

RULE 105

DEPOSITIONS UPON ORAL EXAMINATION

(a) When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including the party, by deposition or oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule \_\_\_\_ (service of process) to appear and answer after service of summons and complaint on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection (c)(2) of this rule. The attendance of a witness may be compelled by subpoena as provided in Rule \_\_\_\_\_. The deposition of a person confined in prison may be taken only by leave of court as provided in section (b) of this rule.

COMMENT:

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

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

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

The specific sources of the rule suggested are as follows:

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

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

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

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

(b)

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

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

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

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

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

COMMENT:

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

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

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

(c)

~~§~~ Notice of Examination: General Requirements; Special Notice; Non-Stereographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. *A notice may provide for the taking of testimony by telephone. If necessary, however, to assure a full right of examination of any deponent, the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.*

COMMENT:

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

This subsection would be amended to provide for the taking of testimony by telephone without court order. The Committee intends, by the use of the word "telephone," to embrace any other recognized form of telecommunication between distant points. The comments relating to changes in Rule 30(b)(4) apply equally to this proposed Rule change.

(105 c' 4 below)

The Committee is aware, however, that in appropriate cases, physical confrontation may be necessary for proper examination to protect against coaching, or to permit the exchange and reading of documents. The recipient of a notice calling for a deposition by telephone may apply to the court for an order requiring the noticing party to appear in the presence of the deponent for the taking of the deposition.

(c) (2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. ~~The sanctions provided by Rule 11 are applicable to the certification.~~

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

COMMENT:

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

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

(c)(4) The notice of deposition required under (1) of this subsection (b) may provide that the testimony be recorded by other than stenographic means in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

COMMENT:

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

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

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

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

\* \* \* \*

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

Rule 109

Rule 109

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

COMMENT:

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

\* \* \* \*

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

COMMENT:

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

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

\* \* \* \*



(e)

~~41.185~~ **Motion to terminate or limit examination.** At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any party, the court in which the action, ~~suit~~ or proceeding is pending, or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in ~~ORS 41.018~~. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action, ~~suit~~ or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 112(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 101 (c).

COMMENT:

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

\* \* \* \* \*

(f) Submission to Witness; Changes; Signing. When the testimony is taken by stenographic means, or is recorded by other

than stenographic means as provided in subsection (c)(4) of this Rule, and if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness within 30 days of its submission to him, the reasons for the refusal shall be stated under/on the transcription or in a writing to accompany the recording by the party requesting the filing of the transcription or recording.

COMMENT:

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

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

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

The federal rule has a last sentence as follows:

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

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

\* \* \* \*

- (9) (1) Certification and filing; Exhibits; Copies; Notice of Filing. *When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in his presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than <sup>(e)</sup> stenographic means as provided in subsection 30~~(b)~~(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. When a recording or a non-stenographic deposition is filed with the court, the party taking*

*the deposition shall certify that such is a true, complete and accurate recording of the deposition of the witness and the recording has not been altered.*

*A deposition so certified shall be considered prima facie evidence of the testimony of the witness.*

(g)(2) If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection (c)(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending, or such other person as may by writing be agreed upon, and deliver or forward it accordingly, by mail or other usual channel of conveyance.

(g)(3) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(g) (4) Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection (c)(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

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

COMMENT.

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

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

**Payment of expenses upon**

- (h) **failure to appear.** (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action, ~~suit or~~ proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.
- (h) (2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

**COMMENT:**

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

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 <sup>upon</sup> or oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 ~~(service of process)~~ to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of <sup>79</sup> each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum


is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before the expiration of the period of time specified in Rule 7 (~~service of process~~) to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

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

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

(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

 (5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule <sup>43</sup>~~109~~ for the production of documents and tangible things at the taking of the deposition. The procedure of Rule <sup>43</sup>~~109~~ shall apply to the request.



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

(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule <sup>38</sup>~~103~~ shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the <sup>20</sup>party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections

made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule <sup>36</sup>~~101~~ C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule <sup>46</sup>~~412~~ A. (4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C. (4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording

shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule ~~107~~<sup>41</sup> D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

<sup>123</sup> G. Certification, filing and exhibits.

