BROTHERS
&
ASH
AND ASSOCIATES

FACSIMILE TRANSMISSION

OUR FAX NO.: (541) 382-3328 **DATE: March 9, 1998**

TO: Council on Court Procedures' ORCP 39 Subcommittee

Karsten Rasmussen, Esq.
Honorable Don A. Dickey
Honorable Ted Carp

FROM: Bruce J. Brothers

NO. OF PAGES, including cover sheet: 3

COMMENTS: OSB Procedure and Practice Committee proposed changes to ORCP 39

Gentlemen:

Bruce Hamlin has asked that I chair the Council on Court Procedure Subcommittee on proposed changes to ORCP 39. I have had the opportunity to review the memorandum from Jeffrey Johnson and his committee which was prepared for the OSB Procedure and Practice Committee, relating to that rule.

In anticipation of the conference call to be held on March 12th, I would like to raise some concerns relating to the proposed changes for your comments:

I share the concern raised by members of the Procedure and Practice Committee with regard to the existing language of FRCP 30(d)(1) relating to "any objection to evidence." Since, presumably, the rules are intended to guide members of the bar with regard to procedures to be followed, I can see no reason not to include language relating to "objection to questions." Both evidence and questions are the subject of depositions and it should be clear that the rules relate to both.

The proposed changes provide that upon motion by any party "the court in the county where the deposition is being taken shall rule on any question presented by the motion ..." I question the wisdom of limiting such a motion to the court in the county where the deposition is being taken. There are a number of reasons, including the fact that attorneys who have agreed to have a deposition taken outside the county where the case is filed, may not have a notion as to whom to

call to argue a deposition question. Furthermore, the judge called would have no background on the litigation and no vested interest in the ultimate resolution of the problem. By consensus, the Council on Court Procedures recently agreed that there was no need to have a rule with regard to where the deposition of parties may be taken. A requirement that the court in the county where the deposition is taken rule on deposition questions may well make parties more reluctant to cooperate in selecting the location of depositions.

I am confused by the language "those persons described in 46B(2) shall present the motion to the court in which the action is pending." 46B(2) refers to parties as does the first sentence of the proposed amendment requiring that the question be presented to the court in the county where the deposition is taken. On the other hand, non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. Finally, the proposed rule allows the court in the county where the deposition is being taken to order the examination to cease, but if the order terminates the examination, only upon the order of the court in which the action is pending shall it be resumed. That will, on many occasions, result in two courts being involved in resolving the same issue.

I also note that the objecting party or the deponent may demand that the deposition be suspended. I would anticipate that there would then be two different motions, one by telephone with regard to the objection and another by personal appearance with regard to the award of expenses. The rule relied on, Rule 46A(4), provides for "opportunity for hearing," though the practice here is to suspend the deposition and call a judge. Can the party making the objection refuse to have the issue resolved by telephone?

With regard to provision E(2), I wonder why the exceptions there are different than those set forth at E(4). It appears that the only time an attorney may instruct a deponent not to answer is to preserve a privilege, to enforce a previously imposed limitation on evidence, or to stop the proceedings and make a motion under paragraph 1. However, pursuant to E(4) when a question is asked, a break can be taken if the attorney claims a privacy right, privilege, or an area protected by the constitution, statute or work product. Because E(4) is, apparently, broader than E(2), it appears that one cannot instruct a deponent not to answer but can take a break and discuss the answer with the deponent. I note that the Federal Rules of Civil Procedure do not allow for any such "break" prior to answering a question. I question this exception in the sentence that begins "If a question is pending, it shall be answered before a break is taken ..."

Paragraph E(3) addresses limiting the time permitted for the conduct of the deposition and additional time being allowed if needed for fair examination of the deponent. I wonder if the reference to attorney's fees is necessary in that provision in view of the reference to 46A(4) in paragraph E(1).

Finally, I wonder if the custom of making motions and soliciting rulings on deposition questions over the telephone is ever an appropriate way to resolve discovery issues in the absence of agreement. Perhaps the party instructing a witness not to answer a question should do so at his own risk and, likewise, a party who terminates a deposition should as well, so that a court will ultimately award attorney's fees to the innocent party following the filing of a written motion with an opportunity to respond and argue. If a "telephone motion" is appropriate, perhaps the rule should address the

procedure.

