OREGON RULES OF CIVIL PROCEDURE

DISCOVERY

INTRODUCTION

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

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

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

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

(d) No logical organization.

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

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

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

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

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

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

101 **GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; ~~written interrogatories~~; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(if adopted "written interrogatories")

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

Comment:

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

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

Comment:

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

101

(1) In General.

~~41.635 Scope of discovery.~~ For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ~~suit~~ or proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Comment:

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

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

description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons having knowledge of any discoverable matter; *and the oral testimony of witnesses.* It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

Committee Comments

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

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

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

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

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

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

101(b)(2)

Insurance agreements.

(a) In a civil action, a party, upon the request of an adverse party, shall disclose the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) The obligation to disclose under this section shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to insure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this section as provided in ~~ORS 41.621~~ Section (c) of this rule.

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

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

Comment:

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

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

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

(b)(3) Trial preparation materials. Subject to the provisions of Rule 110 (and subsection (b)(4) of this rule) A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 112 (a)(4)

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule ~~37(a)(4)~~ apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Comment:

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

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

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

Rules Advisory Committee comment on this subparagraph is as follows:

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

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

(c) **Court order limiting extent of disclosure; expenses and attorney fees.** (1) Upon motion by a party, and for good cause shown, the court in which the action, suit or proceeding is pending may make any order which justice requires to protect a party or a witness upon whom a request for any type of discovery has been made from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the court;

(6) That a trade secret or other confidential research, development or commercial

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

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

(8) That to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

(9) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party provide or permit discovery. The provisions of ~~subsection (3)~~ of this section apply to the award of expenses incurred in relation to the motion.

→ Rule 112(a)(4)

Comment:

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

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

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

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

Comment:

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

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

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

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

Comment:

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

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

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

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

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

F. Procedure. The motion for substitution may be made by any party or by the successors in interest or representatives of the deceased or disabled party or the successors in interest of the transferor and shall be served on the parties as provided in Rule 9 and upon persons not parties in the manner provided in Rule 7 for the service of a summons.

BACKGROUND NOTE

ORS sections superseded: 13.080, 13.090.

COMMENT

This rule generally preserves the existing rules of ORS 13.080. ORS 13.090 was unnecessary and was eliminated. Sections 34 A. through D. use the language of the existing statute. The words, "if the claim survives or continues", were added to the first sentence of section 34 A. to make clear that this rule relates only to the procedural question of abatement of the action.

Sections 34 D. and E. are based upon sections (a) and (d) of Federal Rule 25. The federal approach to substitution of federal officials is more direct and flexible than existing Oregon practice. Section 34 F. provides a procedure for substitution, which is not addressed by the existing ORS sections.

RULE 35 (RESERVED)

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

is as follows:

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

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or proceeding or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action or proceeding. In such case, the party seeking discovery shall be ~~advised~~ of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of

the existence of coverage later arises, the party discovered against has the duty to immediately advise the party who sought discovery of the question regarding the existence of coverage. The party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

B.(4) Trial preparation; experts.

B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the

expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming an opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to such expert witness by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to paragraph (c) of this subsection concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 46 A. (4) apply to the award of expenses incurred in relation to the motion.

B.(4)(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under paragraph (a) of this subsection shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees

for time spent responding to discovery under paragraph (b) of this subsection.

B.(4)(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this paragraph, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

B.(4)(e) As used herein, the terms, "expert" and "expert witness", include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

B.(4)(f) A party who has furnished a statement in response to paragraph (a) of this subsection is under a duty to immediately supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

B.(4)(g) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

C. Court order limiting extent of disclosure. Upon motion

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

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

BACKGROUND NOTE

ORS sections superseded: 41.616(4), 41.618, 41.622, 41.631, 41.635.

COMMENT

This rule is a combination of existing ORS sections (which are primarily drawn from Federal Rule 26), portions of Federal Rule 26, and new provisions drafted by the Council.

Section 36 A. and the introductory language of section 36 B. come from the federal rule. Subsection B.(1) is based on ORS 41.635. The scope of discovery is changed from "relevant to the subject matter involved in the pending action, suit or proceeding..." to "...relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party...". This change conforms to the suggested amendment to Federal Rule 26(b)(1) proposed by the committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance; if there is a coverage question, the subsection provides that a party seeking discovery of the existence and limits of the policy be advised of any existing or later arising coverage question. A copy of the policy shall then be produced upon request. The initial discovery of existence and limits of the policy may be by any method, including interrogatory. Paragraph (b) of subsection B.(2) was drawn from the last two sentences of Federal Rule 26 B.(2).

