NOTICE

January 4, 1980

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

FROM: COUNCIL ON COURT PROCEDURES
University of Oregon Law Center
Eugene, Oregon 97403

The next meeting of the COUNCIL ON COURT PROCEDURES will be held on Saturday, January 19, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland. At that time, the Council will decide which rules of Oregon pleading, practice, and procedure are to be considered by the Council during the next biennium.

# # # #

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, Jan. 19, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

1. Approval of minutes of meeting held October 27, 1979

2. Reports of subcommittees:

   Enforcement of judgments and provisional remedies - Judge Buttler

   Judgments - Judge Jackson

   Class actions - Austin Crowe

   Discovery - Garr M. King

   Third party practice - summary judgments - Frank H. Pozzi

   Writs of review - Justice Lent

3. Letter from Judge Musick re Rule 23

4. Assignment of subcommittees for Rules 65, 66, and 90 through 93; referees, submitted controversies, injunctions, receivers, bonds, and undertakings

5. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held January 19, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

Present:	Carl Burnham, Jr.	Laird Kirkpatrick
	John Buttler	Harriet R. Krauss
	Anthony L. Casciato	Berkeley Lent
	John M. Copenhaver	Donald W. McEwen
	Austin W. Crowe, Jr.	Charles P.A. Paulson
	Wendell E. Gronso	Frank H. Pozzi
	William L. Jackson	Robert W. Redding
	Garr M. King	Wendell H. Tompkins
Absent:	Darst B. Atherly	James C. Tait
	William M. Dale, Jr.	Lyle C. Velure
	Val D. Sloper	William W. Wells

The meeting was called to order by Chairman Don McEwen at 9:45 a.m. in Judge Dale's Courtroom in the Multnomah County Courthouse, Portland, Oregon.

A motion was made by Judge Buttler, seconded by Judge Casciato, that the minutes of the meeting held October 27, 1979, be approved. The motion passed unanimously.

Garr King, chairman of the discovery subcommittee, reported that the subcommittee had received no responses to the letters directed to the Procedure and Practice Committee, Trial Practice Section, Oregon Association of Defense Counsel, or Oregon Trial Lawyers Association in soliciting comments or suggestions relating to interrogatories and discovery of expert opinions. Mr. King reported that the discovery subcommittee had met with the following results:

Interrogatories. The subcommittee's recommendation is that the Council not do anything with interrogatories at this time. The vote in favor of this recommendation was 3-0 with one abstention.

Requests for admission. It was the subcommittee's consenses that there was no particular problem with the rule as promulgated by the Council and adopted by the legislature. It was the subcommittee's recommendation that the rule not be changed.

Expert witnesses. The subcommittee was split as to whether or not to propose a new rule. A motion was made by Garr King, seconded by Judge Buttler, that the Council direct staff to draft and submit a rule

allowing discovery of the names, qualifications, and summary of the area in which expert witnesses will testify at trial. Laird Kirkpatrick moved, seconded by Austin Crowe, to amend the main motion so that it would not apply to claims to recover for professional negligence of any person licensed to practice healing arts. The motion failed with Laird Kirkpatrick, Justice Lent, Austin Crowe, and Judge Redding voting in favor of the motion.

Carl Burnham moved, seconded by Justice Lent, to amend the main motion by adding a condition that the depositions of the experts disclosed pursuant to a request for discovery could not be taken. The motion passed, with Judge Tompkins, Harriet Krauss, Judge Buttler, and Judge Casciato opposing it. Garr M. King abstained.

The Council voted in favor of the main motion. The following opposed the motion: Frank Pozzi, Wendell Gronso, Judge Redding, Judge Tompkins, Judge Copenhaver, Judge Casciato, and Charles Paulson.

Austin W. Crowe, Jr., chairman, stated that his subcommittee had reviewed the background information concerning the original Class Action Statute and legislative activity during the last several sessions and that Frank Pozzi had produced a list of six proposed changes in the Class Action Statute. The Executive Director was asked to furnish Council members with copies of the proposed changes, and it was decided to defer further consideration at this time.

Frank Pozzi stated that the subcommittee appointed to study and report on third party practice and summary judgments had not had an opportunity to meet. He said that he was attempting to obtain written comments and suggestions from judges as to their feelings on third party practice.

Judge Jackson reported that the subcommittee had carefully reviewed proposed Rules 67-74 and suggested the following changes:

Rule 67 B.

Wendell Gronso said that the subcommitee felt there was a problem under section B., stating that if a judgment is entered for a plaintiff before the rest of the case is decided, the time for appeal will be running. A suggestion was made that a decision as to any change in the section be deferred until the Council voted on third party practice.