If other committee members or interested parties would like to raise additional issues or comment on the ones raised by me, prior to the telephone conference presently set for March 12th at 1:00 p.m., you are invited to do so.

c: Susan Evans Grabe
Bruce Hamlin
Maurice J. Holland
Jeff Johnson

MODIFICATIONS AND ADDITIONS TO RULE 39

Rule 39 E presently reads as follows:

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. Those persons described in Rule 46 B.(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. 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.

Rule 39 E is amended to read as follows:

E. (1) At any time in connection with the taking of a deposition, on motion by a party or the deponent and a showing that the examination is conducted or hindered in bad faith or in a manner as unreasonably to annoy, embarrass, oppress or unduly burden 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 may order the parties to cease forthwith from taking the deposition, or limit and control the scope and manner of taking the deposition as provided in Rule 36 C. If the order terminates the examination, the deposition shall be resumed only upon order of the court in which the action is pending. Upon request of the objecting party or the deponent, a deposition may be suspended to allow time for a motion to be presented under this rule. The court where the action is pending may make orders as follows: award reasonable expenses pursuant to Rule 46 A.(4) incurred in connection with the motion and, after consideration as contempt of court of the acts and failures of the other party, grant sanctions and make orders in regard thereto as are just, including orders as described in Rule 46 B.

E. (2) If the court finds that a party or the deponent has unreasonably impeded or delayed a deposition, such is sufficient good cause under Rule 39 C.(3) to allow the court to modify the time limits of the deposition. In such an instance, the court may award reasonable expenses pursuant to Rule 46 A.(4).

E. (3) Any objection during a deposition shall be stated concisely and shall not be argumentative or suggestive. A party may instruct a deponent not to answer a question only as follows: to comply with or to enforce any limitation on evidence or the question as directed by the court, to present a motion under E (1) of this Rule, or to preserve a valid privilege.

COVER SHEET FAX

To: Maurice J. Holland
Fax #: 541- 346-1564
Subject: Council on Court Procedures
Date: March 13, 1998
Pages: 3, including this cover sheet.

COMMENTS:

I have redrafted the language after our telephone discussion. I see some further problems but I may just drop this until we get feed back from the larger group.

From the desk of...

DON A. DICKEY
Judge
Marion County Circuit Court
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Salem, OR 97309-0869

(503) 373-4445
Fax: (503) 373-4361

MODIFICATIONS AND ADDITIONS TO RULE 39

Rule 39 E presently reads as follows:

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. Those persons described in Rule 46 B.(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. 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.

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E. (2) If the court finds that a party or the deponent has unreasonably impeded or delayed a deposition, such is sufficient good cause under Rule 39 C.(3) to allow the court to modify the time limits of the deposition. In such an instance, the court may award reasonable expenses pursuant to Rule 46 A.(4).

E. (3) Any objection during a deposition shall be stated concisely and shall not be argumentative or suggestive. A party may instruct a deponent not to answer a question only as follows: to comply with or to enforce any limitation on evidence or the question as directed by the court, to present a motion under E (1) of this Rule, or to preserve a valid privilege.

E. (4) If a break in questioning is requested, it shall be allowed if a question is not pending. If a question is pending, the question shall be answered before the break is taken, unless the question involves a matter which a party has properly instructed the deponent not to answer pursuant to E. (3) of this rule, or is such as the deponent may properly decline to answer because of the constitution, a statute or the work product rule.

E. (5) **Appropriate court for non-parties.** The above provisions of this rule notwithstanding, the Appropriate court for application of an order to a non-party deponent shall only be as provided in Rule 46 A.(1)(b) and Rule 46 B.(1): to the court of competent jurisdiction in the political subdivision where the non-party deponent is located.

* * *

Rule 39 C.(3) presently reads as follows:

Shorter or longer time. The Court may for cause shown enlarge or shorten the time for taking the deposition.

Rule 39 C.(3) is amended to read as follows:

Time Limits for Deposition. The court may establish time limits on depositions pursuant to local rule or by order, and may modify the time limits upon good cause.

Suaviter in Modo
Fortiter in Rem

June 1, 1998

To: Rule 39 Subcommittee (Bruce Brothers, Chair; Ted Carp, Don Dickey, Karsten Rasmussen, Members)

Fm: Maury Holland M. J. H.

