COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 3, 1977

Multnomah County Courthouse, Portland, Oregon

Present:	Sid Brockley	Laird Kirkpatrick
	Hon. William M. Dale	Harriet Krauss
	James O. Garrett	Donald W. McEwen
	Wendell E. Gronso	Gene C. Rose
	Hon. Lee Johnson	Hon. Wendell H. Tompkins
	Garr M. King	Hon. William W. Wells
Absent:	Darst Atherly	Hon. Berkeley Lent
	E. Richard Bodyfelt	James B. O'Hanlon
	Hon. Anthony L. Casciato	Charles P. A. Paulson
	Hon. John M. Copenhaver	Hon. Val D. Sloper
	Hon. L. A. Cushing	Roger B. Todd
	Hon. Alan F. Davis	

Chairman Don McEwen called the meeting to order at 9:35 a.m. in the Chambers of Judge Dale at the Multnomah County Courthouse, Portland, Oregon. The chairman announced that copies of the minutes of the meeting of November 12, 1977, had not been mailed to all council members but would be distributed before the January meeting. The minutes were distributed to the members present and approved.

The council discussed the retention of or abolition of the procedural distinction between law and equity. Chairman Don McEwen reported that absent members Atherly and O'Hanlon had indicated a preference against the merger of law and equity based upon problems with knowledge of whether a case would be tried to a jury. Lee Johnson moved adoption of alternative three set forward in the Merrill memorandum. This motion was not seconded. William M. Dale moved that the council take the position that, to the extent possible, it would abolish all procedural distinctions between law and equity. The motion was seconded by Sid Brockley. The motion was passed unanimously and the Executive Director was asked to furnish a chapter-by-chapter analysis of modifications in the existing statutes that would be required to carry out the abolition of procedural distinctions between law and equity.

Wendell E. Gronso moved that the council retain code pleading. The motion was seconded by William H. Wells. This motion was passed with Sid Brockley and Lee Johnson voting against the motion. The Executive Director was asked to submit a memorandum giving a detailed analysis of possible improvements that could be made in the pleading system and motion practice while retaining the present code pleading system.

The council considered the Federal Rule 30b6 procedure that allows the person seeking a deposition to name a corporate party as a deponent and requires the corporate party to designate an individual to respond to the deposition. Lee Johnson moved that the discovery rules be modified to incorporate the substance of Rule 30b6. The motion was seconded by William H. Wells. The motion passed unanimously. William Dale suggested that the council take a detailed look at the entire discovery area as the existing statutes are confusing and badly need reorganization. It was decided that the chairman would appoint a subcommittee to deal with the discovery area. The advisability of adopting interrogatories as a discovery procedure was discussed in detail and the Executive Director was asked to do a background memorandum on interrogatories specifically describing controls that have been developed by other jurisdictions to prevent abuse.

Laird Kirkpatrick passed out a list of items, referred by the Procedure of Practice Committee of the Oregon State Bar, for consideration by the council and a list of suggested agenda items for the council. There was discussion of a possible procedure for setting up areas to be considered by the council and setting an agenda for future meetings. The Executive Director was asked to prepare a list of possible areas to be considered by the council. Priorities for consideration of various areas could be determined at the next meeting.

The council also briefly discussed the possible problem of affidavits of prejudice in third party cases. It was decided to discuss that subject in more detail at a future meeting when the entire third party practice area would be considered.

The next scheduled meeting will be January 21, 1978, in the County Commissioners Board Room in the Multnomah County Courthouse which will be a public meeting as required by House Bill 2316.