Rule 67 C.

This section should be amended to allow a judgment that exceeds the prayer when the court has equitable jurisdiction and to limit damages to the amount of the prayer when an action is brought for money damages.

Rule 67 E.

Alternative II on page 3 of the draft, which allows a partnership to be sued as an entity, should be used. The Executive Director suggested that this would also involve amending ORCP 26 to add a new subsection B. as shown on page 20 of the comment to Rule 67 and a possible new section for service on partnerships in Rule 7. He was asked to submit a draft of a suggested rule covering service on partnerships.

Rule 67 F.

The complicated categories of who may stipulate to judgment in 67 F.(2) should be eliminated and replaced by a requirement that the stipulation be signed by the defendant or a person with authority to bind the defendant.

Rule 68 A.(3)

The comment to this subsection should reflect that the language relating to deposition expense was taken from ORS 20.020 and there was no intent to change existing law.

Rule 68 C.(2)

This subsection should be changed to require allegation of facts, statute, or rule providing a basis for such fees in the body of the pleading. The section should also cover the situation where a party seeking fees files no pleading but moves to dismiss or for summary judgment and also to allow assertion of a right to attorney fees at a point later than an initial pleading if the right to such fees later appears.

Rule 68 C.(4)(b)

The time for objection to cost bill should be increased from 15 days after the entry of judgment to "15 days after the filing of the cost bill or 30 days after the entry of judgment, whichever occurs first." Since there are 10 days in which to file the cost bill, 15 days to object is too short.

Rule 68 C.(4)(d)

The words "and the same shall be conclusive as to all questions of fact" should be removed from the last sentence.

Rule 68 C.(4)(e)

This section should be eliminated. Any additional costs incurred in the objection to the cost bill should be recoverable.

Rule 68 C.(5)

This section should be changed to provide an automatic stay of the costs and attorney fees portion of the judgment upon filing of objections.

Rule 69 A.

The words "or court" should be added between "clerk" and "shall" in last line.

Rule 69 B.(1)

A further qualification upon the power of the clerk to enter judgment should be added as section B.(1)(g) as follows:

> "Summons was personally served within the State of Oregon upon the party against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i)."

Rule 69 B.(2)

The necessity for appearance by a general guardian should be eliminated. The reference to three days in line 9 should be changed to "10 days, unless shortened by the court," and specific reference to authority of the court to use affidavits should be added. The requirement for mandatory jury trial in unliquidated damage cases should be omitted.

Rule 69 C.

The Executive Director was asked to redraft this section to avoid differing standards for vacating default judgments and other judgments.

Rule 69 E.

This section relating to publication default should be eliminated.

Rule 70 A.

Add the words "plainly labelled as a judgment" between the words "writing" and "and" in the first line. The words "or approved" should be eliminated from line 6.

Rule 70 B.

Eliminate words "in the journal" in lines 1 and 2 of this section.

Rule 70 C.

This section should be redrafted to provide for service a fixed number of days prior to submission.

Rule 71 A.

Add the words "to all parties who have appeared" after "notice" in line 5.

Rule 71 B.

Subsection B.(3) relating to fraud should be eliminated as it does not appear in ORS 18.160. It was suggested case law interpretation of ORS 18.160 provides adequate grounds for relief. The Executive Director was asked to summarize the cases.

Rule 73 A. and C.

The Executive Director was asked to clarify whether "pendency of an appeal" meant after filing notice of appeal or after other steps for appeal.

Rule 73 D.

The Executive Director was asked to investigate what the words "or interested" mean.

Rule 74

The subcommittee recommended Alternative 1 which is the complete elimination of the confession of judgment without action. Confessions in a pending action are covered under stipulated judgments in Rule 67 F.

The Chairman asked Judge Jackson's subcommittee to review Rules 65-66 and Rules 90-93 when they are drafted.

Discussion regarding Judge Musick's letter was deferred until the next meeting.

The next meeting of the Council is scheduled to be held Saturday, February 16, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 12:06 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

Oregon Association for Court Administration

December 13, 1979

Dr. Fredric R. Merrill, Director
Council on Court Procedures
c/o University of Oregon Law School
Eugene, Oregon 97401

Re: Proposed Rules 67-74

Dear Dr. Merrill:

The Oregon Association for Court Administration (OACA) has made a detailed examination of the above proposed rules. We found no problems basically with the rules except for Rule 70. Also, we have some procedural concerns with the stay of enforcement of judgments embodied in 67B, 73E, 74I and 74K(3).