Re: Proposed Modifications and Additions to ORCP 39 E

When I phoned Don about three weeks or so ago to tell him that the May Council meeting had been canceled, he graciously invited me to send to all of you any comments or suggestions I might have regarding your proposed amendments to ORCP 39 E as dated 3-13-98. Since doing that sort of thing is part of my job, and because, like most people, I very much enjoy taking pot shots at other folks' drafting efforts, which is so much easier and more fun than doing the heavy lifting oneself, I told Don I'd try to get my comments to all of you pronto, and certainly in time for your subcommittee to consider them prior to the June 13 meeting. A few days after insouciantly making that promise, I was struck with what must have been the mother of all flu bugs, and for the past two weeks have hardly been able to get out of bed. I am now sufficiently recovered that I can get to work on what I told Don I'd do. However, I will obviously not be able to get anything to you in time for you to confer as a group, prior to the June 13 meeting, to consider whether you might wish to modify proposed new 39 E(1), (2), or (3) in light of whatever I come up with.

The 39 E amendments as dated 3-13-98, and as they will be distributed with the agenda of the Council's 6-13-98 meeting unless you have already agreed among yourselves on further changes, seem to me useful and headed in the right direction. However, I also think there is some considerable room for improvement. With the right amount of effort, a little research in support of your efforts on my part, and a bit of inspiration, I think the problems raised in Ms. Solomon's 2-10-98 letter to Bruce Hamlin afford the Council an opportunity to make a significant, practical contribution to good deposition practice in Oregon. In fact, as a result of just starting some LEXIS research on a national scale, I'm finding that the difficulties to which your proposed 39 E amendments are addressed are increasingly coming to the fore across the country, and are eliciting a variety of responses from rule-makers and judges. Rules governing oral depositions have long reflected the well understood need to provide authority for judicial protection of deponents against bullying or abusive tactics of deposing counsel. However, only more recently, it seems, has a need to deal with the converse problem--obstructive, delaying tactics of counsel "defending" depositions--been widely perceived and getting some attention.

One very promising source of possible inspiration I've started to explore is a three-volume compilation of all 91 sets of Local Rules of U.S. District Courts, although until now I thought I'd just wait and see the movie version when it comes out. While I haven't nearly finished my excursion

through this exciting compendium, I've seen enough to know that many of these Local Rules deal in considerable detail with attorney conduct at oral depositions, and should provide at least a few good drafting models.

While, naturally, it is not my place to tell your subcommittee how to conduct its business, might I nonetheless suggest that Bruce, or whoever will be making your subcommittee's interim report to the Council at the June 13 meeting, simply go ahead and report on how matters then stand and ask for whatever reactions members might offer to proposed 39 E(1), (2), and (3) as dated 3-13-98, which is, of course, the form in which Council members will get them as an attachment to the agenda of that meeting unless you send me a version incorporating any later changes you might already have agreed upon. Bruce might say at the outset of his report that your subcommittee is not, at that point, reporting any recommended specific language for the Council to vote on, but merely sounding members out on their reactions to the language shown in the attachment in an effort to provoke discussion, whether narrowly focused on specific wording or more generally pitched at the level of policy objectives. My guess is that Anna Brown's Rule 55 subcommittee will be doing much the same thing, and perhaps others as well.

Those of you who are new to the Council should know that there is absolutely nothing unusual, and certainly nothing wrong, with a subcommittee proceeding in this manner, that is, by one or more interim reports keyed to highly tentative, evolving wording of proposed amendments, which are provided for illustration and to focus discussion, and not to be voted on by the Council until the subcommittee is prepared to report specific recommended language in final form. The Council, in other words, does not expect a subcommittee's initial report also to be its final one, where its recommended amendments are in form for the Council to vote on. In past biennia I can recall instances where a subcommittee made as many as three or four such interim reports over a succession of several Council meetings, for discussion and feedback, before finally reporting its recommended amending language. And, of course, even that is not necessarily the end of the process, because the full Council has been known either itself to amend language reported out by a subcommittee which the latter had assumed would be final, or, more often, to "remand" the language reported out by a subcommittee for further revision by it in light of whatever discussion and debate had ensued in the Council. Even when the Council formally votes to adopt a subcommittee's reported recommended language, that adoption remains only tentative until the vote on promulgation at the December meeting prior to opening of the Legislature. (Describing the process this way makes it seem almost grimly formal, something like the Law Lords of Appeal in Ordinary, but, as Karsten knows from his past experience, the whole thing really consists of lots of informal give and take, and even the occasional exchange of good-natured insults about one another's drafting efforts.)

