

AMENDMENTS

TO ORCP 43

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2016

RULE 43

PRODUCTION OF DOCUMENTS AND THINGS AND
ENTRY UPON LAND FOR INSPECTION AND
OTHER PURPOSES

A. Scope. Any party may serve on any other party a request: (1) to produce and permit the party making the request or someone acting on behalf of the party making the request, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 36 B. and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B. Procedure. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and

category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. A defendant shall not be required to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party upon whom a request has been served shall comply with the request, unless the request is objected to with a statement of reasons for each objection before the time specified in the request for inspection and performing the related acts. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 46 A. with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

C. Writing called for need not be offered. Though a writing called for by one party is produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D. Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMENT

This rule is based primarily upon ORS 41.616, which is similar to Federal Rule 34. In section 43 B., the federal rule

requires a written response to the request to produce, and ORS 41.616 simply requires that the party comply with the request, or object. The language of ORS 41.616 was modified slightly because it was ambiguous in providing that the request would specify the time for production, but the party receiving the request would have 30 days to object. If the time for response was less than 30 days, it was unclear whether a compliance order could be sought until the 30 day period elapsed. This rule requires any objections to be filed before the time specified for production. If the person seeking discovery specifies an unreasonably early date for production, a protective order is available under Rule 36 C.

Section C. does not appear in the federal rules and is based upon ORS 41.620. Section D. was not included in the ORS sections and was taken from the federal rule.

PRODUCTION OF DOCUMENTS AND
THINGS AND ENTRY UPON LAND FOR
INSPECTION AND OTHER PURPOSES
RULE 43

* * * * *

D. Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55. This rule does not preclude an independent action against a person not a party for [production of documents and things and] permission to enter upon land.

COMMENT

See comment to ORCP 55.

PRODUCTION OF DOCUMENTS AND
THINGS AND ENTRY UPON LAND FOR
INSPECTION AND OTHER PURPOSES
RULE 43

* * * * *

B Procedure. [The request] A party may [be served upon] serve the request on the plaintiff after commencement of the action and [upon] on any other party with or after service of the summons [upon] on that party. The request shall set [forth] out the items [to be inspected] that the requesting party desires to inspect either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner [of] for making the inspection and performing the related acts. A [defendant] request shall not [be required] require a defendant to produce or allow inspection or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. The party [upon whom] that receives service of a request [has been served] shall comply with the request[,] unless [the request is objected to] that party objects to the request, with a statement of reasons for each objection, before the time specified in the request for allowing the inspection and performing the related acts. [If] An objection [is made] to part of an item or category[, the part shall be specified] of a requested item shall specify the objectionable part. The duty to comply with the request is a continuing duty during the pendency of the action. Notwithstanding any other response or objection, a

party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item. The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

**PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY
UPON LAND FOR INSPECTION AND OTHER PURPOSES**

RULE 43

* * * * *

B Procedure.

B(1) A party may serve [*the*] **a** request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request shall [*set out the*] **identify any items requested for inspection, copying, or related acts** [*that the requesting party desires to inspect either*] by individual item or by category [*and*] described [*each item and category*] with reasonable particularity[.], **designate any land or other property upon which entry is requested, and** [*The request*] shall specify a reasonable [*time,*] place[,], and manner for [*making*] the inspection, **copying, entry,** and [*performing the*] related acts.

B(2) A request shall not require a defendant to produce or allow inspection, **copying, entry,** or other related acts before the expiration of 45 days after service of summons, unless the court specifies a shorter time. **Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or the parties may agree upon in writing,** [*The*] **a** party [*that receives service of a request*] shall [*comply with the request unless that party objects to the request, with a statement of reasons for each objection, before the time specified in the request for allowing the inspection and performing the related acts.*] **serve a response that includes the following:**

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, which items shall be organized and labeled to correspond with the categories in the request;

B(2)(b) as to any requested item not in the party's possession or custody, a statement that reasonable effort has been made to obtain it, unless specifically objected to, or that no such item is within the party's control;

B(2)(c) as to any land or other property, a statement that entry will be permitted as requested unless specifically objected to; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request shall clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to. [*An objection to part of an item or category of a requested item shall specify the objectionable part.*]

B(4) A party served in accordance with subsection B(1) of this rule [*The duty to comply with the request*] is **under** a continuing duty during the pendency of the action[.] **to produce promptly any item responsive to the request and not objected to which comes into the party's possession, custody, or control.** [*Notwithstanding any other response or objection, a party that subsequently discovers any document or thing that the request identifies shall produce or allow inspection of the item, or object in the manner described in this paragraph, within a reasonable time after discovering the item.*]

