RULE 41

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 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.

C.(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.

C.(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.

C.(3) Objections to the form of written questions submitted under Rule 40 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 20 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, endorsed, transmitted, filed, or otherwise dealt with under Rules 39 and 40 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.

BACKGROUND NOTE

ORS sections superseded: 45.280.

COMMENT

Sections 41 A., B. and D. are based upon Federal Rule 32. Section 41 C. is based upn ORS 45.280. ORS 45.250 to 45.270 are retained as statutes because they were deemed to be rules of evidence.

in prison may be taken only as provided in Rule 39 B.

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 such person or the particular class or group to which the person 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 39 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 39 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 the officer.

BACKGROUND NOTE

ORS sections superseded: 45.325, 45.340.

COMMENT

The commission procedure for taking a deposition on written questions provided in the existing ORS sections is unnecessarily cumbersome. The language used is based upon Federal Rule 31.

RULE 41

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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 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.

C.(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.

C.(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

RULE ~~107~~ 41

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(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 ~~126~~ 40 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 20 days after service of the last questions authorized.

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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, endorsed, transmitted, filed, or otherwise dealt with under Rules ~~[illegible]~~ 39 and ~~[illegible]~~ 40 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.

Rule 41.

Backgrnd note

ons. sections superceded.

45.280.

Comment

sections ~~R~~ 41 A, B and D are based upon Federal Rule 32. section 41 C is based upon ons 45.280. ons 45.250 To 45.270 are Retained as statutes because they were deemed to be rules of evidence.

obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

C.(3) Objections to the form of written questions submitted under Rule 40 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 20 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, endorsed, transmitted, filed, or otherwise dealt with under Rules 39 and 40 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.

BACKGROUND NOTE

ORS sections superseded: 45.280.

COMMENT

Sections 41 A., B. and D. are based upon Federal Rule 32. Section 41 C. is based upon ORS 45.280. ORS 45.250 to 45.270 are retained as statutes because they were deemed to be rules of evidence.

RULE 42

LIMITED INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action or proceeding and upon any other party with or after service of the summons upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within

the scope of discovery under Rule 36 B. and subject to Rule 36 C., interrogatories may be used to obtain the following facts:

B.(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

B.(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

p5 nov13 memo

B.(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

B.(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered into the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all preexisting mental, physical and organic conditions bearing upon such claims.

B.(6) The address, registered agents, offices, places

of business, nature of business, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

B.(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

B.(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action or proceeding.

B.(9) The custody, use, location, description, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action or proceeding.

B.(10) The items of an account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection

of such business records, or from a compilation, abstract or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records of reports and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

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

E. Limitations.

E.(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

E.(2) Number. A party may serve more than one set of interrogatories upon an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

BACKGROUND NOTE

ORS sections superseded: 16.470.

COMMENT

No single rule provoked more debate within the Council than this rule. It was finally determined that interrogatories could serve a useful function, but the unlimited federal approach invited abuse in the form of excessive interrogatories. The Council decided to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections 42 B. and E. Section 42 E. combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what constitutes an interrogatory, it was the intent of the Council that in compound questions, each element of the question be considered as constituting a separate interrogatory, e.g., "What is the present home address, business address and telephone number of X?", equals three interrogatories.

The limitations of subject matter in section 42 B. are entirely new. The scope of interrogatories is, of course, subject to the general requirement that the information sought be relevant to the claims or defenses of a party. Subsection B.(10) was included because an interrogatory would replace the request for particulars on an account, presently provided by ORS 16.470.

The interrogatory procedure provided in section 42 A. and

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.

~~EXHIBIT A~~

RULE ~~108~~ 42

LIMITED INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories 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 upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule ~~37~~ 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within the scope of discovery under Rule ~~101~~ 36 B. and subject to Rule ~~101~~ 36 C., interrogatories may only be used to obtain the following ~~facts~~ Facts:

(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings, graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, extent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all pre-existing mental, physical and organic conditions bearing upon such claims.

(6) The addresses, registered agents, offices, places of business, nature of business, names and addresses of board of directors and officers, names and addresses and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action.

(9) The custody, use, location, descripition, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action.

10. the items or on account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the 37 interrogatory reasonable opportunity to examine, audit or inspect such records or reports and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

D. Form of Response. The interrogatories shall be so arranged that a blank space shall be provided after each separately numbered interrogatory. The space shall be reasonably calculated to enable the answering party to insert the answer or objections within the space. If sufficient space is not provided, the answering party may attach additional papers with the answers and refer to them in the space provided in the interrogatories.

