

AMENDMENTS

TO ORCP 38

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2016

RULE 38

PERSONS WHO MAY ADMINISTER OATHS  
FOR DEPOSITIONS; FOREIGN DEPOSITIONS

A. Within Oregon. Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

B. Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person appointed or commissioned by the court, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. 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) Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.

C.(2) This rule shall be so interpreted and construed as to effectuate its general purposes to make uniform the laws of those states which have similar rules or statutes.

COMMENT

This rule is based upon the Vermont version of Federal Rule 28. This rule and ORCP 39 and 40 incorporate modifications suggested by the American Bar Association Special Committee of the Section of Litigation, providing a more flexible procedure for nonstenographic depositions. Section

38 A. provides who shall administer an oath, not before whom a deposition shall be taken. It would not be necessary for the person who administers the oath to remain at the taking of the deposition after the witness is put on oath. See, Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October 1977, Second Printing and Revision, December 1977), hereinafter referred to as ABA Special Committee Report.

Section 38 A. contemplates that in a particular case the court could appoint a person not generally authorized to administer oaths for the special purpose of a deposition. ORS 45.320, 45.330, 45.350, and 45.360, providing for issuance of commissions for depositions, were eliminated, but 38 B. provides that if necessary for a foreign deposition, a commission would be issued by the court.

Section 38 B. provides maximum flexibility to an Oregon litigant who wishes to take a deposition in another state or country. The Oregon litigant may need to comply with local requirements in taking the deposition and securing attendance of the witness. ORS 45.320 and 45.370 provide for taking depositions outside the state before commissioners appointed by the Governor, but the ORS provisions relating to appointment of Commissioners outside this state have been repealed, and those sections were eliminated.

Section 38 C. is the existing Uniform Foreign Deposition Act, ORS 45.910.

PERSONS WHO MAY ADMINISTER OATHS  
FOR DEPOSITIONS; FOREIGN DEPOSITIONS  
RULE 38

A. Within Oregon.

A. (1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition.

A. (2) For purposes of this rule, a deposition taken pursuant to Rule 39 C. (7) is taken within this state if either the deponent or the person administering the oath is located in this state.

\* \* \* \* \*

COMMENT

38 A. (2). This subsection is added to provide that when, pursuant to subsection 39 C. (7), a deposition is taken by telephone it shall be regarded as being taken within Oregon if either the deponent or the individual administering the oath or affirmation is within Oregon at the time the oath or affirmation is administered. This is intended to make clear that, under such circumstances, there need be no compliance with the more cumbersome requirements of subsection 38 B. If an out-of-state deponent is a non-party, compliance with the Uniform Foreign Deposition Act or other pertinent legislation of the jurisdiction where the deponent is located would of course be necessary in order to secure his or her attendance and compel his or her testimony.

1 **PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN**

2 **DEPOSITIONS**

3 **RULE 38**

4 **A Within Oregon.**

5 A(1) Within this state, depositions shall be preceded by an oath or affirmation  
6 administered to the deponent by an officer authorized to administer oaths by the laws of this state  
7 or by a person specially appointed by the court in which the action is pending. A person so  
8 appointed has the power to administer oaths for the purpose of the deposition.

9 A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken  
10 within this state if either the deponent or the person administering the oath is located in this state.

11 **B Outside the state.** Within another state, or within a territory or insular possession  
12 subject to the dominion of the United States, or in a foreign country, depositions may be taken:  
13 (1) on notice before a person authorized to administer oaths in the place in which the  
14 examination is held, either by the law thereof or by the law of the United States[,] [or] (2)  
15 before a person appointed or commissioned by the court in which the action is pending, and such  
16 a person shall have the power by virtue of such person’s appointment or commission to  
17 administer any necessary oath and take testimony[,] or (3) pursuant to a letter rogatory. A  
18 commission or letter rogatory shall be issued on application and notice and on terms that are just  
19 and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the  
20 taking of the deposition in any other manner is impracticable or inconvenient; and both a  
21 commission and a letter rogatory may be issued in proper cases. A notice or commission may  
22 designate the person before whom the deposition is to be taken either by name or descriptive  
23 title. A letter rogatory may be addressed “To the Appropriate Authority in (here name the state,  
24 territory, or country).” Evidence obtained in a foreign country in response to a letter rogatory  
25 need not be excluded merely for the reason that it is not a verbatim transcript or that the  
26 testimony was not taken under oath or for any similar departure from the requirements for

1 depositions taken within the United States under these rules.

2 **C Foreign depositions and subpoenas.**

3 *[C(1) Whenever any mandate, writ, or commission is issued out of any court of record in*  
4 *any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement*  
5 *it is required to take the testimony of a witness or witnesses in this state, witnesses may be*  
6 *compelled to appear and testify in the same manner and by the same process and proceeding as*  
7 *may be employed for the purpose of taking testimony in proceedings pending in this state.*

8 *C(2) This section shall be so interpreted and construed as to effectuate its general*  
9 *purposes to make uniform the laws of those states which have similar rules or statutes.]*

10 **C(1) Definitions. For the purpose of this rule:**

11 **C(1)(a) “Foreign subpoena” means a subpoena issued under authority of a court of**  
12 **record of any state other than Oregon.**

13 **C(1)(b) “State” means a state of the United States, the District of Columbia, Puerto**  
14 **Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory**  
15 **or insular possession subject to the jurisdiction of the United States.**

16 **C(2) Issuance of subpoena.**

17 **C(2)(a) To request issuance of a subpoena under this rule, a party or attorney shall**  
18 **submit a foreign subpoena to a clerk of court in the county in which discovery is sought to**  
19 **be conducted in this state.**

20 **C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in**  
21 **this state, the clerk, in accordance with that court’s procedure and requirements, shall**  
22 **assign a case number and promptly issue a subpoena for service upon the person to whom**  
23 **the foreign subpoena is directed. If a party to an out-of-state proceeding retains an**  
24 **attorney licensed to practice in this state, that attorney may assist the clerk in drafting the**  
25 **subpoena.**

1        **C(2)(c) A subpoena under this subsection shall:**

2        **(i) conform to the requirements of these Oregon Rules of Civil Procedure, including**  
3 **Rule 55, and conform substantially to the form provided in Rule 55 A but may otherwise**  
4 **incorporate the terms used in the foreign subpoena as long as those terms conform to these**  
5 **rules; and**

6        **(ii) contain or be accompanied by the names, addresses, and telephone numbers**  
7 **of all counsel of record in the proceeding to which the subpoena relates and of any party**  
8 **not represented by counsel.**

9        **C(3) Service of subpoena. A subpoena issued by a clerk of court**  
10 **under subsection (2) of this rule shall be served in compliance with Rule 55.**

11        **C(4) Effects of request for subpoena. A request for issuance of a subpoena under**  
12 **this rule does not constitute an appearance in the court. A request does allow the court to**  
13 **impose sanctions for any action in connection with the subpoena that is a violation of**  
14 **applicable law.**

15        **C(5) Motions. A motion to the court, or a response thereto, for a protective order or**  
16 **to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this rule is**  
17 **an appearance before the court and shall comply with the rules and statutes of this state.**  
18 **The motion shall be submitted to the court in the county in which discovery is to be**  
19 **conducted.**

20        **C(6) Uniformity of application and construction. In applying and construing this**  
21 **rule, consideration shall be given to the need to promote the uniformity of the law with**  
22 **respect to its subject matter among states that enact it.**