Subsection B.(3) is based on ORS 41.616(4) and Federal Rule 26 (b)(3). The last paragraph relating to a person's own statement does not appear in the existing ORS language.

Subsection B.(4) is a new provision drafted by the Council. Federal Rule 26 (b)(4) regulates all discovery from experts of information acquired or developed in anticipation of trial. It provides for discovery by interrogatories of basic information from experts to be called at trial, allows further discovery from trial experts and discovery from non-trial experts only upon court order, and prohibits any discovery at all from some types of experts. This rule deals only with experts to be called at trial and leaves regulation of discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases. The Council felt that the need for discovery of basic information relating to the prospective testimony of expert

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RULE ~~101~~

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

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

~~101 B.~~ (2) Insurance agreements. (a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

discovered against shall reveal the existence and nature of any coverage questions which have been raised and must supplement the response to the interrogatory if any such questions are raised at a later time. If any questions as to the existence of liability has been raised or is raised, then the party seeking discovery may obtain production and inspection of the insurance agreement or policy under Rule 109.

(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation materials. Subject to the provisions of Rule 110 and subsection B.(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statetment concerning the action or its subject matter previously made by that person. If the request

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is refused, the person may move for a court order. The provisions of Rule ~~112~~ A.(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrial, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation; experts. — Insert.

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

~~EXHIBIT C~~

Rule 101 B.(4)

(a) Subject to the provisions of Rule ~~110~~ 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming his opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to him by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to ~~subsection~~ (c) of this section concerning fees and expenses, as the court may deem appropriate. The provisions of Rule ~~112~~ 46 (f) A. apply to the award of

expenses incurred in relation to the motion.

(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under subsection (a) of this section shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees for time spent responding to discovery under subsection (b) of this section.

(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this subsection of this section, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

(e) As used herein, the terms "expert" and "expert witness" include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

(f) A party who has furnished a statement in response to subsection (a) of this rule is under a duty to supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

(g) Nothing contained in this rule shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 112 A.(4) apply to the award of expenses incurred in relation to the motion.

Rule 36

Background note:

ORS. Sections superseded. 41.618, 41.635, 41.616 (4), 41.622, 46.631 (1) and (2)

COMMENT:

This rule is a combination of existing ORS sections, (which are primarily drawn from Federal Rule 26) portions of Federal Rule 26 and new provisions drafted by the council.

Section 36 A and the Introductory language of Section 36 B come from the Federal Rule. Subsection 36 B(1) is based on ORS 41.635. The scope of discovery is changed from "relevent to the subject matter involved in the pending action, suit or proceeding..." to"....relevent to the claim or defense of the party seeking discovery or to the claim or defense of any other party..." This change conforms to the suggested amendment to Federal Rule 26 (b) (1) proposed the committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March 1978.

Subsection B (2) is a new provision drafted by the council. The existing rule in ORS 41.622 allows production and inpection of liability policies. Absent some question of coverage, anothers partys legitmate interest in discovery extends only to the existance and limits of discovery; if the is a coverage question the subsection provides that a copy of the policy shall be produced upon request. The intital discovery of existance and limits of the policy may be by any method, including interrogatory . Paragraph (b) of subsection B(2) was drawn from the last two sentences of Federal Rule 26 B (2).

Subsection B(3) is based on ORS 41.616(4) and Federal Rule 26 B (3). The last paragraph relating to a party own statement does not appear in the existing ORS language.

Subsection B (4) is a new provision drafted by the council. Federal rule 26 B ($) regulates all discovery from experts of information acquired or developed in anticipation of trial. It provides for discovery by interrogatories of basic information from experts to be called at trial, allows further discovery from trial experts and discovery from non trial experts only upon court order and prohibits any discovery at all from some types of experts. This rule deals only with experts to be called at trial only and leaves discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases. The council felt that the need for discovery of basic information relating to the prospective testimony of expert witnesses was very high because such information is crucial to effective cross examination. The rule provides that information will be furnished upon request in the form of a statement by the party and a report prepared by the expert. Paragraph (b) gives the court authority to order further discovery in case where the statement and report do not provide the deeded information and it shown that

cannot be obtained without further discovery. Any potential for unfairness to the party expecting to call an expert as a witness or to the expert is offset by the mandatory requirement that the discovering party pay the experts fees and costs for the discovery. Failure to comply with the rule will either result in an automatic right to depose the expert, without cost, or exclusion of the experts testimony. The request may be made at any time, but the information must be furnished not less than 30 days prior to trial; if a party has not decided upon an expert witness or discovers new expert witnesses, statements and reports for such late experts must be furnished under paragraph (f). The council anticipates that ethical obligations would prevent attorneys from habitually putting off decision as to which experts to call until just prior to trial.

