

RULE 112

FAILURE TO MAKE DISCOVERY; SANCTIONS

(Note: Bracketed material to be included if interrogatories adopted or replaced by reference to account statement if interrogatories are not adopted)

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 105 or 106, or a corporation or other entity fails to make a designation under Rule 105(c)(6) or 106, (or a party fails to answer an interrogatory submitted under Rule 108), or if a party fails to furnish a statement and report under Rule 101(B)(4), or if a party in response to a request for inspection submitted under Rule 109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 101(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity

for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in ^{Judicial} District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by ~~the~~ the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

Circuit Court
Judge
Judicial

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~30(d)~~ (6) or ~~31(a)~~ to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule ~~25~~, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

105(c) ←

→ 106(a)

110 ←

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

110(a) ←

(E) Where a party has failed to comply with an order under Rule ~~30(d)~~ requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this

subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

111 ← (c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule ~~35~~, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule ~~30(a)~~, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

105(c) ← (d) **Failure of Party to Attend at Own Deposition [or Serve Answers to Interrogatories] or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~30(b)~~ (6) or ~~31(a)~~ to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule ~~33~~, after proper service of the interrogatories, or (3) (2) to serve a written response to a request for inspection submitted under Rule ~~34~~, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. → 106(a)

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule ~~26(c)~~. 101(c)

COMMENT:

This should be one of the most important revisions to the discovery procedures. The present sanctions for failure to discover are scattered through Chapters 41 and 45 of ORS, are set up separately and differently for different discovery devices and, in some cases, use pre-1970 federal rule language.

This rule is basically Federal Rule 37, which was a product of a careful and extensive revision of the sanction rule in 1970. Generally, this revision strengthened and clarified the sanctions procedures and removed confusing references to willful refusals and failures to discover. With a few exceptions, all sanctions under the rule are gathered under Rule 37, and any failure to engage in discovery falls under Rule 37. This, however, does not mean that absolute compliance with the discovery procedures is required at risk of serious sanctions. Under the scheme of Rule 37, no serious sanctions under part (b) can be imposed until there is a failure to obey a direct court order (except for several exceptions under subpart (d)). In any case, sanctions are completely at the discretion of the court and constitutionally limited to persistent and willful failures to comply with the rules. See 11 Wright and Miller, Federal Practice and Procedure, § 2283.

The federal rule language was modified in some instances to conform to state practice and statutes and to the exact provisions of the Oregon rules as follows:

(a)(1) The federal rule allowing the district court where a deposition is being taken to act on all matters relating to the

deposition was changed to allowing a circuit judge in a judicial district where the deposition is being taken to act in case of a deponent's refusal to answer a question. The modification is based on the Minnesota rule and contemplates sanctions by the court where the action is pending unless absolutely necessary. There is no present equivalent to this provision in the Oregon statutes.

(a)(2) to (4) This is presently covered by ORS 41.617 but only for production and inspection. The federal rules refer to "failing to respond" and an order "compelling an answer, or a designation" if there is a refusal to comply with a production and inspection request. This was changed to conform to Rule 109 of these rules. A specific reference to a refusal to furnish the statement and expert reports from Rule 101(b)(4) was added as there is no equivalent provision in the federal rules. Under subsection (4), the language of ORS 41.617(2), 41.631 and 41.626(5) was used which says that the court "may" rather than "shall" give expense awards. This apparently was a deliberate policy choice by the legislature.

(b)(1) This conforms to the change in (a)(1) above. There is no equivalent provision in the existing Oregon statutes.

(b)(2) Except for changes in numbering, the federal rule language was used. ORS 41.617(3) and (4), which are the equivalent provisions for production and inspection, are basically the same, but the description of the sanctions is slightly different. ORS 45.190 for depositions refers only to striking a pleading or dismissing an action when a party willfully refuses to appear for a deposition. It should be noted that the expense provisions

here use the word, "shall", rather than "may". This conforms to ORS 41.617(4).

Subsections (b)(2)(A) and (B) refer to prohibiting the introduction of evidence but were left under the theory that this is not an evidentiary rule but part of the discovery sanctions.

(c) In this section the language of the federal rule and ORS 41.626(6) were identical.

(d) There is no equivalent provision in the Oregon statute except ORS 45.910 relating to failure to appear for a deposition. The federal rule language was used except for numbering changes. It should be noted that under the existing Oregon scheme, there are no provisions covering failing to answer questions at a deposition; ORS 45.190 only covers failing to show up for the deposition.

The federal rule contains two other sections. Federal Rule 37(e) refers to subpoenas served outside the United States. Wright and Miller call it a "superfluous orphan" and it has no application to state practice. Rule (f) limits expense sanctions against the United States because of a federal statute limiting imposition of cost against the United States. There is no equivalent state limitation.

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

46 ~~112~~ A. (2) Motion. If a deponent fails to answer a question propounded or submitted under Rules ^{39 40} 105 or 106, or a corporation or other entity fails to make a designation under Rule ³⁹ 105 C. (6) or Rule ^{40A} 106, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule ³⁶ 101 B. (2), or a party fails to answer an interrogatory submitted under Rule ⁴² 108, or if a party in response to a request for inspection submitted under Rule ⁴³ 109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule ³⁶ 101 C.

