

RULE 110

PHYSICAL AND MENTAL EXAMINATION
OF PERSONS; REPORTS OF
EXAMINATIONS

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 ~~in which the action is pending~~ may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his 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.

(b) Report of Examining Physician.

~~§~~ If requested by the party against whom an order is made under ~~Rule 35~~ ^{section of this rule} (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. ~~This subdivision~~ ^{section} applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

(c) Reports of claimants for damages and injuries.

~~In a civil~~ ^{In a civil} action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party,

Upon the request of the party against whom the claim is pending, the claimant shall deliver to him a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply.

(d) ~~44.000~~ Effect of failure to comply. If a party fails to comply with ~~ORS 44.040 and 44.610 to 44.640~~ or if a physician fails or refuses to make a detailed report the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

→ sections (b) and (c) of this rule.

(e) Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.

~~rule~~ (F) Discovery by other means.

~~This subdivision~~ does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician, in accordance with the provisions of any other rule or any other form of discovery authorized by this rule.

COMMENT:

This rule is a combination of existing ORS 44.610 and Federal Rule 35. The most significant change from existing practice is the extension of medical examinations from personal injury cases to any situation where the medical and physical condition of a party is in controversy. The most common use of the examination would continue to be personal injury cases, but there are other situations where physical conditions are at issue and medical exams are desirable, e.g., negligence claim based upon a defective physical condition of the defendant.

The language of paragraph (a) comes from the federal rule. The language is similar to ORS 44.610. That statute referred to a party or person in the custody or legal control of a party but did not contain the requirement "to produce for examination the person in his custody and control". The custody and control language came into the federal rule in the 1970 revision because of problems related to physical examinations of children and wards. A proposed 1955 amendment to Rule 35 which was never adopted would have extended the rule to include "agents and employees of a party." This language has been picked up by a number of states but was not included here because it probably creates more problems than benefits received. The reference to blood group as a physical condition was also added in 1970 to clearly authorize orders for blood tests in paternity cases.

The language of section (b) is from Federal Rule 35(b)(1) and (b)(3). The Oregon statutes provide for an exchange of reports

but in a slightly different manner; ORS 44.620(1) provides for a delivery of a copy of a report on request of the examined party when the examination is pursuant to a court order, and ORS 44.620(2) (discussed below) provides for delivery of the claimant's reports but not related to any request for defendant's reports or even a court-ordered examination. This rule operates as follows. If an examination is ordered, the examining party can request a copy of the resulting report. By so doing, the examined party becomes subject to a request from the examining party for all medical reports which the examined party has as to the same physical or mental condition. If no request for a report is made by the examined party, no right to reports from the examined party arises for the examining party.

There is one aspect in which discovery under the existing Oregon statute is broader than this rule. ORS 44.620(1) provides that any party may secure the report from the examining party, but this rule only allows the examined party to secure the report. The federal rule limitation to examine a party was retained because allowing any party to request a report complicates the exchange provisions, and the need for access to the examining party's reports exist most strongly for the examined party who has consented or been subjected to the examination.

The language in section (b) describing the contents of the report is the same as existing ORS 44.620(1), and the last sentence of section (b) is the same as ORS 44.640, making the duty of exchange applicable to examinations by stipulation.

Subsection (c) is ORS 44.620(2) and does not exist in the federal rule. The 1973 Oregon State Bar bill, which became ORS 44.610, was expressly designed to create a duty on the part of plaintiffs in personal injury cases to furnish medical reports apart from any exchange with the defendant or any court-ordered examination. The practice and procedure committee's comment on the Bar bill are as follows:

/"Under existing case law the medical reports of a bodily injury claimant's physician are not subject to discovery. However, the report of the independent examining physician is subject to discovery. This creates a disparity in the pre-trial exchange of information. It delays settlements. In many cases, it causes delay because of the length of time it takes to schedule an independent medical examination. It causes added expense. In many cases, an independent medical examination would not be necessary if defense counsel were supplied with detailed reports by plaintiff's treating doctors.

The purpose of this bill is to require plaintiff to produce copies of the medical reports of his treating physician."/

See Woolsey v. Dunning, 268 Or. 233 (1974).

Section (d) is ORS 44.630. It has the same effect as the last sentence of Federal Rule 35(b)(1) but was retained as a separate section as it would apply to orders under both sections (b) and (c). The sanction of a deposition does not exist in the federal rule. The language refers only to the refusal to deliver a report. The sanctions for refusal to submit to an examination are covered in the general sanctions rule. Sections (b) and (c) do not clearly specify that a report must be created if one does not exist; under this section, the physician must "make" a report. ORS 44.630 says that failure to comply with "ORS 44.040 and 44.610 to 44.640" could result in a court order. That was changed to

refer to "this rule". This does not incorporate the existing reference to ORS 44.040. That statute, however, is the privilege rule; it was modified by the Bar bill to be made subject to this rule, but contains no duty to furnish a report.

Section (e) is ORS 441.810. This provision apparently came into the statutes in 1931 as part of the hospital lien law and ended up codified under the health care facilities section of the statutes, but it is clearly a discovery provision and was therefore included in this rule. In State ex rel Calley v. Olsen, 271 Or. 369 (1975), a life insurance company that wished to examine the hospital records of a deceased to prove that death was due to a pre-existing sickness or disease argued that the statute on its face authorized such an examination. The court there pointed out that when it was codified in the Oregon revised statutes, the language of the statute was changed from the Oregon law as enacted. Using the language of the original law, the court interpreted the statute as only authorizing discovery for hospitalization related to the injuries for which a claim for damages is asserted. See 271 Or. 373, pp. 373-376. The language of the statute was, therefore, changed to conform to this, adding the words, "for such injuries." The last sentence of this section does not appear in the Oregon statute but was adapted from the Wisconsin discovery statutes.