E. Limitations.

(1) Duty of attorney. It is the duty of an attorney directing interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

(2) Number. A party may serve more than one set of interrogatories upon an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

Rule 42.

Background note

ORS. sections superceded

16.470

COMMENT:

No single rule provoked more debate within the council than this rule. A number of council favored no inclusion of interrogatories in these rules. It was finally determined that interoggatories could serve a useful function, but the wide open federal approach invited abuse in the form of excessive interrogatories served as a routine matter for harrasment and delay rather than to secure needed information. The council set out to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections B and E. Section E combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what consititutes an interrogatory it was the intent of the council that compound questions, each element of the question be considered as constituting a seperate interrogatory; e.g. State the present address, business address of X? equals three interrogatories.

The limitations by subject matter in section B are entirely new. and were developed by examination of examples of sets of interrogatories to determine common subjects of inquiry other than the main operative facts giving rise to the case. The scope of interogatories is of course subject to the general requirement that the information sought be relevent to the claims or defenses of a party. Subsection B (10) was included because an interogatory would replace the request for particulars on an account presently provided by ORS 16.470 .

The interrogatory procedure provided in section 42 A and C is based upon Federal Rule 33. The council added the specific option in Rule C to respond to a an interrogatory by producing a report prepared by an expert.

Section D is designed to avoid shuffling between two seperate documents and is based upon the New Jersey Procedure.

RULE 42

LIMITED INTERROGATORIES

A. Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories 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 upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court ~~may~~ allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 46 A. with respect to any objection to or other failure to answer an interrogatory.

B. Use at trial; scope. Answers to interrogatories may be used to the extent permitted by rules of evidence. Within the scope of discovery under Rule 36 B. and subject to Rule 36 C., interrogatories may be used to obtain the following facts:

B.(1) The names, residence and business addresses, telephone numbers, and nature of employment, business or occupation of persons or entities having knowledge and the source of such knowledge.

B.(2) The existence, identity, description, nature, custody, and location of documents (including writings, drawings, graphs, charts, photographs, motion pictures, phono-records, and other data compilations from which information can be obtained), tangible things and real property.

B.(3) The name, address, subject matter of testimony and qualifications of expert witnesses to be called at trial.

B.(4) The existence and limits of liability of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered into the action or to indemnify or reimburse for payments made to satisfy the judgment.

B.(5) The nature and extent of any damages or monetary amounts claimed by a party in the action; the nature, exent and permanency of any mental or physical condition forming the basis of such claim; all treatments for such physical condition; all tests and examinations relating to such condition; and, all pre-existing mental, physical and organic conditions bearing upon such claims.

B.(6) The addresss, registered agents, offices, places of business, nature of business, names and addresses of board of directors and officers, names and addresss and job classifications and duties of agents and employees, names and addresses of stockholders or partners and dates and places of incorporation or organization of any corporation or business entity.

B.(7) The date of birth, and the present addresses, business addresses, telephone numbers, employment or occupation or business, and marital status of any party or the employees, agents, or persons under the control of a party.

B.(8) The location, legal description, present and prior ownership, occupation and use, purchase or sale price, value, nature of improvements, interests affecting title, and records of deeds and instruments relating to title of any real property involved in an action.

B.(9) The custody, use, location, description, present and prior ownership, purchase or sale price, value, recording of instruments relating to title and security interests, interests claimed in such property, license numbers, registration numbers, model numbers, serial numbers, make, model, delivery and place of manufacture, and manufacturer of any tangible property involved in an action.

B.(10) The items of an account set forth in a pleading.

C. Option to produce business records or experts' reports. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, or from examination of reports prepared by experts in the possession of a party upon whom the interrogatory has been served, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records or reports from which the answer may be derived or ascertained and to afford to the party serving the

interrogatory reasonable oipportunity to examine, audit or inspect such records of reports and to make copies, compilations, abstracts or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

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

E. Limitations.

E.(1) Duty of attorney. It is the duty of an attorney directting interrogatories to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party..

E.(2) Number. A party may serve more than one set of interrogatorires upon an adverse party, but the total number of interrogatories shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.

BACKGROUND NOTE

ORS sections superseded: 16.470.

