

AMENDMENTS

TO ORCP 65

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

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 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. If a 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. Reference may be made in actions to be tried without a jury upon motion by any party or upon the court's own initiative. In absence of agreement of the parties, 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. The order 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) 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.

D.(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, after 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 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 17.765.

REFEREES

RULE 65

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 as provided in ORS 21.400.

A(3) Delinquent fees. The referee may not retain the referee's report as security for compensation.

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. Reference may be made in actions to be tried without a jury upon motion by any party or upon the court's own initiative. In absence of agreement of the parties, 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. The order 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

1 production of evidence upon all matters embraced in the reference, including the production of
2 all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise
3 directed by the order of reference, the referee may rule upon the admissibility of evidence. The
4 referee has the authority to put witnesses on oath and may personally examine such witnesses
5 upon oath.

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

9 **D Proceedings.**

10 **D(1) Meetings.**

11 D(1)(a) When a reference is made, the clerk or person performing the duties of that
12 office shall forthwith furnish the referee with a copy of the order of reference. Upon receipt
13 thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time
14 and place for the first meeting of the parties or their attorneys to be held within 20 days after
15 the date of the order of reference and shall notify the parties or their attorneys of the meeting
16 date.

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

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

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

1 provided in [*Rule 55 G*] **Rule 55 A(6)(d)**.

2 **D(3) Accounts.** When matters of accounting are in issue, the referee may prescribe the
3 form in which the accounts shall be submitted and in any proper case may require or receive in
4 evidence a statement by a certified public accountant who is called as a witness. Upon
5 objection of a party to any of the items thus submitted or upon a showing that the form of
6 statement is insufficient, the referee may require a different form of statement to be furnished
7 or the accounts or specific items thereof to be proved by oral examination of the accounting
8 parties or in such other manner as the referee directs.

9 **E Report.**

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

13 **E(2) Filing.** Unless otherwise directed by the order of reference, the referee shall file the
14 report with the clerk of the court or person performing the duties of that office and shall file a
15 transcript of the proceedings and of the evidence and the original exhibits with the report. The
16 referee shall forthwith mail a copy of the report to all parties.

17 **E(3) Effect.**

18 E(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall
19 have the same effect as a jury verdict. Within 10 days after being served with notice of the filing
20 of the report, any party may serve written objections thereto upon the other parties.

21 Application to the court for action upon the report and upon objections to the report shall be
22 by motion. The court after hearing may affirm or set aside the report, in whole or in part.

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

2017-2019 BIENNIUM STAFF COMMENT TO RULE 65

Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2017-2019 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 65 required an amendment in subsection 65 D(2). A reference to "Rule 55 G" is amended to "Rule 55 A(6)(d)" to be an accurate reference to the completely redrafted Rule 55.