The language of section 33 C was taken from Federal Rule 26 C. Virtually identical provisions appear in two duplicative ORS sections, 41.618 and 41.631. The principal difference is that the ORS sections did not allow a non-party witness to move for a protective order.

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

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

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided

unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court

order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B.(4) Trial preparation; experts.

B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming his opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to him by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days pror to trial.

B.(4)(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to ~~subsection~~ paragraph (c) of this sub section concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

B.(4)(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under ~~subsection~~ paragraph. (a) of this sub section shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees for time spent responding to discovery under ~~subsection~~ paragraph (b) of this sub section.

B.(4)(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this ~~subsection of this section~~ paragraph., the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

B.(4)(e) As used herein, the terms, "expert" and "expert witness", include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

B.(4)(f) A party who has furnished a statement in response to ~~subsection~~ paragraph (a) of this ~~rule~~ subsection is under a duty to supplement immediately such response by additional statement and report of any expert witness that ~~such~~ party decides to call as an exper witness after the time of furnishing the statement.

B.(4)(g) Nothing contained in this ~~rule~~ subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

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

discovery may to the other party reasonable

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

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, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance ~~discovery~~; if there is a coverage question, the subsection provides that a copy of the policy shall be produced upon request. The initial discovery of existence and limits of the policy may be by any method, including interrogatory. Paragraph (b) of subsection B.(2) was drawn from the last two sentences of Feeral Rule 26 B.(2). ADS

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basic information relating to the prospective testimony of expert witnesses was very high because such information is crucial to effective cross-examination. The rule provides that information will be furnished upon request in the form of a statement by the party and a report prepared by the expert. Pararaph (b) gives the court authority to order further discovery in cases where the statement and report do not provide the needed information and it is shown that such information cannot be obtained without further discovery. Any potential for unfairness to the party expecting to call an expert as a witness or to the expert is offset by the mandatory requirement that the discovering party pay the expert's fees for, and the costs of, discovery. Failure to comply with the rule will either result in an automatic right to depose the expert, without cost, or exclusion of the expert's testimony. The request may be made at any time, but the information must be furnished not less than 30 days prior to trial; if a request for discovery has been made and a party has not decided upon an expert witness or discovers new expert witnesses less than 30 days prior to trial, statements and reports for such late experts must be furnished under paragraph (f). The Council anticipates that ethical obligations would prevent attorneys from evading the discovery ~~provided in subsection (f) and~~ habitually putting off decision as to which experts to call until just prior to trial.

The language of section 36 C. was taken from Federal Rule 26 (c). Virtually identical provisions appear in two duplicative ORS sections, 41.618 and 41.631. The principal difference is that the ORS sections did not allow a non-party witness to move for a protective order.

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

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

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided

unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court

order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B.(4) Trial preparation; experts.

B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming his opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to him by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days pror to trial.

B.(4)(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to paragraph (c) of this subsection concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 46 A. (4) apply to the award of expenses incurred in relation to the motion.

B.(4)(c) Unless the court upon motio finds that manifest injustice would result, the party requesting a report under paragraph (a) of this subsection shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees for time spent responding to discovery under paragraph (b) of this subsection.

B.(4)(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this paragraph, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

B.(4)(e) As used herein, the terms, "expert" and "expert witness", include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

B.(4)(f) A party who has furnished a statement in response to paragraph (a) of this subsection is under a duty to immediately supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

B.(4)(g) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

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

discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

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

BACKGROUND NOTE

ORS sections superseded: 41.616(4), 41.618, 41.622, 41.631, 41.635.

COMMENT

This rule is a combination of existing ORS sections (which are primarily drawn from Federal Rule 26), portions of Federal Rule 26, and new provisions drafted by the Council.

