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MODES OF TAKING TESTIMONY**45.010 Testimony taken in three modes.**

The testimony of a witness is taken by three modes:

- (1) Affidavit.
- (2) Deposition.
- (3) Oral examination.

45.020 Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party.

45.030 Deposition defined. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

45.040 Oral examination defined. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact, or act upon it, the testimony being heard by the jury or tribunal from the mouth of the witness.

45.050 Reference in equity to referee to take testimony and report. Whenever a suit is at issue upon a question of fact, the court may refer it to a referee to take the testimony in the case and report it to the court within such time as the court or judge may order; provided, that in districts composed of only one county and having more than one judge of the circuit court, no cause shall be referred to a referee without the written consent of all parties filed in the cause, except in suits involving the examination of long and complicated accounts. The court or judge may revoke a reference or change the referee. Special reference may be made to a special referee for taking the testimony of witnesses residing more than 20 miles from the place of holding the court or residing out of the state, and the testimony so taken shall be returned to the court. When an equity cause has gone to a final decree, the judge rendering it shall, within 10 days after its entry by a proper certificate, identify all the evidence taken before a referee, whether it consists of the testimony of witnesses, documentary evidence or exhibits. The referee shall have the power to require the attendance of witnesses and may issue subpoenas. The testimony of witnesses so taken shall be reduced to writing; provided, that if the evidence is taken by a stenographer, he shall extend the same, and certify to its being a true and correct transcript. All documentary evidence offered shall be preserved and in-

corporated in the report of the evidence by the referee. Where evidence is offered by any party to the suit, and it is excluded by the ruling of the referee, the party so offering it shall be entitled to have it taken down in like manner as the testimony received. The party offering that testimony is required to pay for taking that so excluded, unless the court holds it competent.

45.060 to 45.100 [Reserved for expansion]

**AFFIDAVITS AND DEPOSITIONS
GENERALLY**

45.110 Affidavit or deposition, how taken. In all affidavits and depositions the witness must be made to speak in the first person. Depositions shall be taken in the form of question and answer, unless the parties agree to a different mode.

45.120 Use of affidavits. An affidavit may be used to prove the service of a summons, notice or other paper in an action, suit or proceeding to obtain a provisional remedy, the examination of a witness, or a stay of proceedings or upon a motion. It may also be used in any other case provided by statute, except as provided in ORS 45.130.

45.130 Production of affiant for cross-examination. Whenever a provisional remedy has been allowed upon affidavit, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant to be produced for cross-examination before a named officer authorized to administer oaths. Thereupon the party to whom the remedy was allowed shall lose the benefit of the affidavit and all proceedings founded thereon, unless within eight days, or such other time as the court or judge may direct, upon a previous notice to his adversary of at least three days, he produces the affiant for examination before the officer mentioned in the notice, or some other of like authority, provided for in the order of the court or judge. Upon production, the affiant may be examined by either party; but a party is not obliged to make this production of a witness except within the county where the provisional remedy was allowed.

45.140 When deposition required. In all cases other than those mentioned in ORS 45.120, where a written declaration under

oath is used, it must be a deposition as prescribed by statute.

45.150 Use of depositions as evidence. A deposition taken pursuant to the provisions of this chapter may be used by either party upon the trial or proceeding, against any party giving or receiving the notice, subject to all legal exceptions. No objections, however, can be made at the trial to the relevancy of the testimony or the form of the interrogatory, unless it appears by the deposition or written interrogatories to have been taken at the time of the examination or the settling of the interrogatories.

45.160 Proof before using certain depositions; exclusion of all or part of depositions. If a deposition is taken under subsections (2), (3) or (4) of ORS 45.210, before it can be used, proof shall be made that the witness did reside beyond the service of a subpoena, or that he still continues absent or infirm. A deposition taken in the state or without, upon insufficient notice or otherwise, not substantially in conformity with the provisions of this chapter, may be excluded from the case, unless the insufficient notice or other omission has been waived by the consent or conduct of the adverse party. When any portion of a deposition is excluded from a case, so much of the adverse examination as relates thereto is also excluded.