One other thing which might be useful for me to say, especially for Bruce's benefit as Chair, is that whenever your subcommittee needs to confer for discussion, debate, or any internal voting you might conduct (although subcommittees seem usually to operate by consensus), you should feel free to

phone Gilma Henthorne (541-346-3990) and ask her to set up a conference call for you. Arranging for a conference call often entails a fair amount of advance time and effort, but that is part of Gilma's job and she's good at it. Please try to give her three or four days lead time, since she will need to contact each subcommittee member separately to find out whether he can participate in the call at the time specified by Bruce. Also, by working through Gilma, it is much easier to get a conference call charged to the Council's budget, not your own. However, if your own office phone bills ever pick up charges for calls that should be paid out of the Council budget, please let us know and provide the documentation so that we can get you reimbursed. Conference calls, I've recently learned, can be pretty pricey.

Assuming you'll give me an extension of time to do now what I told Don three weeks ago I would do then, I could get my work product to you in time for your subcommittee to confer and discuss what, if any, revisions it might decide to make in proposed new 39 E(1), (2), and (3) in light of that product, sufficiently in advance of the Council's July 11 meeting so that any revisions thus agreed upon could be reflected in the amending language provided to members as an attachment to the agenda of that meeting. However, I don't want to raise undue expectations on your part as to what my contribution is likely to be. I'm no magician and have no silver bullets in my belt. The likelihood is that, whatever I ultimately provide for your consideration will represent only modest, marginal improvement over what your subcommittee has already produced.

After the July meeting, only those in August and September will remain at which further Council deliberation, fine-tuning and tweaking can take place. That will probably provide enough time, but if the Council could ever summon up the courage to ask the Legislature to delete the damnable "exact language" requirement of ORS 1.735(2), which was imposed on us as recently as 1993 and has hamstrung the Council ever since, meetings in October and November would become available for those purposes, at least in future biennia. Getting rid of that ill-considered requirement would ease the perennial pressure on the Council to rush things during the final months of a biennial cycle. But I suppose that is an issue for another day.

c: Bruce C. Hamlin (fyi)

BROTHERS
&
ASH
AND ASSOCIATES

July 2, 1998

Jeffrey A. Johnson
Cosgrove, Vergeer & Kester
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Portland, OR 97204 Via Facsimile: (503) 323-9019

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University of Oregon School of Law
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Eugene, OR 97403 Via Facsimile: (541) 346-1564

Karsten H. Rasmussen
Rasmussen Tyler & Mundorff
1600 Executive Parkway, Suite 110
Eugene, OR 97401 Via Facsimile: (541) 344-5059

Honorable Don A. Dickey
District Court Judge of Marion County
PO Box 12869
Salem, OR 97310 Via Facsimile: (503) 373-4369

Honorable Ted Carp
District Court Judge of Lane County
125 East 8th St.
Eugene, OR 97401 Via Facsimile: (541) 682-4563

Re: Council on Court Procedures

Gentlemen:

I am enclosing herewith a proposal with regard to amendments to Rule 39. I have plagiarized shamelessly from the thoughts of Maury Holland as well as those of Judge Carp and Judge Dickey.

I am enclosing Judge Dickey's final proposed amendments as well as a proposal by me that followed. I am also enclosing a letter received from Maury Holland which includes his proposed changes and my version of his proposed changes.

I would like to schedule a telephone conference with Jeff Johnson, Karsten Rasmussen, Judges Dickey and Carp, and Maury Holland and myself for Tuesday, July 7th. I would appreciate if each of you would advise my secretary as to your availability on that date, as well as a time that is convenient to you.

Please feel free to call me directly with any questions or comments.

Very truly yours,

BRUCE J. BROTHERS

BJB:jh
Enc.

D. Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of *deponents* may proceed as permitted at the trial. The person described in Rule 38 shall put the *deponent* on oath. The testimony of the *deponent* 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 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 record. Evidence objected to shall be taken subject to the objections. Objections shall be stated concisely and non-argumentatively, and shall not suggest to the *deponent*[1] how to answer a question. A deposition shall not be suspended or recessed while a questions is pending. A deponent may be instructed not to answer a question only when necessary to present a motion under subsection E(1) of this rule, to enforce a limitation on examination ordered by the court, or to preserve a privilege *or constitutional right* of the witness, except that a witness who is not a party and not assisted by counsel may be advised by any party as to any privilege such witness may have, but shall not be instructed by any party either to invoke or waive such privilege.

In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the deponent and see that the answers thereto are recorded verbatim.

E. Motion to Terminate or Limit Examination, Terminating or Hindering Examination.

E (1) 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 *deposition* is being conducted *in a manner not consistent with these rules* ~~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 of 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 or manner of the taking of the deposition as provided in Rule 36 C. Those ~~persons described in Rule 46 B(2) shall present the motion to the court~~ in which ~~the action is pending. Non-party deponents may present~~ the motion ~~to the court in which the action is pending or the court at the place of examination.~~ 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~~ moving 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.

