

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 12, 1992

COUNCIL ON COURT PROCEDURES

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1993 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1994, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1991-93 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A; subdivisions of sections are called subsections and are indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Shading denotes new language while strikeout indicates language to be deleted.

The Council held public meetings at the Oregon State Bar Center in Lake Oswego on the following dates: October 12, 1991, November 9, 1991, December 14, 1991, March 14, 1992, May 9, 1991, October 17, 1991, and November 14, 1991. In addition, public meetings were held on the following dates at the locations indicated: February 8, 1992, State Capitol, Salem; June 13, 1992, Civic Center, Ashland; August 1, 1992, Multnomah County Sheriff's Office, Portland; September 26, 1992, Seaside Civic & Convention Center (in conjunction with Annual Meeting of Oregon State Bar); and December 12, 1992, University of Oregon School of Law, Eugene.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

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OREGON RULES OF CIVIL PROCEDURE

Contents

	<u>Page</u>
RULE 7 SUMMONS.....	1
RULE 32 CLASS ACTIONS.....	5
RULE 38 PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS; FOREIGN DEPOSITIONS.....	20
RULE 39 DEPOSITIONS UPON ORAL EXAMINATION.....	21
RULE 46 FAILURE TO MAKE DISCOVERY; SANCTIONS.....	25
RULE 68 ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS.....	27
RULE 69 DEFAULT ORDERS AND JUDGMENTS.....	29

**SUMMONS
RULE 7**

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C.(1) Contents. The summons shall contain:

* * * * *

C.(3) Notice to party served.

C.(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(b) Service for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D.(1)

shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT: READ THESE PAPERS CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. **If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**

* * * * *

E. By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, **except as provided in ORS 180.260,** an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

* * * * *

COMMENT

7 C.(3)(a), (b) and (c). Some persons served with a summons will not already have an attorney and will be unaware of the Oregon State Bar's Lawyer Referral Service and how it can be contacted. The language added to the "summons warning" prescribed by each of the above subsections provides that information.

7 E. The language added removes the inconsistency between this section of the rule and ORS 180.260, which authorizes service of summons by some officers or employees of the Department of Justice in cases in which the State is interested.

CLASS ACTIONS
RULE 32

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

A.(5) In an action for damages ~~under subsection (3) of section B of this rule~~, the representative parties have complied with the prelitigation notice provisions of section H of this rule.

B. Class action maintainable. An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

B.(1) The extent to which the prosecution of separate actions by or against individual members of the class would creates a risk of:

B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B.(1)(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

B.(2) ~~The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ The extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

B.(3) ~~The court finds that the~~ extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members, ~~and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a)~~

~~B. (4)~~ ~~†~~The interest of members of the class in individually controlling the prosecution or defense of separate actions;

~~bB. (5)~~ ~~†~~The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

~~eB. (6)~~ ~~†~~The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

~~dB. (7)~~ ~~†~~The difficulties likely to be encountered in the management of a class action ~~that will be eliminated or significantly reduced if the controversy is adjudicated by other available means; and~~

~~eB. (8)~~ ~~w~~Whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; ~~and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.~~

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether ~~and with respect to what claims or issues~~ it is to be so maintained and, ~~in action pursuant to subsection (3) of section B of this rule, the court~~ shall find the facts specially and state separately its conclusions thereon. An order under

this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

D. Dismissal or compromises of class actions; court approval required; when notice required. A **Any action filed as a class action in which there has been no ruling under subsection C. (1) of this rule and any action ordered maintained as a class action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to some or all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any of such compensation has been made. If the statute of limitations has run or may run**

against the claim of any class member, the court may require appropriate notice.

E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including precertification determination of a motion made by any party pursuant to Rules 21 or 47 if the court concludes that such determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

E.(2) Requiring, for the protection of ~~the members of the class~~ class members or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all ~~of the~~ class members of any step in the action, ~~or~~ of the proposed extent of the judgment, ~~or~~ of the opportunity of class members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ otherwise to come into the action, ~~or to be excluded from the class~~;

E.(3) Imposing conditions on the representative parties, class members, or ~~an~~ intervenors;

E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; and

E.(5) Dealing with similar procedural matters.

