

RULE 51

ISSUES; TRIAL BY JURY OR BY THE COURT

A. Issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other.

A.(1) An issue of law arises upon a motion to dismiss a complaint or some part thereof for failure to state a claim, <sup>check this on top</sup> upon a motion to strike a defense or new matter in a reply, or some part thereof, upon a motion for judgment on the pleadings or upon a motion for summary judgment.

A.(2) An issue of fact arises:

A.(2)(a) Upon a material allegation in the complaint controverted by the answer.

A.(2)(b) Upon new matter in the answer.

A.(2)(c) Upon new matter in the reply.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried.

~~C. (1) By jury. (If jury demand is required, then use appropriate language).~~

The trial of all issues of fact shall be by jury unless:

C.(1) ~~(1)~~ The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.~~(1)~~<sup>(2)</sup>(b) The court, upon motion or <sup>or</sup> its own initiative <sup>ive</sup>, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State.

~~C.(2) By the court. (If demand is required, then need rule giving court discretion to try case to jury even though demand not filed.~~

D. Advisory jury and trial by consent. In all actions not triable by right by a jury the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of both parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

COMMENT: Section A. is ORS 17.005 to 17.015. ORS 17.020 is dropped. The rest of the Rule is Committee Rule B.

- Rule 51. -

Background <sup>Note</sup> ~~on~~ ~~Chapters~~

ORS sections superseded.

17.005, 17.010, 17.015, 17.020

17.025, 17.030, 17.035, 17.040, 17.045

Comment:

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.025, 17.030, ~~XX~~ 17.035 and 17.040. ORS 17.020 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and conform to these rules.

Note that the Council returned the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the Federal system of requiring a demand for jury trial.

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A.(2) An issue of fact arises:

A.(2)(a) Upon a material allegation in the complaint controverted by the answer.

A.(2)(b) Upon new matter in the answer.

A.(2)(c) Upon new matter in the reply.

B. Issues of law; how tried. An issue of law shall be tried by the court.

C. Issues of fact; how tried. The trial of all issues of fact shall be by jury unless:

C.(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury, or

C.(2) The court, upon motion of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of <sup>This</sup> the State.



D. Advisory jury and trial by consent. In all actions not triable by right by a jury the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of <sup>all</sup> both parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.060, 17.040, 17.045.

~~030, 17.035~~

COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, ~~17.025~~, 17.030, 17.035 and 17.040. ORS 17.020 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial.

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COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.

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C.(2) The court, upon motion or <sup>of a party</sup> its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

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D. Advisory jury and trial by consent. In all actions or proceedings not triable by right <sup>to</sup> by a jury, the court, upon motion <sup>of a party</sup> or <sup>to</sup> its own initiative, may try an issue with an advisory jury, or it may, with the consent of all parties, order a trial <sup>to</sup> with a jury whose verdict <sup>shall have</sup> has the same effect as if trial <sup>to a</sup> by jury had been a matter of right.

BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.035, 17.040, 17.045, 46.160.

COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.030, 17.035 and 17.040. ORS 17.020, 17.025 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial.

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RULE 52  
*Continuances*  
~~ASSIGNMENT OF CASES~~

A. Methods. Each circuit and district court shall provide by local rule for the placing of actions upon the trial calendar (1) without request of the parties, or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems appropriate.

~~B. Continuances~~. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

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BACKGROUND NOTE

ORS sections superseded: 17.050.

COMMENT

This is a new provision.

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BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.035, 17.040, 17.045.

COMMENT

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COMMENT

The elimination of procedural distinctions between actions at law and suits in equity cannot affect the constitutional right to jury trial.

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C.(2) The court, upon motion of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and trial by consent. In all actions or proceedings not triable by right by a jury, the court, upon motion or of its own initiative, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

BACKGROUND NOTE

ORS sections superseded: 17.005, 17.010, 17.015, 17.020, 17.025, 17.030, 17.035, 17.040, 17.045, 46.160.

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C.(2) The court, upon motion/ of its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and trial by consent. In all actions <sup>to</sup> ~~or proceedings~~ not triable by right ~~as~~ a jury, the court, upon ~~of a party or on its own initiative~~ motion/ ~~or of its own initiative~~, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial/ <sup>to</sup> ~~with~~ a jury whose verdict/ <sup>shall have</sup> ~~has~~ the same effect as if <sup>to a</sup> ~~by~~ jury had been a matter of right.



COMMENT

This rule preserves the procedures covered by ORS 17.005 to 17.015, 17.030, 17.035 and 17.040. ORS 17.020, 17.025 and 17.045 are eliminated as unnecessary. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial. Jury trial pro-

cedure in district court remains different in several respects. ORS 46.180 and 46.190 are not superseded. They provided for 6-person juries, require a jury demand, and provide only 2 peremptory challenges. See ORCP 1.

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C.(2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state.

D. Advisory jury and jury trial by consent. In all actions not triable by right to a jury, the court, upon motion of a party or on its own initiative, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial to a jury whose verdict shall have the same effect as if trial to a jury had been a matter of right.

COMMENT

This rule is based on ORS 17.005, 17.030, 17.035, and 17.040. ORS 17.010, 17.015, 17.020, 17.025, and 17.045 are eliminated. A party in a case tried to the court would make an offer of proof relating to excluded testimony, rather than present the testimony "under the Rule" as provided in ORS 17.045. The language of the existing ORS sections was modified to eliminate archaic language and to conform to these rules. Note that the Council retained the existing Oregon procedure of having jury trial waivable only by affirmative action of the parties rather than the federal system of requiring a demand for jury trial. Jury trial procedure in district court remains different in several respects. ORS 46.180 and 46.190 are not superseded. They provide for six-person juries, require a jury demand, and provide only two peremptory challenges. See ORCP 1.