B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall do so within a reasonable time. [*The party submitting the request may move for an order under Rule 46 A with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.*]

* * * * *

1 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY**
2 **UPON LAND FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

4 **A Scope.** Any party may serve on any other party a request: (1) to produce and permit the
5 party making the request, or someone acting on behalf of the party making the request, to inspect
6 and copy[,] any designated documents (including **electronically stored information**, writings,
7 drawings, graphs, charts, photographs, [*phono-records*,] **sound recordings, images**, and other
8 **data or** data compilations from which information can be obtained[,] and translated, if
9 necessary, by the respondent through detection devices **or software** into reasonably usable
10 form)[,] or to inspect and copy, test, or sample any tangible things which constitute or contain
11 matters within the scope of Rule 36 B and which are in the possession, custody, or control of the
12 party upon whom the request is served; or (2) to permit entry upon designated land or other
13 property in the possession or control of the party upon whom the request is served for the
14 purpose of inspection and measuring, surveying, photographing, testing, or sampling the
15 property or any designated object or operation thereon, within the scope of Rule 36 B.

16 **B Procedure.**

17 B(1) A party may serve a request on the plaintiff after commencement of the action and
18 on any other party with or after service of the summons on that party. The request shall identify
19 any items requested for inspection, copying, or related acts by individual item or by category
20 described with reasonable particularity, designate any land or other property upon which entry is
21 requested, and shall specify a reasonable place and manner for the inspection, copying, entry,
22 and related acts.

23 B(2) A request shall not require a defendant to produce or allow inspection, copying,
24 entry, or other related acts before the expiration of 45 days after service of summons, unless the
25 court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance
26 with subsection B(1) of this rule, or such other time as the court may order or the parties may

1 agree upon in writing, a party shall serve a response that includes the following:

2 B(2)(a) a statement that, except as specifically objected to, any requested item within the
3 party's possession or custody is provided, or will be provided or made available within the time
4 allowed and at the place and in the manner specified in the request, which items shall be
5 organized and labeled to correspond with the categories in the request;

6 B(2)(b) as to any requested item not in the party's possession or custody, a statement that
7 reasonable effort has been made to obtain it, unless specifically objected to, or that no such item
8 is within the party's control;

9 B(2)(c) as to any land or other property, a statement that entry will be permitted as
10 requested unless specifically objected to; and

11 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

12 B(3) Any objection not stated in accordance with subsection B(2) of this rule is waived.
13 Any objection to only a part of a request shall clearly state the part objected to. An objection
14 does not relieve the requested party of the duty to comply with any request or part thereof not
15 specifically objected to.

16 B(4) A party served in accordance with subsection B(1) of this rule is under a continuing
17 duty during the pendency of the action to produce promptly any item responsive to the request
18 and not objected to which comes into the party's possession, custody, or control.

19 B(5) A party who moves for an order under Rule 46 A(2) regarding any objection or
20 other failure to respond or to permit inspection, copying, entry, or related acts as requested, shall
21 do so within a reasonable time.

22 **C Writing called for need not be offered.** Though a writing called for by one party is
23 produced by the other, and is inspected by the party calling for it, the party requesting production
24 is not obliged to offer it in evidence.

25 **D Persons not parties.** A person not a party to the action may be compelled to produce
26 books, papers, documents, or tangible things and to submit to an inspection thereof as provided

1 in Rule 55. This rule does not preclude an independent action against a person not a party for
2 permission to enter upon land.

3 **E Electronically stored information.**

4 **A request for electronically stored information may specify the form in which the**
5 **information is to be produced by the responding party but, if no such specification is made,**
6 **the responding party must produce the information in either the form in which it is**
7 **ordinarily maintained or in a reasonably useful form.**

1 **PRODUCTION OF DOCUMENTS AND THINGS AND [ENTRY**

2 **UPON LAND] ENTERING PROPERTY FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

4 **A Scope.** Any party may serve on any other party [*a request: (1)*] **any of the following**
5 **requests:**

6 **A(1) Documents or things. A request** to produce and permit the party making the
7 request, or someone acting on behalf of the party making the request, to inspect and copy any
8 designated documents (including electronically stored information, writings, drawings, graphs,
9 charts, photographs, sound recordings, images, and other data or data compilations from which
10 information can be obtained and translated, if necessary, by the respondent through detection
11 devices or software into reasonably usable form) or to inspect and copy, test, or sample any
12 tangible things [*which*] **that** constitute or contain matters within the scope of Rule 36 B and
13 [*which*] **that** are in the possession, custody, or control of the party [*upon*] **on** whom the request
14 is served; [*or (2)*]

15 **A(2) Entering property. A request to enter** [*to permit entry upon designated*] land or
16 other property in the possession or control of the party [*upon*] **on** whom the request is served
17 for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the
18 property or any designated object or operation thereon, within the scope of Rule 36 B.