Section 36 A. and the introductory language of section 36 B. come from the Federal Rule. Subsection B.(1) is based on ORS 41.635. The scope of discovery is changed from "relevant to the subject matter involved in the pending action, suit or proceeding..." to "...relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party...". This change conforms to the suggested amendment to Federal Rule 26(b)(1) proposed by the committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance; if there is a coverage question, the subsection provides that a copy of the policy shall be produced upon request. The initial discovery of existence and limits of the policy may be by any method, including interrogatory. Paragraph (b) of subsection B.(2) was drawn from the last two sentences of Federal Rule 26 B.(2).

Subsection B.(3) is based on ORS 41.616(4) and Federal Rule 26 (b)(3). The last paragraph relating to a person's own statement does not appear in the existing ORS language.

Subsection B.(4) is a new provision drafted by the Council. Federal Rule 26 (b)(4) regulates all discovery from experts of information acquired or developed in anticipation of trial. It provides for discovery by interrogatories of basic information from experts to be called at trial, allows further discovery from trial experts and discovery from non-trial experts only upon court order, and prohibits any discovery at all from some types of experts. This rule deals only with experts to be called at trial only and leaves regulation of discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases. The Council felt that the need for discovery of basic information relating to the prospective testimony of expert witnesses was very high because such information is crucial to effective cross-examination. The rule provides that information will be furnished upon request in the form of a statement by the party and a report prepared by the expert. Pararaph (b) gives the court authority to order futher discovery in cases where the statement and report do not provide the needed information and it is shown that such information cannot be obtained without further discovery. Any potential for unfairness to the party expecting to call an expert as a witness or to the expert is offset by the mandatory requirement that the discovering party pay the expert's fees for, and the costs of, discovery. Failure to comply with the rule will either result in an automatic right to depose the expert, without cost, or exclusion of the expert's testimony. The request may be made at any time, but the information must be furnished not less than 30 days prior to trial; if a request for discovery has been made and a party has not decided upon an expert witness or discovers new expert witnesses less than 30 days prior to trial, statements and reports for such late experts must be furnished under paragraph (f). The Council anticipates that ethical obligations would prevent attorneys from evading the discovery by habitually putting off decision as to which experts to call until just prior to trial.

The language of section 36 C. was taken from Federal Rule 26 (c). Virtually identical provisions appear in two duplicative ORS sections, 41.618 and 41.631. The principal difference is that the ORS sections did not allow a non-party witness to move for a protective order.

F. Procedure. The motion for substitution may be made by any party or by the successors in interest or representatives of the deceased or disabled party or the successors in interest of the transferor and shall be served on the parties as provided in Rule 9 and upon persons not parties in the manner provided in Rule 7 for the service of a summons.

BACKGROUND NOTE

ORS sections superseded: 13.080, 13.090.

COMMENT

This rule generally preserves the existing rules of ORS 13.080. ORS 13.090 was unnecessary and was eliminated. Sections 34 A. through D. use the language of the existing statute. The words, "if the claim survives or continues", were added to the first sentence of section 34 A. to make clear that this rule relates only to the procedural question of abatement of the action.

Sections 34 D. and E. are based upon sections (a) and (d) of Federal Rule 25. The federal approach to substitution of federal officials is more direct and flexible than existing Oregon practice. Section 34 F. provides a procedure for substitution, which is not addressed by the existing ORS sections.

RULE 35 (RESERVED)

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

is as follows:

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

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or proceeding or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action or proceeding. In such case, the party seeking discovery shall be advised of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of

the existence of coverage later arises, the party discovered against has the duty to immediately advise the party who sought discovery of the question regarding the existence of coverage. The party seeking discovery shall be advised of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

B.(4) Trial preparation; experts.

B.(4)(a) Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the

expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming an opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to such expert witness by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial.

B.(4)(b) A party may only obtain further discovery of information acquired or developed in anticipation of litigation or for trial by experts expected to be called at trial upon motion for a court order allowing such discovery, subject to such restrictions as to scope and such provisions, pursuant to paragraph (c) of this subsection concerning fees and expenses, as the court may deem appropriate. The provisions of Rule 46 A. (4) apply to the award of expenses incurred in relation to the motion.

B.(4)(c) Unless the court upon motion finds that manifest injustice would result, the party requesting a report under paragraph (a) of this subsection shall pay the reasonable costs and expenses, including expert witness fees, necessary to prepare the expert's report, and shall pay expert witness fees

for time spent responding to discovery under paragraph (b) of this subsection.

