect as the last sentence of Federal Rule 35(b)(1) but was retained as a separate section as it would apply to orders under both sections (b) and (c). The sanction of a deposition does not exist in the federal rule. The language refers only to the refusal to deliver a report. The sanctions for refusal to submit to an examination are covered in the general sanctions rule. Sections (b) and (c) do not clearly specify that a report must be created if one does not exist; under this section, the physician must "make" a report. ORS 44.630 says that failure to comply with "ORS 44.040 and 44.610 to 44.640" could result in a court order. That was changed to

refer to "this rule". This does not incorporate the existing reference to ORS 44.040. That statute, however, is the privilege rule; it was modified by the Bar bill to be made subject to this rule, but contains no duty to furnish a report.

Section (e) is ORS 441.810. This provision apparently came into the statutes in 1931 as part of the hospital lien law and ended up codified under the health care facilities section of the statutes, but it is clearly a discovery provision and was therefore included in this rule. In State ex rel Calley v. Olsen, 271 Or. 369 (1975), a life insurance company that wished to examine the hospital records of a deceased to prove that death was due to a pre-existing sickness or disease argued that the statute on its face authorized such an examination. The court there pointed out that when it was codified in the Oregon revised statutes, the language of the statute was changed from the Oregon law as enacted. Using the language of the original law, the court interpreted the statute as only authorizing discovery for hospitalization related to the injuries for which a claim for damages is asserted. See 271 Or. 373, pp. 373-376. The language of the statute was, therefore, changed to conform to this, adding the words, "for such injuries." The last sentence of this section does not appear in the Oregon statute but was adapted from the Wisconsin discovery statutes.

Section (f) is the same as the last sentence of ORS 44.640 and Federal Rule 35 (b)(3). It is clearly necessary to preserve the current relationship to discovery under other rules. This rule

applies to only report exchanges after a court-ordered or stipulated medical examination of an opponent and reports of personal injury plaintiffs. For testifying doctors in a case, the proposed Rule 101(b)(4) relating to expert discovery would authorize statements, reports and depositions. The language of the rule referring to "any other discovery" was added to 44.640 to be sure that statements under the expert discovery rule would not be affected. For any other situation, discovery probably would be prohibited under the physician-patient, attorney-client and work product privileges but still might be possible under the general deposition and discovery rules. It should be noted that the proposed rules relating to experts and trial preparation materials are expressly made subject to this rule. This rule would allow discovery of reports of experts not to be called at trial automatically without any showing of special need, etc., and provides for a detailed report.

Finally, the federal rule has one provision that was not included in this rule:

> (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

This was not included as it is an evidentiary rule and different from existing Oregon law. It is clear that, even in a personal injury case, the plaintiff waives privilege only for the discovery of the written report and not for discovery by deposition or at

trial. See Woolsey v. Dunning, supra, pp. 241-243. Although ORS 44.040(d)(the physician-patient privilege) was modified to say "subject to ORS 44.610 to 44.640", this only qualifies the privilege as to the delivery of reports under those provisions and has no effect on other applications of the physician-patient privilege. We should ask the Legislature to amend ORS 44.040(d) to say "subject to Rule 110".

RULE 111

REQUESTS FOR ADMISSION

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule ~~26~~ 191(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in 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 the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(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 the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him. 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 his answer or deny only a part of the matter of which an admission is requested, he 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 he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him 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; he may, subject to the provisions of ~~Rule 37(c)~~ 215(c), deny the matter or set forth reasons why he 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 pre-trial conference or at~~ a designated time prior to trial. The provisions of Rule ~~37(a)(4)~~ 215(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Effect of admission.

Any matter admitted pursuant to ~~ORS 41.620 to 41.635~~ → 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 and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his case or his defense on the merits. Any admission made by → this rule a party pursuant to ~~ORS 41.620 to 41.635~~ is for the purpose of the pending proceeding only, and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

(a) Form of response.

Admissions, denials and objections to requests for admissions shall identify and quote each request for admission in full immediately preceding the statement of any admission, denial or objection thereto.

COMMENT:

This rule is a combination of ORS 41.626 and Federal Rule 36. The present Oregon statute is very similar to the federal rule but has a number of small language variations and three substantial differences. Most of the minor language variations have no purpose and the federal language was used. Some of the Oregon language is awkward, e.g., use of "shall" in the first sentence of ORS 41.620(2), and repetitive, e.g., first two sentences of ORS 41.626(4). The more significant language deviations from the Oregon statutes are:

(a) Addition of the provision in paragraph (c) that allows the court to postpone determination of objections. The federal rule also makes specific reference to a postponement to a pretrial conference, but this was deleted to conform to Oregon practice. This reference was part of the 1970 revisions to this rule and was designed to provide flexibility because of the increased scope of admissions under paragraph (a) by the addition of reference to opinions of the application of fact to law.

