A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. Foreign depositions.

C.(1) and C.(2) unchanged.

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RULE 44

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

A. Order for examination. When the mental or physical condition [(including the blood group)] or the blood relationship of a party [or of a], or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions,

and scope of the examination and the person or persons by whom it is to be made.

Note

The language used in the promulgated rule is that of Federal Rule 35. Looking at 10 states at random, I found that all of them have adopted the Minnesota physical examination rule which was submitted as a proposed amendment to the federal rules and was never adopted. The primary difference is the specific reference to agent or employee as well as person under legal custody and control of a party. The suggestion made at the hearing was that this might be desirable; otherwise the plaintiff might join an employee, such as the bus driver in Schlagenhauf v. Holder, 379 U.S. 104 (1964), not because they expected to recover against the agent but simply to get a physical examination. The exact language used relating to employees was taken from New York CPLR 3121.1.

If the rule required a non-party to submit to a physical examination in an action brought by someone else and subjected the non-party to contempt for refusal, there would be some constitutional problems. If the rule required the party to produce someone who could not be produced, the rule would be of questionable validity. The order is directed to a party and can only require the party to produce a person in custody or control. Thus if the agency or employment relationship is terminated or a child has reached majority, no order can be entered. Further, the only sanction available under ORCP 46 B.(2)(e) is against the party and then only when the party could have produced a person in custody or under control. Thus if a child or employee refuses to submit to examination, despite a direction to do so from the party, neither the party nor the non-party can be held in contempt.

The one situation not clearly covered is a loss of consortium case. Wright and Miller say:

> It is not quite so clear, but it would seem that when a husband has a substantive right to recover for injuries to his wife, the wife is under his legal control for this purpose and he can be ordered to produce her for a physical examination. 8 Wright and Miller § 2233, p 669.

There is some doubt on this, and no case has so held. At least, one state court has held that, although the rule does not specifically cover the situation, a court has inherent power to order a wife to submit to a physical examination in a loss of consortium case. St. Louis Public Serv. Co. v. McMullan, 297 S.W. 2d 431 (1957). The Oregon courts

have recognized inherent court power to order physical examinations, including possibly blood tests of a child in a divorce case, but have never dealt with the consortium situation. Parsons v. Parsons, 197 Or 420 (1953).

To clarify the situation, I added the language in parenthesis.

B. through D.(2) unchanged.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with [the hospitalization of the injured person.] any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B.

Note

This approach more clearly reflects the intent of the Council but does not comply with the suggestion offered by Mr. Atchison. Presumably, some types of prior records might be clearly irrelevant, e.g., the 20-year old mental hospital records in an action to recover for a broken arm. In most cases the only way to determine if prior hospital records were relevant to a defense of pre-existing injury would be to examine them.

REPORT OF OREGON STATE BAR COMMITTEE
ON PROCEDURE AND PRACTICE
ON PROPOSED OREGON RULES OF CIVIL PROCEDURE

The Committee on Procedure and Practice has reviewed the proposed Oregon Rules of Civil Procedure dated December 2, 1978, as promulgated by the Council on Court Procedures. Five subcommittees of the Committee on Procedure and Practice studied the proposed rules and reported to the Committee as a whole, which makes the following recommendations.

Jurisdiction and Process

Rule 7, Summons, should be expanded to incorporate by appropriate language the substance of ORS 15.190 which provides for service upon the Department of Motor Vehicles. ORS 15.190 provides a clearly defined standard of due diligence for substituted service upon non-resident motorists and resident motorists who depart from or cannot be found within the state. The statute is fair, workable and provides a certainty of adequate service that will not exist under the proposed rules.

Pleading

Rule 21F requires that all motions be made at the same time except those motions in subsection G(2). Rule 21F should be modified to provide that a motion challenging jurisdiction would not need to include all other available motions. Motions challenging jurisdictions should be handled separately to avoid unnecessary time and expense for counsel and courts in preparing and arguing all available motions. If the motion challenging jurisdiction is successful, all of their motions are moot and unnecessary.

Parties

Rule 33B, "Intervention of right," does not recognize any existing common law right of intervention. The rule should be modified to provide: "At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, these rules, or the common law, confers an unconditional right to intervene.

Discovery

The Committee objects to that portion of Rule 44D which requires a party to either obtain a medical report from

an examining physician or, if it is not obtained, permits a deposition of the physician. The rule should be modified to provide that, if a claimant does not have a physician's written report, there is no obligation to obtain and furnish a report to the defense with one exception. If the defense obtains an independent medical examination, the defense must obtain a medical report and furnish it to the claimant, and the claimant must obtain a medical report and furnish it to the defendant in exchange.

Trial Procedure

Cleveland Cory was chairman of the subcommittee on trial procedure. The committee as a whole did not have sufficient time to review in depth the recommendations of the subcommittee. However, the committee believes further consideration should be given to the concerns expressed about Rules 55, 57, 58, 59, and 64. A copy of the subcommittee comments on these rules is attached to this report.

Bruce Smith

Bruce Smith, Secretary
Committee on Procedure and Practice

RULE 44

PHYSICAL AND MENTAL EXAMINATION
OF PERSONS; REPORTS OF EXAMINATIONS

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

COMMENT: This rule as stated completely ignores the rights to privacy of anyone who files a personal injury claim. There is no requirement in the rule that the hospital records that the defendant can now review have to be related to the claim being asserted in the complaint and, in fact, the comment indicates that it is the intention of the framers that it is intended to allow examination of any hospital records of the injured person.

At the very least, inspection of hospital records, other than those related directly to an injury should only be obtained upon proper showing by the party desiring other records and by court order.

Rule 44

A. Order for examination. When the mental or physical condition [(including the blood group)] or the blood relationship of a party [or of a], or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

E. Access to hospital records. Any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with [the hospitalization of the injured person.] any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.