Rule 70 serves only to confuse further the terms, "filing" and "entry". There have been numerous opinions rendered by county counsels regarding the effective date of a judgment. "Filed" has come to mean, "officially tendered to the clerk-of-the-court" (clocked in as received with a date/time stamp). "Entry" is most often used to describe the entry of the filed document into the register of the court. "Docketed" has come to mean entry in the judgment docket, which is the lien reference. Thus, the commentary concerning rule 70 becomes confusing; if entry is the key, entry where--the register, judgment record or journal? We believe it should be entry in the judgment record.

OACA is also supportive of eliminating the term, "journal". We know that almost every Oregon county has a different definition of this record. In addition, the Supreme Court has authorized its non-use for counties utilizing the State Judicial Information System. Thus, we recommend your deleting references to the journal.

We hope this information will be of assistance to the Council's deliberations. If further information is desired, or if we can be of any assistance concerning the administrative operations of the rules, please feel free to call me at (503)378-6034.

Sincerely,

James H. Murchison
President

cc: John Donnelly
Julie Ellingboe

Albert R. Musick
Judge

Circuit Court of Oregon

Washington County
Twentieth Judicial District
HILLSBORO, OREGON 97123

December 14, 1979

Professor Fredric R. Merrill
Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Civil Rules of Procedure
Rule 23 B

Dear Professor Merrill:

The Oregon Law Institute is to be complimented upon the high quality of the two-day seminar held on the subject of the new Civil Rules of Procedure. The presentation was excellent and thorough and by reason thereof I may feel a little more comfortable on motion day when I have to rule upon motions which come before me.

However, the subject of this letter pertains only to one portion of one of the rules, namely, the last two sentences of Rule 23 B, which read as follows:

> "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

As a trial judge, I read this portion of the rule with astonishment and dismay. I assure you that my church affiliations leave a great deal to be desired and that I am inclined to look with askance when a party attempts to inject religious subjects into a hearing, nevertheless, somewhere from my early training came the quotation "Forgive them for they know not what they do".

At the outset, a trial judge has enough difficulty under the complicated third-party practice of trying the issues which are set forth by the pleadings. I have no objection to the amendment of pleadings to conform to the evidence which has come in without objection, as it is up to the trial attorney to protect his record.

However, to allow a party to inject new issues into the case over the objection of the opposing party after the trial has started and a jury has been empaneled, with the further admonition that the court shall "freely" allow such amendment, seems to me to be extremely undesirable for the following reasons:

(1) It undermines and to a great extent renders Rule 18 a nullity. The comment under Rule 18 states: "The Council decided to retain fact pleading as opposed to notice pleading * * * ". The purpose being of course that each party and the court shall be apprised of the issues which shall be tried.

(2) It is a back-door method of adopting the Federal notice pleading without a protective pretrial order setting forth and limiting the issues to be tried.

(3) It awards the lazy or inept lawyer for his lack of effort to properly set forth in his pleadings the issues to be tried and, on the other hand, it can be used by crafty lawyers as a trap to ensnare their opponents, who were entitled to believe that the issues to be tried were set forth by the pleadings.

(4) It places the court in the unpleasant position of delaying the trial, while the jury cools their heels in the jury room, to listen to heated assertions of counsel that the new issue contained in the Pandora's box presented to the court will or will not be prejudicial, followed by additional delay to allow offer of proof to determine the scope and nature of the evidence to be presented. If the court allows an offer of proof and feels compelled by reason of the statute to allow the amendment, but also feels that in order to avoid

error the opposing counsel should be allowed a continuance to produce evidence to rebut the surprise evidence admitted, raises the additional practical questions of (a) how long shall the continuance be allowed (a day or week, etc)? (b) will the jury be allowed to be called in to sit on other cases in the meantime? (c) the courtroom must be used for other cases in the meantime and, in view of the priority of criminal cases already set on the docket and the uncertainty of the length of other trials, how will the court set a definite date for reconvening the trial and recalling the jury in the event that even more than one day is allowed for the continuance? (d) how about the rescheduling of witnesses, particularly expert witnesses and witnesses that may be recalled from out of state, etc., under the circumstances of uncertainty of date of continuance?