The meeting was adjourned at 12:10.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEMORANDUM

TO: Council on Court Procedures

FROM: Fred Merrill

RE: Distinction between law and equity

DATE: November 29, 1977

BACKGROUND

The distinction between law and equity is historically rooted in the separate development of the common law courts and the Chancery court in England. As early as 1250, the English Chancellor began to provide litigants with assistance because of the inflexibility of the existing English common law courts. By approximately 1600 this practice developed into an entirely separate equity court which applied a separate body of substantive law through flexible remedies. Because of this differing function, the chancery court developed a completely different procedural system.[1]

In the United States, the dual court system did not develop uniformly. Some colonies set up separate courts of law and equity, others had only one court with a rigid separation between cases brought in law and cases brought in equity and still others adjudicated equity claims through common law courts and forms of action.[2]

All retained a fairly clear distinction between law and equity. This was required by the fact that the common law system of forms of action could not function without the separation and common law procedure was so technical that it was inappropriate for equity. In 1846 New York adopted a new constitution

1. Millar, Civil Procedure in the Trial Courts in Historical Perspective (1952), 23-26, James and Hazard, Civil Procedure (2nd ed. 1977), section 1.4, page 1215.

2. James and Hazard, supra, page 18.

which abolished their separate equity court and in 1848 a new civil procedure code (the Field code) was adopted. The most significant aspects of the Field code were the abolition of the common law forms of action and elimination of the procedural distinction between law and equity.[3] The Field code was ultimately adopted in 29 states. Four of these states (including Oregon) adopted most of the procedures in the Field code and abolished the forms of action but expressly retained a formal distinction between law and equity.[4] Another state, Illinois, retained only a requirement that pleadings be labeled as law or equity but with no other procedural distinctions between law and equity cases.

In the federal system there was no separate court of equity but until 1938 a distinction was maintained between the equity and the law side of the federal trial courts. In 1938, the federal rules of civil procedure were promulgated which abolished the distinction between law and equity.[5]

At the present time only two states have separate courts in law and equity.[6] Nine states preserve some distinction between law and equity although there is no prohibition against combining legal and equitable issues in one case.[7] Illinois continues to require a labeling of pleadings as legal or equitable. The recent trend is clearly to abolish any procedural distinction between law and equity.[8]

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3. Clark, "Code Pleading" (2nd ed. 1947), page 21-22, 78. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action." N.Y. Laws 1848, c. 379 §62.

4. Clark, supra, page 82.

5. FRLP 1 "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or inequity or in admiralty...", FRLP 2, "There shall be one form of action to be known as a 'civil action'."

6. Delaware and Mississippi, (The present status of the states comes from Barron and Holtzoff, Federal Procedure and Practice, Sections 9.1-9.53, pages 46-80).

7. Florida, Illinois, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania and Virginia.

8. This can be clearly seen by comparing the number of states retaining a separate law and equity side (15) and the number of states with separate courts of

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The Oregon statute reads as follows:

> 11.010 Distinction abolished; but one form of action. The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law, for the enforcement of private rights or the redress of private wrongs.
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> 11.020 Cases when suits are maintainable. The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided by statute.

This is unchanged from the Oregon Code of 1854 which was based upon the Field code. As noted above, Oregon was one of four states adopting the Field code that abolished the forms of action but retained a distinction between actions at law and suits in equity. According to one of the drafters of the 1854 code, this was done by a 2 to 1 vote of the three commissioners who drafted the code and the only reason given was an interpretation of some provisions of the Organic Act of 1848 which referred to "chancery" as requiring separate equity procedure.[9] A more basic explanation may lie in the training of the drafters in common law procedures which required the distinction between law and equity and the uncertainty in 1854 whether the Field code procedure would truly eliminate any such need.[10] 123 years later, the lack of any need for a procedural distinction between law and equity is clear. In fact, any meaningful distinction between the law and equity sides of the Oregon court has been eliminated by the amendments allowing free joinder of legal and equitable claims,[11] and assertion of equitable defense in

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8. (cont'd.) law and equity (4) in 1957 (as shown in appendix A of Joinder and Geddes, The Union of Law and Equity, a Prerequisite to Procedural Revision, 55 Mich. L. Rev. 1059, 1111, (1957)) with the present situation.

