

DISCOVERY

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RULE 104
STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

COMMENT:

This is Federal Rule 29. Current practice includes substantial discovery by stipulation, both written and unwritten, and the rule may be unnecessary. It may be useful, however, to specifically encourage discovery without formal court procedures.

The last clause of Federal Rule 29 which reads, "except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court", was deleted from this rule. It seems inconsistent with present practice and unnecessary.

RULE 106

DEPOSITIONS UPON WRITTEN QUESTIONS

(a) **Serving Questions; Notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in ~~Rule 33~~. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. *→ as provided in Rule 105(b).*

Rule —
(subpoena rule)

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule ~~30(b)~~ *(105(c)(6)).*

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) **Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by ~~Rule 30(c), (e), and (f)~~, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

Rule 105(d),
(F) and (g)

(c) **Notice of Filing.** The party requesting filing of the deposition shall promptly give notice of its filing to all other parties.

COMMENT:

Depositions on written questions may now be taken in Oregon pursuant to ORS 45.320 and 45.350. The procedure for such a deposition is unnecessarily cumbersome. A special commission is required, and the court has to settle the questions. The procedure is not used frequently but is useful as a cheap method of securing a deposition for simple matters.

The language is based on Federal Rule 32. The procedure is relatively simple and consistent with the oral deposition rule. Subsection (c) was modified to conform to Rule 105 and again might be eliminated.

RULE 108
INTERROGATORIES
(SEE SEPARATE MEMO)

ALTERNATIVE
ACCOUNT

*to the requesting party
within 5
days AFTER request*

A party may set forth in a pleading the items of an account
alleged ~~therein~~ ^{in the pleading may} or file a copy thereof ^{of the account} with the pleading, filed
by himself or by the party's agent or attorney. If the party does
neither, ^{upon the request of any other party} the party shall deliver to the adverse party within 5
days ^{after demand} a copy of such signed account. Any other
party may move for an order under Rule 112(a) with respect to any
failure to furnish an account when demanded or when the account
filed is incomplete or defective.

*Allegation in account
in pleading
A copy of
an account shall
be signed
in accordance
with Rule
17.*

COMMENT:

If the Council does not adopt interrogatories, the bill of particulars could be retained. The procedure is more related to discovery than pleading. This rule is based on ORS 16.470 but modified to eliminate the harsh sanctions of the statute and to conform enforcement to other discovery devices by reference to the sanctions rule.

RULE 108
INTERROGATORIES
(SEE SEPARATE MEMO)
ALTERNATIVE
ACCOUNT

A party may set forth in a pleading the items of an account alleged therein or file a copy thereof with the pleading filed by himself or by the party's agent or attorney. If the party does neither, the party shall deliver to the adverse party within 5 days after demand a copy of such signed account. Any other party may move for an order under Rule 112(a) with respect to any failure to furnish an account when demanded or when the account filed is incomplete or defective.

COMMENT:

If the Council does not adopt interrogatories, the bill of particulars could be retained. The procedure is more related to discovery than pleading. This rule is based on ORS 16.470 but modified to eliminate the harsh sanctions of the statute and to conform enforcement to other discovery devices by reference to the sanctions rule.

DISTRIBUTION OF ORS PROVISIONS

ORS	RULE		
41.616(1)-(3)	108	44.140	None
41.616(4)	101(b)	45.151	105(a)
41.617(1) and (2)	112(a)	45.161	103(a) and (b) and 105(c)
41.617 (3) and (4)	112(b)		
41.618	101(c)	45.171	105(c), (d), and (f)
41.620	108(c)	45.185	105(c)
41.622	101(b)	45.190	105(a) and 112(b)
41.626(1)	111(a)	45.200	105(h)
41.626(2) and (4)	111(b)	45.230	105(g)
41.626(3)	111(c)	45.240	105(g)
41.626(5)	111(c)	45.280	107
41.626(6)	112(c)	45.230	103(b)
41.626(7)	112(d)	45.325	106
41.631(1) and (2)	101(c)	45.330	103(b)
41.631(3)	112(a)	45.340	106
41.635	101(a)	45.350	103(b)
44.230	105(b)	45.360	None
44.610	110(a)	45.370	None
44.620(1)	110(b)	45.410	102
44.620(2)	110(c)	45.420	102
44.630	110(d)	45.430	102
44.640	110(b) and (c)	45.440	102
44.110	None	45.470	102
44.120	(to process rules)	45.910	103(d)
44.130	(to provi- sion remedies)	44.810	110(e)