(5) Finally, the matter of preparation of instructions. Unfortunately, not many of our appellate judges, nor law professors, nor practicing attorneys, have gone through or appreciate the pressure of the tight-rope walk of composing and formulating instructions in complicated cases and meeting the deadline of having them ready and completed when the last closing argument is finished. This task must be undertaken at the earliest possible time and that is why the court rules require that attorneys must present requested instructions at the beginning of the trial. The pleadings are the road map for the preparation thereof. It is true that we have uniform instructions and, indeed, they are very helpful, however, the manner in which they are fitted together in order that they have some chronological and understandable content aided by some explanation of their relation to each other, as well as their sequence of consideration by the jury, are matters of no small importance. The more the issues, particularly where different theories of law are involved, the more difficult it becomes to simplify and explain what the case is all about. This

> task cannot be undertaken ordinarily during the taking of testimony, and it is very dangerous to ad lib without some painstaking care and preparation. Even the dropping of an issue may materially affect the entire composition. The last minute adding of a new issue, particularly if it is a new theory of law, may also result in the complete revamping of the instructions after they have been materially completed. As a trial judge, I naturally resent the pressure and danger inherent in such last-minute changes.

With reference to item (4) above, our court is a busy court. The business of administration of the docket and the myriad of difficulties in the setting of cases and disposing of the same, are very real and substantial in nature and cannot be lightly ignored. The resetting of a case for continuation of testimony at a subsequent date (with an interval of time in between) is extremely difficult, as it may (and usually does) interrupt other litigation then in process. This is extremely unfair to other litigants and must be avoided.

This court, and most all courts that I know of, have little patience with the lazy or dilatory attorney who will not properly prepare his case for trial, and in view of our very liberal rules of discovery and amendment of pleadings prior to trial, there is no reason to allow counsel to change horses in the midst of a trial.

The portion of Rule 23 B above quoted is not only a booby trap for both the court and the litigants, but is completely unnecessary and inconsistent with the fundamental concept that code pleadings shall be retained. I urge that the commission consider presenting a change in the rules in the next legislation striking the above-quoted language from Rule 23.

Very truly yours,

Albert R. Musick

ALBERT R. MUSICK
Presiding Circuit Judge

ARM:so

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Michael G. Hanlon
Henry Kantor

12/17/79

December 14, 1979

The Honorable William L. Jackson
Baker County Circuit Court
Baker County Courthouse
Baker, Oregon 97814

Dear Judge Jackson:

I have observed in the copy of the minutes of the Council on Court Procedures that you are chairing a committee which is recommending that the amount of and basis for an attorneys' fee claim appear in the complaint.

For your reference, I am enclosing a photocopy of page 3 of the Manual for Complex Litigation relating to definitions of complex litigation, identification, etc. The problem of making any reasonable evaluation of a reasonable attorneys' fee at the time of filing a complaint in complex litigation is virtually impossible. It is not unusual for these cases to be in the courts for five to ten years. We presently have a case in our office in which summary judgment was entered in 1970. The case was appealed to the United States Supreme Court and now, ten years later, the final subclass in the case will ultimately be tried in the forthcoming months. The results of this trial may well be appealed as well.

As a matter of interest, I am also attaching a rather voluminous extract from the six-volume work of Newberg on Class Actions, wherein the most recent supplement to Volume 3 deals with various considerations utilized in awarding attorneys' fees. A review of this material will establish that, because of the complexity of the problem, it is unreasonable, at least in complex cases, to suggest that the initial complaint should include a

prayer for the exact amount of attorneys' fees. In the federal court case to which I have made reference, the trial judge has volunteered from the bench that he thinks a fee of 50 percent of the fund is not unreasonable in light of all the circumstances. I submit to you that a prayer for 50 percent attorneys' fees at the outset of a litigation would have been looked at incredulously.

I frankly do not understand the rationale behind insisting that the complaint specify the amount of attorneys' fees which are sought. If that should become the rule, lawyers who are involved in complex litigation would have no alternative but to include a prayer with the attorneys' fee based upon a percentage of the ultimate recovery.

I welcome an opportunity to discuss this problem with you; however, because of the case now pending in your court, I am somewhat reluctant to make that suggestion. It might be more appropriate if any such discussion takes place in an open and neutral forum, preferably amenable to argument, with the proponent of such legislation.

Yours very truly,

Henry A. Carey

Henry A. Carey

HAC:Bgm
Enclosure

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Michael G. Hanlon
Henry Kantor

HAND DELIVERED TO THE
PIONEER COURTHOUSE
PORTLAND, OREGON

January 17, 1980

The Honorable William L. Jackson
Circuit Court of Oregon
Baker, Oregon 97814

Dear Judge Jackson:

Thank you for your response to my letter of December 14. I will not be present at the meeting of your subcommittee on the evening of January 18.

