

Memo to Council
April 2, 1979
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Rule 58. The argument here is based on a misreading of the statute and the rule. Rule 58 B.(5) limits the court's inherent authority to restrict argument, not the ability to argue more than two hours.

Rule 59. Using the same mode of instruction for original and supplementary instructions makes sense and most courts would. Why make it a rigid rule?

Rule 64. The last sentence of ORS 17.630 is being prepared as a new section for ORS Chapter 19 and will be presented to the judiciary committees for action.

The question relating to new trials is covered by the letter to Judge Allen previously furnished to the Council. The rules do not diminish certainty of judgments in divorce cases and, in fact, increase it through specific time limits on motion and ruling.

Enclosures:

Trial Committee's Comments on Rules 55, 57, 58, 59, and 64

Legislative Changes as of March 29, 1979. (pages numbered 1 through 20)

Rule 64

New Trials

The Council's amended comment is self-explanatory, and the language of this Rule is very similar to ORS 17.605 through 17.630. It should be noted that although the amended comment states that the last sentence of ORS 17.630 "*** is not included and will remain as a statute as it relates to appellate procedure, ***" ORS 17.630 is one of the statutes which is stated to be "superseded" (p. 201). This minor technicality should be called to the attention of the legislature.

This Committee is greatly concerned with Rule 64C which allows a new trial to be granted in a nonjury action on the same grounds as in a jury action. It is feared that in many marriage dissolution actions the aggrieved party will insist upon filing such a new trial motion, thus postponing and delaying the finality of the proceedings. This Committee recommends that Rule 64C be amended to be not applicable to proceedings under Chapter 107 ORS.

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NEW TRIALS

The subcommittee is correct with regard to the last sentence of ORS 17.630 relating to appellate procedure. The omnibus bill will have to reflect the fact that this section is only partially superseded.

The subcommittee is wrong in its assessment of the law regarding new trials in equity cases. The Supreme Court has not said that the grounds listed in ORS 17.665 to 17.630 specifically apply, but has left the trial courts free to overturn their verdicts on any ground. There is a policy issue there as to whether the procedure is appropriate for divorce cases. Excluding them from ~~rule~~ Rule 64C is not the answer since the common law was less restrictive. The answer, should the Council choose to follow the subcommittee's recommendation, is to amend Rule 64C to read:

" * * * Proved that ~~is~~ a new

trial may not be granted in
a civil action for dissolution
of a marriage or for the
custody of a child."

I have referred to a "civil action for dissolution of a marriage" instead of ORS ch. 107 which includes a number of other matters. If the policy is ~~to~~ in favor of excluding dissolution, child custody cases should probably be excluded as well.

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Thank you!
Give this morning!
Damm!
FF

The Council also endorsed the changes suggested by Frank Pozzi to section 54 B.(4) (page 14 of March 29 Committee memo) and section 64 B. (page 26 of Committee memo). The changes would appear as follows:

Rule 54

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication [with] without prejudice.

Rule 64

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

[B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.]

B.[(6)](5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.[(7)](6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

All other changes suggested in the March 29, 1979, Committee memo which have not as yet been discussed in Committee work sessions did not appear desirable to the majority of the Council members.

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NEW TRIALS

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed not later than 10 days after the [filing] entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the [filing] entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own initiative. If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the [filing] entry of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

COMMENT

Sections 64 F. and G. were changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 70.

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