9. Kelly, History of the Preparation of the First Code of Oregon, 4 Oly. Or. Hist. Soc'y. 82, 190 (1903)

10. Clark, supra, 83.

11. ORS 16.220 as amended by 1977 Oregon laws, chapter 356, ORS 16.305.

cases at law and the elimination of any substantial penalty for mislabeling a case.[12] The law-equity distinction remains only as a requirement that pleadings be labeled as equity or law and a few random procedural distinctions.

CONSIDERATIONS IN ABOLISHING LAW EQUITY DISTINCTION

There are four considerations in deciding whether any final distinction between law and equity should or could be eliminated:

1. Right to jury trial.

The right to jury trial is controlled by the legal or equitable nature of the issues presented. This is a Constitutional right under Article I, Section 17 of the Oregon Constitution and not controlled by statute. Any abolition of statutory references to law and equity would not affect the right to a jury trial. The right is not controlled by a labeling of a case as legal or equitable nor by the application of any particular procedures but by a historical test of whether the issue would have been tried to a jury under the procedures in effect when the Oregon constitution was adopted.[13] The test is the same whether or not the jurisdiction makes any procedural distinctions between law and equity.

The elimination of procedural distinctions between law and equity does raise several incidental questions. The first is whether the statutes should make any provision for right to jury trial. ORS 17.033 says that the right to jury trial shall be preserved in actions at law. Even with a formal elimination of law-equity distinctions in other respects this would be a correct statement of the situation. Other states have attempted to describe the type of cases where jury trial is allowed (Actions for money damages, etc.). A few states have avoided the problem by granting a right to jury trial in any case. Neither

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12. ORS 16.460.

13. Moore Mill and Lumber Company v. Foster, 216 Or. 204, 336 P.2d 39, 337 P.2d 810 (1959).

approach seems desirable. The question is ultimately a constitutional one and very complex; any attempt to categorize cases in a statute is usually incorrect. To grant a jury trial in every case seems too extreme. A better approach followed in Federal Rule 38 and a number of states is to simply make specific reference to a right to jury trial existing as granted by the Constitution.[14]

The second question is when the jury trial question is presented. The labeling of a case as legal or equitable at the outset arguably gives the parties a rough indication of the availability of jury trial. However, since the right is constitutional, the labeling is not controlling and could in fact be extremely misleading.

The label attached to the case may, however, raise the jury trial question before trial. In the federal system and many state courts, a jury trial demand is required within 10 days of the last pleading relating to an issue.[15] The jury trial issue can be raised in advance of trial by moving to strike the jury demand. Under the Oregon system, where no demand is required and the jury trial right can only be waived by affirmative action of the parties,[16] without labeling a case as law or equity, there may be no occasion to consider the right to jury trial until the time of trial. The Council could consider the merits of a demand-waiver system. Even without a demand-waiver system, the trial courts could avoid scheduling problems by requiring the parties to docket the case for jury or non-jury trial. If a pretrial conference procedure is adopted, the issue could be settled at that time. In terms of the law equity merger, the raising of the issue of right to jury trial at an early date by labeling a case as legal or equitable seems neither important enough nor real enough to justify retaining the distinction between law and equity.

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14. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." See Clark, supra, 95-102.

15. FRLP 38.

16. ORS 17.035.

2. Remedies.

The present procedural merger of law and equity does not affect the nature and availability of remedies. The further elimination of remaining distinctions would not do so either. It is of course necessary to consider whether a given remedy has a legal or historical background in order to define its availability, but this is a matter of substantive law.

3. Trial de novo.

The scope of review in suits in equity is much broader than review in actions at law. Equity cases are reviewed de novo.[17] Since rules of appellate procedure are beyond the rulemaking power of the Council,[18] the question is whether elimination of a trial level distinction between law and equity would be limited by the different scope of review in equity cases.

The labeling of a case as legal or equitable in the pleadings or the conduct of the parties and the trial court during trial, are not binding on the appellate court decision of scope of review based on existence of an equitable suit.[19] The parties are required to establish the nature of the case to the appellate court at the time of the appeal and would be in no better or worse shape in that regard without the existing distinctions between law and equity at the trial court level. Even in an equity case mistakenly tried to a jury, the appellate court can take the jury verdict as advisory and review de novo.[20]

In appellate procedure, the main difference is the necessity for assignments of error.[21] Again, this is required by the nature of the case and not the label at the trial court level.

