

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.

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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 Vineyard 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 constitutional 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 crucial 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.

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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) Meetings.

D.(1)(a) When a reference is made, the clerk or person performing the duties of that office 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 the meeting date.

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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 by the court and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) 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.

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E.(3) Effect.

E.(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury

verdict. 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. The court after hearing may affirm or set aside the report, in whole or in part.

E.(3)(b) In any case, the parties may stipulate that a referee's findings of fact shall be binding or shall be binding unless clearly erroneous.

COMMENT

This rule supersedes the existing sections in ORS chapter 17 relating to reference. The rule is intended to provide more flexibility in use of referees, but to avoid abuse of the procedure. It was adapted from Federal Rule 53 with substantial changes.

Section 65 A. was taken from Wisconsin statutes 805.06(1). It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as the juror.

Section 65 B. contains the most important change in the procedure. Subsection 65 B.(1) does not appear in the federal rule and was taken from ORS 17.720. Any right to jury trial is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. Subsection 65 B.(2) allows the court to appoint a referee upon motion in any type of case.

However, there are limitations;

(1) Reference upon motion is only available where there is no right to jury trial. This differs from the federal rule. The procedure is available in any non-jury case, whether formerly equitable or legal.

(2) The use of referees cannot be adopted by the court as a routine matter. See LaBuy v. Howes Leather Co., 352 U.S.

249 (1957). Note, long account cases would still be referable upon motion; there is no right to jury trial in such cases. Tribou and McPhee v. Strowbridge, 7 Or. 157 (1879).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (65 C. through 65 E.(2)) are taken from the federal rule and are more detailed than the ORS sections. They give the court a great deal of flexibility in utilization of the referee. The provisions of ORS 45.050 for deposition reference are unnecessary and would be superseded. The rule attempts to avoid delay, which is one of the principal difficulties with reference. The referee is required to begin meeting with the parties in 20 days, 65 D.(1)(a), and to act with all reasonable diligence. If the referee delays the proceeding, any party may ask the court for an order requiring the referee to act with more diligence. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection 65 E.(3) is new but gives the same weight to the referee's findings of fact as did ORS 17.763.

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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 by the court and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) 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 or person performing the duties of that office and shall file a transcript of the proceedings and of the evidence and the original exhibits with the report. The referee shall forthwith mail a copy of the report to all parties.

E.(3) Effect.

E.(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury

verdict. 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. The court after hearing may affirm or set aside the report, in whole or in part.

E.(3)(b) In any case, the parties may stipulate that a referee's findings of fact shall be binding or shall be binding unless clearly erroneous.

COMMENT

This rule supersedes the existing sections in ORS chapter 17 relating to reference. The rule is intended to provide more flexibility in use of referees, but to avoid abuse of the procedure. It was adapted from Federal Rule 53 with substantial changes.

Section 65 A. was taken from Wisconsin Statutes 805.06(1). It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as a juror.

Subsection 65 B.(1) does not appear in the federal rule and was taken from ORS 17.720. Any right to jury trial is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. Subsection 65 B.(2) allows the court to appoint a referee upon motion in any type of case.

However, there are limitations:

(1) Reference upon motion is only available where there is no right to jury trial. The procedure is available in any non-jury case, whether formerly equitable or legal. Note, long account cases would still be referable upon motion; there is no right to jury trial in such cases. Tribou and McPhee v. Strowbridge, 7 Or. 156, 159 (1879).

(2) Reference cannot be used by the court as a routine matter. A showing of some exceptional condition is required. 65 B.(2). See LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (65 C. through 65 E.(2)) are taken from the federal rule and are more detailed than the ORS sections. They give the court a great deal of flexibility in utilization of the referee. The provisions of ORS 45.050 for deposition reference are unnecessary and would be superseded. The rule attempts to avoid delay, which is one of the principal difficulties with reference. The referee is required to begin meeting with the parties in 20 days, 65 D.(1)(a), and to act with all reasonable diligence. If the referee delays the proceeding, any party may ask the court for an order requiring the referee to act with more diligence. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection 65 E.(3) is new but gives the same weight to the referee's findings of fact as did ORS 17.763.