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OUR FAX NO.: (541) 382-3328 **DATE: March 9, 1998**

TO: Council on Court Procedures' ORCP 39 Subcommittee

Karsten Rasmussen, Esq.
Honorable Don A. Dickey
Honorable Ted Carp

FROM: Bruce J. Brothers

NO. OF PAGES, including cover sheet: 3

COMMENTS: OSB Procedure and Practice Committee proposed changes to ORCP 39

Gentlemen:

Bruce Hamlin has asked that I chair the Council on Court Procedure Subcommittee on proposed changes to ORCP 39. I have had the opportunity to review the memorandum from Jeffrey Johnson and his committee which was prepared for the OSB Procedure and Practice Committee, relating to that rule.

In anticipation of the conference call to be held on March 12th, I would like to raise some concerns relating to the proposed changes for your comments:

I share the concern raised by members of the Procedure and Practice Committee with regard to the existing language of FRCP 30(d)(1) relating to "any objection to evidence." Since, presumably, the rules are intended to guide members of the bar with regard to procedures to be followed, I can see no reason not to include language relating to "objection to questions." Both evidence and questions are the subject of depositions and it should be clear that the rules relate to both.

The proposed changes provide that upon motion by any party "the court in the county where the deposition is being taken shall rule on any question presented by the motion ..." I question the wisdom of limiting such a motion to the court in the county where the deposition is being taken. There are a number of reasons, including the fact that attorneys who have agreed to have a deposition taken outside the county where the case is filed, may not have a notion as to whom to

call to argue a deposition question. Furthermore, the judge called would have no background on the litigation and no vested interest in the ultimate resolution of the problem. By consensus, the Council on Court Procedures recently agreed that there was no need to have a rule with regard to where the deposition of parties may be taken. A requirement that the court in the county where the deposition is taken rule on deposition questions may well make parties more reluctant to cooperate in selecting the location of depositions.

I am confused by the language "those persons described in 46B(2) shall present the motion to the court in which the action is pending." 46B(2) refers to parties as does the first sentence of the proposed amendment requiring that the question be presented to the court in the county where the deposition is taken. On the other hand, non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. Finally, the proposed rule allows the court in the county where the deposition is being taken to order the examination to cease, but if the order terminates the examination, only upon the order of the court in which the action is pending shall it be resumed. That will, on many occasions, result in two courts being involved in resolving the same issue.

I also note that the objecting party or the deponent may demand that the deposition be suspended. I would anticipate that there would then be two different motions, one by telephone with regard to the objection and another by personal appearance with regard to the award of expenses. The rule relied on, Rule 46A(4), provides for "opportunity for hearing," though the practice here is to suspend the deposition and call a judge. Can the party making the objection refuse to have the issue resolved by telephone?

With regard to provision E(2), I wonder why the exceptions there are different than those set forth at E(4). It appears that the only time an attorney may instruct a deponent not to answer is to preserve a privilege, to enforce a previously imposed limitation on evidence, or to stop the proceedings and make a motion under paragraph 1. However, pursuant to E(4) when a question is asked, a break can be taken if the attorney claims a privacy right, privilege, or an area protected by the constitution, statute or work product. Because E(4) is, apparently, broader than E(2), it appears that one cannot instruct a deponent not to answer but can take a break and discuss the answer with the deponent. I note that the Federal Rules of Civil Procedure do not allow for any such "break" prior to answering a question. I question this exception in the sentence that begins "If a question is pending, it shall be answered before a break is taken ..."

Paragraph E(3) addresses limiting the time permitted for the conduct of the deposition and additional time being allowed if needed for fair examination of the deponent. I wonder if the reference to attorney's fees is necessary in that provision in view of the reference to 46A(4) in paragraph E(1).

Finally, I wonder if the custom of making motions and soliciting rulings on deposition questions over the telephone is ever an appropriate way to resolve discovery issues in the absence of agreement. Perhaps the party instructing a witness not to answer a question should do so at his own risk and, likewise, a party who terminates a deposition should as well, so that a court will ultimately award attorney's fees to the innocent party following the filing of a written motion with an opportunity to respond and argue. If a "telephone motion" is appropriate, perhaps the rule should address the

procedure.

If other committee members or interested parties would like to raise additional issues or comment on the ones raised by me, prior to the telephone conference presently set for March 12th at 1:00 p.m., you are invited to do so.

c: Susan Evans Grabe
Bruce Hamlin
Maurice J. Holland
Jeff Johnson

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
FAX (541) 682-7437

March 10, 1998

Hon. Robert D. Durham
Oregon Supreme Court
1163 State St.
Salem, Or. 97310

Hon. Michael H. Marcus
Multnomah County Courthouse
1021 SW 4th Ave.
Portland, Or. 97204

Professor Maurice Holland
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid St.
Eugene, Or. 97403

RE: Mailbox Service- Process Servers' Proposal

Dear Colleagues:

I have reviewed the materials provided by Mr. Barrows and Ms. Williams, and have done a little research of my own regarding the private mailbox service concept. Here are some initial reactions:

1) Both the Washington and California statutes relegate mailbox service to secondary status, available only where primary service can't be accomplished despite reasonable diligence.

2) The Washington statute is so recent that there is no interpretive caselaw to date.

3) The California statute has been considered in two reported cases, with markedly different results. In Bonita Packing Co. v. O'Sullivan, et al. , 165 FRD 610 (DC CA 1995), the California federal court drew the conclusion that the California legislature had not even intended to permit private mailbox service in enacting the 1989 amendments to California CCP Section 415.20 relied upon by the Oregon process servers. The federal judge reasoned that the legislature intended to preclude any mailbox substituted service in excluding USPS boxes from the "usual mailing address" definition. Moreover, the court opined that private post office service does not comport with due process because the relationship between proprietor and renter is not sufficient

to assure actual notice via substitute service. Finally, the court rejected mailbox service on the facts of the case because a better method was easily available.
In contrast, I enclose the Texas federal court decision in Burrows v. City of League, et al, 985 F. Supp. 704 (S.D. Tex. 1997). The Texas court disagreed with the Bonita Packing decision on the issues of legislative intent, and by implication, the due process sufficiency of mailbox service. The Texas court specifically found that the defendant was dodging service , and that the plaintiff had reasonably exhausted primary service options before resorting to mailbox service.
I have not located any other cases which address the due process aspects of mailbox service, although my search may not have been exhaustive enough.

4) My instinct is that generalizations about the relationships between mailbox proprietors and renters under Oregon's "reasonably calculated" standard may be risky. The schism between the California and Texas federal courts shows that the issue is not entirely free from doubt. While it may well be that the legislature could require mailbox companies to act as agents for renters for service of process under defined circumstances, absent such an edict may courts presume the existence of an adequate relationship for due process purpose without, for example, considering the terms of the rental contract and other relevant facts? Perhaps, but at least one federal judge would seem to disagree.

5) Even without a formal mailbox service rule, it seems plausible to me that Oregon courts might well uphold either office service, or possibly even mail service to the defendant at a private mailbox where the facts satisfy ORCP 7D.(1). However, the inquiry would perhaps be so fact specific as to defy certain predictability. Further to this speculation, how is the liklihood of actual notice to the defendant enhanced by personal delivery to a person in charge at the mailbox office versus mailing to the defendant at the mailbox address? See 7), below.

6) Please note that the rule proposed by the Oregon process servers is more liberal in certain respects than either the California or Washington versions. For example, both comparison statutes provide that service is complete on the 10th day after mailing. The proposed rule provides that service is complete upon mailing. In addition, the other statutes make mailbox service secondary to personal service which can be accomplished with reasonable diligence, whereas the proposal triggers mailbox service where an address for the defendant is unknown (not reasonably unknown) , or the person cannot be served at home, business or place of employment.

7) The proposed rule imposes upon the proprietor the obligation to place the documents in the mailbox on the day of delivery. It is unclear how the proprietor's failure to comply in a timely manner, or at all, might affect the validity of service, or the sanctity of a subsequent default order or judgment.

No doubt you will see issues and questions which I have overlooked. I suggest that we schedule a conference call to discuss this proposal sometime in the next two weeks or so, if possible, so that we may have the makings of a report to the Council for the May meeting. I'll ask Gilma to contact each of you to schedule the call. I look forward to our discussion.

Very Truly Yours,

Dave Brewer

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425 (S.D.Tex.))

Stephany Lee BURROWS
v.
The CITY OF LEAGUE CITY, TEXAS and Officer Brian Fletchall
No. CIV. A. G-97-242.
United States District Court,
S.D. Texas,
Galveston Division.
Dec. 19, 1997.

