

RULE 102
DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

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

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

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

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

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

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

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

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

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

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

COMMENT:

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

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

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

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

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

access to evidence necessary to defend itself.

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

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

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

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

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

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

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

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

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

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

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

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

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

A. Before action.

(1) Petition. A person who desires to perpetuate testimony or to obtain discovery to perpetuate evidence under Rule ⁴³~~109~~ or Rule ⁴⁴~~110~~ regarding any matter that may be cognizable in any court of this state may file a petition in the circuit court in the county of such person's residence or the residence of any expected adverse party. The petitioner, or petitioner's agent, shall verify that petitioner believes that the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or his personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as is ¹⁰⁹known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each, and shall ask for an order authorizing the petitioner

to take the deposition of the person to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule ⁴³ ~~109~~ or Rule ⁴⁴ ~~210~~ from the persons named in the petition.

(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state and within the time ~~and in the manner provided for service of summons in Rules 7F (rules relating to personal or substituted service)~~ ^{personal or substituted service} ~~and in the manner provided for service of summons in Rules 7F (rules relating to personal or substituted service)~~, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7F ~~(personal or substituted service)~~ ^(personal or substituted service), an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this Rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 ~~(guardian ad litem rule)~~ apply.

(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence ¹⁰ may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom

discovery may be sought under Rule ⁴³~~109~~ and specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule ⁴⁴~~110~~. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule ⁴³~~109~~ or Rule ⁴⁴~~110~~ for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in ^{subsection} paragraph (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This Rule does not limit the power of a court to entertain an action to perpetuate testimony.

D. Filing of depositions. Depositions taken under this Rule shall be filed with the court in which the petition is filed or the motion is made.

Rule 37

Back ground

ORS ~~Chapter~~ sections superseded.

45.410, 45.420, 45.430, 45.440, 45.460, 45.470.

COMMENT:

This rule governs use of depositions, requests for production and inspection and medical examinations ~~XXXXXXXXXX~~ before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470 which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal rule 27 appearing in the Vermont Rules of Civil Procedure, The uniform Perpetuation of Testimony Act, and a small portion of the ~~XX existing ORS sections.~~ It is not actually a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate be specified and the reasons for perpetuation be given, it ~~cannot~~ cannot be used to fish for information but to ~~perpetuate evidence~~ *perpetuate evidence*

Subsection A (1) comes from the Uniform perpetuation of testimony Act. It is generally ^{based} modelled upon Federal Rule 27 A but contains additional language in paragraphs (a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate ~~his own testimony~~ ^{evidence} to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (b) is necessary to allow parties given notice ^{of} a ~~reasonable~~ ^{deposition} meaningful opportunity for cross examination. The last clause of Paragraph ^(a) relating to a petitioner with an interest in real property, comes from Ors 45.420(1).

Under Subsection A (2) the general scheme for service of summons ^{in Rule 7} is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may proceed with an attorney appointed by the court to protect the ^{interests} interests of persons not served. Since the Council does not promulgate rules of evidence, ^{perpetuation} proceeding without notice ~~XXXXX~~ under this rule ^{involves} involves ~~contains~~ no guarantee that ~~XX~~ evidence so perpetuated will be admissible in evidence, ~~in a later case and~~ the next to the last sentence of this subsection was added to make ~~that~~ ^{this} clear.

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RULE 37

DEPOSITIONS 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 his personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as is

known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each, and shall ask for an order authorizing the petitioner to take the deposition of the person to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 43 or Rule 44 the persons named in the petition.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. ✓ Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence

may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or

other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in ^{subsection} ~~paragraph~~ (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the ~~same~~ conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

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

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

BACKGROUND NOTE

ORS sections superseded: 45.410, 45.420, 45.430, 45.440, ^{45.450} 45.460, 45.470.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate be specified and the reasons for perpetuation be given, it cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is ~~generally~~ based upon Federal Rule 27 (a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances

(1)
of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in Rule 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

RULE 38

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

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

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of his appointment or

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

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petitioner's personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as ^{one} ~~is~~ known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony, or to seek discovery under Rule 43 or Rule 44 from the persons named in the petition.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition,

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stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these

rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This rule does not limit

the power of a court to entertain an action to perpetuate testimony.

D. Filing of depositions. Depositions taken under this rule shall ^{be} filed with the court in which the petition is filed or the motion is made.

BACKGROUND NOTE

ORS sections superseded: 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate ^e be specified and the reasons for perpetuation be given, it cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27 (a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (1)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (1)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in Rule 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may

proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

RULE 38

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

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

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

RULE 37

DEPOSITIONS 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 his personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as is

known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each, and shall ask for an order authorizing the petitioner to take the deposition of the person to be examined named in the petition, for the purpose of perpetuating their testimony or to seek discovery under Rule 43 or Rule 44 the persons named in the petition.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence

may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or

other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A, of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

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

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

BACKGROUND NOTE

ORS sections superseded: 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision; by its language and requirement that facts which the petitioner desires to perpetuate be specified and the reasons for perpetuation be given, it cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27 (a) but contains additional language in paragraphs 1(a) and (b) that permits a petitioner who had executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances

of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (1)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (1)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in Rule 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

RULE 38

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

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

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of his appointment or

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

petitioner's personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action or proceeding cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action or proceeding; (b) the subject matter of the expected action or proceeding and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action or proceeding; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony, or to seek discovery under Rule 43 or Rule 44 from the persons named in the petition.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition,

stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these

rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which he expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This rule does not limit

the power of a court to entertain an action to perpetuate testimony.

