

Rule 55.

Bookend

cons. sections surrendered

~~44.110~~ 41.915, ~~41.920~~ 41.920, 41.925,

~~41.930~~, 41.935, 41.940, 41.945, 44.110,

44.120, 44.130, 44.140, ^{44.160} ~~44.150~~, 44.171

44.180, 44.190, 44.200, 44.210, 44.220.

44.230

COMMENT:

This rule is a combination of existing ORS provisions and Federal Rule 45. The existing ORS provisions contain some archaic language and do not clearly cover deposition subpoenas.

Section A is based upon ORS 44.110. Section B comes from the Federal Rule.

Section C retains the basic procedure of ORS ~~XXXX~~44.120 but the language of the ORS section is awkward and was modified, relying upon California Civil Practice Code, § Sec. 1986. Paragraph C(1)(a) ~~covered trial subpoenas~~, C(1)(b) ~~covers deposition subpoenas~~ and C(1)(c) ~~covers subpoenas issued under any other circumstances.~~

Section D is based on ORS 44.140 and 44.160. ~~XXXXXXXXXXXX~~
~~XXXXXXXXXXXX~~

Subsection E (1) is based upon ORS 44.171 but applies only to trial subpoenas. ~~XXXXXXXXXX~~ Subsection E (2) replaces ORS 44.230. It ~~XXXXXXXXXX~~ it leaves the question of production of a prison inmate to the discretion of the court. The present ORS provisions allowed production, if trial was in the county ~~XXXX~~ where the prisoner was held on a ~~XX~~ party, but ~~XX~~ required use of a deposition in all other cases. ORS 44.240 relates more to duties of the institution or Sheriff and is left as a statute.

Section F is based upon Federal Rule 45 (d). It limits the place where a deposition may be taken rather than simply allowing a party to serve a subpoena for a deposition anywhere, with enhanced witness fees if the witness had to travel a long distance. Choice of place of trial is relatively limited but this is not true for depositions.

Section G is based upon ORS ~~XXXX~~44.190 with some of ~~XXX~~ modifications because of provisions already incorporated in the discovery rules. ORS 44.200 to 44.210 are eliminated unnecessary.

Section H is based upon ORS 41.915 to 41.940, except ORS 41.930 which is a rule of evidence and would be left as a statute. The only change from the existing language is in ~~XXX~~ paragraph H(2)(c) which allows inspection of the sealed records by parties or attorneys prior to the trial or deposition. documents

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Practice requiring a witness ~~found with a card~~
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RULE 55

SUBPOENA

A. Defined; form. The process by which attendance of a witness ~~is~~ required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time ~~specified~~ in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance. (1) A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue ~~the~~ ~~rein,~~ or upon the taking of a deposition in an action or proceeding pending therein: (i) it may be issued by the clerk of the court in which the action or proceeding is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by the attorney of record of the party to the action or proceeding in whose behalf the witness is required to appear, subscribed by the

signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 ^C ~~A~~, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of the circuit court in the judicial district in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice or other officer before whom the attendance is required.

C.(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; proof of service.

(1) Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to him at the same time the fees to which he is entitled for travel to and from the place designated and one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

D.(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may

be made upon the officer in charge of the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of his employment as a peace officer, a subpoena may be served on him by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

D.(3) Proof of service of a subpoena is made in the same manner as in the service of a summons.

E. Subpoena for hearing or trial; witness' obligation to attend; prisoners. (1) A witness is not obliged to attend for trial or hearing at a place outside the county in which he resides or is served with subpoena unless his residence is within 100 miles of such place, or, if his residence is not within 100 miles of such place,

unless there is paid or tendered to him upon service of the subpoena:

(a) double attendance fee, if his residence is not more than 200 miles from the place of examination; or (b) triple attendance fee, if his residence is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if his residence is more than 300 miles from such place; and (d) single mileage to and from such place.

E.(2) If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for purposes of testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions; place of examination.

F.(1) Proof of service of a notice to take a deposition as provided in Rules ~~105~~ 39 C. and 40 A. constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B., but in that event the subpoena will be subject to the provisions of Rule 36 C. and section B. of this Rule.

F.(2) A resident of this state may be required to attend an

examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required to attend only in the county wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action or proceeding is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, his complaint, answer or reply may be stricken.

H. Hospital records.

H.(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442~~3~~40 to 442.450.

H.(2) Mode of compliance with subpoena of hospital records.

(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail

or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed ~~evenloop~~ or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer ^{Administering the oath for} ~~before whom~~ the deposition is ~~to be taken~~, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all

parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian of records. (a) The records described in ^{sub}section (2) of this ^{section}~~rule~~ shall be accompanied by the affidavit of a custodian of the hospital records, stating in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described *in the* ^{sub}~~sub~~poena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which he has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required. (a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) Tender and payment of fees. Nothing in this Rule requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

BACKGROUND NOTE

ORS sections superseded: 41.915, 41.920, 41.925, 41.935, 41.940, ~~41.945~~, 44.110, 44.120, 44.130, 44.140, 44.160, 44.171, 44.180, 44.190, 44.200, 44.210, 44.220, 44.230.

COMMENT

This rule is a combination of existing ORS provisions and Federal Rule 45. The existing ORS provisions contain some archaic language and do not clearly cover deposition subpoenas.