45.170 Use in same or other proceeding. When a deposition has been once taken, it may be read in the same action, suit or proceeding, or in any other action, suit or proceeding between the same parties, or their representatives upon the same subject, and is then to be deemed the evidence of the party reading it.

45.180 Authentication of affidavits taken in another state or country. An affidavit taken in another state or territory of the United States, the District of Columbia or in a foreign county must be authenticated as follows before it can be used in this state:

(1) Certified by a commissioner appointed by the Governor of this state to take affidavits in such place; or

(2) Certified by a judge of court, having a clerk and a seal, to have been taken and subscribed before him at a time and place specified, in which case the existence of the court, the fact that the judge is a member and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof; or

(3) Made and certified before a notary public having a seal, and acting as such by authority of any state or territory of the United States or the District of Columbia, and his seal shall be affixed to the affidavit together with the date of the expiration of the notarial commission; or

(4) Made in a foreign country before any minister plenipotentiary, minister extraordinary, minister resident, charge d'affaires, commissioner, consul, vice consul, or consul general of the United States appointed to reside therein, and certified thereon by the signature of the officer taking it; or made before any officer authorized to administer oaths in such foreign country and certified by his signature and official seal.

45.190 and 45.200 [Reserved for expansion]

TAKING DEPOSITIONS IN THE STATE

45.210 Depositions in state, when taken. The testimony of a witness in this state may be taken by deposition in an action or suit at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen, in the following cases:

(1) When a witness is a party, or an agent, officer, servant or employee of a corporation which is a party to the action or proceeding by the adverse party.

(2) When the witness' residence is such that he is not obliged to attend in obedience to a subpoena as provided in ORS 44.170.

(3) When the witness is about to leave the county and go more than 20 miles beyond the place of trial.

(4) When the witness, otherwise liable to attend the trial, is too infirm to attend.

(5) When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

45.220 Depositions within state, how taken. (1) Either party may take the testimony of a witness in this state by deposition, in the cases allowed by statute, before the clerk of a court of record, or other person authorized to administer oaths, except that in any case provided for in subsection (1) of ORS 45.210 the deposition may be taken only before the court in which the suit or action is pending, or before a judge of a court of record within the county where it is pending or if the witness is not within

the county, before any judge of a court of record in any county within the state where the witness may reside or be found, on giving the adverse party previous notice of the time and place of examination and the name of the officer and the witness. The notice shall be at least three days, if the distance of the place of examination from the residence of the person to whom the notice is given does not exceed 25 miles, and one day in addition for every additional 25 miles, unless the court or judge by order prescribes a shorter time. When a shorter time is prescribed the order shall be served with the notice.

(2) Either party may also take the deposition of a witness in this state on written interrogatories attached to a commission, the same as provided for in ORS 45.330 and 45.340, but when so taken neither party shall be represented by counsel at taking.

(3) Either party may attend the examination and examine the witness upon oral interrogatories. The deposition shall be written by the officer taking it, or by the witness, or by some disinterested person, in the presence and under the direction of the officer. When completed, it shall be read to or by the witness and subscribed by him. Before subscribing it, the witness shall be allowed, if he desires, to correct or explain any statement in the deposition, but the statement although corrected and explained, shall remain a part of the deposition.

45.230 Certificate of officer taking deposition. The officer taking the deposition shall append thereto his certificate, under his seal of office, if any, that the deposition was taken before him, at a place mentioned, between certain hours of a day and reduced to writing by a person named; that before proceeding to the examination, the witness was duly sworn to tell the truth, the whole truth, and nothing but the truth; that the deposition was read to or by the witness and was then subscribed by him.

45.240 Delivery or forwarding of deposition. The officer taking the deposition shall inclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action, suit or proceeding is pending, or such other person as may by writing be agreed upon, and deliver or forward it accordingly, by mail or other usual channel of conveyance.