COMMENT

No single rule provoked more debate within the Council than this rule. It was finally determined that interrogatories could serve a useful function, but the ~~wide-open~~ federal approach invited abuse in the form of excessive interrogatories served as a routine matter for harassment and delay rather than to secure needed information. The Council decided to develop a rule that would preserve the useful aspects of interrogatories, while controlling abuse. The control provisions are contained in sections 42 B. and E. Section E. combines a specific duty upon attorneys to avoid abuse with a limitation upon number. The numerical limitation was adapted from the New Hampshire rules. In determining what constitutes an interrogatory, it was the intent of the Council that in compound questions, each element of the question be considered as constituting a separate interrogatory, e.g., "What is the present address, business address of X?", equals three interrogatories.

The limitations of subject matter in section B. are entirely new. The ~~scope~~ of interrogatories is, of course, also subject to the general requirement that the information sought be relevant to the claims or defenses of a party. Subsection B.(10) was included because an interrogatory would replace the request for particulars on an account presently provided by ORS 16.470.

The interrogatory procedure provided in section 42 A. and C. is based upon Federal Rule 33. The Council added the specific option in ~~Rule~~ C. to respond to an interrogatory by producing a report prepared by an expert.

Section D. is designed to avoid shuffling between two separate documents and is based upon the New Jersey procedure.

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RULE 43

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 obtaned, 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 36 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 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons 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. A defendant shall not be required to produce or allow inspection or other related acts 37 before the expiration of 60 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless

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the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule ~~112~~ 46A. 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. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

D. 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.

RCP 43

Background note

ORS sections superceded

41.616, 41.620

COMMENT:

This rule is based primarily upon ORS 41.616 which is similar to Federal Rule 34. In Section B the federal rule requires a written response to the request to produce and ORS 41.616 simply requires that the party comply with the request or object. The language of ORS 41.616 was modified slightly ~~XXXXXXXXXXXXXXXXX~~ because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30 day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifys an unreasonably ~~XXXXXXXX~~ early date for production, ~~quick production~~ a cover order is available under Rule 36 C.

Section C does not appear in the Federal Rules and is based upon ORS 41.620. Section D was not included in the ORS sections and was taken from the Federal Rule.

RULE 43

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 36 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 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons 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. A defendant shall not be required to produce or allow inspection or other related

acts before the expiration of 60 days after service of summons, unless the court specifies a shorter time. 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 before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 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. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

D. 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.

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section B., the federal rule requires a written response to the request to produce , and ORS 41.616 simply requires that the party comply with the request or object. The language of ORS 41.616 was modified slightly because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30-day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifies an unreasonably early date for production, a cover order is available under Rule 36 C.

Section 43 is based on ors. 41.620 Section D comes From the Federal Rule.

Section C. does not appear in the federal rules and is based upon

see 1st Draft

C. is based upon Federal Rule 33. The Council added the specific option in section 42 C. to respond to an interrogatory by producing a report prepared by an expert.

Section 42 D. is designed to avoid shuffling between two separate documents and is based upon the New Jersey procedure.

RULE 43

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 behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, 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 36 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 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action or proceeding and upon any other party with or after service of the summons 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. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. 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 before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 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. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D. Persons not parties. This rule does not preclude an independent action or proceeding against a person not a party for production of documents and things and permission to enter upon land.

RULE ~~120~~ 44.

PHYSICAL AND MENTAL EXAMINATION

OF PERSONS; REPORTS OF

EXAMINATIONS

A. 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 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 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 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 the 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 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 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. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

(2) If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, 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 44.

Background Note.

ORS sections superceded.

44.610, 44.620, 44.630, 44.640

441.810

COMMENT: Section 44A comes from the Federal Rule and

This rule is a combination of ORS sections and Federal Rule 35. ~~It~~ extends the possibility of a medical examination from personal injury cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party, would authorize court ordered blood tests in paternity disputes.

Section B is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report and ~~the existing provision says~~ as opposed to any party, ~~may secure a copy~~.

Section C is based on ORS 44.620(2), ~~and has no XXXXXX federal Rule has no corresponding provision~~.

Section D is based upon ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section E is based upon ORS 441.810. Dispite its location in ORS, the provision ~~clearly~~ is a discovery rule. ~~The language of the ORS~~ As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v Olsen 271 Or 369 (1975) The language was modified to conform to the original intent.

RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. 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 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 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 report of the examining physician setting out ~~his~~ such physician's 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 the 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 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 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 the requesting party 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. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, 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 for the reasonable and necessary costs of enforcing the party's right to discover.

BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the reprt, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section 43 B., the federal rule requires a written response to the request to produce, and ORS 41.616 simply requires that the party comply with the request, or object. The language of ORS 41.616 was modified slightly because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30-day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifies an unreasonably early date for production, a protective order is available under Rule 36 C.