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules ³⁹105 or ⁴⁰106, or a corporation or other entity fails to make a designation under Rule ³⁹105 C. (6) or Rule ^{40A}106, or a party fails to answer an interrogatory submitted under Rule ⁴²108, or if a party in response to a request for inspection submitted under Rule ⁴³109, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule ³⁶101 C.

¹¹⁰ (3) Evasive or Incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Present

comply with a request under Rule 36 B(2), or a party fails to

30 (4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

(1) Sanctions by court in judicial district where deposition is taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a ~~party~~^X or an officer, director, or managing agent of a party or a person designated ~~under Rule 106~~³⁹ C. (6) or ~~106~~⁴⁰ A. to testify on behalf of a party fails to obey an order to provide or permit ~~discovery~~⁴⁴, including an order made under section A. of this Rule or Rule ~~110~~¹¹⁰, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

B.(v)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(v)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

B.(v)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

B.(v)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

B.(v)(e) Where a party has failed to comply with an order under Rule ⁴⁴~~40~~ A. requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this ^{section} subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the ¹¹²attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule ⁴⁵~~41~~, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the

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other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule ⁴⁵ ~~44~~ ^{B or C} A., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule ³⁹ ~~105~~ C. (6) or ⁴⁰ ~~106~~ A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule ⁴² ~~108~~, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule ⁴³ ~~109~~, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the ¹¹³ failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection ^{Section 8} ~~B~~ (2) of this Rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this ~~subdivision~~ ^{Section} may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule ^{36 C} ~~101~~ ³.

Rule 46.

FOR Failure to Furnish
expert report when requested,
see: Rule 36 B 4.

Background Note ✓

FOR Failure to Furnish
medical reports when
requested, see:
Rule 44 D.

ORS sections superseded.

41.617, ~~41.626~~ 41.626 (5), (6) and (7),

41.631 (3), 45.190,

COMMENT:

This rule is based upon Federal Rule 37 and incorporates most of the provisions for sanctions for failure to engage in discovery in one rule. The existing sanction provisions in Oregon are scattered through ORS chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear picture of procedure to be followed when a ~~party or witness fails to engage in discovery~~ party or witness fails to ~~comply with discovery requirements~~ comply with discovery requirements. The federal language was modified slightly to ~~comply with~~ fit existing ORS Sections and these rules. In ⁶⁰⁸Section A(2) a reference to ~~failure to respond to a request for insurance policy under Rule 36~~ ^{Oregon} failure to respond to a request for insurance policy under Rule 36 was included. In Subsection A(4) the court "may" award expenses and in Subsection B(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631 ~~and~~ 41.626(5) and 41.617(4).

incorporates
~~the provisions~~ must
note

Oregon

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a

motion made pursuant to Rule 36 C.

A(3) Evasive or Incomplete answer. For purposes of this subdivision, evasive, or incomplete answer is to be treated as a failure to answer.

A(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial district in which the deposition is being taken, the failure may

be considered a contempt of that court.

B.(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this ~~subsection~~ ^{subsection}, unless the party failing to comply shows that he is

unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 ^{B o r d e r} ~~R.~~, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve

objections to a request for production and inspection submitted under Rule 43, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection ~~B~~(2) *of section B* of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this ~~subdivision~~ ^{section} may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see: Rule 36 B.(4). For failure to furnish medical reports when requested, see: Rule 44 D. *For Failure of Person Furnishing deposition or witness to appear at deposition see 39 H.*

ORS sections superseded: 41.617, 41.626 ~~(5), (6) and (7)~~, 41.631 ~~(3)~~, 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4).

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action or proceeding is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the ^{Courty} ~~judicial~~ district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the ^{Courty} ~~judicial~~ district where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, fails to permit inspection as requested, the discovering party may move for an order compelling ^{Discovery} ~~inspection~~ in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered

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Nov 13
memo
Add
request for
~~to~~
a report

~~1/1/19~~

to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in ^{County} judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or

district court judge in ^{County} the ~~judicial~~ district in which the deposition is being taken, the failure may be considered a contempt of ~~that~~ court.

B.(2) Sanctions by court in which action is pending.

If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, the court in which the action or proceeding is pending may make such orders in regard to the failure as are just, ^{including} ~~and~~ among others the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders ~~except~~ except an order to submit to a physical

Plutis
PIS
evidence
Excluded

or mental examination.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring ^{the} such party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability to produce such person for examination.

3 In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good

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reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (4) to ^{inform} advise a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action or proceeding is pending on motion may make such orders in regard to the failure as are just, ^{in such} ~~and among others it may take any action~~ ^{on any order} authorized under paragraphs (a), (b), and (c) of subsection B. (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act, ~~or~~ the attorney advising such party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

See B2.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of the circuit court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of the circuit court in the judicial district where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a

motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this subdivision, evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the judicial district in which the deposition is being taken, the failure may

be considered a contempt of that court.