Plaintiff sued city and police officer, alleging she was sexually assaulted while she was in custody of police as pretrial detainee. Police officer moved to dismiss or to quash service of process. The District Court, Kent, J., held that service was properly effected under California law by mailing copy of summons and complaint to defendant's private post office box.

Motion denied.

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425 (S.D.Tex.))
Burrows v. City of League City, Tex.

> 313 PROCESS
> 313II Service
> 313II(B) Substituted Service
> 313k76 Mode and Sufficiency of Service

> 313k82 k. Mailing as constructive service.
S.D.Tex.,1997.
Under California law as predicted by the district court, service on defendant was properly effected by mailing copy of summons and complaint to defendant's private post office box by first class mail and by certified mail, return receipt requested; statute allowing service at person's usual mailing address only exempted United States Postal Service post office boxes, and person in charge of private post boxes to receive certified mail for post box renters told plaintiff's process server that he had received documents and had personally given them to defendant. > West's Ann.Cal.C.C.P. s 415.20(b); > Fed.Rules Civ.Proc.Rule 4(e)(2), 28 U.S.C.A.

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425 (S.D.Tex.))

Jerome Mansour Karam, Webster, TX, for Stephany Lee Burrows.
William Scott Helfand, Jennie Stinebaugh, Magenheim Bateman Robinson Wrotenbery and Helfand, Houston, TX, for City of League City, Texas.
John Joseph Hightower, Olson & Olson, Houston, TX, for Brian Fletchall.

ORDER

KENT, District Judge.

*1 This lawsuit arises from Plaintiff's claims that Defendant Fletchall sexually assaulted her while she was in custody of the League City Police as a pretrial detainee. Plaintiff asserts various causes of action against Fletchall, including claims under > 42 U.S.C. s 1983 for violations of her Fourteenth Amendment rights, claims under the Texas Tort Claims Act, and state law claims of assault and battery, and intentional infliction of emotional distress. Now before the Court is Defendant Brian Fletchall's Motion to Dismiss or, in the Alternative, to Quash Service of Process, filed on November 10, 1997. (FN1) For the reasons set forth below, the Motion is DENIED.

Fletchall moves to dismiss himself from this case pursuant to > Fed. R. Civ. P. 12(b)(5) for insufficiency of service or process. Plaintiff has responded to the Motion to Dismiss, stating that her process server, Ralph Brannen, properly served Defendant Fletchall at the Defendant's only known address.

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425, *1 (S.D.Tex.))

(FN2) That address is a private post office box in Studio City, California. Brannen attempted service at that address on July 18, 1997, and spoke with an employee who confirmed Fletchall's address and post box number. On July 28, 1997, Brannen spoke with an employee named John Blakely, who was in charge of the private post boxes. Blakely confirmed that Fletchall was still the user of the post box, and accepted the papers, assuring Brannen that he would see to it that Fletchall received them personally. Brannen mailed a copy of all the documents to Fletchall at the address of substituted service, two times: first, on July 28, 1997 by first class mail, and second on September 21, 1997 by certified mail, return receipt requested. The second set of documents mailed by Brannen were received by John Blakely on September 22, 1997. On October 23, 1997, Brannen spoke with Blakely, who informed Brannen that he had personally given the Summons, Complaint, and all other documents to Fletchall. Blakely also informed Brannen that it was his responsibility, as the person in charge of the private post boxes, to receive certified mail for the Post Box Renters.

Under the Federal Rules of Civil Procedure, service "may be effected in any judicial district of the United States ... by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." > Fed. R. Civ. P. 4(e)(2) (emphasis added). Therefore,

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425, *1 (S.D.Tex.))
the Court looks to California law to determine whether Brannen, as the person in charge of the private post office boxes, was authorized by law to receive service of process.

California law provides:

(i)f a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in (other provisions providing for service of process), a summons may be served by leaving a copy of the summons and of the complaint at such person's ... usual mailing address other than a United States Postal Service post office box, in the presence of a competent ... person apparently in charge of his or her ... usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

*2 > Cal. Civ. Proc. Code s 415.20(b) (West 1997) (emphasis added).

Fletchall relies on a federal district court case, > Bonita Packing Co. v. O'Sullivan, 165 F.R.D. 610 (C.D.Cal.1995), to argue that delivery of the summons and complaint to Blakely is not effective service on Fletchall. The

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425, *2 (S.D.Tex.))

> Bonita court found that "(t)he owner of a private post office box company is not a person who has a sufficient relationship to the renter of a private post office box to assure that the renter will receive actual notice of a pending legal proceeding." > Id. at 614. The Court also likened private post office boxes to United States Postal Service boxes, and opined that the California legislature had shown its intention to preclude service at post office boxes in general. > Id. This Court respectfully disagrees with > Bonita. (FN3) By the clear and unequivocal language of the California statute, the California legislature has mandated that service at a person's usual mailing address other than a United States Postal Service post office box is effective. Had the legislature intended that service be effective only at mailing addresses other than any post office box, it would have omitted the descriptive language "United States Postal Service" preceding "post office box." Clearly, the legislature felt it necessary to clarify which types of post office boxes which were excluded from the rule. By implication, service is proper on private post office boxes. (FN4)

Therefore, the Court finds that, under California law as expressed by the clear and unambiguous language of > Cal. Code Civ. Proc. 415.20(b), service on Brian Fletchall was properly effected as of September 7, 1997, or alternatively as of October 1, 1997. (FN5) Accordingly, Defendant Brian Fletchall's Motion

(To be reported at: 985 F.Supp. 704)
(Cite as: 1997 WL 789425, *2 (S.D.Tex.))
to Dismiss or, in the Alternative, to Quash Service of Process is emphatically DENIED. Defendant Fletchall is ORDERED to file an Answer to Plaintiff's Complaint forthwith, pursuant to the Federal Rules of Civil Procedure.
T IS SO ORDERED.

FN1. An Amended Motion was filed on December 8, 1997.

FN2. Because Fletchall was not represented by counsel apparently until the filing of his Motion to Dismiss, service under > Fed. R. Civ. P. 5(b). Also, according to an affidavit from a Harris County process server first assigned to serve Fletchall with the summons, the server first attempted service at Fletchall's place of employment, the Houston Police Department, but was informed he no longer worked there. She next attempted service at his Houston residence, and was informed that he had moved to California. She attempted service once more, at the District Attorney's office in Galveston, where Fletchall was supposed to attend a hearing, but was unable to serve him.

FN3. The language quoted in > Bonita is arguably dicta, since the holding was largely premised on the fact that service on the defendant's attorney

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was readily available, but not utilized by the plaintiff. > Bonita, 165 F.R.D. at 614; see > Fed. R. Civ. P. 5(b). "Even if not legally deficient, the method of service selected by intervening plaintiffs was, thus, insufficient because a better method of service was easily available." > Bonita, 165 F.R.D. at 614. In this case, service under > Rule 5(b) was not possible, as Fletchall was not represented by counsel until the filing of the instant Motion to Dismiss.

FN4. The Court notes also that Defendant Fletchall has apparently been intentionally evading service of process in this case. He willfully removed himself from this state after the occurrence of the facts made the basis of this lawsuit, and the Court refuses to allow him to capitalize on his purposeful avoidance by subscribing to a strained and unnatural interpretation of an unambiguous statute.

FN5. These dates represent a time period of ten days after the mailing of a copy of the summons and complaint subsequent to substituted service. The mailing was accomplished first on July 28, 1997, and second on September 21, 1997.

END OF DOCUMENT

COVER SHEET FAX

To: Maurice J. Holland
Fax #: 541- 346-1564
Subject: Council on Court Procedures
Date: March 13, 1998
Pages: 3, including this cover sheet.

COMMENTS:

I have redrafted the language after our telephone discussion. I see some further problems but I may just drop this until we get feed back from the larger group.

From the desk of...

DON A. DICKEY
Judge
Marion County Circuit Court
P.O. Box 12869
Salem, OR 97309-0869

(503) 373-4445
Fax: (503) 373-4361

MODIFICATIONS AND ADDITIONS TO RULE 39

Rule 39 E presently reads as follows:

At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. Those persons described in Rule 46 B.(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

Rule 39 E is amended to read as follows:

E. (1) At any time in connection with the taking of a deposition, on motion by a party or the deponent and a showing that the examination is conducted or hindered in bad faith or in a manner as unreasonably to annoy, embarrass, oppress or unduly burden the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken may order the parties to cease forthwith from taking the deposition, or limit and control the scope and manner of taking the deposition as provided in Rule 36 C. If the order terminates the examination, the deposition shall be resumed only upon order of the court in which the action is pending. Upon request of the objecting party or the deponent, a deposition may be suspended to allow time for a motion to be presented under this rule. The court where the action is pending may make orders as follows: award reasonable expenses pursuant to Rule 46 A.(4) incurred in connection with the motion and, after consideration as contempt of court of the acts and failures of the other party, grant sanctions and make orders in regard thereto as are just, including orders as described in Rule 46 B.

