

# MEMO

TO: William A. Gaylord, Chair  
Council on Court Procedures

FROM: Hon. Robert D. Durham RD

SUBJECT: Supplemental Memorandum Re Finding to  
Support Attorney Fee Award,  
ORCP 68 C(4) (c) (ii)

DATE: September 3, 1996

1 In my memorandum to you dated June 10, 1996, I proposed  
2 an amendment to ORCP 68C(4) (c) (ii) that would require findings,  
3 if requested, regarding an award of attorney fees.

4 Judge Sid Brockley stated a valid criticism of my  
5 proposal in his memorandum to you (circulated to the council)  
6 dated July 8, 1996. He pointed out, correctly, that my proposed  
7 phrase "determines the issue" could lead to unnecessary  
8 procedural arguments about the rule's operation.

9 I wish to amend my proposal regarding ORCP  
10 68C(4) (c) (ii) as follows:

1           "The court shall deny or award in whole or in part the  
2 amounts sought as attorney fees or costs and disbursements. The  
3 trial court shall make <sup>material</sup> any necessary findings of fact and  
4 conclusions of law regarding an award or denial of attorney fees  
5 if requested by a party. A party waives the right to request  
6 that the trial court make findings of fact and conclusions of law  
7 if the party fails to incorporate the request into the statement  
8 or objection filed under ORCP 68C(4)(a) or (b). [No findings of  
9 fact or conclusions of law shall be necessary except as otherwise  
10 required by law.]" (Proposed change underscored; deleted  
11 material in brackets.)

12           Here are the reasons for my proposed changes.

13           1. "Any necessary" findings and conclusions.

14           I added the phrase "any necessary" as a modifier for  
15 "findings of fact" and "conclusions of law." I did so to stress  
16 that the trial court should resolve only the disputes of fact or  
17 law that are material to the award or denial of fees. For  
18 example, if a party objects to a statement of attorney fees on  
19 the ground that the statement contains a mathematical error, the  
20 court should make a necessary finding that resolves that claimed  
21 error. The rule should not obligate the judge to make other  
22 findings about other potential factual disputes that neither the

1 court nor the parties consider to be material issues.

2 Some Council members may believe that the phrase "any  
3 necessary" states an implicit requirement and that it is, for  
4 that reason, unneeded. I include it simply to make it crystal  
5 clear that my proposed rule applies only to those disputes that  
6 make a genuine difference in the award or denial of attorney  
7 fees.

8 2. Waiver.

9 Responding to Judge Brockley's comments, I have  
10 advanced the point in time by which the moving or responding  
11 party must request findings or conclusions from the court.  
12 Following the model of ORCP 62A (regarding findings of fact for a  
13 trial) and UTCR 4.050 (regarding a request for oral argument on a  
14 motion in a civil case), I have provided that a party waives the  
15 right to request findings and conclusions unless the party  
16 incorporates the request into the statement of fees or the  
17 objection. Thus, a party is under a burden to request findings  
18 and conclusions in the party's first post-judgment filing  
19 regarding attorney fees. In the absence of a request in that  
20 first filing, the right to make the request is waived, the trial  
21 court would have no obligation to make findings or conclusions,  
22 and the issue of lack of findings is foreclosed on appeal.

1           With due respect to Judge Brockley, I declined to  
2 impose an obligation to request findings regarding attorney fees  
3 prior to the commencement of trial, as he had suggested. I had  
4 several reasons. First, parties frequently have no reason to  
5 request findings until the statement of attorney fees is filed  
6 after judgment. We should not obligate a party to request  
7 findings before they are aware of the facts that give rise to a  
8 need for findings in the first place.

9           Second, ORCP 62A obligates the trial court to make  
10 findings about issues that arise during the trial. However,  
11 under ORCP 68, attorney fee issues arise not from the evidence at  
12 trial, but rather from the statement of attorney fees, objections  
13 thereto, and any evidence concerning those documents. ORCP  
14 68C(4) (c) (i) provides:

15           "If objections are filed in accordance with  
16 paragraph C(4) (b) of this rule, the court, without a  
17 jury, shall hear and determine all issues of law and  
18 fact raised by the statement of attorney fees or costs  
19 and disbursements and by the objections. The parties  
20 shall be given a reasonable opportunity to present  
21 evidence and affidavits relevant to any factual issue."  
22 (Emphasis added.)

23 In view of that rule, it seems procedurally odd to require  
24 parties to request findings before trial. The attorney fee  
25 issues that the trial judge must resolve all arise after

1 judgment.

2 Third, requiring a pretrial request for findings on  
3 attorney fees probably would lead to unnecessary precautionary  
4 requests for findings, which in turn would compel trial courts to  
5 make findings on attorney fees even though, after judgment, the  
6 parties may no longer care about such findings. No one would  
7 benefit from a rule that may lead to unnecessary trial court  
8 work.

9 In summary, I presently am persuaded that the correct  
10 rule is one that obligates the parties to make their request for  
11 findings regarding attorney fees in their first post-judgment  
12 filing about that subject, and imposes a waiver if they fail to  
13 make a timely request.

14 On separate but related matter, I would have no  
15 objection to adding a requirement that the request for findings  
16 be set forth in the caption or the first paragraph of the  
17 statement of fees or objection. In general, that is the  
18 procedure now followed for requesting oral argument on a motion  
19 under UTCR 5.050. That procedure may help trial judges by  
20 preventing a party from burying a request for findings in the  
21 body of a lengthy statement of fees or an objection.

22 If the Council desires to adopt that procedure, I

1 suggest that last sentence of my proposal be modified, as  
2 follows:

3 "A party waives the right to request that the  
4 trial court make findings of fact and conclusions of  
5 law if the part fails to incorporate the request into  
6 the [caption of/the first paragraph of] the statement  
7 or objection filed under ORCP 68 C(4) (a) or (b)."  
8 (Alternative wording underlined and bracketed.)

9 Thank you for considering these proposed modifications.

10 cc: Professor Maury Holland