Section (f) is the same as the last sentence of ORS 44.640 and Federal Rule 35 (b)(3). It is clearly necessary to preserve the current relationship to discovery under other rules. This rule

applies to only report exchanges after a court-ordered or stipulated medical examination of an opponent and reports of personal injury plaintiffs. For testifying doctors in a case, the proposed Rule 101(b)(4) relating to expert discovery would authorize statements, reports and depositions. The language of the rule referring to "any other discovery" was added to 44.640 to be sure that statements under the expert discovery rule would not be affected. For any other situation, discovery probably would be prohibited under the physician-patient, attorney-client and work product privileges but still might be possible under the general deposition and discovery rules. It should be noted that the proposed rules relating to experts and trial preparation materials are expressly made subject to this rule. This rule would allow discovery of reports of experts not to be called at trial automatically without any showing of special need, etc., and provides for a detailed report.

Finally, the federal rule has one provision that was not included in this rule:

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

This was not included as it is an evidentiary rule and different from existing Oregon law. It is clear that, even in a personal injury case, the plaintiff waives privilege only for the discovery of the written report and not for discovery by deposition or at

trial. See Woolsey v. Dunning, supra, pp. 241-243. Although ORS 44.040(d) (the physician-patient privilege) was modified to say "subject to ORS 44.610 to 44.640", this only qualifies the privilege as to the delivery of reports under those provisions and has no effect on other applications of the physician-patient privilege. We should ask the Legislature to amend ORS 44.040(d) to say "subject to Rule 110".

44.
RULE ~~110~~

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 his 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.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this Rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

or C. Reports of claimants for damages and injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to him a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply.

D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.2(2) If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.

Rule 44.

Background Note.

ORS sections superseded.

44.610, 44.620, 44.630, 44.640

441.810

COMMENT: Section 44A comes from the Federal Rule and

This rule is a combination of ORS sections and Federal Rule 35. It extends the possibility of a medical examination from personal injury cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court ordered blood tests in paternity disputes.

Section B is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report and ~~the existing provision says any party may secure a copy.~~ as opposed to

Section C is based on ORS 44.620(2), and has no ~~XXXXXX~~ federal Rule has no corresponding provision.

Section D is based upon ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section E is based upon ORS 441.810. Despite its location in ORS, the provision clearly is a discovery rule. ~~The language of the ORS~~ As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel. Calley v Olsen 271 Or 369 (1975) The language was modified to conform to the original intent.

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 his 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.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this Rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed report of the examining physician setting out ^{the physician's} ~~his~~ findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. Reports of claimants for damages and injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon ~~the~~ request of the party against whom the claim is pending, the claimant shall deliver to ~~him~~ ^{the requesting party} a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows that he is unable to comply.

D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports

for the reasonable and necessary costs of enforcing for the reasonable and necessary costs of enforcing the party's right to discover.

BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

⁴⁴ Section B. is also adapted from the ~~the~~ federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

⁴⁴ Section C. is based on ORS 44.620(2).

⁴⁴ Section D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

⁴⁴ Section E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

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.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. Reports of claimants for damages and injuries. In a civil action or proceeding where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report,

the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. [Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.]

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BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a **more complete** exchange of reports than that contemplated by the **existing** ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to **specifically** cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was **apparently** intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

RULE 45

REQUESTS FOR ADMISSION

A. Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action or proceeding only, of the truth of any matters within the scope of Rule 36 B. set forth in the request that relate to **statements** or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request **unless** they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, **without** leave of court, be served upon the

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RULE 44

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B. Report of examining physician. If requested by the party against whom an order is made under section A. of this Rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

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D. Report; effect of failure to comply. (1) If an obligation to furnish a report arises under sections B. or C. of this Rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this Rule or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request such a report within a reasonable time, the court may require the physician to appear for a deposition or may exclude his testimony if offered at the trial.

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BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 441.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

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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.

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B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

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D.(2) If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.

BACKGROUND NOTE

ORS sections superseded: 44.610, 44.620, 44.630, 44.640, 44.810.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 44.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

RULE 45

REQUESTS FOR ADMISSION

A. Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action or proceeding only, of the truth of any matters within the scope of Rule 36 B. set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the

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.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. Reports of claimants for damages and injuries. In a civil action ~~or proceeding~~ where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply. ^{D.} (1) If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report,

the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person for such injuries. ~~Any person having custody of such records and who unreasonably refuses to allow examination and copying of such records shall be liable to the party seeking the records and reports for the reasonable and necessary costs of enforcing the party's right to discover.~~

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and extends the possibility of a medical examination from personal injury

cases to any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody or under the legal control of a party would authorize court-ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by the existing ORS sections. In one respect the rule is narrower than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report.

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the codification did not make this clear. See State ex rel Calley v. Olsen, 271 Or 369 (1975). The language was modified to conform to the original intent.

The liability for failure to allow access to hospital records set out in ORS 441.810 is a substantive provision and is left as a statute.

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.

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a

person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

D. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply.

D.(1) Preparation of written report. If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) Failure to comply or make report or request report. If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a

reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with the hospitalization of the injured person.

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and is more comprehensive than ORS 44.610. It allows a medical examination in any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody of or under the legal control of a party would authorize court ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by existing ORS 44.620 and 44.640. In one respect the rule is more narrow than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report. A party may also be ordered to furnish a report under ORCP 46 A.(2).

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the ORS codification did not make this clear. See State ex rel. Calley v. Olsen, 271 Or 369 (1975). The Council used language similar to that in the ORS section and intended to allow examination of any hospital records of the injured person.