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17. ORS 19.125(3).

18. House Bill 2316, Section 3.

19. In re Wakefield's Estate, 161 Or. 330, 87 P.2d 794, 89 P.2d 592 (1939).

20. Paul v. Mazzocco, 221 Or. 411, 351 P.2d 709 (1960).

21. Supreme Court and Court of Appeals Rule of Procedure 2.35, 2.40.

4. Differing procedures applied to law and equity cases.

Most of the differences between law and equity cases seem to be either historical accidents or the result of some drafting error occasioned by the difficulty of keeping track of existing distinctions between law and equity.[22] In some cases, however, the designation of suits in equity or actions at law specifies the application of a particular procedure to the mode of trial appropriate in law or equity.[23] Neither of these classes provides any good reason for retaining the distinction. The first type of distinction serves no procedural purpose and generates confusion and should be eliminated. The second can be eliminated by simply specifying particular procedures as appropriate to jury or non-jury trials or for particular remedies or proceedings without the intervening confusion of labeling as law or equity.

At least some law equity procedural distinctions are found in Chapter 12 (Statute of Limitations), Chapter 13 (Parties), Chapter 14 (Venue), Chapter 15 (Process), Chapter 16 (Pleading), Chapter 17 (Trial), Chapter 18 (Judgments), Chapter 23 (Enforcements of Judgments), Chapter 29 (Provisional Remedies), and Chapter 45 (Discovery and Referees). There is also some ambiguity created in Chapter 26 (Confession of Judgment) and Chapter 31 (Receivership) and Chapter 33 (Special Proceedings) by references to suits and actions.

An examination of these statutes suggests that some care is required in eliminating references to law and equity or suits and actions. The procedural

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22. For example, the ambiguity created for summary judgments and third party practice by the failure to amend the statutes specifying procedures to be followed in equity, ORS 18.020 and 16.010 to specifically include ORS 16.315 and 18.105.

23. For example, references to decrees or judgments to specify use of nonsuit or judgment NOV for jury trials. See ORS 18.210-.250 and 18.140.

distinctions that are used to indicate certain desired results would require careful conversion. It is also possible that some unanticipated results might result from a wholesale abolition of distinction between law and equity without careful consideration of specific statutes.[24]

CONCLUSION

The remaining procedural distinctions between law and equity should generally be abolished. Law and equity are already procedurally merged in all respects except the retention of labels and some remaining unnecessary procedural distinctions. The existence of the distinction is cumbersome, confusing and generates drafting mistakes and unnecessary ambiguity.

The elimination of distinctions should involve two steps.

A. Adoption of a General Statute.

ORS 11.110 and 11.020 should be replaced by a general statute that both abolishes the forms of action and any general procedural distinction between law and equity. This could be done in several alternative forms:

Alternative One

"There shall be one form of action known as a civil action." (This is based on federal rule 2. It does not seem to clearly state what is intended, but is used in most of the recent states merging law and equity together with the rule statement of application of uniform rules in all cases.)

Alternative Two

"There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." (This is based on the former New York CPLR Section 103. It may be overly broad considering the retention of de novo appeal and does not clearly limit the merger to procedural practices.)

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24. For example, ORS 17.045 refers to a different procedure to preserve the record in law and equity trials which may have some validity in light of the potential of de novo review in an equity case.

Alternative Three

"There shall be one form of action known as a civil action. Any distinction between pleading, practice and procedure in actions at law and in suits in equity is abolished except to the extent specifically retained by other provisions of these rules." (The use of the language from HB 2316 would abolish the distinction to the extent of the rulemaking power of the Council and the last clause would protect against any unforeseen consequences. On the other hand, the use of "pleading practice and procedure" seems awkward. The use of the federal rule language seems more appropriate than ORS 11.110 to recodify the abolition of the forms of action because that statute makes reference to forms "heretofore existing" and at the time of the re-enactment there would be no existing forms of action.)