Section A. is based upon ORS 44.110. Section B. comes from the federal rule.

Section C. retains the basis procedure of ORS 44.120, but the language of the ORS section is awkward and was modified, relying upon California Civil Practice Code, Sec. 1986.

Section D. is based on ORS 44.140 and 44.160.

Subsection E.(1) is based upon ORS 44.171 but applies only to trial subpoenas. Subsection E.(2) replaces ORS 44.230. It leaves the question of production of a prison inmate to the discretion of the court. The existing ORS provisions allowed production if trial was in the county where the prisoner was held ~~????????????????~~ *on when the inmate was a party. ORS. 44.240 is left as a statute.* *only*
~~but required use of a deposition in all other cases.~~

Section F. is based upon Federal Rule 45 (d). It limits the place where a deposition may be taken rather than simply allowing a party to serve a subpoena for a deposition anywhere, with enhanced witness fees if the witness had to travel a long distance, which is the approach under ORS 44.171. Choice of place of trial is relatively limited but this is not true for depositions. The second paragraph of Federal Rule 5 (d)(1) was intentionally omitted to preserve existing Oregon practice requiring a witness who objects to a subpoena to seek a protective order.

Section G. is based upon ORS 44.190 with some modifications because of provisions already incorporated in the discovery rules. ORS 44.200 to 44.210 are eliminated as unnecessary.

Section H. is based upon ORS 41.915 to 41.940, ~~except~~ ORS 41.930, ~~which~~ is left as a statute, is a rule of evidence. The only change from the existing language is in paragraph H.(2)(c), which allows inspection of the sealed documents by parties or attorneys prior to the trial or deposition.

unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C. Issuance. (1) A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein: (i) it may be issued by the clerk of the court in which the action or proceeding is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by the attorney of record of the party to the action or proceeding in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C., or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit or district court in the ^{County} ~~judicial district~~ in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice or other officer before whom the attendance is required.

C.(2) Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered

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to the party or attorney requesting it, who shall fill it in before service.

D. Service; service on law enforcement agency; proof of service. (1) Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person over 18 years of age. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and ^{File} one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

D.(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of his employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time

of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to ^{give actual notice to.} ~~actually~~ notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall ^{promptly put in} ~~contact~~ the court and a ^{postponement or} ~~continuance~~ may be granted to allow the officer to be personally served.

D.(2)(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department or a municipal police department.

D.(3) Proof of service of a subpoena is made in the same ^{proof of} ~~in the~~ manner as the service of a summons.

E. Subpoena for hearing or trial; witness' obligation to attend; prisoners. (1) A witness is not obliged to attend for trial or hearing at a place outside the county in which the witness resides or is served with subpoena unless the residence of the witness is within 100 miles of such place, or, if the residence of the witness is not within 100 miles of such place, unless there is paid or tendered to the witness upon service of the subpoena: (a) double attendance fee, if the residence of the witness is not more than 200 miles from the place of examination; or (b) triple attendance fee, if the residence of the witness is more than 200 miles and not more than 300 miles from such place; or (c) quadruple attendance fee, if the residence of the witness is more than 300 miles from such place; and (d) single mileage to and from such place.

E.(2) If the witness is confined in a prison or jail in this state, a subpoena may be served on such person only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order temporary removal and production of the prisoner for purpose²¹⁴⁻⁹ of testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F. Subpoena for taking depositions; place of examination.

F.(1) Proof of service of a notice to take a deposition as provided in Rules 39 C. and 40 A. constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 36 B., but in that event the subpoena will be subject to the provisions of Rule 36 C. and section B. of this rule.

F.(2) A resident of this state may be required to attend an examination only in the county wherein such person resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of court. A non-resident of this state may be required to attend only in the county wherein such person is served with a subpoena, or at such other convenient place as is fixed by an order of court.

G. Disobedience of subpoena; refusal to be sworn or answer as a witness. Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action or proceeding is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, his complaint, answer or reply may be stricken.

H. Hospital records.

H.(1) Hospital. As used in this section, unless the context requires otherwise, "hospital" means a hospital licensed under ORS 441.015 to 441.087, 441.525 to 441.595, 441.810 to 441.820, 441.990, 442.300, 442.320, 442.330 and 442.340 to 442.450.

H.(2) Mode of compliance with subpoena of hospital records.

(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action or proceeding in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

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H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness and the date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

H.(2)(c) After filing, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition or other hearing, at the direction of the judge, officer or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H.(3) Affidavit of custodian of records. (a) The records described in subsection (2) of this section shall be accompanied by the affidavit of a custodian of the hospital records, stating

in substance each of the following: (i) that the affiant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records described in the subpoena; (iii) the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business, at or near the time of the act, condition or event described or referred to therein.

H.(3)(b) If the hospital has none of the records described in the subpoena, or only part thereof, the affiant shall so state in the affidavit, and shall send only those records of which the affiant has custody.

H.(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

H.(4) Personal attendance of custodian of records may be required. (a) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

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H.(4)(b) If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H.(5) Tender and payment of fees. Nothing in this rule requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

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Section 55 F. is based upon Federal Rule 45 (d). It limits the place where a deposition may be taken rather than simply allowing a party to serve a subpoena for a deposition anywhere, with enhanced witness fees if the witness had to travel