~~[O]r hindered" seems out of place here, and should be moved to E(2). All the words in E(1), such as "annoy, embarrass, or oppress the deponent or any party, . . ." refer to misconduct of the deposing party, not the deponent or a defending party. Also, the remedies provided by F(1) termination or limitation of the examination make no sense in the context of hindrance of examination by the deponent or a defending party.~~

E(2) Hindrance of Examination. If a party taking a deposition shows by motion presented to the court in which the action is pending that examination of a deponent was unreasonably hindered by *the conduct of counsel, including the manner* of objection or instructions by any attorney to the deponent not to answer one or more questions in violation of subsection (1) of this section, such party may apply to the court in which the action is pending for *relief* ~~such order~~ as the court ~~deems proper~~, which may include an order that any attorney found responsible for such unreasonable hindrance pay to the said party its costs, including reasonable attorney fees, directly attributable thereto. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

Don A. Dickey
Circuit Court Judge
(503) 373-4445
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July 2, 1998

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Maury Holland
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Eugene, OR 97403

Hon. Ted Carp
Circuit Court Judge
Lane County Courthouse
125 E 8th Avenue
Eugene, OR 97401

Re: ORCP 39

Gentlemen:

After considering the comments at the June, 1998 Council on Court Procedures meeting and review of Maury Holland's suggestions dated June 10, 1998, I have redrafted the proposed rule changes to ORCP 39.

The changes are generally as follows:

1. The section regarding "objections" has been added to Rule 39D(1) rather than 39 E.

2 The prior Break in Questioning has also been moved to 39D(2).

3. Because of the suggestion of Bruce, we have deleted the section on Time Limits for Deposition (this had been proposed as a modification to 39C(3)).

From Maury's notes there is some reason to consider deleting the Hindrance portion of 39E, but it probably deserves further consideration. I took the liberty to take out the section regarding a lawyer advising a nonrepresented deponent. We can add it back if you think otherwise.

I will be gone for the meeting on July 11 but I will be back for the next meeting. Please advise. I do think we should share any approved draft with the "Procedures and Practice" Committee.

I note that an entirely different Rule (46B), needs a clean-up modification to delete reference to the "District Court". There may be other rules which also need this.

Very truly yours,

Don A. Dickey
Circuit Court Judge

DAD:kat
Enclosure
070298brothers.ltr

MODIFICATIONS AND ADDITIONS TO RULE 39

Rule 39 D presently reads as follows:

Examination and cross-examination of witness 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 of 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 record. 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 t the witness and see that the answers thereto are recorded verbatim.

* * * * *

Rule 39 is amended as follows:

Rule 39D:

D.(1) Examination and Cross-Examination; Record of Examination; Oath. 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 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.

D.(2) Objections. 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 record. Evidence objected to shall be taken subject to the objections. Objections shall be stated concisely and non-argumentatively, and shall not suggest to the witness how to answer a question. A deposition shall not be suspended or recessed while a question is pending. A witness may be instructed not to answer a question only when necessary to present a motion under subsection E(1) of this rule, to enforce a limitation on examination ordered by the court, or to preserve a privilege or constitutional right of the witness.

* * * *

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* * * *

Rule 39 E is amended to read as follows:

E. Motion to Terminate or Limit Examination. At any time in connection with the taking of a deposition, on motion by a party or the deponent and a showing that the examination is conducted in bad faith or in a manner as unreasonably to annoy, embarrass, oppress or unduly burden 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 may rule on any question presented by the motion and may order the parties to cease forthwith from taking the deposition, or limit and control the scope or manner of taking the deposition as provided in Rule 36 C. If the order terminates the examination, the deposition shall be resumed only upon order of the court in which the action is pending. Upon request of the moving party or the deponent, a deposition may be suspended to allow time for a motion to be presented under this rule. The court where the action is pending may make orders as follows: award reasonable expenses pursuant to Rule 46 A.(4) incurred in connection with the motion and, after consideration as contempt of court of the acts and failures of the other party, grant sanctions and make orders in regard thereto as are just, including orders as described in Rule 46 B.