E. (2) If the court finds that a party or the deponent has unreasonably impeded or delayed a deposition, such is sufficient good cause under Rule 39 C.(3) to allow the court to modify the time limits of the deposition. In such an instance, the court may award reasonable expenses pursuant to Rule 46 A.(4).

E. (3) Any objection during a deposition shall be stated concisely and shall not be argumentative or suggestive. A party may instruct a deponent not to answer a question only as follows: to comply with or to enforce any limitation on evidence or the question as directed by the court, to present a motion under E (1) of this Rule, or to preserve a valid privilege.

E. (4) If a break in questioning is requested, it shall be allowed if a question is not pending. If a question is pending, the question shall be answered before the break is taken, unless the question involves a matter which a party has properly instructed the deponent not to answer pursuant to E. (3) of this rule, or is such as the deponent may properly decline to answer because of the constitution, a statute or the work product rule.

E. (5) **Appropriate court for non-parties.** The above provisions of this rule notwithstanding, the Appropriate court for application of an order to a non-party deponent shall only be as provided in Rule 46 A.(1)(b) and Rule 46 B.(1): to the court of competent jurisdiction in the political subdivision where the non-party deponent is located.

* * *

Rule 39 C.(3) presently reads as follows:

Shorter or longer time. The Court may for cause shown enlarge or shorten the time for taking the deposition.

Rule 39 C.(3) is amended to read as follows:

Time Limits for Deposition. The court may establish time limits on depositions pursuant to local rule or by order, and may modify the time limits upon good cause.

May 16, 1998

To: ORCP 7 Subcommittee (Judge Dave Brewer, Chair; Justice Skip Durham, Mr. Rudy Lachenmeier, Mr. Dave Paradis, and Mr. Karsten Rasmussen, members)

Fm: Maury Holland

Re: Suggested Fix to ORCP 7 E Problem

This replaces my 2-11-98 memo which, despite the legend at the top, was not distributed to the full Council, but only to subcommittee members at the 2-14-98 meeting. Below is language amending ORCP 7 E to deal with what all subcommittee members agreed is a minor problem with this section as it presently appears, namely, its disqualification of attorneys from among those eligible to serve summons even when service is by mailing pursuant to D(2)(d)(i) and D(3)(a)(i). [Language added in bold and underlined; language omitted in strikeover]:

E. BY WHOM SERVED; COMPENSATION

A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action ~~nor~~, except as provided in ORS 180.260, an officer, director, ~~or~~ employee ~~of~~, ~~nor~~ attorney ~~for,~~ **of** any party, corporate or otherwise. **However, an attorney of a party to the action may serve summons pursuant to subparagraph D(2)(d)(i) of this rule.**

As you see, I also tried to clean up the language of this section a bit. A separate sentence beginning: "However" seemed to me a little better than something like: "and except that . . . ."

To expedite things, and possibly to avoid the need for a telecon where it is usually difficult to get everybody on board at the same time and date, I suggest that **IF ANY ONE OF YOU DON'T LIKE THE AMENDMENT SHOWN ABOVE OR WISH TO SUGGEST CHANGES, YOU PLEASE CONTACT JUDGE BREWER BY PHONE, FAX OR LETTER, NO LATER THAN JUNE 5.** He can then decide whether a telecon is unnecessary before taking this suggested language to the Council at our June 13 meeting.

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April 5, 1998

To: Chair and Members, Council on Court Procedures

Fm: Maury Holland, Executive Director M.J.H.

Re: The Problem about Rule 68 Findings and Conclusions

I hesitate to bother you with an idea, different from those the Council has considered thus far, about how the problem of facilitating review of attorney fee awards might be solved without requiring trial judges to make or approve findings and conclusions in every case where they are timely requested. My hesitation is all the greater because I have already sounded out Skip Durham about my alternative idea, and his reaction was that it is not practicable. But I've decided to write this up anyway on the off chance that, with some polishing by you folks if it appeals to enough of you to warrant the effort, Skip might be persuaded.

My extremely tentative suggestion is that the second sentence of subparagraph 68 C(4)(c)(ii) be deleted, and a new paragraph 68 C(4)(e) be added to read as follows:

> C(4)(e) Request for Findings and Conclusions. No findings of fact or conclusions of law shall be necessary in connection with a ruling on attorney fees unless objection to a statement seeking such fees has been served in accordance with paragraph (b) of this subsection, and unless, within [??] days of serving on the clerk of the trial court notice of appeal including a statement pursuant to ORAP 2.05 that appeal is taken from a judgment, or some specified part thereof, awarding or refusing to award such fees, any party interested in such judgment serves on the clerk of the trial court and on all other interested parties a request for such findings and conclusions. After such request is filed the court may propose findings of fact and conclusions of law material to its judgment awarding or refusing to award attorney fees, or may on notice order any interested party to file with the court, and serve on all other interested parties, requested findings and conclusions. Before making its findings and stating its conclusions the court shall by order provide for filing and service of any objection to proposed or requested findings or conclusions, and, if the court deems necessary or expedient, for hearing on the same. If timely requested in accordance with this paragraph, the court shall provide to all parties interested in a judgment awarding, or refusing to award, attorney fees findings of fact and conclusions of law

material thereto in time and form suitable for inclusion in the record on appeal. A party failing to request findings and conclusions pursuant to this paragraph thereby waives any contention[1] that a judgment awarding, or refusing to award, attorney fees is not adequately supported by findings of fact or conclusions of law.

The drafting above could doubtless be vastly improved upon if there is any interest in trying to do so. I've left the provision for the days following a notice of appeal within which a request for findings and conclusions must be served blank, because I don't have a feeling for what that time period should be, except that it should be quite short.

The great advantage of keying requests for findings and conclusions to the statement in the notice of appeal is that it would eliminate the need for trial judges to bother about them except when they are actually needed for purposes of appellate review. Of course it runs counter to two points urged by Michael Marcus and others. Those are that the requirement of making findings, etc., can serve important purposes independent of facilitating appellate review, and that trial judges should know, at the time they are in the process of deciding about fee requests, whether or not they must make findings and state conclusions. My suggested scheme would require trial judges to cast their minds back several weeks. This drawback would be mitigated by having to make findings and state conclusions in only 5%, 10%, 20%, whatever, of the cases in which they would have to do so under the proposals hitherto considered by the Council.

Whether my proposal is worth any serious consideration probably depends upon the proportion that cases wherein the losing party appeals an award, or the prevailing party appeals the trial court's refusal to award more, bears to the entire universe of cases in which attorney fees are sought. If the proportion is anything like on the order of 25% or more, then the complexities my proposal would introduce, plus the disadvantage of its requiring trial judges to cast their minds several weeks in the past, would probably not be worth the gain it would achieve in relieving trial judges from having to make findings and state conclusions in every case where requested. If, on the other hand,

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[1] "[A]ny contention" might not be right. I originally had: "thereby waives assignment of error on appeal . . . ," but that's no good because it would obviously state a rule of appellate procedure. Trial court rules, including the ORCP, can and do typically contain all sorts of waiver provisions. However, such waivers are technically applicable only in the trial court. It is up to the appellate courts whether to extend trial court waivers to waiver of, or failure to preserve, error on appeal, which they almost always do. In this context, the entire point of waiver would be waiver on appeal, since trial court proceedings will have been concluded, but no ORCP provision can directly state an appellate waiver rule.

the proportion is anything on the order of 5% or less, perhaps the gain would be worth the complexity, fuss, and bother.[2] Additionally, I wonder whether the strong and sensible objection of trial judges to any procedure that would require them to go back several weeks in time might not be sufficiently met by the option of ordering the party that prevailed respecting attorney fees to submit requested findings and conclusions.

Another thing I don't know is whether my proposed language should require the trial court to hold a hearing whenever proposed or requested findings and conclusion are objected to, should require a hearing only when so requested by a party, or, as I have provided, hold a hearing only as a matter of the court's discretion.