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

BACKGROUND NOTE

ORS sections superseded: 45.410, 45.420, 45.430, 45.440, 45.450, 45.460, 45.470.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

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proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.

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PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS

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

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

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 the petitioner believes that the facts stated in the petition are true.~~ The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors or assigns are likely to be a party to an action ~~or proceeding~~ cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action ~~or proceeding~~; (b) the subject matter of the expected action ~~or proceeding~~ and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action ~~or proceeding~~; (c) the facts which petitioner desires to establish by the

proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties and their addresses so far as ^{one} is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. ~~The petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony, or to seek discovery under Rule 43 or Rule 44 from the persons named in the petition.~~

The petition shall name persons to be examined and ask for an order authorizing the petitioner to take their depositions for the purpose of perpetuating their testimony, or shall name persons in the petition from whom discovery is sought and shall ask for an order allowing discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition,

stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7 F., but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7 F., an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these

rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A. of this Rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

C. Perpetuation by action. This rule does not limit

the power of a court to entertain an action to perpetuate testimony.

D. Filing of depositions. Depositions taken under this rule shall ^{be} filed with the court in which the petition is filed or the motion is made.

COMMENT

This rule governs use of depositions, requests for production and inspection and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 to 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

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

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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 petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner, or the petitioner's personal representatives, heirs, beneficiaries, successors, or assigns are likely to be a party to an action cognizable in a court of this state and are presently unable to bring such an action or defend it, or that the petitioner has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such action; (b) the subject matter of the expected action and petitioner's interest therein and a copy, attached to the petition, of any written instrument the validity or construction of which may be called into question or which is connected with the subject matter of the expected action; (c) the facts which petitioner desires to establish by the proposed testimony or other discovery and petitioner's reasons for desiring to perpetuate; (d) the names or a description of the persons petitioner expects will be adverse parties

and their addresses so far as one is known; and, (e) the names and addresses of the parties to be examined or from whom discovery is sought and the substance of the testimony or other discovery which petitioner expects to elicit and obtain from each. The petition shall name persons to be examined and ask for an order authorizing the petitioner to take their depositions for the purpose of perpetuating their testimony, or shall name persons in the petition from whom discovery is sought and shall ask for an order allowing discovery under Rule 43 or Rule 44 from such persons for the purpose of preserving evidence.

A.(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named therein, for the order described in the petition. The notice shall be served either within or without the state in the manner provided for service of summons in Rule 7, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served with summons in the manner provided in Rule 7, an attorney who shall represent them and whose services shall be paid for by petitioner in an amount fixed by the court, and, in case they are not otherwise

represented, shall cross examine the deponent. Testimony and evidence perpetuated under this rule shall be admissible against expected adverse parties not served with notice only in accordance with the applicable rules of evidence. If any expected adverse party is a minor or incompetent, the provisions of Rule 27 apply.

A.(3) Order and examination. If the court is satisfied that the perpetuation of the testimony or other discovery to perpetuate evidence may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 43 specifying the objects of such discovery; or shall make an order for a physical or mental examination as provided in Rule 44. Discovery may then be had in accordance with these rules. For the purpose of applying these rules to discovery before action, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

B. Pending appeal. If an appeal has been taken from a judgment of a court to which these rules apply or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking

of the depositions of witnesses to perpetuate their testimony or may allow discovery under Rule 43 or Rule 44 for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony or obtain the discovery may make a motion in the court therefor upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show: (1) the names and addresses of the persons to be examined or from whom other discovery is sought and the substance of the testimony or other discovery which the party expects to elicit from each; and (2) the reasons for perpetuating their testimony or seeking such other discovery. If the court finds that the perpetuation of the testimony or other discovery is proper to avoid a failure or delay of justice, it may make an order as provided in subsection (3) of section A. of this rule and thereupon discovery may be had and used in the same manner and under the same conditions as are prescribed in these rules for discovery in actions pending in the circuit court.

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

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

COMMENT

This rule governs use of depositions, requests for production and inspection, and medical examinations before a case is filed and pending appeal. It replaces the original Oregon deposition statute, ORS 45.410 through 45.470, which remained in ORS and applied to both depositions before and after a case was filed. The federal deposition procedure was adopted in Oregon and is generally used after a case was filed, but the original statute was used before filing. There was no ORS section dealing with depositions pending appeal.

The language used in this rule is a combination of the version of Federal Rule 27 appearing in the Vermont Rules of Civil Procedure, the Uniform Perpetuation of Testimony Act, and a small portion of the existing ORS sections. The rule is not a discovery provision. It cannot be used to "fish" for information but only to perpetuate evidence.

Subsection A.(1) comes from the Uniform Perpetuation of Testimony Act. It is generally based upon Federal Rule 27(a) but contains additional language in paragraphs (a) and (b) that permits a petitioner who has executed a written instrument, including a will, to anticipate an action after assignment or death and to perpetuate evidence to show the circumstances of execution and mental capacity. The requirement of attaching a copy of an instrument in paragraph (1)(b) is necessary to allow parties given notice of a deposition a meaningful opportunity for cross examination. The last clause of paragraph (1)(a), relating to a petitioner with an interest in real property, comes from ORS 45.420(1).

Under subsection A.(2), the general scheme for service of summons in ORCP 7 is followed for service of notice and petition. The rule follows the federal rule in providing that, if actual notice cannot be given to prospective parties, the petitioner may proceed with an attorney appointed by the court to protect the interests of persons not served. Since the Council does not promulgate rules of evidence, perpetuation without notice under this rule involves no guarantee that evidence so perpetuated will be admissible in evidence. The next to the last sentence of this subsection was added to make this clear.