(b) The statute contains specific descriptions of attorneys fee awards in subsection (5) and a sanction provision for refusal to admit in subsection (6). With the general sanctions rule of these rules, this was changed in section (c) to a reference to the sanctions rule for attorneys fee awards. The sanctions for failure to admit appear in Rule 112(c).

The rule does have some variations from the federal rule. It

was subparagraphed with titles added and the order of some sentences slightly rearranged. In subsection (d), the federal rule permits withdrawal or amendment of admissions under the standards of Rule 16, the pretrial rule. The Oregon language which spells out the same standard, i.e., "when the presentation of the merits of the case will be subserved thereby", was used. The most important variation from the federal rule is the retention of ORS 41.626(3) as subsection (e) of this rule. This provision does not appear in the federal rules but seems desirable to avoid shuffling back and forth between requests and admissions. This approach does end up with the requests being typed twice. An alternative approach would be the following provision from the Ohio rules:

> "(C) Form of answers and objections to requests for admissions. The party submitting requests for admissions shall arrange them so that there is sufficient space after each request for admission in which to type the answer or objections to that request for admission. The minimum vertical space between requests for admissions shall be one inch."

The Ohio approach seems to have its own mechanical problems, and the difference did not seem important enough to change the existing Oregon statute.

The three substantial variations from the Oregon statute are all 1970 revisions to Federal Rule 36. At least two of these involve policy questions which the Council should consider:

(1) The Oregon rule prohibits service of a request by a plaintiff within 20 days after service of summons, unless leave of court is obtained. This was the pre-1970 federal rule designed to protect a defendant from being forced to admit before the defendant had time to get an attorney. The present federal rule says the request may be served at any time, but a defendant does not have to answer until the expiration of 45 days from the service of summons. This achieves the same objective and is more consistent with the approach of the other rules and is designed to require less court intervention. The important limit is not when the request may be served but when it must be answered. Since an Oregon defendant may have up to six weeks to respond to the summons, the time limit for defendant's response was increased from 45 to 60 days.

(2) The Oregon statute provides that a party may request admission of "relevant matters within the scope of ORS 41.635 or documents...". The federal rule says that admissions may be requested of matters "that relate to statements or opinions of fact or the application of law to fact" within the scope of discovery. The Oregon statutory language appears deliberate but leaves the issue hanging in the air. The existing Oregon statutory language could be interpreted as consistent with the existing federal rule or more restrictive. Whatever policy decision is to be made, it should be clearly spelled out in the rule. The suggested approach was that of the federal rules. The argument of the advisory committee that drafted the federal rule is persuasive:

> "Not only is it difficult as a practical matter to separate 'fact' from 'opinion' * * * * but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial."

(c) In defining the conditions under which lack of information and belief may be asserted in a response, the Oregon statute says this can be done only where the answering party states that the information known or readily obtainable by him is insufficient. The federal rule adds the requirement of a statement that "he has made reasonable inquiry" and the information is not sufficient. The federal language was used in section (b) of this rule. It seems reasonable to require a party to ask agents or look at readily available records rather than simply respond, "I don't know". The advisory committee comment on this change is as follows:

> The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c). * * *

RULE 112

FAILURE TO MAKE DISCOVERY; SANCTIONS

(Note: Bracketed material to be included if interrogatories adopted or replaced by reference to account statement if interrogatories are not adopted)

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the juducial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 105 or 106, or a corporation or other entity fails to make a designation under Rule 105(c)(6) or 106, (or a party fails to answer an interrogatory submitted under Rule 108), or if a party fails to furnish a statement and report under Rule 101(B)(4), or if a party in response to a request for inspection submitted under Rule 109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 101(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity

for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by ~~the court~~ in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~30(b)~~ (6) or ~~31(a)~~ to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule ~~35~~, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule ~~35(a)~~ requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this

subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule ~~36~~, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule ~~36(a)~~, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~30(b)~~ (6) or ~~31(a)~~ to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule ~~33~~, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule ~~34~~, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule ~~26(c)~~.

COMMENT:

This should be one of the most important revisions to the discovery procedures. The present sanctions for failure to discover are scattered through Chapters 41 and 45 of ORS, are set up separately and differently for different discovery devices and, in some cases, use pre-1970 federal rule language.