Yet another thing that would need some thought is how to provide the parties to an appeal involving attorney fees with requested findings and conclusions in time for supplementation of the record on appeal. In order not to delay briefing and argument of the appeal, the parties would have to get the findings and conclusions well before the opening brief is due for filing and serving. I haven't carefully checked my proposal against all the mechanics of perfecting an appeal in conformity with Chap. 19 of the ORS and the ORAP, but this would obviously have to be done. I didn't think it appropriate to put trial courts under an obligation to provide findings and conclusions within some stated number of days after their being requested.

Two more quick points. First, I don't think there is any doubt that my proposal stays within the bounds of trial court procedure, and doesn't venture into the domain of appellate procedure, which of course is out of bounds for the Council. Secondly, it has by no means been unknown in the tradition of Anglo-American procedure for trial courts to be required to add to, or furnish something for, the record of a case even after the case is on appeal. Sometimes remands for further proceedings have substantially that effect. There is also the old-time "by-stander's bill of exceptions," which were used when an error asserted on appeal was not shown in the official trial court record, but was shown by means of something akin to an affidavit of a disinterested (hence "bystander") person who happened to be present in court and observed its occurrence.

Naturally, I could be wrong, but my guess is that the response from the Judicial Conference will be overwhelmingly adverse to any amendment requiring findings and conclusions. I keep thinking of that letter we received a couple of years ago from Jack Mattison, a very highly respected judge here in Lane County. If my guess proves correct, maybe the Council would then

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[2] As far as I know, these figures are not available from the State Court Administrator, or any other source. However, judicial members of the Council will probably have a pretty good idea of roughly what the relevant proportion is.

think it worthwhile to give something along the lines I propose further thought. It's a bit Rube Goldberg-like in its present form, but it could be worked on and improved.

Post-it® Fax Note 7671	Date 7-29-98	# of pages ▶ 1
To Justice Durham	From Colleen Henderson	
Co./Dept.	Co.	
Phone #	Phone # 541-346-3990	
Fax # 503-986-5730	Fax # 541-346-1564	

GAYLE A. NACHTIGAL
JUDGE

CIRCUIT COURT OF OREGON
TWENTIETH JUDICIAL DISTRICT
Washington County Courthouse
145 N.E. Second Avenue
Hillsboro, Oregon 97124

July 23, 1998

Professor Maury Holland, Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403-1221

Re: Proposed Changes to ORCP 68

Dear Professor Holland:

I am sorry for the delay in responding to your letter, however, I was on vacation for three weeks and am just now getting to the bottom of my in-basket. I realize this response is beyond the action time, but for what it is worth I would support proposal two as it is cleaner and simpler.

Sincerely,

Gayle A. Nachtigal
Presiding Judge

GAN/mmw

cc: Justice Durham

RESPONSES FROM JUDGES REGARDING ORCP 68

STEPHEN N. TIKTIN, *Presiding Judge*
MICHAEL C. SULLIVAN, *Judge*
EDWARD L. PERKINS, *Judge*

CIRCUIT COURT OF OREGON
ELEVENTH JUDICIAL DISTRICT
DESCHUTES COUNTY JUSTICE BUILDING
BEND, OREGON 97701
(541) 388-5300 (Voice & TDD)

ALTA J. BRADY, *Judge*
A. MICHAEL ADLER, *Judge*
BARBARA A. HASLINGER, *Judge*

July 6, 1998

Professor Maury Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403

RE: Proposed Changes to ORCP 68 to Recognize the Need for Special Findings on Attorney Fees

Dear Professor Holland and Council on Court Procedures:

I am responding to Bruce Hamlin's letter of June 26, 1998.

I share the view that in most, but not all instances, findings of fact and conclusions of law regarding attorney fee awards are unnecessary and an unwarranted burden on already overloaded courts. The common dispute involves a claim by the losing party that the attorneys fees sought by the prevailing party are simply "too much" given the nature of the claims and defenses and the amount in controversy. When a judge awards the amount requested or reduces the attorney fees, the court is making a finding about what is reasonable. Requiring a special finding, for instance, that each service performed was or was not necessary adds little, except needless labor and delay, to the sensibility of the decision.

On the other hand, bad faith or frivolous claim cases present a different problem. Mattiza v. Foster, 311 Or 1 (1990) involved an award of attorney fees under ORS 20.105. McCarthy v. Oregon Freeze Dry, Inc., 327 Or 84 (1998) involved an award of fees by the Court of Appeals where defendant contended plaintiff's appeal was frivolous. The appellate courts have said that these cases require findings of fact, and rightfully so. These cases involve whether attorney fees should be awarded, not the amount. Extrapolating from Mattiza and McCarthy to a rule which potentially requires findings in every case goes unnecessarily far.

Therefore, I propose a rule which allows the parties to request findings of fact in cases arising under ORS 20.105, ORCP 17 or other statutes or rules which allow an award of attorney fees for bad faith or frivolous conduct, on the issue of whether or not to award the fees. An alternative proposal would be to require, if requested, findings pursuant to ORS 20.075 (1) on the issue of

whether to award attorney fees where an award is discretionary.

Thanks for considering my suggestions.

Sincerely,

STEPHEN N. TIKTIN
Presiding Judge

SNT/adb

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

PAUL LIPSCOMB, Presiding Judge
(503) 588-5024
FAX (503) 373-4360

July 2, 1998

Prof. Maury Holland
Executive Director
Council on Court Proceedings
1221 University of Oregon
School of Law
Eugene OR 97403-1221

Re: Rule 68

Dear Prof. Holland:

Bruce Hamlin has asked me to respond to you regarding his letter of June 26. My thoughts are as follows:

As you know, the Oregon Rules of Civil Procedure are statutory in nature. However, those rules, by their very nature, impact court procedures. Accordingly, the appellate courts also have a role in regulating those same procedures. From a separation of powers perspective, I think that this is what we call a dual regulatory authority situation. Typically, in those situations, unless the legislature's regulatory scheme is invasive enough so as to adversely affect the ability of the courts to perform their constitutional function, it is the courts that give way to the legislature, rather than vice versa. Frankly, I'm a bit puzzled as to why the legislature is, under these circumstances, being asked to bring their statutory enactments into conformance with the recent judicial decisions in the absence of a Constitutional defect.

Be that as it may, I don't really see a need to change Rule 68 even in the face of the recent appellate decisions requiring findings by the trial court. So far as I am aware, each of these appellate cases addressed attorneys fees awarded as a sanction under ORCP Rule 17 or under ORS 20.105. Rather than amend the general rule (Rule 68), I would suggest that it would be sufficient, and preferable, to amend the specific statutory enactments actually affected by those recent appellate decisions (Rule 17 and ORS 20.105) to make plain that awards under those provisions now require articulate findings. (McCarthy v. Oregon Freeze Dry, Inc. is not a Rule 68 case and operates only with respect to the Court of Appeals, rather than the trial courts. Rule 68 does not apply to the appellate courts.)

Requiring articulated findings whenever imposing any sanction is probably good public policy. The recipient of the sanction certainly should be told why he or she is being sanctioned, otherwise the punishment may appear pointless and arbitrary, and the lesson is

lost. Arguably, the public should also have notice of the reason the sanction was imposed so that similarly situated parties can better govern their own conduct in the future. Accordingly, I do think that cases involving the imposition of attorneys fees as a sanction under Rule 17 or ORS 20.105 are distinctively different from typical Rule 68 situations and justify different treatment as a matter of good public policy.

I don't think the general provision, Rule 68 itself, should be changed, however, and certainly not just to make appellate review more "meaningful." First, most cases (indeed the vast majority of cases) are not appealed. Accordingly, we would be adding additional costs to all attorney fee cases at the trial level, in order to impact the relatively insignificant number of cases which do appeal on that issue outside the context of Rule 17 and ORS 20.105. (Again, Rule 17 and ORS 20.105 cases can be treated separately without adversely impacting Rule 68.)

Second, I question whether the actual result is likely to be any different after the appellate remand if a trial court's findings are deemed inadequate on appeal. Many months of appellate briefings, arguments, and waiting for the decision is probably only going to be followed by the identical financial award accompanied by a more complete explanation by the trial court on remand. I doubt that this rather limited "benefit" to the litigant aggrieved is likely to be worth the "cost" to any litigant or to the public in getting there.

Third, I think trial court decisions under Rule 68, as well as most other discretionary trial court decisions, should be treated as presumptively correct. I think the appellant seeking to show an abuse of discretion should be required to demonstrate that the decision in question is outside the permissible range of potential discretionary decisions as determined by the evidence presented. Abuse of discretion has always been a tough appellate standard under the past practices in this state, and I think it should continue to be so. Only if the court's discretionary decision is outside the universe of acceptable decisions has the appellant really been wounded unfairly. If the court's decision is within the range of acceptable decisions which could be reached, it should matter not <u>why</u> the court actually reached the decision it did, at least in terms of appellate review.