While I do not want to deluge you with additional materials, it occurred to me that members of your committee might be interested in the full opinions in Lindy Bros. Builders, Inc. v. American Radiation and Standard Sanitary Corp., 487 F2d 161 (3rd Cir 1973), 1973-2 Trade Cases, ¶74,761, 540 F2d 102 (3rd Cir 1976), 1976-2 Trade Cases, ¶61,039. It is the landmark decision relied upon in a vast body of case law in both federal and state court opinions.

I am also enclosing a recent decision from Texas involving an award of attorneys' fees where the case was settled, McNary v. American Savings & Loan Association, 76 FRD 644 (ND Texas 1977). The Ninth Circuit has adopted this method of determining reasonable attorneys' fees in class actions.

I respectfully submit that the soundest approach in those cases where a fee is to be awarded by the court (out of a fund which has been created by the efforts of the plaintiff's attorney, or from defendant by statute, etc.) is a statute which leaves the amount of the fee to the sound discretion of the court. It should be suffi-

cient to include in the body of the complaint, and in the prayer, a request for attorneys' fees and costs in such amount as the court may deem reasonable.

Yours very truly,

Henry A. Carey

Henry A. Carey

HAC:Bgm
Enclosures

cc: Mr. Carl Burnham, Jr.
Mr. Wendell E. Gronso

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January 7, 1980

Fredric R. Merrill
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Council on Court Procedures
- Subcommittee on Class
Actions

Dear Fred:

The Subcommittee on Class Actions met on January 5, 1980, in Judge Dale's chambers and reviewed the material which you forwarded to me for distribution in December. Laird Kirkpatrick and Frank Pozzi reviewed the background information concerning the original Class Action Statute and legislative activity during the last several sessions.

Mr. Pozzi produced a list of six proposed changes in the Class Action Statute. I am enclosing a copy of the material which he provided to the Subcommittee. While I believe the Subcommittee has a good grasp of the arguments in favor of the proposed changes, I would appreciate it, if it is possible for you, to review the proposed changes and determine if there is any background material to the contrary which should be considered by the Subcommittee. In your review of the proposed changes suggested by Mr. Pozzi, if you happen to come across any background law review articles or cases that support his suggestions, I would appreciate it if you would also make a note so that we have that available for our consideration.

I would be in a position to make a short report on the Subcommittee's action at the January Council meeting if you feel that is appropriate.

Very truly yours,

Austin W. Crowe, Jr.

AWC:jmc

Enclosures

cc: Judge William Dale
Frank Pozzi
Laird Kirkpatrick

PROPOSED REVISIONS RE
NOTICE TO CLASS

Add to Existing ORCP 32 G.:

"The court may order that the cost of any notice under this section be paid by the defendant or the plaintiff or by the parties jointly, as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice."

Add to Existing ORCP 32 G.(1):

"* * * and whose potential monetary recovery or liability is extimated to exceed $100."

PROPOSED REVISIONS RE
PRE-LITIGATION NOTICE

Eliminate ORCP 32 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 I. of this rule."

Eliminate ORCP 32 I.:

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

"I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

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

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

"I.(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, if neither will effect actual notice, the office of the Secretary of State."

PROPOSED REVISION RE
FLUID RECOVERY

Add to Existing ORCP 32 G.:

"If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable."

PROPOSED REVISION RE
ATTORNEYS' FEES

Eliminate Existing ORCP 32 O.:

"O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court."

Add to Existing ORCP 32 G.:

"A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorneys' fees."

PROPOSED REVISIONS RE
CLAIM FORM ("OPT-IN")

Eliminate Existing ORCP 32 G.(2) and (3):

"G.(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 for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court."

"G.(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 such claim."

RULE 65

REFEREES

A. In general.

A.(1) Appointment. A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.

A.(2) Compensation. The fees to be allowed to a referee shall be fixed by the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court, as the court may direct.

A.(3) Delinquent fees. The referee shall not retain the referee's report as security for compensation; but if the party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.

B. Reference.

B.(1) Reference by agreement. The court may make a reference upon the written consent of the parties. In any case triable by right to a jury, consent to reference for decision upon issues of fact shall be a waiver of right to jury trial.

B.(2) Reference without agreement. In absence of agreement of the parties, reference shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of

damages, a reference shall be made only upon a showing that some exceptional condition requires it.

C. Powers.

C.(1) Order of reference. The order of reference to a referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report.

C.(2) Power under order of reference. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise directed by the order of reference, the referee may rule upon the admissibility of evidence. The referee has the authority to put witnesses on oath and may personally examine such witnesses upon oath.

C.(3) Record. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

D. Proceedings.

D.(1)(a) Meetings. When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys of such meeting date.

D.(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report.

D.(1)(c) If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

D.(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 55. If without adequate excuse a witness fails to appear or give evidence, that witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) Statement of accounts. When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of

the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or in such other manner as the referee directs.

