

The Council next considered revised Rules 67 - 73. Fred Merrill stated that copies of those rules, and also Rules 75 - 87, had been furnished to various State Bar committees and other groups. The only written response has been from Legal Aid. The State Procedure and Practice Committee has been given copies of the revised rules. It was suggested that any further action be deferred until they have an opportunity to respond. The Executive Director suggested that the revised rules include several matters where the Council had requested further information or drafting as follows:

68 C.(2) Asserting claim for attorney fees, costs, and disbursements. The language was designed to include all matters suggested by the Council at the last meeting. The Council discussed whether consideration of attorney fees arising from a contractual right would violate the constitutional right to jury trial. Austin Crowe moved, seconded by Garr King, that Rule 68 C.(2) be redrafted in order to protect the right to jury trial when the claim for fees is based upon a contractual right. The motion passed, with Lyle Velure opposing it.

71 B. The Executive Director pointed out that in the second draft of Rule 71, the word "fraud" had been eliminated from section B. Examination of Oregon cases has revealed that there is some question if fraud could provide a ground for motion to vacate judgment. The Executive Director suggested that, even if there was no desire to expand fraud beyond extrinsic fraud, extrinsic fraud should be raisable by motion as well as by independent equity suit. After discussion, a motion was made by Austin Crowe, seconded by Charles Paulson, to include "fraud" as a subsection under 71 B. The motion passed, with Wendell Gronso and Carl Burnham opposing it.

The Council discussed proposed Rule 42 (account). Wendell Gronso moved, seconded by Carl Burnham, to change Rule 42 so that 30 days would be allowed within which to furnish a copy of an account unless motion for extension of time was filed within 30 days and that if the account were not furnished, no evidence of the account could be submitted at trial. The motion failed, with Judge Wells and Wendell Gronso voting in favor of the motion.

David Vandenberg moved, seconded by Carl Burnham, to leave the matter of furnishing an account to notice of production and inspection and other discovery devices and that no request for account procedure be retained. The motion passed unanimously.

The Council received reports of subcommittees as follows:

For the subcommittee considering Rules 75 - 87, the Executive Director reported that they were examining the rules and soliciting comments.

PROPOSED RULE 42

ACCOUNT

A party may set forth in a pleading the items of an account alleged in the pleading or may file a copy of the account with the pleading. If the party alleging an account in a pleading does neither, upon the request of any other party, the party alleging an account in a pleading shall deliver a copy of such account to the requesting party within five days after request. A copy of an account shall be signed in accordance with Rule 17.

COMMENT

Rule 42

If you recall, the Council did not supersede ORS 16.470. Demands for accounts would have been swallowed by interrogatories if interrogatories had been adopted. Last biennium, when it was clear there would be no interrogatories, it was too late to draft a rule on demanding accounts and it remained as a statute. Since the Council has now decided not to act on interrogatories this biennium, we need an account rule to replace ORS 16.470. The procedure is basically a discovery procedure. The sanction of the existing statute (preclusion of evidence) is too harsh. The rule eliminates the preclusion sanction and the revision of ORCP 46 B. integrates the rule with discovery sanctions.