B.(4)(d) If a party fails to timely comply with the request for experts' reports, or if the expert fails or refuses to make a report, and unless the court finds that manifest injustice would result, the court shall require the expert to appear for a deposition or exclude the expert's testimony if offered at trial. If an expert witness is deposed under this paragraph, the party requesting the expert's report shall not be required to pay expert witness fees for the expert witness' attendance at or preparation for the deposition.

B.(4)(e) As used herein, the terms, "expert" and "expert witness", include any person who is expected to testify at trial in an expert capacity, and regardless of whether the witness is also a party, an employee, agent or representative of the party, or has been specifically retained or employed.

B.(4)(f) A party who has furnished a statement in response to paragraph (a) of this subsection is under a duty to immediately supplement such response by additional statement and report of any expert witness that such party decides to call as an expert witness after the time of furnishing the statement.

B.(4)(g) Nothing contained in this subsection shall be deemed to be a limitation of one party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

C. Court order limiting extent of disclosure. Upon motion

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

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

BACKGROUND NOTE

ORS sections superseded: 41.616(4), 41.618, 41.622, 41.631, 41.635.

COMMENT

This rule is a combination of existing ORS sections (which are primarily drawn from Federal Rule 26), portions of Federal Rule 26, and new provisions drafted by the Council.

Section 36 A. and the introductory language of section 36 B. come from the federal rule. Subsection B.(1) is based on ORS 41.635. The scope of discovery is changed from "relevant to the subject matter involved in the pending action, suit or proceeding..." to "...relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party...". This change conforms to the suggested amendment to Federal Rule 26(b)(1) proposed by the committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance; if there is a coverage question, the subsection provides that a party seeking discovery of the existence and limits of the policy be advised of any existing or later arising coverage question. A copy of the policy shall then be produced upon request. The initial discovery of existence and limits of the policy may be by any method, including interrogatory. Paragraph (b) of subsection B.(2) was drawn from the last two sentences of Federal Rule 26 B.(2).

Subsection B.(3) is based on ORS 41.616(4) and Federal Rule 26 (b)(3). The last paragraph relating to a person's own statement does not appear in the existing ORS language.

Subsection B.(4) is a new provision drafted by the Council. Federal Rule 26 (b)(4) regulates all discovery from experts of information acquired or developed in anticipation of trial. It provides for discovery by interrogatories of basic information from experts to be called at trial, allows further discovery from trial experts and discovery from non-trial experts only upon court order, and prohibits any discovery at all from some types of experts. This rule deals only with experts to be called at trial and leaves regulation of discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases. The Council felt that the need for discovery of basic information relating to the prospective testimony of expert

witnesses was very high because such information is crucial to effective cross-examination. The rule provides that information will be furnished upon request in the form of a statement by the party and a report prepared by the expert. Paragraph (b) gives the court authority to order further discovery in cases where the statement and report do not provide the needed information and it is shown that such information cannot be obtained without further discovery. Any potential for unfairness to the party expecting to call an expert as a witness or to the expert is offset by the mandatory requirement that the discovering party pay the expert's fees for, and the costs of, discovery. Failure to comply with the rule will either result in an automatic right to depose the expert, without cost, or exclusion of the expert's testimony. The request may be made at any time, but the information must be furnished not less than 30 days prior to trial; if a request for discovery has been made and a party has not decided upon an expert witness or discovers new expert witnesses less than 30 days prior to trial, statements and reports for such late experts must be furnished under paragraph (f). The Council anticipates that ethical obligations would prevent attorneys from evading discovery by habitually putting off decision as to which experts to call until just prior to trial.

Section 36 C. is based upon Federal Rule 26 (c) and two duplicative ORS sections, 41.618 and 41.631. The rule allows a non-party witness to move for a protective order which was not possible under the ORS sections. Subsection C.(9) does not appear in the federal rule.