B. (2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a person designated under Rule 39 C. (6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

B. (2) (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B. (2) (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

B. (2) (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

B. (2) (d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

B. (2) (e) Where a party has failed to comply with an order under Rule 44 A. requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows that he is

unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve

objections to a request for production and inspection submitted under Rule 43, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection (2) of subsection of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see Rule 36 B.(4). For failure to furnish medical reports when requested, see Rule 44 D. For failure of person taking deposition or witness to appear at deposition, see 39 H.

ORS sections superseded: 41.617, 41.626 (5), (6) and (7), 41.631 (3), 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4).

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action or proceeding is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the judicial district where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered

to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in judicial district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or

district court judge in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

B.(2) Sanctions by court in which action is pending.

If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this Rule or Rule 44, the court in which the action or proceeding is pending may make such orders in regard to the failure as are just, and among others the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical

or mental examination.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring such party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good

reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (4) to advise a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action or proceeding is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B. (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable

unless the party failing to act has applied for a protective order as provided by Rule 36 C.

BACKGROUND NOTE

For failure to furnish expert report when requested, see Rule 36 B.(4). For failure of person taking deposition or witness to appear at deposition, see 39 H. For failure to furnish medical reports when requested, see Rule 44 D. For failure to provide access to hospital records, see Rule 44 E.

ORS sections superseded: 41.617, 61.626(5), (6) and (7), 41.631(3), 45.190.

COMMENT

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under Oregon Rule 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under Rule 36 B. of the existence of a coverage question was added to section 46 D.

RULE 47 (RESERVED)

RULE 48 (RESERVED)

RULE 49 (RESERVED)

RULE 50

JURY TRIAL OF RIGHT

The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.

BACKGROUND NOTE

ORS sections superseded: 17.033.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action ~~or proceeding~~ is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or county district court in the ~~judicial district~~ where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the ~~judicial district~~ ^{county} where the deposition is being taken.

A.(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or a party fails to answer an interrogatory submitted under Rule 42, or if a party in response to a request for inspection submitted under Rule 43, ^(out) fails to permit inspection as requested, the discovering party may move for an order compelling ~~inspection~~ ^{discovery} in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered

to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in ~~the~~ ^{the county} ~~district~~ where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or

county
district court judge in the ~~judicial district~~ in which the deposition is being taken, the failure may be considered a contempt of ~~that~~ court.

B.(2) Sanctions by court in which action is pending.

If a party or an officer, director, or managing agent of a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this ^rRule or Rule 44, the court in which the action ~~or proceeding~~ is pending may make such orders in regard to the failure as are just, including ~~and~~ among others the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action ~~or proceeding~~ or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order, except an order to submit to a physical

or mental examination.

B.(2)(e) Where a party has failed to comply with an order under Rule 44 A. requiring ~~such~~ ^{the} party to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subsection, unless the party failing to comply shows inability to produce such person for examination.

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances made an award of expenses unjust.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to ✓ admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses

incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that ~~he~~ ^{such party} might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is the ^{of that party or person} to take ~~his~~ deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 42, after proper service of the interrogatories, or (3) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after ^{inform} proper service of the request, or (4) to ~~advise~~ a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action ~~or proceeding~~ is pending on motion may make such orders in regard to the ^{including} failure as are just, ~~and~~ among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.

(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

For failure to identify expert witnesses when requested, see ORCP 36 B.(4). For failure of a person taking deposition or witness to appear at deposition, see ORCP 39 H. For failure to furnish medical reports when requested, see ORCP 44 D.

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered through ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under ~~ORS~~ 36 was included. In subsection A.(4) the court "may" award expenses, and in subsection B.(2) the court "shall" award expenses which conforms to ORS 41.617(2), 41.631, 41.626(5) and 41.617(4). Failure to advise a party seeking discovery under ~~ORS~~ 36 B. of the existence of a coverage question was added to section 46 D.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

A.(2) Motion. If a party fails to furnish a written statement under Rule 36 B.(4), or if a party fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the deposition is being taken, the failure may be considered a contempt of court.

B.(2) Sanctions by court in which action is pending.

If a party or an officer, director, or managing agent or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B.(2)(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

B.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or

dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B.(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A. requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses

incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising

such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

For failure to identify expert witnesses when requested, see ORCP 36 B.(4). For failure of a person taking deposition or witness to appear at deposition, see ORCP 39 H. For failure to furnish medical reports when requested, see ORCP 44 D.

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered throughout ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under ORCP 36 B.(2), failure to furnish a statement under ORCP 36 B.(4), and failure to furnish a report under ORCP 44 B. or C., were included. In subsection A.(4) the court "may" award expenses, and in subsection B.(3) and D. the court "shall" award expenses which conforms to ORS 41.617(2), 41.631(3), 41.626(5), and 41.617(4). Failure to advise a party seeking discovery under ORCP 36 B.(2) of the existence of a coverage question was added to section 46 D.