E. Report.

E.(1) Contents. The referee shall without delay prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report.

E.(2) Filing. Unless otherwise directed by the order of reference, the referee shall file the report with the clerk of the court and in an action to be tried without a jury shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The referee shall forthwith mail a copy of the report to all parties.

E.(3) Without jury. In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections to the report shall be by motion and upon notice. The court after hearing may affirm or set aside the report, in whole or in part.

E.(4) With jury. In an action to be tried with a jury, the referee shall not be directed to report the evidence. The referee's

findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

E.(5) Stipulation by parties. In any case, the parties may stipulate that a referee's findings of fact shall be final; in such case, only questions of law arising upon the report shall thereafter be considered.

RULE 65

COMMENT

The basic question involved in this rule is whether the Council wishes to expand the use of referees in Oregon courts. One dramatic step in that direction would be the authorization of permanent or standing masters or referees (similar to Federal Rule 3(a) and a number of states) or suggest that the legislature establish a magistrate system such as that now being developed under the Federal Magistrates Act.

The argument for the increase of assistant judges is relief of court congestion and increased court flexibility in handling cases. The argument against this is well summarized by the 7th Circuit in Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 815 (7th Cir. 1942):

> It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy. For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay. Likewise, the litigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge.

The rule that follows does not involve a magistrate system or a standing panel on references. If the Council wishes to proceed in this direction, I will revise the rule.

What the rule does do is expand the circumstances when referees could be used beyond account cases. It is suggested that despite the dangers involved, there is room for reasonable expansion in use of references. The proposed rule does not authorize reference as a routine matter and is designed to minimize delay.

The existing Oregon rules relating to references are not entirely clear. The principal ORS sections relating to referees, ORS 17.705-17.765, were originally only applicable to actions at law (Deady Code §§ 218-226). They basically have only been used: (a) by consent of the parties, ORS 17.720 (see Ward v. Town Tavern, 191 Or. 1 (1951)), and (b) in cases involving a "long account." ORS 17.725(1) and (2); Craig v. California Vinyard Co., 30 Or. 43 (1896). They were taken almost directly from the 1848 New York Field Code (§ 226). ORS 17.725(3) authorizes reference for determination of pretrial factual issues, and ORS 17.725(4) authorizes reference for advisory purposes in special proceedings. These provisions appear to be little used. The ORS sections contemplate a report by the referee which can either decide on issues of law or fact in the action or report information to the court. ORS 17.705 and 17.725. In any case the report can be accepted or rejected by the court, but "[u]pon motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury." ORS 17.765.

In equity there was apparently no provision for appointment of masters, but the law referee provisions were originally made applicable to equity suits (Deady Code § 97). The Deady Code also contained a provision that allowed appointment of a referee to take a deposition in a suit in equity. In 1872 this was amended to provide that the referee could make findings of fact, 1872 Or. Laws, p. 119, and then in 1874 to allow the referee to report conclusions of fact or law. In 1893, however, this was again changed to allow the use of the reference only to take testimony and then only with consent of the parties unless the case was pending in a judicial district composed of more than one county and having only one judge. The provisions relating to trial in equity suits were also changed to provide that all issues of fact would be tried to the court, except

depositions could be taken by references. 1893 Or. Laws, p. 26. These provisions remain as ORS 17.045 and 45.050. See Anthony v. Hillsboro Gold Mining Co., 58 Or. 258 (1911). This left a conflict in the statutes, however, as the provision allowing reference in an equity suit under ORS 17.705-17.765 remained (ultimately as OCLA 9.206), but ORS 17.045 said the court was required to try all issues of law or fact except for reference for deposition under ORS 17.045. Finally, in 1951 the conflict was eliminated by adding a subsection (2) to ORS 17.705 that said ORS 17.705 through 17.765 did not apply to suits in equity except reference with consent of the parties and by amending ORS 17.045 to provide that the case would be tried to the court except as provided in ORS 17.045(2) and ORS 45.050, 1951 Or. Laws, ch. 356.

However, subsection (2) of ORS 17.705 (1965 Or. Laws, ch. 391) was eliminated in 1965. The ORS sections then literally did not allow referral in equity except for deposition.[1/] ORCP 2, 1979 Or. Laws, ch. 298, § 5, and the repeal of ORS 17.045 probably eliminated that problem.

The draft of ORCP 65 was taken from the Wisconsin statutes and Federal Rule 53.

