

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION.

A. When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C.(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.

B. Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition shall be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C. Notice of examination.

C.(1) General requirements. A party desiring to take the

deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C.(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C.(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C.(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C.(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C.(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection

does not preclude taking a deposition by any other procedure authorized in these rules.

C.(7) Deposition by telephone. The court may upon motion order that testimony at a deposition be taken by telephone, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

D. Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C.(4) of this rule. If testimony is recorded pursuant to subsection C.(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G.(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription

or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.

E. Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used

at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

G. Certification; filing; exhibits; copies.

G.(1) Certification. When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was sworn in the reporter's presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the

justice of the peace before whom the action is pending or such other person as may by writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

G.(3) Exhibits. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G.(4) Copies. Upon payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party

taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

H. Payment of expenses upon failure to appear.

H.(1) Failure of party to attend. If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

H.(2) Failure of witness to attend. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable attorney's fees.

COMMENT

This rule is based upon Federal Rule 30, existing ORS 45.151, 45.161, 45.171, 45.185, 45.200, 45.230, and 45.240 (which were based upon the pre-1970 federal rule language), and the proposed changes to accommodate non-stenographic depositions of the ABA Special Committee Report (see Comment to ORCP 38). The term "non-stenographic" includes video tape and any other

recording device capable of producing a permanent and accurate record. ORS 45.020, 45.030, 45.110, and 45.140 were eliminated as unnecessary.

Section 39 A. incorporates the 1970 amendments to the federal rules relating to time of taking depositions and special notice.

Section 39 B. covers that portion of ORS 44.230 relating to taking depositions of prison inmates. It requires a court order for such a deposition. That portion of ORS 44.230 relating to testimony at trial by prison inmates is covered under ORCP 55, relating to subpoenas.

Subsections C.(1), (2), (3), (5), and (6) change the language of ORS 45.151 and 45.161 to conform to the 1970 amendments to the federal rules. Subsection C.(4) is based upon the recommendations of the ABA Special Committee Report and reverses the existing requirement for a court order to take a non-stenographic deposition. Subsection B.(7) is new. The ABA Special Committee Report recommended that a party be allowed simply to specify a deposition by telephone in the notice. This rule requires a court order for such a deposition.

Except for the addition of the last sentence, section 39 E. is the same as ORS 45.185. Sections 39 D., F., and G. are generally the modified form of the corresponding federal rule sections recommended by the ABA Special Committee Report. Use of non-stenographic depositions requires special provisions relating to the manner of taking, signing, certifying, and filing depositions because the person administering the oath will not necessarily be present or transcribing the deposition. The ABA approach did not contemplate filing of depositions with the court. This rule does provide for filing upon request of any party in subsection G.(2). For non-stenographic depositions, the rule contemplates that the oath will be administered on the recording and the recording will be preserved by the party taking the deposition unless the recording is filed with the court. Testimony would only be transcribed if requested by a party. If the recording or a transcription thereof is to be filed or used in the proceeding, it must be submitted to the witness for examination unless the parties and the witness waive the examination. A procedure for preserving changes by a witness and the reasons for such changes are provided, and the witness then signs a written statement affirming the correctness of the transcription or recording subject to any changes made. If a witness refuses to make such a statement within the time allowed, the deposition may be used as fully as though signed, unless suppressed by the court. For a non-stenographic deposition, the

party taking the deposition certifies to the authenticity of the recording, and if transcribed, the person making the transcription also certifies that the oath was administered and that the transcription is accurate. Other than changes related to non-stenographic depositions, the procedures described in these sections are not notably different from existing Oregon practice. Subsection F.(3) provides a simplified method of dealing with exhibits.

Section 39 H. is based on ORS 45.200.

MEMORANDUM

TO: Dennis Bromka and Jim McCandlish
FROM: Fred Merrill
RE: HEARING HELD MARCH 8, 1979
DATE: March 9, 1979

The following is a list of matters raised at the March 8, 1979, meeting and not included in the attached list of changes, together with the reason no change was submitted.

RULE 36

I could not determine what committee reaction was to Don Atchison's arguments on 36 B.(2) and 36 B.(4) relating to insurance policies and expert witnesses. The arguments have already been made to the Council and rejected. If the committees want to reinstate the automatic right to an insurance policy, the existing statute, ORS 41.622, has a couple of warts that should be ironed out.

RULE 39 F.

I think we straightened out the question raised about witnesses changing testimony in depositions. Since reporters and transcribers err, the witness has, and should have, the right to examine a transcript or recording and say, "I didn't say that." The language used in the rule differs from the Oregon statute, but the net effect is exactly the same.

RULE 39 G.(2)

The Council considered the possibility of eliminating filing of depositions but felt that for security with a non-stenographic deposition, or to provide a basis for summary judgment in any case, there

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had to be some filing possibility. Note, the Council has mitigated the problem by providing for filing only when a party requests it.

RULE 39 G.(3)

There are situations where having the original of an exhibit is vitally important and one party does not trust the other to keep it. Donnelly's suggestion that the producing party always keep the original does not cover this.

On the question of fees, the matter is one which should be covered outside the rules.

RULE 43 B.

The telephone request for a change which was reported was to modify the second full sentence on Page 129 as follows:

"A defendant shall not be required to provide or allow inspection or other related acts before the expiration of 45 days after summons, and in any case before 30 days from the date of the request, unless a court specifies a shorter time."

I assume the intent was to require that the notice specify 30 days or more to respond. The suggested approach would, however, apply this only to defendants. Any such limitation should apply to all parties. A new sentence could be added after the first full sentence on Page 129 as follows:

"The time specified in the request shall be not less than 30 days after the date of service of the request, unless the court specifies a shorter time."

Rule 39

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes [in form or substance] which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with

the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

F. Submission to witness; changes; statement.

F.(1) Necessity of submission to witness for examination.

When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if [the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties] any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F.(2) Procedure after examination. Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the

statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F.(3) No request for examination. If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

COMMENT

This section was changed to require submission of the deposition to the witness for examination and statement of correctness only when such a procedure is requested by a party or the witness. The existing rule requires such examination and statement unless waived by the parties and the witness.

Rule 39

F. Submission to witness; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes [in form or substance] which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with

the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.