Finally, if you do decide to rewrite Rule 68, then I'd lobby for Proposal Two as the less burdensome and less expensive alternative for the litigants, the public, and the courts.

Sincerely,

Paul J. Lipscomb
Presiding Judge

PJL:ka
cc: Bruce Hamlin

holland.ltr.70298

CIRCUIT COURT OF OREGON
FOR BENTON COUNTY

ROBERT S. GARDNER
CIRCUIT JUDGE

P.O. BOX 1870
CORVALLIS, OREGON 97339
TELEPHONE 541-757-6827

BENTON COUNTY COURTHOUSE

July 7, 1998

Professor Maury Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403-1221

RE: COUNCIL ON COURT PROCEDURES
FINDINGS FOR ATTORNEY FEES AWARD ISSUE

Dear Professor Holland:

The most difficulty I will encounter with the Council's proposed rule will be in domestic relations cases. I feel that findings should not be required for attorney fee awards in domestic relations cases for the following reasons:

1. Most attorneys tell me that they prefer that the judge make the attorney fees award at the time the judge announces or writes his or her decision. When the issue is delayed, it keeps the litigation going. Also, often it is difficult to separate the considerations for awarding attorneys fees from the considerations for dividing up the party's assets.

2. Oftentimes attorneys are not able to get the dissolution decree finalized right away and so quite a bit of time can elapse before the judgment is submitted along with the attorneys fees request. The best thing a judge can do in these circumstances in 95%of the cases is to carefully review the written fee request and the objection and make a decision. The worst thing that can happen is for one of the attorneys to request a hearing (or findings) and prolong the process with more expense to the respective clients.

3. Who pays the other parties attorney fees is often a very big, highly charged emotional issue in a dissolution trial (e.g., the angry husband who does not want a divorce and does not understand why his pension must be divided and now, has to pay his wife's attorney fees). Therefore, I think that, at least for a while, there may be a number of requests for findings on attorney fee awards as well as some appeals from the findings.

4. It has been my experience that after several rounds of appeals and the appellate courts will just hold that they will not look behind the findings made by the judge and the findings will tend to become meaningless boiler plate. An example, would be in criminal cases where the Court has to make a finding that the defendant can afford to pay restitution before the Court can order him or her to pay restitution. But all the trial Court has to do is to say that he or she has found the ability to pay and that is the end of the issue.

I can certainly manage with the new proposed rule, but it will, at least initially, cost us all more time and the clients more money. I just cannot see changing a rule that works well in the great, great majority of cases to cover the few cases in which it does not work. I would think with a little more creativity, one could come up with a rule that would cover those types of cases likely to need findings when attorney fees are or are not awarded.

Very truly yours,

Robert S. Gardner
Circuit Judge

(acknowledged 7-2-98)

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

RICHARD L. BARRON
Judge

Coos County Courthouse
Coquille, Oregon 97423
396-3121

July 1, 1998

Professor Maury Holland
Executive Director
Council on Court Procedures
1221 University of Oregon
School of Law
Eugene, OR 97403-1221

Re: ORCP 68C(4)(c)(ii)

Dear Professor Holland:

I am in receipt of Bruce Hamlin's letter dated June 26, 1998 regarding the amendment of the above rule and creation of a new rule numbered 68C(4)(e). At the risk of adding to what I am sure has been a lengthy and exhaustive discussion of the above, I would propose that after deleting the second sentence in 68C(4)(c)(ii) the following be adopted as 68C(4)(e):

Findings and Conclusions. On the written request of a party, the court shall make special findings of fact and state its conclusions of law regarding the award or denial of attorney fees. The request must be included in either the statement of attorney fees and costs and disbursements filed under ORCP 68C(4)(a) or in the objections filed under 68C(4)(b). If no objection is filed, the court need not make findings of fact and conclusions of law.

The proposals presently before the Council allow oral and letter requests. I assume the Council did not intend to allow a party to call in a request, but there is nothing to prevent it under the proposals. Further, written letters are sometimes placed on the side of the file with other letters that do not deal with either procedural or substantive matters and, therefore, are not seen or considered by a judge. A request in a document already required to be filed is the best way to put the court on notice that findings and conclusions are necessary. A party can easily add the request to the heading and body of the pleading. If the Council thinks that creates problems, then require a separate motion, but require it to be filed at the same time the statement or objections are filed.

I see no need for stating that findings and conclusions be material. It goes without saying that a court will only make findings and conclusions that are material to the issue before it. It seems like a waste of words.

Is there a reason for creating a separate time for filing a request for findings and conclusions? Why create a time trap and the necessity for a court to wait an additional seven days or until the date of the hearing to see if a party wants findings and conclusions? A party requesting attorney fees can

easily request findings and conclusions at the time the statement for attorney fees is filed and an objecting party can easily submit a request at the same time the party files the objections. There is no reason for allowing additional time to make a request. It is simple and straightforward. A party either wants findings and conclusions or a party does not want them.

The waiver language in the two proposals is unnecessary. If a party does not request findings and conclusions, the party is not entitled to them. I believe there is case law relating to ORCP 62 that so states and I cannot see why there would be a difference regarding ORCP 68.

I included the last sentence of my proposal to make it clear that even though a party seeking attorney fees also requests findings and conclusions, the court does not have to make them when no objection is filed. It would be unnecessary although a court for some reason may wish to do so.

Sincerely,

Richard L. Barron
Presiding Judge

Suaviter in Modo
Fortiter in Rem

June 1, 1998

To: Rule 39 Subcommittee (Bruce Brothers, Chair; Ted Carp, Don Dickey, Karsten Rasmussen, Members)

Fm: Maury Holland M. J. H.

Re: Proposed Modifications and Additions to ORCP 39 E

When I phoned Don about three weeks or so ago to tell him that the May Council meeting had been canceled, he graciously invited me to send to all of you any comments or suggestions I might have regarding your proposed amendments to ORCP 39 E as dated 3-13-98. Since doing that sort of thing is part of my job, and because, like most people, I very much enjoy taking pot shots at other folks' drafting efforts, which is so much easier and more fun than doing the heavy lifting oneself, I told Don I'd try to get my comments to all of you pronto, and certainly in time for your subcommittee to consider them prior to the June 13 meeting. A few days after insouciantly making that promise, I was struck with what must have been the mother of all flu bugs, and for the past two weeks have hardly been able to get out of bed. I am now sufficiently recovered that I can get to work on what I told Don I'd do. However, I will obviously not be able to get anything to you in time for you to confer as a group, prior to the June 13 meeting, to consider whether you might wish to modify proposed new 39 E(1), (2), or (3) in light of whatever I come up with.

The 39 E amendments as dated 3-13-98, and as they will be distributed with the agenda of the Council's 6-13-98 meeting unless you have already agreed among yourselves on further changes, seem to me useful and headed in the right direction. However, I also think there is some considerable room for improvement. With the right amount of effort, a little research in support of your efforts on my part, and a bit of inspiration, I think the problems raised in Ms. Solomon's 2-10-98 letter to Bruce Hamlin afford the Council an opportunity to make a significant, practical contribution to good deposition practice in Oregon. In fact, as a result of just starting some LEXIS research on a national scale, I'm finding that the difficulties to which your proposed 39 E amendments are addressed are increasingly coming to the fore across the country, and are eliciting a variety of responses from rule-makers and judges. Rules governing oral depositions have long reflected the well understood need to provide authority for judicial protection of deponents against bullying or abusive tactics of deposing counsel. However, only more recently, it seems, has a need to deal with the converse problem--obstructive, delaying tactics of counsel "defending" depositions--been widely perceived and getting some attention.

One very promising source of possible inspiration I've started to explore is a three-volume compilation of all 91 sets of Local Rules of U.S. District Courts, although until now I thought I'd just wait and see the movie version when it comes out. While I haven't nearly finished my excursion

through this exciting compendium, I've seen enough to know that many of these Local Rules deal in considerable detail with attorney conduct at oral depositions, and should provide at least a few good drafting models.

While, naturally, it is not my place to tell your subcommittee how to conduct its business, might I nonetheless suggest that Bruce, or whoever will be making your subcommittee's interim report to the Council at the June 13 meeting, simply go ahead and report on how matters then stand and ask for whatever reactions members might offer to proposed 39 E(1), (2), and (3) as dated 3-13-98, which is, of course, the form in which Council members will get them as an attachment to the agenda of that meeting unless you send me a version incorporating any later changes you might already have agreed upon. Bruce might say at the outset of his report that your subcommittee is not, at that point, reporting any recommended specific language for the Council to vote on, but merely sounding members out on their reactions to the language shown in the attachment in an effort to provoke discussion, whether narrowly focused on specific wording or more generally pitched at the level of policy objectives. My guess is that Anna Brown's Rule 55 subcommittee will be doing much the same thing, and perhaps others as well.