1/ Present subsections (1), (2), and (3) of ORS 17.405 were paragraphs (a), (b), and (c) of subsection (1) of that statute before the 1965 Amendment and were renumbered. No change was made in the cross reference in ORS 17.045, and the cross reference in ORS 17.045 relating to ORS 17.705(2) is to a subsection that no longer exists.

Section A.

A.(1) This differs from ORS 17.735-17.740 in leaving the qualifications of the referee to the discretion of the judge. Under the ORS sections the referee had to meet the qualifications set out for jurors and were subject to challenge. The rule also contemplates one referee rather than up to three.

A.(2) Although ORS 20.020 allows a charge of the referee's compensation as a disbursement (see proposed Rule 68 A.), this section gives the court more flexibility in ordering immediate payment or payment out of fund held by the court. ORS 17.755 did allow for a charge of the compensation against a winning party in some circumstances. Under this rule, that could be done (also under proposed Rule 68 A.)

A.(3) This is designed to avoid any delay arising from the reference. ORS had no comparable provision.

Section B.

This section eliminates any confusion about application of reference procedure in equitable cases.

Subsection B.(1) is the same as ORS 17.720 allowing reference on consent. The last sentence is new to clarify use in actions at law not involving long accounts.

Subsection B.(2) allowing reference without consent by the court is the key change from present practice. It is identical to Federal Rule 53(b). The rule is much more flexible than the present Oregon rule. It allows reference by the court in any case, non-jury or jury (for the effect in a jury case, see paragraph E.(4)), and is not limited to account. Note, however, it is made clear that reference should

not be routinely used without consent of the parties because of the danger of increased costs, likelihood of delay, and possible lack of confidence in the outcome. In LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), cert. denied, 352 U.S. 1019, the supreme court held that this language did not allow reference based upon calendar congestion, complexity of the issues or the prospect of an unduly lengthy trial. See 9 Wright and Miller, Federal Practice and Procedure § 2205.

Section C.

This section gives the trial judge the power to direct the role of the referee and defines the powers of the referee. It is more flexible than ORS 17.705 and 17.745 but is basically the same.

Section D.

This language specifies the proceedings upon reference in more detail than ORS 17.745. Note the emphasis is on diligent proceedings to avoid any delay; the requirement of a meeting in 20 days under D.(1)(a) and duty to proceed diligently, with ongoing supervision by the court, should control excessive delay. See also reference to diligence in filing of report in E.(1) and requirement to report before payment of fees in A.(3).

Section E.

E.(1) and E.(2) The provisions as to contents and filing of report are similar to present practice.

E.(3) This section differs from ORS 17.765 in that it does not make the report the equivalent of a jury verdict. Under our unusual consitutional provisions relating to jury verdicts, ORS 17.765 literally makes the referee's findings of fact conclusive unless the judge

can say there is no evidence to support them. See Liebe v. Nicolai, 30 Or. 364 (1897); Bay Creek Lumber Co. v. Cesla, 213 Or. 316 (1958). The "clearly erroneous" standard gives the judge more flexibility and is equivalent to the standard for appellate review. Note also that this changes the rule in equity cases where the referee's report was always merely advisory. See Ward v. Town Tavern, supra. This, of course, would not affect the de novo review of such cases by the supreme court, but the rule does require the submission of the evidence. See Nessley v. Ladd, 29 Or. 354 (1896).

E.(4) Under existing Oregon law, no reference is possible without consent in cases where a right to jury trial exists. The only reference without consent for findings of fact involves a "long account." When a court makes a reference in an action at law involving a "long account", the referee's decision is used instead of any jury. There is no violation of right to jury trial because when the constitution was adopted, long account cases could be sent to a referee rather than submitted to a jury. In other words, there is no right to jury trial in such a case. Tribou v. Strawbridge, 7 Or. 156 (1979).

Under this rule there could be a reference in a jury case but not one involving factual findings that would invade the province of the jury.

Basically, the procedure is similar to a court-appointed expert but with one crucual difference. The referee has power and authority to conduct a legally enforceable investigative hearing as a basis for conclusions to be drawn. Any conclusions are reported as expert opinion and do not bind the jury.

Note, in "long account" cases the referee could make the factual decision as under Tribou, supra. Such cases fall under section E.(3), not section E.(4). Section E.(5) allows the parties to stipulate that the referee's decision is final and not subject to review by the court.

ORS SECTIONS SUPERSEDED

ORS 17.045 has already been repealed. ORS 17.705-17.765 would be replaced by this rule. ORS 45.050 also is not needed under the modern deposition rules.

RULE 66

SUBMITTED CONTROVERSY

A. Submission without action. Parties to a question in controversy, which might have been the subject of an action with such parties plaintiff and defendant, may submit the question to the determination of a court having subject matter jurisdiction.