Section C. does not appear in the federal rules and is based upon ORS 41.620. Section D. was not included in the ORS sections and was taken from the federal rule.

RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. 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 may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's 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 section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's 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 the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This 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 a civil action or proceeding 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 the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report,

the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's 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.]

Oct 30 memo p 15

Substance

BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

RULE 45

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 or proceeding only, of the truth of any matters within the scope of Rule 36 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 or proceeding and upon any other party with or after service of the summons and complaint upon that party.

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

such party may, subject to the provisions of Rule 46 C., deny the matter or set forth reasons why he cannot admit or deny it. If a written answer or objection to any request, other than a request for the admission of the genuineness of documents or things, is not served within the time specified above, the party requesting the admission may apply to the court for an order that the matter requested shall be deemed admitted. The order shall be granted unless the party to whom the request is directed establishes that the failure to respond was due to mistake, inadvertence or excusable neglect. Requests for admission as to the genuineness of documents or things are deemed admitted without court order if a written answer or objection is not served within the time specified above. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

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

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

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

F. Number. A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary

or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined or arranged.

BACKGROUND NOTE

ORS sections superseded: 41.626.

COMMENT

This rule is a combination of ORS 41.626 and Federal Rule 36. The principal variations from the ORS section, which were taken from the federal rule are: elimination of any restrictions on when requests for admissions may be served in Section 46 A. and the additional time to respond for defendants served with requests; the specific language in section 46 A. allowing requests as to "statements or opinions of fact of the application of law to fact"; and, the addition of a requirement in 46 B. that lack of information and belief may only be used as a response where "the answering party has made reasonable inquiry."

The Council also added several provisions that appear neither in the ORS section or the federal rule. Section 46 B. was modified to eliminate the automatic admission arising from failure to respond within the time allowed for admissions other than the genuineness of documents and things. The party serving the admission must apply to the court for an order that the matter requested is deemed admitted. This was done because it was felt the automatic admission created a procedural trap. Parties receiving requests for admissions cannot simply ignore them, however, and then resist a court order, as the rule provides the order establishing the admission shall be given unless mistake, inadvertence or excusable neglect is shown. Requests for admission of the genuineness of documents and things are automatically admitted if not denied; the danger of a serious procedural mistake arising from an admission of this type is slight, and such admissions are routinely used to avoid the necessity of authentication of exhibits at trial. The Council also added sections 46 E. and F. Section 46 E. replaces ORS 41.626(3) and provides that space shall be left for responses in the admissions form, rather than requiring that the request be retyped on a separate response. It was felt this would be consistent with the approach in the interrogatories rule and would minimize total typing time involved. Section 46 F. provides a number limitation on requests for admissions similar to the rule governing interrogatories.

EXHIBIT D

RULE ~~111~~ 45

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 ~~101~~ 36 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. 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 shall serve 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 45 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 ~~112~~ 46 C., deny the matter or set forth reasons why he cannot admit or deny it. If a written answer or objection is not served within the time specified above, the party requesting the admission may apply to the court for an order that the matter requested shall be deemed admitted. The order shall be granted unless the party to whom the request is directed establishes that the failure to respond was due to mistake, inadvertence or excusable neglect. The provisions of Rule ~~112~~ 46 A. apply to the award of expenses incurred in relation to the motion. ! That is right!

C. Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule ~~112~~ 46. A. apply to the award of expenses incurred in relation to the motion.

D. Effect of admission. Any matter admitted pursuant to this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby 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 a party pursuant to this Rule 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.

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

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

Rule 45

Background note

ORS. sections superseded

41.426.

COMMENT:

This rule is a combination of ORS 41.626 and Federal Rule 36. The principle variations from the ORS section, which were taken from the federal rule are: elimination of any restrictions on when requests for admissions could be served in Section 46 A and the additional time to respond for defendants served with requests with the complaint; the specific language in section 46 A allowing requests as to "statements or opinons of fact or the application of law to fact; and, the addition of a requriement that lack of information and belief may only be used as a response where a party states that "he has made reasonable inquiry". in 46B

The council also added several provisions that appear neither in the ORS section or the federal rule. Section 46B was modified to eliminate the automatic admission arising from failure to respond within the time allowed. The party serving the admission must apply to the court for an order that the matter requested is deemed admitted. This was done because it was felt the automatic admission created a procedural trap. Parties receiving requests for admissions cannot simply ignore them, however, and then seek to avoid a court order as the rule provides the order establishing the admission shall be given unless mistake, inadvertance or excusable neglect is shown. The council also added sections 46E and 46F. Section E replaces ORS 41.626(3) and provides that space shall be left for responses in the admissions form, father than requiring that the request be retyped on a seperate response. It was felt this would be consistant with the approach in the interrogatories rule and would minimize toatl typing time involved. Section 46F provides a number limitation on requests for admissions similar to the rule governing interrogatories.

