

AMENDMENTS

TO ORCP 44

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

RULE 44

PHYSICAL AND MENTAL EXAMINATION
OF PERSONS; REPORTS OF
EXAMINATIONS

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

B. Report of examining physician. If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician setting out such physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a

person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

D. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D. Report; effect of failure to comply.

D.(1) Preparation of written report. If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician has not made a written report, the party who is obliged to furnish the report shall request that the examining physician prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examining physician's fee, necessary to prepare such a report.

D.(2) Failure to comply or make report or request report.

If a party fails to comply with sections B. and C. of this rule, or if a physician fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician prepare a written report within a

reasonable time, the court may require the physician to appear for a deposition or may exclude the physician's testimony if offered at the trial.

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

COMMENT

This rule is a combination of ORS sections and Federal Rule 35. Section 44 A. comes from the federal rule and is more comprehensive than ORS 44.610. It allows a medical examination in any situation where the mental and physical condition of a party is at issue. The reference to blood tests and persons in the custody of or under the legal control of a party would authorize court ordered blood tests in paternity disputes.

Section 44 B. is also adapted from the federal rule. It provides for a more complete exchange of reports than that contemplated by existing ORS 44.620 and 44.640. In one respect the rule is more narrow than existing practice; it only allows the examined party to secure a copy of the report, as opposed to any party.

Section 44 C. is based on ORS 44.620(2).

Section 44 D. is based on ORS 44.630 but the language was modified to specifically cover the situation where the party obligated to furnish a report does not have a written report. A party may also be ordered to furnish a report under ORCP 46 A.(2).

Section 44 E. is based upon ORS 441.810. Despite its location in ORS, the provision is a discovery rule. As enacted, the provision was apparently intended to allow examination of hospital records related to the injuries forming the basis for a claim, but the language used in the ORS codification did not make this clear. See State ex rel. Calley v. Olsen, 271 Or 369 (1975). The Council used language similar to that in the ORS section and intended to allow examination of any hospital records of the injured person.

RULE 45

REQUESTS FOR ADMISSION

A. Request for admission. After commencement of an action, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B. specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

B. Response. The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B. WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is

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E. Access to hospital records.

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

COMMENT

The rule will be amended to allow access to hospital
records to one against whom a "civil action" has been
filed, rather than a "claim."

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C. Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports or existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

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COMMENT

The amendment to Rule 44 was made as a response to rulings out of the Multnomah County Circuit Court. The current language "written reports" has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding "or existing notations" is intended to broaden the rule to include office and chart notes.

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(RESERVE FOR POSSIBLE EXPANSION AFTER JANUARY 6, 1989 MEETING)

~~the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit under section E of this rule. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

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E Access to [hospital records] individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of [all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person] individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. [Hospital records] Individually identifiable health information [shall] may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

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2 **REPORTS OF EXAMINATIONS**

3 **RULE 44**

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

13 **B Report of examining physician or psychologist.** If requested by the party against whom
14 an order is made under section A of this rule or the person examined, the party causing the
15 examination to be made shall deliver to the requesting person or party a copy of a detailed
16 report of the examining physician or psychologist setting out such physician's or psychologist's
17 findings, including results of all tests made, diagnoses and conclusions, together with like
18 reports of all earlier examinations of the same condition. After delivery the party causing the
19 examination shall be entitled upon request to receive from the party against whom the order is
20 made a like report of any examination, previously or thereafter made, of the same condition,
21 unless, in the case of a report of examination of a person not a party, the party shows inability
22 to obtain it. This section applies to examinations made by agreement of the parties, unless the
23 agreement expressly provides otherwise.

24 **C Reports of examinations; claims for damages for injuries.** In a civil action where a
25 claim is made for damages for injuries to the party or to a person in the custody or under the
26 legal control of a party, upon the request of the party against whom the claim is pending, the

1 claimant shall deliver to the requesting party a copy of all written reports and existing notations
2 of any examinations relating to injuries for which recovery is sought unless the claimant shows
3 inability to comply.

4 **D Report; effect of failure to comply.**

5 **D(1) Preparation of written report.** If an obligation to furnish a report arises under
6 sections B or C of this rule and the examining physician or psychologist has not made a written
7 report, the party who is obliged to furnish the report shall request that the examining physician
8 or psychologist prepare a written report of the examination, and the party requesting such
9 report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to
10 prepare such a report.

11 **D(2) Failure to comply or make report or request report.** If a party fails to comply with
12 sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed
13 report within a reasonable time, or if a party fails to request that the examining physician or
14 psychologist prepare a written report within a reasonable time, the court may require the
15 physician or psychologist to appear for a deposition or may exclude the physician's or
16 psychologist's testimony if offered at the trial.

17 **E Access to [*individually identifiable*] confidential health information.** Any party against
18 whom a civil action is filed for compensation or damages for injuries may obtain copies of
19 [*individually identifiable*] confidential health information as defined in [Rule 55 H] **Rule 55 D**
20 within the scope of discovery under Rule 36 B. [*Individually identifiable*] Confidential health
21 information may be obtained by written patient authorization, by an order of the court, or by
22 subpoena in accordance with [Rule 55 H] **Rule 55 D**.

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2017-2019 BIENNIUM STAFF COMMENT TO RULE 44

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 44 required an amendment in section 44 E to replace “individually identifiable health information” where that phrase appeared three times with “confidential health information,” to reflect the concurrent rewrite of Rule 55. Also, two references to “Rule 55 H” are amended to read “Rule 55 D” to be an accurate reference to the completely redrafted Rule 55.