

AMENDMENTS

TO ORCP 38

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

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), herein-after 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.**

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

2 **FOREIGN 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
7 state 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. A(2) For
9 purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if
10 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)]

14 B(1) on notice before a person authorized to administer oaths in the place in which the
15 examination is held, either by the law thereof or by the law of the United States; [(2)]

16 B(2) before a person appointed or commissioned by the court in which the action is
17 pending, and such a person shall have the power by virtue of such person's appointment or
18 commission to administer any necessary oath and take testimony; or [(3)]

19 B(3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on
20 application and notice and on terms that are just and appropriate. It is not requisite to the
21 issuance of a commission or a letter rogatory that the taking of the deposition in any other
22 manner is impracticable or inconvenient; and both a commission and a letter rogatory may be
23 issued in proper cases. A notice or commission may designate the person before whom the
24 deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed
25 "To the Appropriate Authority in (here name the state, territory, or country)." Evidence
26 obtained in a foreign country in response to a letter rogatory need not be excluded merely for

1 the reason that it is not a verbatim transcript or that the testimony was not taken under oath or
2 for any similar departure from the requirements for depositions taken within the United States
3 under these rules.

4 **C Foreign depositions and subpoenas.**

5 **C(1) Definitions.** For the purpose of this section:

6 C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record
7 of any state other than Oregon.

8 C(1)(b) "State" means a state of the United States, the District of Columbia, Puerto Rico,
9 the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular
10 possession subject to the jurisdiction of the United States.

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

12 C(2)(a) To request issuance of a subpoena under this section, a party or attorney shall
13 submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be
14 conducted in this state.

15 C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this
16 state, the clerk, in accordance with that court's procedure and requirements, shall assign a case
17 number and promptly issue a subpoena for service upon the person to whom the foreign
18 subpoena is directed. If a party to an out-of-state proceeding retains an attorney licensed to
19 practice in this state, that attorney may assist the clerk in drafting the subpoena.

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

21 [(i)] **C(2)(c)(i)** Conform to the requirements of these Oregon Rules of Civil Procedure,
22 including Rule 55, and conform substantially to the form provided in [Rule 55 A] **Rule 55 A(1)**,
23 but may otherwise incorporate the terms used in the foreign subpoena as long as those terms
24 conform to these rules; and

25 [(ii)] **C(2)(c)(ii)** Contain or be accompanied by the names, addresses, and telephone
26 numbers of all counsel of record in the proceeding to which the subpoena relates and of any

1 party not represented by counsel.

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

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

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

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

15
16
17
18
19
20
21
22
23
24
25
26

2017-2019 BIENNIUM STAFF COMMENT TO RULE 38

Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2017-2019 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 38 was amended in subparagraph 38 C(2)(c)(i) to make the reference to the completely revised Rule 55 more specific.

There are other amendments to Rule 38 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

1. In section 38 B, numbered designations to emphasize a series of three in a long paragraph are separated into three subsections for clarity and to simplify citations to the relevant part of the section.
2. In paragraph 38 C(2)(c), the existing subparagraphs are more completely identified to be consistent with ORCP format.