~~F. Notice required; content; statements of class members required; form; content; effect of failure to file required statement and exclusion.~~

F.(1) When ordering that an action be maintained as a class action under this rule, the court shall direct that notice be given to some or all members of the class under subsection E.(2) of this rule, shall determine when and how this notice should be given and shall determine whether, when, how, and under what conditions putative members may elect to be excluded from the class. The matters pertinent to these determinations ordinarily include: (a) the nature of the controversy and the relief sought; (b) the extent and nature of any member's injury or liability; (c) the interest of the party opposing the class in securing a final resolution of the matters in controversy; (d) the inefficiency or impracticality of separately maintained actions to resolve the controversy; (e) the cost of notifying the members of the class; and (f) the possible prejudice to members to whom notice is not directed. When appropriate, exclusion may be conditioned on a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the class from which exclusion is sought.

~~F.(1)(a) Following certification, in any class action~~

~~maintained under subsection (3) of section B of this rule, the court by order, after hearing, shall direct the giving of notice to the class.~~

~~F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:~~

~~F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;~~

~~F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;~~

~~F.(1)(b)(iii) A description of possible financial consequences on the class;~~

~~F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;~~

~~F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;~~

~~F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;~~

~~F.(1)(b)(vii) An address to which inquiries may be directed; and~~

~~F.(1)(b)(viii) Other information the court deems appropriate.~~

~~F.(1)(c) The order shall prescribe the manner of~~

~~notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.~~

~~F.(1)(d) Members of the class shall be given the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort.~~

~~F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.~~

~~F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members. The court may also direct that separate and distinctive notice be included with a regular mailing by the defendant to the class members who are current customers or employees of the defendant.~~

~~F.(1)(g) The court may order, as an alternative to the~~

~~order and direction under paragraph (f) of this subsection, that a defendant who has a mailing list of class members, including those who are or were current customers or employees of the defendant, provide a copy of that list to the representative parties. The representative parties shall be required to pay the reasonable costs of generating, printing or duplicating the mailing list.~~

~~F.(1)(h) The court may order a defendant who has a list of former customers or employees to provide that list to the representative parties. The court may further order that a separate and distinctive notice be included with a regular mailing by the defendant to current customers or employees of the defendant.~~

F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of

damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court, assessable court costs, and an award of attorney fees, if any, as determined by the court.

F.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for each claim.

F.(4) ~~Except as otherwise provided in this subsection, the~~ Plaintiffs shall bear ~~the expense~~ costs of notification ~~any~~ notice ordered prior to a determination of liability. The court may, ~~if justice requires~~ however, order that the defendant bear ~~the expense of notification~~ all or a specified part of the costs of any notice ~~to the current customers or employees of the~~ defendant included with a regular mailing by the defendant ~~to its~~ current customers or employees. The court may hold a preliminary hearing to determine how the costs of such notice shall be apportioned.

* * * * *

G. Commencement or maintenance of class actions regarding particular issues; ~~division of class;~~ subclasses. When appropriate: G.(1) An action may be brought or ordered maintained as a class action with respect to particular claims or issues; or G.(2) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule~~

~~shall then be construed and applied accordingly by or against multiple classes or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A. (1).~~

H. Notice and demand required prior to commencement of action for damages.

H.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of ~~subsection (3)~~ of sections **A and B** of this rule, the potential plaintiffs' class representative shall:

H.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

H.(1)(b) Demand that such person correct or rectify the alleged wrong.

H.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

* * * * *

M. ~~Judgment; inclusion of class members; description; names~~

~~form of judgment. The judgment in an action ordered maintained as a class action under subsections (1) or (2) of section B of this rule, whether or not favorable to the class, include and shall specify or describe those whom the court finds found to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B of this rule, whether or not favorable to the class, shall include and specify by name those to whom the notice provided in section F of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class, and the judgment shall state the amount to be recovered by each class member or who, as a condition of exclusion, have agreed to be bound by the judgment. If a money judgment is entered in favor of a class it shall when possible identify by name each member of the class and the amount to be recovered thereby.~~

* * * * *

COMMENT

Rule 32 is substantially modified to substitute a unitary class action structure for the tripartite classification scheme of the prior rule, to remove some procedural obstacles to efficient and economical conduct of class action litigation, and to enlarge the discretion of judges to determine appropriate notice to class members. Some of these amendments were modeled in part upon a "Report and Recommendations of the Special Committee on Class Action Improvements," 110 FRD 195 (1986), which includes helpful commentary.

32 A.(5). Language referring specifically to subsection B.(3) of the former rule is deleted because, as amended, that subsection no longer defines a distinct category of class action.

32 B. This section is amended to substitute a unitary structure of class actions for the tripartite classification

scheme of the former section. As amended, this section changes the defining characteristics formerly used to distinguish among three types of class actions into a range of factors which are to be considered in any action for which class certification is sought. The former section's flat prohibition on the required finding of "predominance" of common questions of law or fact if any claims of individual class members are likely to require adjudication of any separate issues apart from ascertaining damages is abandoned as unduly rigid.