Those of you who are new to the Council should know that there is absolutely nothing unusual, and certainly nothing wrong, with a subcommittee proceeding in this manner, that is, by one or more interim reports keyed to highly tentative, evolving wording of proposed amendments, which are provided for illustration and to focus discussion, and not to be voted on by the Council until the subcommittee is prepared to report specific recommended language in final form. The Council, in other words, does not expect a subcommittee's initial report also to be its final one, where its recommended amendments are in form for the Council to vote on. In past biennia I can recall instances where a subcommittee made as many as three or four such interim reports over a succession of several Council meetings, for discussion and feedback, before finally reporting its recommended amending language. And, of course, even that is not necessarily the end of the process, because the full Council has been known either itself to amend language reported out by a subcommittee which the latter had assumed would be final, or, more often, to "remand" the language reported out by a subcommittee for further revision by it in light of whatever discussion and debate had ensued in the Council. Even when the Council formally votes to adopt a subcommittee's reported recommended language, that adoption remains only tentative until the vote on promulgation at the December meeting prior to opening of the Legislature. (Describing the process this way makes it seem almost grimly formal, something like the Law Lords of Appeal in Ordinary, but, as Karsten knows from his past experience, the whole thing really consists of lots of informal give and take, and even the occasional exchange of good-natured insults about one another's drafting efforts.)

One other thing which might be useful for me to say, especially for Bruce's benefit as Chair, is that whenever your subcommittee needs to confer for discussion, debate, or any internal voting you might conduct (although subcommittees seem usually to operate by consensus), you should feel free to

phone Gilma Henthorne (541-346-3990) and ask her to set up a conference call for you. Arranging for a conference call often entails a fair amount of advance time and effort, but that is part of Gilma's job and she's good at it. Please try to give her three or four days lead time, since she will need to contact each subcommittee member separately to find out whether he can participate in the call at the time specified by Bruce. Also, by working through Gilma, it is much easier to get a conference call charged to the Council's budget, not your own. However, if your own office phone bills ever pick up charges for calls that should be paid out of the Council budget, please let us—~~k~~now and provide the documentation so that we can get you reimbursed. Conference calls, I've recently learned, can be pretty pricey.

Assuming you'll give me an extension of time to do now what I told Don three weeks ago I would do then, I could get my work product to you in time for your subcommittee to confer and discuss what, if any, revisions it might decide to make in proposed new 39 E(1), (2), and (3) in light of that product, sufficiently in advance of the Council's July 11 meeting so that any revisions thus agreed upon could be reflected in the amending language provided to members as an attachment to the agenda of that meeting. However, I don't want to raise undue expectations on your part as to what my contribution is likely to be. I'm no magician and have no silver bullets in my belt. The likelihood is that, whatever I ultimately provide for your consideration will represent only modest, marginal improvement over what your subcommittee has already produced.

After the July meeting, only those in August and September will remain at which further Council deliberation, fine-tuning and tweaking can take place. That will probably provide enough time, but if the Council could ever summon up the courage to ask the Legislature to delete the damnable "exact language" requirement of ORS 1.735(2), which was imposed on us as recently as 1993 and has hamstrung the Council ever since, meetings in October and November would become available for those purposes, at least in future biennia. Getting rid of that ill-considered requirement would ease the perennial pressure on the Council to rush things during the final months of a biennial cycle. But I suppose that is an issue for another day.

c: Bruce C. Hamlin (fyi)

CIRCUIT COURT OF THE STATE OF OREGON

for MULTNOMAH COUNTY
Michael Marcus, Judge
1021 SW FOURTH AVENUE, PORTLAND OR 97201
Department Number 35; (503) 248-3250; fax: (503) 248-3138; home fax: (503) 796-1234

Prof Maurice J. Holland
Executive Director
Council on Court Procedures

fax: 541 346 1564

June 10, 1998

Dear Prof. Holland:

Here's a copy of what I sent to Judge Brewer and Justice Durham: Sorry for the delay, but here are my comments on the latest draft (and I suggest we stop calling it a PMS amendment right away. If you don't know why, ask around. I've used CAPS below because I'm not sure that italics or bold would translate through email.

1. I would parallel (roughly) ORCP 7D(2)(c) office service by expressly including not just the "delivery of a true copy of the summons and the complaint to any person then on duty" but ALSO (expressly) the requirement that "the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at the mailing address related to the contract with the mail agent and any other mailing address known to the plaintiff."

Rationale: it is the combination of service by office service with the mail agent AND using the mail method appointed by the party who cannot otherwise be "found" which is the key to due process here; requiring service on any other mail addresses known to the plaintiff furthers the function of reasonable efforts to achieve actual notice. "Could not otherwise be found" does not negate the existence of another mailing address known to the plaintiff.

2. I would use "with a person apparently in charge" (as in ORCP 7D(2)(c)) instead of "on duty" to capture who it is we leave the summons with; I don't want to create the impression of more formality than in any other office situation.

3. Why delete the "place at which service was made" from the content of the "statement of time and date on which said papers were delivered"? Again, see ORCP 7D(2)(c).

4. Although I appreciate the difficulty of defining in advance what "due diligence" is (e.g., must one exhaust the person locators on the internet, or just the top five? Is voter registration, USPO, and DMV enough? Etc), I would require the affidavit not merely to recite that "due diligence" was met, but that it DEMONSTRATE due diligence by reciting what efforts were made. This would at least facilitate the development ane evolution of standards of diligence, and would probably reduce the burden on courts to take testimony on motions to set aside defaults and default judgments

Michael

June 16, 1998

To: Judge Dave Brewer (via fax) (9) 984-7437
Justice Skip Durham (via fax) (91)(503) 986-5730
Judge Michael Marcus (via e-mail) (also fax) (91) (503) 228-3425

Fm: Maury Holland M.J.H.

Re: Revised Mail Agent Service ("MAS") Amendment

Below is the Dave's latest revision of what will henceforth be referred to as the MAS amendment. It incorporates many of the changes suggested by Mike in his 6-10-98 fax, plus some changes of Dave's own devising. Dave would like to confer about this revision by phonecon on Wednesday, June _ at 12:00 p.m. if everyone is able to participate. Gilma will phone to check your availability. Dave hopes to have language, agreed upon by this subcommittee, ready to take to the Council at the July meeting:

[Language to be added in **bold underlined**; to be deleted in ~~strikeover~~]

D(3)(a) Individuals.

D(3)(a)(i) Generally. . . .

D(3)(a)(ii) ~~Minors~~ **Mail Agent. Provided the proof of service certifies that, after exercise of reasonable diligence in attempting to do so, the defendant could not be otherwise found, an individual defendant contracting with a mail agent as defined in ORS 646.221(1) to receive, store, sort, hold, or forward any United States mail on such defendant's behalf may be served by delivery of a true copy of the summons and the complaint to any person apparently in charge of such mail agent's office or place of business. The plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at the mailing address**

provided to the defendant by the mail agent, and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which service upon the mail agent was made.

D(3)(a)(~~ii~~ iii) Minors. . . . .

D(3)(a)(~~iii~~ iv) Incapacitated Persons. . . . .

MEMO

TO: **Judge Dave Brewer**
Judge Michael Marcus
Prof. Maury Holland

FROM: **Robert Durham**

RE: **Mail Agent Service**

DATE: **June 17, 1998**

I have no substantive concerns to share at this time regarding the MAS amendment set forth in Maury's June 16, 1998 memo. However, I should state a toe-in-the-door reservation of the right to address and decide arguments in future cases that may challenge the Council's ultimate rule on this issue.

I have some suggestions to offer that I hope will improve the clarity and usefulness of our proposal. For example, the current draft purports to add a new subsection, ORCP 7 D(3)(a)(ii), but its structure and phrasing depart from the form now used in the other subsections of ORCP 7(1)(3)(a) and the mail agent statute. Those departures could suggest, unintentionally, that a different interpretation is intended. Additionally, the proposed amendment is hard to read (to me), and we could eliminate some of its "tax code-itis" by redrafting it. I offer

the following as a straightforward restatement of the proposed amendment, with no substantive alterations intended:

D(3)(a)(ii) Tenants of a Mail Agent. For purposes of this subsection, the terms "mail agent," "mailbox," and "tenant," have the definitions stated in ORS 646.221(1), (2), and (3), respectively. Service may be made on a tenant of a mail agent by delivering a true copy of the summons and the complaint to any person apparently in charge of the mail agent's office or place of business, provided that:

(1) the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and complaint to the mail agent's mailbox address for the tenant, and to any other mailing address of the tenant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff served the mail agent, and

(2) the plaintiff files a proof of service that certifies that the plaintiff, after exercising reasonable diligence, could not find the tenant.