19 **B Procedure.**

20 B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the
21 action and on any other party with or after service of the summons on that party. The request
22 shall identify any items requested for inspection, copying, or related acts by individual item or
23 by category described with reasonable particularity, designate any land or other property
24 [*upon*] **on** which entry is requested, and shall specify a reasonable place and manner for the
25 inspection, copying, entry, and related acts.

26 B(2) **Time for response.** A request shall not require a defendant to produce or allow

1 inspection, copying, entry, or other related acts before the expiration of 45 days after service of
2 summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a
3 request in accordance with subsection B(1) of this rule, or such other time as the court may
4 order or **to which** the parties may agree [*upon*] in writing, a party shall serve a response that
5 includes the following:

6 B(2)(a) a statement that, except as specifically objected to, any requested item within
7 the party's possession or custody is provided, or will be provided or made available within the
8 time allowed and at the place and in the manner specified in the request, [*which items*] **and**
9 **that the items are or** shall be organized and labeled to correspond with the categories in the
10 request;

11 B(2)(b)[*as to*] **a statement that, except as specifically objected to, a reasonable effort**
12 **has been made to obtain** any requested item not in the party's possession or custody, [*a*
13 *statement that reasonable effort has been made to obtain it, unless specifically objected to,*] or
14 that no such item is within the party's control;

15 B(2)(c) [*as to*] **a statement that, except as specifically objected to, entry will be**
16 **permitted as requested to** any land or other property[, *a statement that entry will be permitted*
17 *as requested unless specifically objected to*]; and

18 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

19 B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule
20 is waived. Any objection to only a part of a request shall clearly state the part objected to. An
21 objection does not relieve the requested party of the duty to comply with any request or part
22 thereof not specifically objected to.

23 B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is
24 under a continuing duty during the pendency of the action to produce promptly any item
25 responsive to the request and not objected to [*which*] **that** comes into the party's possession,
26 custody, or control.

1 B(5) **Seeking relief under Rule 46 A(2).** A party who moves for an order under Rule 46
2 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry,
3 or related acts as requested, shall do so within a reasonable time.

4 **C Writing called for need not be offered.** Though a writing called for by one party is
5 produced by the other, and is inspected by the party calling for it, the party requesting
6 production is not obliged to offer it in evidence.

7 **D Persons not parties.** A person not a party to the action may be compelled to produce
8 books, papers, documents, or tangible things and to submit to an inspection thereof as
9 provided in Rule 55. This rule does not preclude an independent action against a person not a
10 party for permission to enter [upon] land.

11 **E Electronically stored information (“ESI”).**

12 **E(1) Form in which ESI is to be produced.** A request for [electronically stored
13 information] **ESI** may specify the form in which the information is to be produced by the
14 responding party but, if no such specification is made, the responding party must produce the
15 information in either the form in which it is ordinarily maintained or in a reasonably useful
16 form.

17 **E(2) Meetings to resolve issues regarding ESI production; relevance to discovery**
18 **motions. In any action in which a request for production of ESI is anticipated, any party may**
19 **request one or more meetings to confer about ESI production in that action. No meeting may**
20 **be requested until all of the parties have appeared or have provided written notice of intent**
21 **to file an appearance pursuant to Rule 69 B(1). The court may also require that the parties**
22 **meet to confer about ESI production. Within 21 days of the request for a meeting, the parties**
23 **must meet and confer about the scope of the production of ESI; data sources of the**
24 **requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to**
25 **identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues**
26 **pertaining to metadata; and any other issue a requesting or producing party deems relevant**

1 to the request for ESI. Failure to comply in good faith with this subsection shall be considered
2 by a court when ruling on any motion to compel or motion for a protective order related to
3 ESI. The requirements in this subsection are in addition to any other duty to confer created
4 by any other rule.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26