45.250 to 45.300 [Reserved for expansion]

TAKING DEPOSITIONS OUT OF THE STATE

45.310 Deposition of witness out of state, when taken. The testimony of a witness out of the state may be taken by deposition in an action or suit at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen.

45.320 Deposition of witness out of state, how taken. The deposition of a witness out of the state may be taken upon commission issued from the court, or without commission before a commissioner appointed by the Governor of this state pursuant to ORS 194.210.

45.330 Issuance of commission. The commission may be issued by the clerk of the court, or by a justice of the peace in a cause in his own court, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to a judge, justice of the peace, notary public or clerk of a court, selected by the officer issuing it.

45.340 Written and oral interrogatories. Such interrogatories, direct and cross, as the parties may prepare, to be settled by the clerk or justice in a summary manner as to form, if the parties disagree, may be annexed to the commission. The examination may be without written interrogatories when the parties agree to that mode.

45.350 Contents of commission. The commission shall authorize the commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories, or when the examination is to be without them, in respect to the question in dispute. It shall also authorize him to certify the deposition to the court in a sealed envelope, directed to the clerk or justice who issued the commission, or other person designated and agreed upon, and forwarded to him by mail or other usual channel of conveyance.

45.360 Postponement of trial for non-return of commission. A trial or other proceeding shall not be postponed by reason of

a commission not being returned except if it appears by affidavit that the testimony of the witness is material and necessary and that proper diligence has been used to obtain it.

45.370 Taking deposition before commissioner appointed by Governor. The deposition of a witness in any other state or territory of the United States, or the District of Columbia, may also be taken before a commissioner appointed by the Governor of this state to take depositions in that place. It may be taken upon giving the adverse party eight days' notice of the time and place of examination, and the name of the commissioner and the witness, if the distance of the place of examination from the place where the testimony is to be used does not exceed 50 miles, and one day in addition for every additional 25 miles. Either party may attend the examination and examine the witness upon oral interrogatories, but if either party by written notice to the other, within three days from the service of the original notice, requires it, it shall be taken upon written interrogatories, to be settled, if not agreed upon, by the same officer and in the same manner as in case of a deposition upon commission; and in that case the deposition shall be taken, certified and directed by the commissioner in the same manner as a deposition upon commission.

45.380 Depositions taken out of state upon oral interrogatories, certain sections applicable. Subsection (3) of ORS 45.220, except the first sentence, and ORS 45.230 and 45.240 apply to depositions taken out of the state upon oral interrogatories.

45.390 and 45.400 [Reserved for expansion]

PERPETUATION OF TESTIMONY

45.410 Testimony of a witness may be perpetuated. The testimony of a witness may be taken conditionally and perpetuated, as provided in ORS 45.410 to 45.470.

45.420 Order for examination, when granted. The order for taking the testimony may be made by any judge of the circuit or supreme courts, upon the application of the party desiring it, when it appears from the petition of that party, verified as a complaint, that:

(1) The applicant is a party or expects to be a party to an action, suit or proceed-

ing in a court in this state, or that he has an interest in real property or some easement or franchise therein, about which a controversy may arise, which would be the subject of such an action, suit or proceeding;

(2) The testimony of a witness, whose name and place of residence is stated, is material to the prosecution or defense of the action, suit or proceeding, or possible controversy, and generally the question involved, and the facts expected to be proved by the witness; and

(3) The names and residence of the adverse parties or persons adversely interested, so far as the applicant knows or can ascertain them are stated therein. The judge may thereupon in his discretion make an order allowing the examination, prescribing therein the place of examination and how long before the examination the order and notice of the time and place shall be served.

45.430 Service by publication; by whom deposition taken. If it appears that any of the adverse parties or persons adversely interested reside out of the state, or are unknown, the judge shall direct that, as to them, service of the order and notice shall be made by publication in the same manner as a summons. Upon proof of the service, the deposition may be taken conditionally by the judge who made the order of examination, or by any other person therein designated.