(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and

that the transcript is a correct writing of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under penalty of perjury that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.

24 (3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness <sup>25</sup> because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

4. 55 BAC9d nte.

ORS sections superseded.

44.230

45.185. 45.190. 45.200

45.151, 45.161, 45.171, 45.230, 240.

COMMENT:

~~The XXXXXXXXX~~ This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre 1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38).

Section A incorporates the 1970 amendments ~~XXXXXXXXXXXXXXXXXXXX~~ to the Federal Rules relating to Time of taking deposition and special notice.

Section B covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under rule 55 relating to subpoenas.

Subsections C ~~XXXXXXXXXXXXXXXXXXXX~~ changes the language of ORS 45.161 to conform to the 1970 amendments to the Federal Rules. Subsection B ~~2~~ reverses the existing requirement for a special court order to take a non-stenographic deposition, and allows a party to specify such a deposition in the notice. ~~XXXXXXXXXXXX~~ Subsection B (7) is new. The ABA Special Committee report recommended that a party be allowed to simply notice a deposition by telephone. This rule requires a court order for such a deposition.

Sections 39 D, E, F and G are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing certifying and filing depositions. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing in ~~XXXXXXXXXXXXXXXXXXXX~~ Subsection G (2) upon request of any party. For non-stenographic depositions the rule contemplates that the recording will be preserved by the party taking the deposition unless ~~XXXXXX~~ the ~~XXXXXXXXXXXXXXXXXXXX~~ recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding it must be submitted to the witness for examination and a procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed the deposition may be used as fully as though signed, unless suppressed by the court. For a non stenographic deposition, the party taking the deposition certifies to the authenticity of the recording and if transcribed the person making the transcription certifies that the ~~XXXXXXXXXXXXXXXXXXXX~~ oath was administered on the record and to the ~~XXXXXXXXXXXX~~ accuracy of the transcription. Other than changes related to non-stenographic transcription, the procedures described in these sections are not ~~XXXXXXXXXX~~ notably different from existing Oregon practice.

Except for the addition of the last sentence Section 39 E is the same as ORS 41.185

The term on Stenographic includes video recording and any other producing a permanent accurate record. (1), (2), (5) and (6)

because the person administering the oath will not necessarily be present at the deposition.

is based upon the recommendations of the ABA Special Committee report and

Oath will be administered on the recording and

add sentence in next section

Add Above

Subsection F (3) provides a simplified method of dealing with exhibits.

~~XX~~

Sedction 39 H is ORs 45.200.

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 ~~or~~ <sup>upon</sup> oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

Word

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of



each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

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

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

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court

may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either

stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the

deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the

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statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct <sup>transcription</sup> ~~writing~~ <sup>press ADJ</sup> of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify, under penalty of perjury, that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.

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G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness

because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

BACKGROUND NOTE

~~45.151, 45.161, 45.171, 45.185, 45.190~~, 45.030, 45.110, 45.140

ORS sections superseded: 45.151, 45.161, 45.171, 45.185, ~~45.190~~, 45.200, 45.230, 45.240.

COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. - ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section A. incorporates the 1970 amendments to the federal rules relating to time of taking deposition and special notice.

Section B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under Rule 55, relating to subpoenas. Subsections C.(1), (2), (5) and (6) change the language of ORS 45.161(4) to conform to the 1970 amendments to the federal rules. Subsection B. is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection C.(7) is new. The ABA Special Committee Report recommends that a party be allowed to simply notice a deposition by telephone. This rule requires a court order for such a deposition. (4)

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For non-stenographic depositions, the rule contemplates that the

with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action or proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall



be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of <sup>a</sup> deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to

amoy, embarrass or oppress the deponent or any party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and

reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, <sup>under</sup> ~~under~~ <sup>oath</sup> ~~penalty of perjury,~~ on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under penalty

of perjury, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under penalty of perjury that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action or proceeding is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials

Mullis p 14.