RULE 45

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 36 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~~ 45 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 rerquest; he may, subject to the provisions of Rule 46 C., deny the matter or set forth reasons why he cannot admit or deny it. If a written answer or objection is not served within the time specified above, the party requesting the admission may apply to the court for an order that the matter requested shall be deemed admitted. The order shall be granted unless the party to whom the request is directed establishes that the failure to respond was due to mistake, inadvertence or excusable neglect. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

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

(4)

trial. The provisions of Rule 46 A. apply to the award of expenses incurred in relation to the motion.

D. Effect of admission. Any matter admitted pursuant to this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby 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 a party pursuant to this Rule 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.

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

F. Number. A party may serve more than one set of requested admission upon an adverse party, but the total number of requests shall not exceed thirty, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests

may be grouped, combined or arranged.

BACKGROUND NOTE

ORS sections superseded: 41.626.

COMMENT

This rule is a combination of ORS 41.626 and Federal Rule 36. The principle variations from the ORS section, which were taken from the federal rule are: elimination of any restrictions on when requests for admissions ~~could~~ may be served in Section 46 A. and the additional time to respond for defendants served with requests, ~~with the complaint~~; the specific language in section 46 A. allowing requests as to "statements or opinions of fact of the application of law to fact"; and, the addition of a requirement in 46 B. that lack of information and belief may only be used as a response where a party states that "he has made reasonable inquiry".

The Council also added several provisions that appear neither in the ORS section or the federal rule. Section 46 B. was modified to eliminate the automatic admission arising from failure to respond within the time allowed. The party serving the admission must apply to the court for an order that the matter requested is deemed admitted. This was done because it was felt the automatic admission created a procedural trap. Parties receiving requests for admissions cannot simply ignore them, however, and then seek to avoid a court order, as the rule provides the order establishing the admission shall be given unless mistake, inadvertence or excusable neglect is shown. The Council also added sections 46 E. and F. Section 46 E. replaces ORS 41.626(3) and provides that space shall be left for responses in the admissions form, rather than requiring that the request be retyped on a separate respnse. It was felt this would be consistent with the approach in the interrogatories rule and would minimize total typing time involved. Section 46 F. provides a number limitation on requests for admissions similar to the rule governing interrogatories.

RULE ~~112~~ 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

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 judicial 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 [illegible]

46 ~~112~~ A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules ~~105~~ 39 or ~~106~~ 40, or a corporation or other entity fails to make a designation under Rule ~~105~~ 39 C.(6) or Rule ~~106~~ 40A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule ~~101~~ 36 B.(2), or a party fails to answer an interrogatory submitted under Rule ~~108~~ 42, or if a party in response to a request for inspection submitted under Rule ~~109~~ 43, 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~~ 36 C.

RULE ~~112~~ 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

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 judicial 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~~ 39 or ~~106~~ 40, or a corporation or other entity fails to make a designation under Rule ~~105~~ 39 C. (6) or Rule ~~106~~ 40A, or a party fails to answer an interrogatory submitted under Rule ~~108~~ 42, or if a party in response to a request for inspection submitted under Rule ~~109~~ 43, 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~~ 36 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.

30 (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 judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial 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 ~~106~~ 39 C.(6) or ~~106~~ 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule ~~110~~ 44, 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:

B.(1)(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.(1)(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;

B.(1)(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;

B.(1)(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.

B.(1)(e) Where a party has failed to comply with an order under Rule ~~110~~ 44 A. requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this ~~subdivision~~ section, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foreging orders or in addition thereto, the court shall require the party failing to obey the order or the attorney 17 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 ~~111~~ 45, 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 ~~111~~ 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 insepction. If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~105~~ C.(6) or ~~106~~ 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 ~~108~~, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule ~~109~~, 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 subsection 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 ~~101~~ 3.

Rule 46.

Background Note

For failure to furnish expert report when requested, see: Rule 36 B 4.

For failure to furnish medical reports when required, see: Rule 44 [illegible].

ORS sections superceded.