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
FAX (541) 682-7437

June 19, 1998

Hon. Robert D. Durham
Oregon Supreme Court
1163 State St.
Salem, Or. 97310
Via Fax- (503) 986-5730

Hon. Michael H. Marcus
Multnomah County Courthouse
1021 SW 4th Ave.
Portland, Or. 97204
Via Fax- (503) 796-1234

Professor Maurice Holland
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid St.
Eugene, Or. 97403
Via Fax (541) 346-1564

Post-it® Fax Note 7671	Date	# of pages ▶
To Prof. Maury Holland	From Dave Brewer	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 541-346-1564	Fax # 682-7437	

RE: Mailbox Service- Process Servers' Proposal

Dear Colleagues:

I have reviewed Skip's memo of June 18, and proposed redraft of the mail agent rule. I agree that another conference call before the July meeting of the Council makes good sense. I will ask Gilma to set one up, if possible, for the week of June 29, or at latest, the week of July 6.

A couple of quick reactions follow:

1) Memo, p. 2, line 8. I vote for "individual".

2) Memo, p. 2, line 12. I don't believe we need to include "sole proprietorship," since a sole proprietor is no more or less than an individual in business. No strong bias, however.

3) Memo, pp. 2-5, (certification of service). My instinct is that the certification required in Maury's first draft is the most the rule should mandate. My preference is to delete the requirement altogether. I believe that the requirement that the defendant could not be found

despite due or reasonable diligence satisfies due process, without the need to so certify. However, I am moved sufficiently by the depth of Michael's contrary view that I do not object to certification provided that the detailed factual showing he suggests is not required.

4) Memo, p. 5 (Effective date of Service). I have no problem with use of the "3 or 7" rule, which I believe ought to run from the last date of followup mailing.

I'd like to reflect further on the draft pending our next conference call. Thanks for the prompt and excellent work, Skip.

Dave

MEMO

TO: **Judge David Brewer**
Judge Michael Marcus
Prof. Maury Holland

FROM: **Judge Robert D. Durham (by fax)** Skip

RE: **Mail Agent Service**

DATE: **June 18, 1998**

Accompanying this memo is my revision (with some optional wording) of the draft rule that we discussed by telephone on June 17, 1998. Listed below are the decision points or questions that we should address and resolve (if possible) before submitting a final draft to the Council on July 11, 1998.

1. Scope of potential defendants.

On June 17, we agreed that we should take an incremental approach to mail agent service, and extend the rule to service on natural persons, not corporations or partnerships. The statutory definition of "tenant," ORS 646.221(3), includes a "person" and a "sole proprietorship," as well as partnerships, corporations and other entities. ORCP 7 D(3) describes the procedures for serving specified defendants, but uses somewhat different terminology, i.e., "individual defendant," not

"person" or "natural person." We deduce from the context of ORCP 7 D(3) that an "individual defendant" under that rule is a natural person. The rule creates special procedures for serving other kinds of "individual defendants," such as corporations. Consequently, the term "individual defendant" applies only to natural persons. The current rule's categorization of defendants is not very clear, but seems to work well enough. Consequently, I list "an individual" on p 1:4. Do you agree, or do we need to say, instead, "natural person?"

I have included "sole proprietorship" within the scope of the defendants to whom the draft rule applies. Do you agree, or should the rule omit that reference? Keep in mind that ORCP 7 D(3) does not refer expressly to service on a sole proprietorship.

2. Subsection 2 (plaintiff's certification of service).

After looking more carefully at ORCP 7 in its entirety, I am persuaded that our proposal should not require the plaintiff to certify in a proof of service that he could not find the defendant. Consider the following. Under our proposal, the fact that the plaintiff cannot find the defendant authorizes the plaintiff to use mail agent service. That scheme equates roughly

with a plaintiff's authorization under ORCP 7 D(6)(d) to use mail service at the defendant's last known address if the plaintiff does not know and cannot ascertain, after a diligent inquiry, the defendant's current address. That rule does not obligate the plaintiff to certify either the fact of or the basis for the assertion that the plaintiff cannot locate the defendant's current address.

In addition, ORCP 7 F(2) describes the certification of all forms of service (except upon the defendant's admission). That rule makes no reference to certification of any fact that supposedly justified the plaintiff in choosing a particular service method. In fact, that rule imposes no obligation on a plaintiff to certify anything, probably because plaintiffs do not effect service. Rather, that rule requires a server, mailer, or attorney to certify the facts showing what occurred in delivering documents to the defendant. Requiring the plaintiff to file a proof of service describing why the plaintiff claims he was entitled to use a particular service method seems like an error to me.

A closer analogy is the procedure specified in ORCP 7 D(6). Under that rule, a plaintiff who claims he cannot serve by another method may file a motion, supported by an affidavit that

demonstrates the necessary facts, and obtain authorization through a court order to perform service by publication or by a combination of service methods. In that context, the plaintiff must make his showing ("I cannot find and serve the defendant by other methods, despite due diligence") directly to a judge, and the defendant, I assume, still can attack the accuracy of the plaintiff's factual assertions in a motion to quash service or for relief from default.

If we wish to follow that model, we can do so. We would condition mail agent service on the plaintiff's prior showing to the court in an affidavit that, despite diligent inquiry, he cannot locate the defendant. At present our proposal requires the plaintiff to make a diligent inquiry and be unable to locate the defendant, but it does not require the plaintiff to complete an affidavit that certifies the truth of those facts to a judge or anyone else before using mail agent service.

Right now, I do not think that that is a due process problem. I rely for that conclusion on two facts. First, the contractual relationship between a mail agent and tenant. ORS 646.221. Second, the certifications that occur by operation of ORCP 17 C. If a plaintiff files a proof of service showing mail agent service, that act constitutes a certification that the

plaintiff has made "such inquiry as is reasonable under the circumstances," ORCP 17 C(1), that the certification of service is not presented for any improper purpose, ORCP 17 C(2), and that the certification of service is warranted by existing law, ORCP 17 C(3), including the requirement in our proposal that the plaintiff cannot locate the defendant despite making a diligent inquiry. Those certifications seem to be a sufficient due process protection, so that we do not need a prior judicial determination that the plaintiff's facts are true.

With the foregoing in mind, I would drop what now appears (in brackets) as subparagraph (2) (at p. 1), and delete from the certificate of service any reference to an express written certification by the plaintiff that he cannot find the defendant despite a diligent inquiry. What is the committee's pleasure?

3. Effective date of service.

This proposal declares that service is complete within 3 (or 7) days of the mailing to the mail agent's mailbox address for the defendant. The wording draws heavily on ORCP 7 D(2)(d)(ii), as we discussed. Have we selected the correct event from which to calculate the completion of service? That is, should we count the days from the date of mailing to the mail

agent, or from the last date of all mailings required by the rule, including mailing(s) to defendant's other known addresses? What are your wishes?

4. Format of certificate of service rule.

My proposal would add a long sentence at the end of ORCP 7 F(2)(a)(i) that would describe the specifics about how the plaintiff effected mail agent service. The sentence borrows heavily from the present final two sentences of that rule, because mail agent service combines two separate kinds of service: (1) delivery on the mail agent, and (2) mailing to the mail agent's mailbox and to other known addresses of the defendant. We need to add something to the rule to address the certification of mail agent service, and I think my proposal gets the job done.

I am unhappy with the length and complexity of my proposed sentence, but could compose no better amendment that would say what is necessary. For example, can we develop a method for obtaining a suitable certification by a single person, instead of a number of actors? I welcome all suggestions for improving my proposal.

These issues, and others that I have not discussed, probably justify another telephone conference among our

subcommittee members. I will leave that to Maury and Chairman Brewer. If we don't have a conference, please send your suggestions to me.

Thanks for your time, attention, and helpful comments.