45.440 Deposition, how taken; certification and filing; papers as evidence. Every interrogatory, answer or declaration of the witness shall be taken down, unless the parties otherwise agree. The deposition, when completed, shall be carefully read to and subscribed by the witness, and then certified by the person taking it. Immediately thereafter it shall be filed in the office of the clerk of the county where it was taken, together with the order for the examination of the witness, the petition on which it was granted, the notice and the proof of service of the order and notice. These papers filed with the deposition, or a certified copy thereof, are primary evidence of the facts stated to show compliance with the provisions of ORS 45.410 to 45.470.

45.450 When deposition or copy may be given in evidence. If thereafter a trial is had between the persons named in the petition as parties actual, expectant, or possible, or

their representatives or successors in interest, upon proof of the death or insanity of the witness or that he is beyond the state and his residence unknown, or of his inability to attend the trial by reason of age, sickness or settled infirmity, the deposition or a certified copy may be given in evidence by either party; but in a trial in a suit it may be given in evidence without that proof.

45.460 Objection to deposition when produced in evidence. The deposition so taken, when produced in evidence, may be objected to as if it were the oral testimony of the witness, except that the form of the interrogatory shall not be objected to.

45.470 Power and duty of the person taking the deposition. The person taking the deposition shall control the examination to the end that the whole truth may be declared by the witness. If no one appears other than the applicant, the person taking the deposition shall prevent leading and suggestive interrogatories by the applicant, except when they may be necessary or merely formal, and shall himself cross-examine the witness, concluding with the general interrogatory whether the witness knows anything further of the matter which would be of benefit to either party.

45.480 to 45.500 [Reserved for expansion]

GENERAL RULES OF EXAMINATION AND IMPEACHMENT

45.510 Exclusion of witnesses from courtroom. If either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses.

45.520 Interpreters. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him.

45.530 Court control over interrogation and production of evidence. The court may exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness and as effective for the extraction of the truth as may be; but subject to this rule, the parties may put such legal and pertinent questions as they see fit. The court, however, may stop the production of further

evidence, upon any particular point, when the evidence upon it is already so full as to preclude reasonable doubt.

45.540 Direct examination and cross-examination defined. The examination of a witness by the party producing him is denominated the direct examination. The examination of that witness upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins unless the court otherwise directs.

45.550 Re-examination of witness; recall. A witness once examined shall not be re-examined as to the same matter without leave of the court; but he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examinations on both sides are concluded, the witness shall not be recalled without leave of the court. Leave is granted or withheld in the exercise of a sound discretion.

45.560 Leading questions. A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, unless merely formal or preliminary, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

45.570 Extent of cross-examination; leading questions. The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith, and in so doing may put leading questions; but if he examines him as to other matters, the examination is subject to the same rules as a direct examination.

45.580 Refreshing memory. A witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter or at any other time when the fact was fresh in his memory and he knew that it was correctly stated in the writing; but in either case the writing must be produced, and may be inspected by the adverse party, who may, if he chooses, cross-examine the witness upon it, and read it to the jury. The witness may testify from that writing, though he retains no recollection of the particular

facts; but the evidence shall be received with caution.

45.590 Impeachment of own witness. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in ORS 45.610. However, when a party calls as a witness either an adverse party or the assignor, agent, officer or employe of an adverse party, he shall not be deemed to have vouched for the credit of that witness and he may impeach the credit of that witness in the same manner as in the case of a witness produced by an adverse party.

45.600 Impeachment of adverse witness. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth is bad or that his moral character is such as to render him unworthy of belief; but he may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination or by the record of the judgment, that he has been convicted of a crime.

45.610 Impeachment by evidence of inconsistent statements. A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he shall be asked whether he made the statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any question is put to him concerning them.

45.620 Evidence of good character. Evidence of the good character of a party is not admissible in a civil action, suit or proceeding, unless the issue involves his character, nor of a witness until the character of the witness has been impeached.

45.630 Inspection of writing shown witness; reading to jury. Whenever a writing is shown to a witness it may be inspected by the adverse party, and if proved by the witness shall be read to the jury before his testimony is closed, or it shall not be read except on recalling the witness.