32 C.(1). Language is added making clear that the option exists of certifying for class treatment only some specified claims or issues, leaving others to be litigated outside the scope of the class action, and also that, when any class action is certified, the court is required to find the facts specially and to state separately its conclusions pertinent to such certification.

32 D. Language is added making clear that, when an action filed as a class action is settled or voluntarily dismissed, notice must be given to some or all class members unless class certification has already been denied or if no compensation has been paid or promised for the dismissal. The manner of giving this notice is within the court's discretion.

32 E.(1) Amended to clarify that, both prior to as well as following ruling upon certification, the court possesses the same authority to rule upon Rule 21 or summary judgment motions in class action litigation as in ordinary civil actions.

32 E.(2) Amended to provide that, in addition to the other matters specified, the court may direct that some or all class members be notified of their option to be excluded from the class. Such notice should include directions on how this option may be effectively exercised, including a reasonable time deadline within which to inform the court. The issues of whether this option should be afforded and, if so, whether it is to be extended to some or all class members, and if the former, to which class members, as well as whether such option is subject to any condition in addition to giving the court reasonable notice of its exercise, are all committed to the court's discretion. However, counsel should be alert to the possibility that the current controlling interpretation of the due process clause of the Fourteenth Amendment of the U.S. Constitution might, under certain circumstances, require that all class members identifiable with reasonable effort be given individual written notice of their option to be excluded from the class, subject to no condition except that of informing the court thereof in some reasonable manner as directed in the notice. See e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985), and subsequent lower court decisions.

32 E.(3) Amended to clarify that the court may impose conditions on class members as well as on representative parties

and intervenors.

32 F.(1) Amended to function consistently with the unitary class action structure provided by section B of this rule, as amended. The Council's intent is that the form, manner, and extent of notice of class certification to class members no longer be automatically determined on the basis of which of the three categories defined by former section B a given class action would be thought to fall within. Subject only to the requirement that in all class actions some form of notice of certification be afforded to at least some class members, all questions about the timing, method, and content of such notice are confided to the court's discretion, guided by the considerations specified. Likewise, when the court directs that notice of certification be directed only to some class members, it has discretion to decide which ones. However, counsel should be alert to the possibility that the current controlling interpretation of the due process clause of the Fourteenth Amendment of the U.S. Constitution might, under certain circumstances, require that all class members identifiable with reasonable effort be given individual written notice of class action certification. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 997, 811-12 (1985), and subsequent lower court decisions.

This subsection, as amended, applies to all class actions maintained under this rule, rather than only to a particular subset or category of class actions as defined by former section 32 B. However, the Council's understanding is that the statement required by subsection 32 F.(2) and the related dismissal provision of subsection 32 F.(3) have no application to class actions in which injunctive or declaratory relief is awarded. There is no intent to change existing law in this regard.

32 F.(4) is amended to remove any implication that it precludes imposing upon defendants the costs of any notice that might be ordered subsequent to determination of their liability, and to provide that even prior to such determination the court may order defendants to bear some or all the costs of any notice included with a regular mailing to their current customers or employees.

32 G. is amended to clarify that certain specified claims or issues subsumed within an action filed as a class action may be certified for class treatment, and that a single class as alleged in a complaint may be reorganized into subclasses, in which event each subclass must meet all requirements of this rule except the numerosity requirement of subsection A.(1).

32 H.(1) is amended to conform to the concurrent amendment to section 32 B.

32 M. is amended to conform to the concurrent amendment to section 32 B. and to make clear that class action judgments should specify or describe, in addition to those determined to be

members of the class, anyone who has agreed to be bound by the judgment as a condition of being excluded from the class.

**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.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * * *

C. Notice of examination.

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C.(7) Deposition by telephone. Parties may agree by stipulation or the court may upon motion order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, in which event the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

* * * * *

E. 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 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.

* * * * *

G. Certification; filing; exhibits; copies.

G.(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn ~~in the reporter's presence~~ and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by

other than stenographic means as provided in subsection C.(4) of this rule, and thereafter transcribed, the person transcribing it shall certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, shall certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

* * * *

COMMENT

39 C.(7). The language added to this subsection is intended to clarify that depositions may be taken by telephone pursuant to a stipulation between or among the parties, as well as by court order. It is not the intent of this subsection as amended to require resort either to a court order or written stipulation made part of the record as the exclusive means by which the ground rules for taking depositions may be established. The next-to-the-last sentence added provides that any of the specified grounds of objection are waived unless timely made at the taking of any deposition conducted pursuant to informal agreement between or among counsel. This added language is not intended to dispense with the requirement of subsection 39 C.(1) that a party desiring to take the deposition of any person provide reasonable written notice thereof to every other party to the action.