E. (2) Hindrance of Examination. If a party taking a deposition shows by motion presented to the court in which the action is pending that examination of a deponent was unreasonably hindered by forms of objections or instructions by any attorney to the deponent not to answer one or more questions, such party may apply to the court in which the action is pending for such order as the court deems proper, which may include an order that any attorney found responsible for such unreasonable hindrance pay said party its costs, including reasonable attorneys fees incurred in connection therewith. Any award of expenses shall be reviewed by the court pursuant to Rule 46A(4).

E. (3) Appropriate Court for non-parties. The above provisions of this rule notwithstanding, the appropriate court for application of an order to a non-party deponent shall only be as provided in Rule 46 A.(1)(b) and Rule 46 B.(1): to the court of competent jurisdiction in the political subdivision where the non-party deponent is located.

July 14, 1998

To: Rule 39 Subcommittee (Bruce Brothers, Chair; Ted Carp, Don Dickey, and Karsten Rasmussen, members)

Fm: Maury Holland M.J.H.

Re: Why Evidentiary Objections are Required at Oral Depositions

During the recent conference call, a question was raised as to why evidentiary objections should be required at oral depositions, in other words, why don't the pertinent rules permit such objections to be raised for the first time at trial if and when deposition answers are sought to be introduced in evidence.

The short answer to this question is that objections are "required," in the sense of being waived if not made, at the deposition because ORCP 39 I(6) so provides.[1] Note that this applies only to so-called "perpetuation depositions" pursuant to section 39 I. The rationale of this "use it or lose it" requirement is so that the attorney conducting a deposition is alerted by objections made when objectionable questions are asked as to the grounds of such objections, so that the attorney might "obviate" them by rephrasing questions, laying omitted foundations, and the like.

This notion of obviability is reinforced in ORCP 41 C(1) and (2).[2] I vividly recall from my class in trial practice over thirty years ago asking the professor how a lawyer defending a deposition could, in the split second available, distinguish between grounds of objection that are obviable from those that are not. The answer given was that this distinction can be metaphysically subtle, so

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[1] "Any objections not made at the deposition shall be deemed waived."

[2] "C(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make then before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."

"C(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or int eh conduct of parties, and errors of any kind which might have been obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

These provisions seem, at least in part, to contradict the last sentence of 39 I(6), quoted in n. 1 above. That sentence would be more accurate if it were amended to read: "Any objections **on obviable grounds** not made at the deposition shall be deemed waived." [Added language in bold underlined.]

the sensible thing to do is to object to any question that is objectionable, regardless of whether its ground might be obviable or not. I assume that competent lawyers ensure that all available objections are made and noted on the record, since there is no penalty for objecting to a question on a ground that is not obviable.[3] Of course, there are some grounds of objection that are clearly obviable, such as where questions are argumentative or ambiguous, assume facts not in evidence, or where a prior foundation of a deponent's ability to have observed some event about which he or she is testifying has not been laid.

I suppose the question of obviability versus non-obviability must come up once in a while in the Oregon trial courts. However, there appears to be no Oregon appellate opinion which addresses it. In any event, I don't think anything in this memo has any particular bearing on the problems with which your subcommittee is wrestling.

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[3]I suppose there is the remote possibility that, by making an objection that the court might later rule was not required because the ground was non-obviable, a defending lawyer might occasionally "educate" the deposing lawyer in a way that would allow the latter to solve some evidentiary problem at trial. But that strikes me as something that rule-makers should not even try to address.

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September 7, 1998

Mr. Bruce C. Brothers
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Bend, OR 97709

Dear Bruce: Re: Your fax dated 9/3/98

I frankly don't know whether or not the phrase "in a manner not consistent with these rules" was intended by the subcommittee to be included in 39 E(1) as proposed to be amended. Obviously, it was not included in the version of the E(1) amendments as approved by the subcommittee at the conclusion of the 8/20/98 telecon. Whether that was due to a mistake on my part, which no one caught during the telecon, I cannot now tell. Looking back over the successive versions of the proposed amendments, this phrase appears in some of them, but not others. I do have a vague, and hence unreliable, recollection that, at some point, there was agreement by the subcommittee that this phrase should not be included. It is not included in the current 39 E, but that of course does not prove anything.

May I suggest that, rather than my sending out alternative versions at this late stage, all members of the subcommittee can simply have in mind the point you have raised. If, when this item is reached at the 9-12-98 meeting, the consensus of the subcommittee is that the phrase should be included, it would then be an easy matter just to insert it by interlineation.

Cordially,

Maurice J. Holland
Executive Director

cc: Hon. Ted Carp
Hon. Don Dickey
Mr. Karsten Rasmussen