This rule is basically Federal Rule 37, which was a product of a careful and extensive revision of the sanction rule in 1970. Generally, this revision strengthened and clarified the sanctions procedures and removed confusing references to willful refusals and failures to discover. With a few exceptions, all sanctions under the rule are gathered under Rule 37, and any failure to engage in discovery falls under Rule 37. This, however, does not mean that absolute compliance with the discovery procedures is required at risk of serious sanctions. Under the scheme of Rule 37, no serious sanctions under part (b) can be imposed until there is a failure to obey a direct court order (except for several exceptions under subpart (d). In any case, sanctions are completely at the discretion of the court and constitutionally limited to persistent and willful failures to comply with the rules. See 11 Wright and Miller, Federal Practice and Procedure, § 2283.

The federal rule language was modified in some instances to conform to state practice and statutes and to the exact provisions of the Oregon rules as follows:

(a)(1) The federal rule allowing the district court where a deposition is being taken to act on all matters relating to the

deposition was changed to allowing a circuit judge in a judicial district where the deposition is being taken to act in case of a deponent's refusal to answer a question. The modification is based on the Minnesota rule and contemplates sanctions by the court where the action is pending unless absolutely necessary. There is no present equivalent to this provision in the Oregon statutes.

(a)(2) to (4) This is presently covered by ORS 41.617 but only for production and inspection. The federal rules refer to "failing to respond" and an order "compelling an answer, or a designation" if there is a refusal to comply with a production and inspection request. This was changed to conform to Rule 109 of these rules. A specific reference to a refusal to furnish the statement and expert reports from Rule 101(b)(4) was added as there is no equivalent provision in the federal rules. Under subsection (4), the language of ORS 41.617(2), 41.631 and 41.626(5) was used which says that the court "may" rather than "shall" give expense awards. This apparently was a deliberate policy choice by the legislature.

(b)(1) This conforms to the change in (a)(1) above. There is no equivalent provision in the existing Oregon statutes.

(b)(2) Except for changes in numbering, the federal rule language was used. ORS 41.617(3) and (4), which are the equivalent provisions for production and inspection, are basically the same, but the description of the sanctions is slightly different. ORS 45.190 for depositions refers only to striking a pleading or dismissing an action when a party willfully refuses to appear for a deposition. It should be noted that the expense provisions

here use the word, "shall", rather than "may". This conforms to ORS 41.617(4).

Subsections (b)(2)(A) and (B) refer to prohibiting the introduction of evidence but were left under the theory that this is not an evidentiary rule but part of the discovery sanctions.

(c) In this section the language of the federal rule and ORS 41.626(6) were identical.

(d) There is no equivalent provision in the Oregon statute except ORS 45.910 relating to failure to appear for a deposition. The federal rule language was used except for numbering changes. It should be noted that under the existing Oregon scheme, there are no provisions covering failing to answer questions at a deposition; ORS 45.190 only covers failing to show up for the deposition.

The federal rule contains two other sections. Federal Rule 37(e) refers to subpoenas served outside the United States. Wright and Miller call is a "superfluous orphan" and it has no application to state practice. Rule (f) limits expense sanctions against the United States because of a federal statute limiting imposition of cost against the United States. There is no equivalent state limitation.

DISTRIBUTION OF ORS PROVISIONS

ORS	RULE
41.616(1)-(3)	108
41.616(4)	101(b)
41.617(1) and (2)	112(a)
41.617 (3) and (4)	112(b)
41.618	101(c)
41.620	108(c)
41.622	101(b)
41.626(1)	111(a)
41.626(2) and (4)	111(b)
41.626(3)	111(c)
41.626(5)	111(c)
41.626(6)	112(c)
41.626(7)	112(d)
41.631(1) and (2)	101(c)
41.631(3)	112(a)
41.635	101(a)
44.230	105(b)
44.610	110(a)
44.620(1)	110(b)
44.620(2)	110(c)
44.630	110(d)
44.640	110(b) and (c)
44.110	None
44.120	(to process rules)
44.130	(to provision remedies)
44.140	None
45.151	105(a)
45.161	103(a) and (b) and 105(c)
45.171	105(c), (d), and (f)
45.185	105(c)
45.190	105(a) and 112(b)
45.200	105(h)
45.230	105(g)
45.240	105(g)
45.280	107
45.230	103(b)
45.325	106
45.330	103(b)
45.340	106
45.350	103(b)
45.360	None
45.370	None
45.410	102
45.420	102
45.430	102
45.440	102
45.470	102
45.910	103(d)
44.810	110(e)