The final sentence added to this subsection makes clear that, in telephonic depositions, the oath or affirmation may be administered either in the deponent's presence or by a person so authorized speaking to the deponent, and hearing the deponent's

response, over the telephone, at the election of the party taking the deposition.

39 E. The added language is intended to clarify that motions to terminate or limit examination at deposition must be made before the court in which the action is pending in the case of party-deponents or other parties, whereas non-party deponents have the choice of making such motions either before the court in which the action is pending or the court at the place of examination.

39 G.(1). This amendment is to conform this subsection with amended subsection 38 A.(2), whereby the deponent's oath or affirmation need not be taken in the presence of the stenographic reporter.

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court.

A.(1)(a) Parties. An application for an order to a party may be made to the court in which the action is pending, ~~or and,~~ on matters relating to a deponent's failure to answer questions at a deposition, ~~to a judge of a circuit or district court in the county where the deposition is located~~ such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A.(1)(b) Non-parties. An application for an order to a deponent who is not a party shall be made to a ~~judge of a circuit or district court in the county where the deposition is being taken~~ court of competent jurisdiction in the political subdivision where the non-party deponent is located.

* * * * *

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken the deponent is located. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the ~~deposition is being taken~~ deponent is located, the failure may be

considered a contempt of court.

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COMMENT

46 A.(1). This subsection is reorganized into two distinct subsections. Subsection 46 A.(1)(a) deals with orders against parties who fail to make discovery in accordance with these rules. Such orders are usually sought from the court before which the action is pending. But in the case of party deponents, the alternative of seeking discovery orders from a court where the deponent is physically located is provided. Although not so limited, this alternative is most likely to be effective with respect to deponents who are outside Oregon. Reference to "a court of competent jurisdiction in the political subdivision where the deponent is located" is substituted for the prior language to avoid possible confusion when another jurisdiction might not have counties or where courts are styled differently from those of Oregon. Subsection A.(1)(b) makes clear that, in the case of non-party deponents, discovery orders can be effectively sought only from a competent court of the political subdivision where the deponent is located, which might or might not be the court where the action is pending.

46 B.(1). The phrase "the deponent is located" is substituted for the prior language to make the wording consistent with new subsections 46 A.(1)(a) and (b). This provision is applicable only to the contempt sanction as imposed by an Oregon court for disobedience of its discovery order. When a recalcitrant non-party deponent disobeys a discovery order of a court of another jurisdiction, the availability of a contempt sanction is of course determined by the law of that jurisdiction. When a recalcitrant deponent is a party who disobeys a discovery order of the court wherein the action is pending, contempt of that court is among the sanctions for such disobedience provided by subsection 46 B.(2).

ALLOWANCE AND TAXATION OF
ATTORNEY FEES AND COSTS AND DISBURSEMENTS
RULE 68

A. Definitions. As used in this rule:

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A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the necessary expense of copying of any public record, book, or document ~~used as evidence on the trial~~ admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

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COMMENT

68 A.(2). The purpose of this amendment is to make clear that the costs of copying public records and the like for use at

trial are allowable and taxable only if such records are admitted, as opposed to being merely offered in evidence or obtained in preparation for trial. Admissibility of public records, documents, and data collections is provided for in Rules 803(8) [ORS 40.460], 902(4) [ORS 40.510], and 1005 [ORS 40.570] of the Oregon Evidence Code.

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A. **Entry of order of default.** When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such a showing, the clerk or the court shall enter the order of default.

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C. **Failure to appear for trial.** When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

ED. **Setting aside default.** For good cause shown, the court may set aside an order of default and, if a judgment by default

has been entered, may likewise set it aside in accordance with Rule 71 B and C.

DE. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

EF. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COMMENT

69 C., as amended, is intended to "overrule" the holding of Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990), that when a party who has filed an appearance in the action fails to appear, in person or by counsel, at a scheduled trial, nothing further can take place pending entry of a default order, pursuant to section 69 A., upon not less than ten days advance written notice of application therefor to the non-appearing party. The Council's view is that mandating such delay of proceedings is unfair to parties who do appear prepared for trial, as well as being wasteful of judicial resources. This section, as amended, gives clear discretionary authority to the court to proceed with the scheduled trial in the absence of the non-appearing party unless some sufficient reason becomes known to the court why adjournment or other course of proceeding would better serve the interests of justice.

Former subsections 69 C., D. and F. have been redesignated 69 D., E. and F., respectively, without further change.