41.417, [illegible] 41.626 (5), (6) and (7),

41.631 (3), 45.150,

COMMENT:

This rule is based upon Federal Rule 37 and ~~incorporates most of the provisions for~~ incorporates must sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear ~~picture of~~ procedure to be followed when a ~~[illegible]~~ party or witness fails to ~~[illegible]~~ comply with discovery requirements. The federal language was modified slighty to ~~[illegible]~~ fit existing ORS Sections and these rules. In Section A~~(3)~~(2) a reference to ~~failure to respond to a request for insurance policy under~~ Rule 36 was included. In Subsection A(4) the court "may " award expenses and in Subsection B(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631 ~~and~~ 41.626(5) and41.617(4).

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

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:

A.(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 judicial 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.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, 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 36 C.

A(3) Evasive or Incomplete answer. For purposes of this subdivi- evasive, or incomplete answer is to be treated as a failure to answer.

A(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.

B.(1) Sanctions by court in judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial district in which the deposition is being taken, the failure may

be considered a contempt of that court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, 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:

B.(2)(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.(2)(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;

B.(2)(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;

B.(2)(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.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 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 45, 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 45 B or C, 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 39 C.(6) or 40 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 42, after proper service of the interrogatories, or (3) to comply with or serve

objections to a request for production and inspection submitted under Rule 43, 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 subsection ~~B~~(2) of Section B 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~~ Section 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 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see: Rule 36 B.(4). For failure to furnish medical reports when requested, see: Rule 44 D. For Failure of Person Failing deposition or witness To appear at deposition see 39 H.

ORS sections superseded: 41.617, 41.626 ~~(5), (6) and (7)~~, 41.631 ~~(3)~~, 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4).

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

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:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action or proceeding is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the ~~judicial district~~ county 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 a circuit or district court in the ~~judicial district~~ county where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, fails to permit inspection as requested, the discovering party may move for an order compelling ~~inspection~~ discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying 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 36 C.

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

A.(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.

B.(1) Sanctions by court in ~~judicial district~~ county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or

district court judge in ~~the judicial district~~ County in which the deposition is being taken, the failure may be considered a contempt of ~~that~~ court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, the court in which the action or proceeding is pending may make such orders in regard to the failure as are just, ~~and~~ including among others the following:

B.(2)(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.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(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;

B.(2)(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.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring ~~such~~ the party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability 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 such party 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 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions 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 45 B. or C., 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 39 C.(6) or 40 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 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (4) to ~~advise~~ inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action or proceeding is pending on motion may make such orders in regard to the failure as are just, ~~and~~ among others ~~it may take any action~~ any order authorized under paragraphs (a), (b), and (c) of subsection 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 such party, 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. See B2.

The failure to act described in this section 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 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see Rule 36 B.(4). For failure of person taking deposition or witness to appear at deposition, see 39 H. For failure to furnish medical reports when requested, see Rule 44 D. For failure to provide access to hospital records, see Rule 44 E.

ORS sections superseded: 41.617, 61.626(5), (6) and (7), 41.631(3), 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under Rule 36 B. of the existence of a coverage question was added to section 46 D.

RULE 47 (RESERVED) — Add summary dates

P 7 mw 13 memo

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

BACKGROUND NOTE

ORS sections superseded: 17.033.

COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

A. Issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried. The trial of all issues of fact shall be by jury unless:

C.(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.(2) The court, upon motion of a party or upon its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and trial by consent. In all actions or proceedings not triable by right to a jury, the court, upon motion of a party or upon its own initiative, may try an issue with an advisory jury, or it may, with the consent of all parties, order a trial to a jury whose verdict shall have the same effect as if trial to a jury had been a matter of right.

BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.035, 17.040, 17.045, 46.160.

COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.030, 17.035 and 17.040. ORS 17.020, 17.025 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial.

RULE 52

~~ASSIGNMENT OF CASES~~ Continuances

A. Methods. Each circuit and district court shall provide by local rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems appropriate.

~~B.~~ Continuances. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

BACKGROUND NOTE

ORS sections superseded: 17.050.

COMMENT

This is a new provision.

RULE 50

JURY TTRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

COMMENT: This is Committee Rule A.

R-6 47- Reserved

R-6 48 Reserved

Rule 49. Reserved.

Rule 50

Jury trial of Right

Background Note

ORS sections superseded.

17.033

COMMENT:

The elinimation of procedural distininctions between actions at law and suits in equity cannot effect the consitutional right to jury trial.

RULE 47 (RESERVED)

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

BACKGROUND NOTE

ORS sections superseded: 17.033.

COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.