

RULE 109

PRODUCTION OF DOCUMENTS AND THINGS AND
ENTRY UPON LAND FOR INSPECTION AND
OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, ~~without leave of court~~, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. (The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection within 30 days after the service of the request. The court may allow a shorter or longer time. If objection is made to part of an item or category, the part shall be specified.

The party submitting the request may move for an order under Rule 27(c) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) **Writings called for need not be offered.** Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

(d) ~~(e)~~ **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMENT:

Since ORS 41.616 was amended as a result of an Oregon state Bar bill in 1977; it was used with only slight changes for this rule. The Oregon statute is virtually identical to Federal Rule 34. The specific differences between the statute and this rule are as follows.

The Oregon statute begins, "After commencement of an action, suit or proceeding,..." This does not appear in the federal rule and was omitted as unnecessary and perhaps inconsistent with Rule 102.

The second sentence of ORS 41.616(2) omits the federal rule language, "shall set forth the items to be inspected either by individual item or by category". Since the next to the last sentence of ORS 41.616(2) refers to objection to part of "an item or category", this must have been inadvertent and the language was included in section (b) of this rule.

The federal rule provides that a party upon whom the request is served responds by a written statement within 30 days indicating that they will comply with the request or by objecting. The Oregon statute says that the party shall simply comply with the request. The Oregon approach eliminates a useless intermediate step and was retained. However, if read literally, the statutory language would say that the party must comply with the request in 30 days, i.e., "shall comply with the request, unless objected to...[Ⓞ] within 30 days..." This is inconsistent with section (a) which provides the request shall specify the time for production. The problem is the circled comma, which makes the 30 days modify

compliance rather than objection. This offending comma was not in the Bar draft of the bill and was removed from this rule. The producing party must then comply at the time specified in the request or file objections within 30 days. If the time specified to produce is less than 30 days, no motion to compel production could be given until the 30-day period to file objections had run.

The last sentence of subsection (b) of this rule does not appear in ORS 41.616, but ORS 41.617 has detailed sanction provisions for failure to produce. Since these rules contain a general sanction rule for all discovery devices, the federal format of a reference to the general sanctions rule was used.

Subsection (c) is ORS 41.620. It does not appear in the federal rule. Although it refers to evidence, it is not an evidentiary rule because it refers to the conditions of discovery, not the admissibility of the fruits of discovery in evidence.

Subsection (d) of this rule is taken from the federal rule and does not appear in the Oregon statutes.

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RULE ~~129~~

PRODUCTION OF DOCUMENTS AND THINGS AND
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A. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule ~~129~~³⁶ B. and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule ~~129~~³⁶ B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related ³⁷ acts before the expiration of ~~30~~⁶⁰ days after service of summons, unless the court specifies a shorter time.

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The party upon whom a request has been served shall comply with the request, unless

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the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule ~~112~~^{46A} with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

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

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Rule 43

Background note

ORS sections superseded

41.616, 41.620

COMMENT:

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

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

RULE 43

PRODUCTION OF DOCUMENTS AND THINGS AND
ENTRY UPON LAND FOR INSPECTION AND
OTHER PURPOSES

A. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related

acts before the expiration of 60 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

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

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

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

Section 43 is based on ORS. 41.620. Section D comes from the Federal Rule.

114 *Section C. does not appear in the federal rules and is based upon*
see 1st draft

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

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

RULE 43

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

A. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action or proceeding and upon any other party with or after service of the summons upon that party.

45 - The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of ~~30~~ days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

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

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

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

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

RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

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B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related

acts before the expiration of 60 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, he is not obliged to offer it in evidence.

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

BACKGROUND NOTE

ORS sections superseded: 41.616, 41.620.

COMMENT

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

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

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

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

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B. Procedure. The request may be served upon the plaintiff after commencement of the action or proceeding and upon any other party with or after service of the summons upon that party.

The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 60 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

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B. Procedure. The request may be served upon the plaintiff after commencement of the action or ~~proceeding~~ and upon any other party with or after service of the summons upon that party.

The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of ⁴⁵60 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

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

COMMENT

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

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B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and

category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

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

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section 43 B., the federal rule

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