

RULE 103

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

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

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

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

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

(d) Foreign Depositions.

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

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

COMMENT:

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

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

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

The rule provides three alternatives:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

BACKGROUND NOTE

ORS sections superseded: 45.161, 45.320, 45.330, 45.350, 45.360, 45.370, 45.910.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December, 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition upon oral examination. Leave of court,

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 commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence¹⁵ obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

Rule 38.

Background note

ORS sections superseded

4S. 161, 4S. 320, ~~4S. 230~~, 4S, 330, 4S. 350, 4S. 360
~~4S. 23~~

4S. 370, 4S. 910

COMMENT:

~~XX~~ This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and ~~40~~ ^{As compared} have also adopted modifications suggested by the American Bar Association Special Committee of the section of Litigation ~~to~~ ⁱⁿ provide a more flexible procedure for non-stenographic depositions. Section A provides ~~XXXX~~ who shall administer an oath not before whom a deposition shall be taken. ~~XXXXXX~~ ^{It} would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See Report of the special Committee of the American Bar Association for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December 1977) hereinafter referred to as ABA Special Committee Report.

Section A ^{3A} contemplates that in a particular case the court could appoint a person not ^{generally} ordinary authorized to administer oaths for the special purpose of administering the oath for a deposition. The procedure ^{of} providing for issuance of commissions for in-state depositions was eliminated as unnecessary.

Section B ^{3B} provides maximum flexibility to a litigant ^{N Oregon} in an Oregon court who wishes to take a deposition in another state or country ~~that~~ ⁷ the Oregon litigant can comply with local requirements in taking the deposition and securing attendance of ^{the} witness. Present ORS Sections provide for taking depositions outside the state before commissioners appointed by the Governor, but the ~~XXXXXX~~ ORS provisions relating to appointment of Commissioners outside the ~~the~~ state have been repealed. ~~XXXX~~

Section C is the existing Uniform Foreign Deposition Act, ORS 45.910.

may need to

(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

commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

tatutes.

BACKGROUND NOTE

ORS sections superseded: 45.161, 45.320, 45.330, 45.350, 45.360, 45.370, 45.910.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December 1977), hereinafter referred to as ABA Special Committee Report.

Section ³⁸A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ~~The procedure of issuance of commissions for in state depositions was eliminated, as unnecessary.~~

~~45.320,~~
ORS:
45.330,
45.350
and 45.360
providing
FUR.

Section ³⁸B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ~~Present ORS sections provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed.~~ ~~and that sections were eliminated.~~

ORS 45.320
and 45.370

Section ³⁸C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

but 38 B provides that
if necessary for a foreign
deposition a commission would
be issued by the court.

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

commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

BACKGROUND NOTE

ORS sections superseded: 45.161, 45.320, 45.330, 45.350, 45.360, 45.370, 45.910.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions, were eliminated but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

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

both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

BACKGROUND NOTE

ORS sections superseded: 45.161, 45.320, 45.330, 45.350, 45.360, 45.370, 45.910.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and Rules 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December, 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition upon oral examination. Leave of court,

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

both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and ORCP 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for non-stenographic depositions. Section A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December, 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition upon oral examination. Leave of court,

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 both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person

before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

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

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

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and ORCP 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for nonstenographic depositions. Section

38 A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.320, 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions, were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.