B. Changing the Language of Specific Statutes.

The second step should be a careful chapter by chapter review of the existing statutes referred to above and the changing of statutory language making reference to actions at law or suits in equity or actions and suits to simply speak of a civil action. Those statutes where the use of action or suit achieves a desired procedural objective should be changed to specify the exact objective sought.

The results of the language modifications could be considered individually to be sure that no unanticipated problems are created.

November 29, 1977

Mrs. Helen Riordan
Director of Public Service & Information
Oregon State Bar
1776 S. W. Madison Street
Portland, Oregon 97205

Re: Council on Court Procedures

Dear Mrs. Riordan:

This will confirm my telephone conversation of November 28, 1977, with your office, relating to the notice of public meetings. I heretofore transmitted to the Bar a notice with a request that it be published in the next Bar bulletin as a means of advising all members of the Bar of the scheduled meetings of the Council. In addition, I asked the assistance of the Bar in obtaining publication thereof in various newspapers throughout the state.

Your office advised me that if the notice alone were forwarded to various newspapers, it would simply receive a great many calls as to the nature and business of the Council. I advised that I would write a letter relating to the Council which hopefully may supply at least some of the information representatives of the press will need or desire.

As you are aware, all laws relating to pleading, practice and procedure in civil cases have been enacted by the Legislature. No comprehensive review of the laws relating to civil procedure has been made since 1862 when the Field Code provisions originally adopted in 1854 were codified as a part of the Deady Code. The Legislature from time to time has enacted statutes relating to pleading, procedure and practice in civil cases, but has not ever undertaken a comprehensive review of procedure. Members of the judiciary, the Bar, and the law schools have, particularly in the past several years, emphasized the need for such a review. As a result the 1977 Legislative Assembly enacted Chapter 890, Laws 1977, creating a Council on Court Procedures. The

Council consists of one judge of the Supreme Court chosen by it, one judge of the Court of Appeals chosen by it, six judges of the Circuit Court chosen by the Executive Committee of its association, two judges of the District Court chosen by the Executive Committee of its association, and twelve members of the Oregon State Bar appointed by the Board of Governors. The Act requires that at least two members thereof shall be from each of the state's four congressional districts. The Act directs the Board of Governors in making appointments to include members of the Bar active in civil trial practice. In addition, the Act requires the appointment of one person who by profession is involved in legal teaching or research. In addition, the Act provides for one public member to be appointed by the Supreme Court.

Members of the Council shall serve for terms of four years, and shall be eligible for reappointment to one additional term. In accordance with the Act, half of the initial appointments were for two-year periods in order to obtain staggered expiration dates and insure continuity. Members of the Council receive no compensation for their services, and only receive actual and necessary travel and other expenses incurred in performance of their official duties.

The Council is directed by the Act to promulgate rules governing pleading, practice and procedure in all civil proceedings in all courts of the state. The rules promulgated may not abridge, enlarge, or modify the substantive rights of any litigant. These rules do not include rules of appellate procedure or rules of evidence.

The Council is directed to submit to the Legislature at the beginning of each Legislative Assembly all rules which it adopts from time to time and any amendements thereto, together with a list of the statutes superseded thereby. Rules so promulgated go into effect 90 days after the close of the Legislative session, unless the Legislature provides an earlier effective date. The Legislature may by statute amend, repeal or supplement any of the rules.

Rules promulgated by the Council will be arranged, indexed, printed, published and annotated in the Oregon Revised Statutes by the Legislative Council.

The Act provides that all meetings of the Council are to be held as public meetings, open to the public, and all persons are permitted to attend.

I trust the foregoing supplies you with sufficient information for your use in preparation of releases to various newspapers.

Yours very truly,

HARDY, McEWEN, WEISS, NEWMAN & FAUST

Donald W. McEwen

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