A.(1) Contents of submission. The written submission shall consist of an agreed statement of facts upon which the controversy depends, a certificate that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties, and a request for relief.

A.(2) Who must sign the submission. The submission must be signed by all parties or their attorneys as provided in Rule 17.

A.(3) Effect of the submission. From the moment the submission is filed with the clerk, the court shall treat the controversy as if it is an action pending after a special verdict found. The controversy shall be determined on the agreed case alone, but the court may find facts by inference from the facts agreed to. If the statement of facts in the case is not sufficient to enable the court to enter judgment, the submission shall be dismissed or the court shall allow the filing of an additional statement.

B. Submission of pending case. An action may be submitted at any time before trial, subject to the same requirements and attended by the same results as in a submission without action, and in addition:

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B.(1) Pleadings deemed abandoned. Submission shall be an abandonment by all parties of all prior pleadings, and the cause shall stand on the agreed case alone; and

B.(2) Provisional remedies. The submission must provide for any provisional remedy which is to be continued or such remedy shall be deemed waived.

RULE 66

COMMENT

The only serious question presented by this rule is whether any rule is required at all. The question is whether the procedure accomplishes anything that could not be done by some combination of stipulation of facts, admissions, declaratory judgment, confession of judgment or summary judgment.

Although aspects of the submission procedure overlap the functions of all the procedures described above, the use of submission has two major elements:

(a) No pleadings or summons are involved; any other procedure requires the commencement of an action.

(b) No discovery, trial, or evidence is involved. The submitted facts are presented to the court as the equivalent of a special verdict. See Alsos v. Kendall, 111 Or. 359, 364 (1924); Clason v. Matko, 223 U.S. 646 (1911). This differs from the summary judgment where the court is presented with factual matter and asked to determine if a factual dispute exists. This also differs from "stipulated facts" which are presented in lieu of evidence and the court then finds the ultimate facts. 83 C.J.S. Submission of Controversy § 1. The change in the second sentence of A.(3) reduces the importance of the distinction, but the procedure remains unique as a way of securing a judicial determination of issues of law.

The procedure is not heavily used but an examination of the annotations to Chapter 27 shows 14 appeals from 1869 to 1968 which arose from submitted controversies. Since the submission cannot be used unless

there is sufficient harmony between the parties, the procedure is particularly useful for obtaining declaratory relief, or in resolving legal disputes between a public agency and a citizen at minimum cost. Practice Commentary to N.Y. C.P.L.R. § 3222 at p. 1083. A submission, however, may be used to obtain any type of relief. Apparently, the procedure of submission without any action did not exist at common law, and a rule is necessary. No rule would be required for section B. on submission of pending matters (once a case was filed the parties could stipulate any submission), but reference to such procedure and particular problems involved is useful. 3 Am. Jur.2d Agreed Case § (2).

Section A. is identical to the procedure provided in ORS Chapter 27 (superseded) with a few exceptions. ORS 27.020 (superseded) required verification of the submission. That requirement has been deleted for the same reason it was deleted with respect to pleadings in ORCP 17. The second sentence of Section A.(3) was not in ORS and is taken from N.Y. C.P.L.R. § 3222(b)(4). Its purpose is best described by this quote from the Practice Commentary to § 3222.

> "The major barrier to the use of the submission device under prior law was that the statement of facts had to be so replete that a determination did not even require the drawing of an inference. Many a submission was dismissed because of the need to draw inferences, 'even if the submitted facts logically and reasonably admit of further important inferences.' Cohen v. Mfrs. Safe Dep. Co., 297 N.Y. 266, 78 N.E.2d 604 (1948).
>
> This prior-law limitation is removed by CPLR 3222(b)(4) in direct reaction to such as the Cohen case. * * * The drawing of inferences naturally emanating from the stated facts appears to have been the only thing needed to make the Cohen case ripe for a determination."

In all other respects, the special verdict standard controls. The court may not hear evidence. It can dismiss or allow a new filing. As to

the amendment or withdrawal of submissions, see Am. Jr.2d Agreed Case §§ 26-28.

Section B. did not exist in ORS and is based on Iowa Code Ann. § 678, 3 Am. Jur.2d Agreed Case § 2. Sections B.(1) and (2) are modifications of Iowa Code Ann. § 678.7. New York allows no provisional remedies, even if agreed to by the parties. N.Y. C.P.L.R. § 3222(b)(1). Here the agreement must be express.

ORS SECTIONS SUPERSEDED: 27.010 through 27.030.