Why file  
if it's possible

p 7  
p 10  
memo

transcribe  
not file

desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a

deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

#### BACKGROUND NOTE

ORS sections superseded: 45.030, 45.110, 45.140, 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, 45.240.

#### COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under Rule 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.



Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

#### RULE 40

##### DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action or proceeding, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined

oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination and a procedure for preserving changes by a witness and the reasons for such changes is provided; ~~and~~ the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to non-stenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

#### RULE 40

#### DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined in prison may be taken only as provided in Rule 39 B..

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name

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, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of

each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

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

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

(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court

may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either

stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or any party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the

deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the

statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify, under penalty of perjury, that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.



G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness

because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

#### BACKGROUND NOTE

ORS sections superseded: 45.030, 45.110, 45.140, 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, 45.240.

#### COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking deposition and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under Rule 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a nonstenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply notice a deposition by telephone. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of nonstenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the

oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination and a procedure for preserving changes by a witness and the reasons for such changes is provided; the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a non-stenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

#### RULE 40

##### DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined in prison may be taken only as provided in Rule 39 B.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name

## 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,

with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action or proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall

be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to



annoy, embarrass or oppress the deponent or any party, the court in which the action or proceeding is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action or proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this Rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and

reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under penalty

of perjury, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under penalty of perjury that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action or proceeding is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action or proceeding is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials

desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. (1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a

deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

#### BACKGROUND NOTE

ORS sections superseded: 45.030, 45.110, 45.140, 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, 45.240.

#### COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under Rule 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.

#### RULE 40

##### DEPOSITIONS UPON WRITTEN QUESTIONS

A. Serving questions; notice. After commencement of the action or proceeding, any party may take the testimony of any person, including a party, by deposition upon written questions.

## 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,

with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action ~~or proceeding~~. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall



be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

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

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this Rule. If testimony is recorded pursuant to subsection C.(4) of this Rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this Rule, until the final disposition of the action or proceeding. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of <sup>a</sup> deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to

reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification, filing and exhibits.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, ~~penalty of perjury~~, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under penalty

of perjury, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under penalty of perjury that the recording, either filed or furnished to the person making the transcription, is a true, complete and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action ~~or proceeding~~ is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition, shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action ~~or proceeding~~ is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection C.(4) of this Rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear. H.(1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in

which the action or proceeding is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

#### COMMENT

This rule is based upon Federal Rule 30 modified by existing ORS sections (which were based upon the pre-1970 federal rule language) and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to Rule 38). The term, "non-stenographic", includes video tape and any other recording device capable of producing a permanent and accurate record. ORS 45.020, 45.110 and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under ORS 55, relating to subpoenas.

Subsections C.(1), (2), (5) and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed to simply specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, Section 39 E. is the same as ORS 41.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For nonstenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a nonstenographic deposition, the party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered on the record and to the accuracy of the transcription. Other than changes related to nonstenographic transcription, the procedures described in these sections are not notably different from existing Oregon practice.

Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is ORS 45.200.



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 a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the

deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

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

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection

does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this rule. If testimony is recorded pursuant to subsection C.(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription

or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used

at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the

justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party



taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear.

H.(1) Failure of party to attend. If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) Failure of witness to attend. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

COMMENT

This rule is based upon Federal Rule 30, existing ORS 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, and 45.240 (which were based upon the pre-1970 federal rule language), and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to ORCP 38) The term "non-stenographic" includes video tape and any other

recording device capable of producing a permanent and accurate record. ORS 45.020, 45.030, 45.110, and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under ORCP 55, relating to subpoenas.

Subsections C.(1), (2), (3), (5), and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed simply to specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, section 39 E. is the same as ORS 45.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying, and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For non-stenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes is provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a non-stenographic deposition, the

party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered and that the transcription is accurate. Other than changes related to non-stenographic depositions, the procedures described in these sections are not notably different from existing Oregon practice. Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is based on ORS 45.200.