RULE 37

PERPETUATION OF TESTIMONY OR EVIDENCE BEFORE ACTION OR PENDING APPEAL

A. Before action.

A.(1) Petition. A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule 43 or Rule 44 regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petitioner, or petitioner's agent, shall verify that petitioner believes that the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the

RULE 36

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

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

B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action ~~or proceeding~~ or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action ~~or proceeding~~. In such case, the party seeking discovery shall be informed/~~advised~~ of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to immediately inform/~~advise~~ the party who sought discovery immediately/of the question regarding the existence of coverage. The party seeking discovery shall be informed/~~advised~~ of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

B.(2)(b) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under section B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action ~~or proceeding~~ or its subject matter previously made by that party. Upon request, a person who is not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person or party requesting the statement. If the request is refused, the person may move for a court order. The provisions of Rule 46 A.(4) apply to the

award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

B.(4) Expert witnesses.

B.(4)(a) Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify.

B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.(4)(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.(4)(d) As used herein, the term, "expert witness", includes any person who is expected to testify at trial in an expert

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B.(2) Insurance agreements.

B.(2)(a) A party may obtain discovery of 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 part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The policy need not be provided unless a person or entity carrying on an insurance business has formally or informally raised any question regarding the existence of coverage for the claims being asserted in the action. In such case, the party seeking discovery shall be informed of any prior question regarding the existence of coverage at the time discovery of the existence and limits of the insurance agreement is sought. If any question of the existence of coverage later arises, the party discovered against has the duty to inform the party who sought discovery immediately of the question regarding the existence of coverage. The party seeking discovery shall be informed of the basis for contesting coverage and upon request shall be furnished a copy of the insurance agreement or policy.

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

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 and subsection B.(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in

anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

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B.(4)(b) A party who has furnished a statement in response to paragraph (a) of this subsection and who decides to call additional expert witnesses at trial not included in such statement is under a duty to supplement the statement by immediately providing the information required by paragraph (a) of this subsection for such additional expert witnesses.

B.(4)(c) If a party fails to comply with the duty to furnish or supplement a statement as provided by paragraphs (a) or (b) of this subsection, the court may exclude the expert's testimony if offered at trial.

B.(4)(d) As used herein, the term "expert witness" includes any person who is expected to testify at trial in an

expert capacity, and regardless of whether the witness is also a party, an employee, an agent, or a representative of the party, or has been specifically retained or employed.

B.(4)(e) Nothing contained in this subsection shall be deemed to be a limitation of the party's right to obtain discovery of another party's expert not covered under this rule, if otherwise authorized by law.

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

to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

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

COMMENT

This rule is a combination of existing ORS sections (which are primarily drawn from Federal Rule 26), portions of Federal Rule 26, and new provisions drafted by the Council.

Section 36 A. and the introductory language of section 36 B. come from the federal rule. Subsection B.(1) is based on ORS 41.635. The scope of discovery is changed from ". . . relevant to the subject matter involved in the pending action, suit or proceeding. . ." to ". . .relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . .". This change conforms to the suggested amendment to Federal Rule 26(b)(1) proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in March, 1978.

Subsection B.(2) is a new provision drafted by the Council. The existing rule in ORS 41.622 allows production and inspection of liability insurance policies. Absent some question of coverage, another party's legitimate interest in discovery extends only to the existence and limits of insurance; if there is a coverage question, the subsection provides that a party seeking discovery of the existence and limits of the policy be advised of any existing or later arising coverage question. A copy of the policy shall then be produced upon request. Failure to notify of a question regarding the existence of coverage exposes a party to sanctions under ORCP 46 D. Failure to furnish a copy of the policy when required may result in a court order under ORCP 46 A.(2). The initial discovery of existence and limits of the policy may be by any method. Paragraph (b) of subsection B.(2) was taken from the last two sentences of Federal Rule 26 B.(2).

Subsection B.(3) is based on ORS 41.616(4) and Federal Rule 26 (b)(3). The last paragraph relating to a person's own statement does not appear in the existing ORS language.

Subsection B.(4) is a new provision drafted by the Council. It deals only with one aspect of discovery relating to expert witnesses; that is, determining who an opponent intends to call as an expert witness. The application of work product or other privileges to discovery of an opponent's experts or expert witnesses is left to development by case law. See Brink v. Multnomah County, 224 Or 507 (1960), and Nielsen v. Brown, 232 Or 426 (1962). In addition to the sanction specified in paragraph B.(4)(c), the court may order delivery of the statement under ORCP 46 A.(2).

Section 36 C. is based upon Federal Rule 26(c) and two duplicative ORS sections, 41.618 and 41.631. The rule allows a nonparty witness to move for a protective order which was not possible under the ORS sections. Subsection C.(9) does not appear in the federal rule.