Mail Agent Service

ORCP 7D(3)(a)(ii) Tenant of a Mail Agent. For purposes of this rule, "mail agent," "mailbox," and "tenant," shall have the definitions stated in ORS 646.221(1), (2), and (3), respectively, except that "tenant" includes only an individual or a sole proprietorship. If the plaintiff, after making a diligent inquiry, cannot find defendant, and the defendant is a tenant of a mail agent, the plaintiff may serve the defendant by delivering a true copy of the summons and the complaint to any person apparently in charge of the mail agent's office or place of business, provided that[:

[(1)] the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and complaint to the mail agent's mailbox address for the defendant, and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff served the mail agent.[, and

(2) the plaintiff files a proof of service that

certifies that, after making a diligent inquiry, the plaintiff could not find the defendant.]

For the purposes of computing any period of time prescribed or allowed by these rules or by statute, service on a defendant who is a tenant of a mail agent shall be complete three days after the mailing to the mail agent's mailbox address for the defendant if mailed to a mailbox address within the state, or seven days after that mailing if mailed to a mailbox address outside of the state, whichever occurs first.

ORCP 7F(2)(a)(i) (add at end of current rule):

If the defendant is served through a mail agent, (1) the server shall state in the certificate when, where, and with whom a copy of the summons and complaint was left at the mail agent's office or describe in detail the manner and circumstances of service and (2) the person completing the mailing to the mail agent's mailbox address for defendant and to any other known mailing address of the defendant, or the attorney for any party, shall state in the certificate the circumstances of mailing.[, and (3) the plaintiff shall state in the certificate that, after making a diligent inquiry, the plaintiff could not find the defendant.]

COUNCIL ON COURT PROCEDURES

1221 University of Oregon
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June 26, 1998

The Honorable Rick J. McCormick
Presiding Judge
Linn County Courthouse
P.O. Box 1749
Albany, OR 97321

Re: Proposed Changes to ORCP 68 to Recognize the Need for Special Findings on Attorney Fees

Action Needed by: July 8, 1998

Dear Judge McCormick:

Earlier this year, the Council on Court Procedures began to work in earnest on amendments to ORCP 68 to recognize a requirement for special findings supporting an award of attorney fees. The purpose of this letter is to keep you informed of Council action, and solicit your comment.

The Council is certainly aware of the additional workload that special findings would place on the system, and the potential for rancor among attorneys, parties and the court. However, when the Council tentatively adopted the alternatives discussed in this letter, it was decided that a change is necessary to conform to law which has developed outside the Oregon Rules of Civil Procedure. Some members of the Council supported the change for policy reasons I will mention in a moment.

By way of background, ORCP 68 C(4)(c)(ii) says:

> "[t]he court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. **No findings of fact or**

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conclusions of law shall be necessary. "
(Emphasis supplied.)

The Council believes that this provision must be changed because it is misleading and incorrect in light of appellate decisions such as Mattiza v. Foster, 311 Or 1, 10-11, 803 P2d 723 (1990), requiring trial courts to make findings to support attorney fee awards. See also McCarthy v. Oregon Freeze Dry, Inc., 327 Or 84, 96, __ P2d __ (1998) clarified (June 11, 1998). In Mattiza, supra at 10-11, the Supreme Court noted that:

> "[T]he award of attorney fees under ORS 20.105(1) is a situation in which special findings are a prerequisite to meaningful review by an appellate court. Not only should the trial court make findings regarding the party's claim, defense, or ground for appeal or review, and which of the three grounds under ORS 20.105(1) the court is considering, but it should also specify which actions of the party are violative of the statute." (Citations omitted.)

Over time, the Supreme Court and the Court of Appeals have applied this principle often enough to compel the conclusion that ORCP 68 c(4)(c)(ii) is simply wrong in stating that "no findings * * * shall be necessary."

A further reason for repealing ORCP 68 c(4)(c)(ii), given by some members of the Council, has to do with the increasing importance of attorney fee litigation. For example, statutory attorney fee provisions have been adopted for policy reasons, and some Council members contend that the public has an interest in learning how those policies are carried out.

Once the Council reached a consensus that ORCP 68 c(4)(c)(ii) was wrong and that the last sentence should be repealed, it carefully explored alternatives. Although some proposed including no reference to findings in the rule, that option was rejected, I believe, because ORCP ought to provide the reader with an answer, not silence. Similarly, a sentence that mentioned the requirement of findings for certain attorney fee claims was bound to become quickly outdated.

Since last fall, the Council has instead focused its attention on a sensible procedure for requesting and making findings. The following provisions

were tentatively adopted by the Council for the purpose of addressing (1) the kind of findings that would satisfy requirements that now exist; (2) the time and manner by which findings and conclusions must be requested; and (3) what would constitute waiver of the requirement. In drafting these proposals, the Council sought to impose no more of a burden than that imposed by ORCP 62. In our experience, findings and conclusions are requested only occasionally and do not constitute a significant portion of the work of the trial courts.

Proposal One

C (4)(e) **Heading Needed.** On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make any requests for findings and conclusions pursuant to this paragraph within 7 days of the last date for filing objections to a statement or, if the court conducts a hearing pursuant to subparagraph (c)(I) of this subsection, at the commencement of the hearing unless the court permits a later request. A party's failure to make a request in accordance with this paragraph is a waiver of any objection that is court's determination of the issues is not supported by adequate findings of fact and conclusions of law.

Proposal Two

C (4)(e) **Heading Needed.** On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make any request for findings and conclusions pursuant to this paragraph within 7 days of the last date for filing objections to a statement unless the court permits a later request. A party's failure to make a request in accordance with this paragraph is a waiver of any objection that is court's determination of the issues is not supported by adequate findings of fact and conclusions of law.

The Council has not taken final action. The Council is aware from judges (including some on the Council) that the notion of findings and conclusions in support of attorney fee awards is not popular. But a very strong consensus has developed that some action is required. Your comment in the form of a constructive alternative proposal is encouraged.

By law, the Council must have finalize language for the amendment no later than its September meeting, so that its work product can be published in the fall. The Council's enabling legislation strictly limits the Council's ability at its final meeting in December to do much more than vote a proposal up or down.

For that reason, any alternative proposal must be considered by the Council at its July, August or September meeting.

Sincerely,

Bruce C. Hamlin

Bruce C. Hamlin
Chair, COUNCIL ON COURT
PROCEDURES

cc: Oregon Trial Lawyers Association
Oregon Association of Defense Counsel
Oregon State Bar Procedure & Practice Committee

P.S. Kindly address your response to: Prof. Maury Holland, Executive Director, Council on Court Procedures, at the letterhead address shown above. Your attention to this inquiry is much appreciated.

GAYLORD & EYERMAN, P.C.
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1400 S.W. Montgomery Street
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August 11, 1998

Bruce C. Hamlin
Attorney at Law
520 S.W. Yamhill Street
Suite 800
Portland, Oregon 97204

RE: Council on Courts Procedure

Dear Bruce:

I am writing to tell you, and to apologize, that I am going to miss the August meeting of the Council on Courts Procedure. This is particularly embarrassing in that the date of the meeting was moved in part to avoid a conflict with the Oregon Trial Lawyers Association annual convention, i.e., for the benefit of myself and a few other council members. The long and short of it is that I must prioritize a family event out-of-the-country in recognition of my spousal person's half century birthday.

As I acknowledge that I will be missing an important meeting, I am especially mindful of three concerns: 1) we are nearing the end of effective time for debating rule changes during this cycle, but the really crucial meeting will be in September; 2) the subcommittee on which I have been active regarding potentially sweeping changes to Rule 55 is not going to be presenting a proposal at this time for council consideration because our work is too far from done; and 3) the agenda for August 15th contains some specific items on which I am anxious to express a view even if I must miss the live debate.

On the latter point, in case either of these subjects is treated to a straw vote at the August meeting, I want to tell you and the other members how I see them by way of an informal proxy (with no illusions that my vote will be counted until I am there in person in September for a final vote on what we will publish or not).

Regarding Agenda Item 4, the much discussed alternative versions of an amendment to ORCP 68(C)(4), I favor either proposal (B) or proposal (C) to doing nothing. I tend to favor proposal (B), in keeping with my view that the earlier the request must be made to avoid waiver, the greater pressure there will be on attorneys to make a request in every case or risk criticism later. However, I would listen to further comments by our trial judge members because I have

been impressed with the arguments that it is important to know as one processes information towards a decision whether or not its factual and legal basis will have to be articulated.

I would be concerned that the proposal drafted by my friend Judge Barron would not permit the attorneys to see their opponent's position before deciding to request findings. Again, I think prudence would then dictate requesting findings in every case by all attorneys.

The other agenda item that concerns me enough to comment here is Item 5, in follow-up to the discussion at our last meeting. I think there is no disagreement between the three subcommittee members about the contents of a proposed ORCP 7(D)(3)(a)(iv) permitting service of process on a tenant of mail agent. If I am reading them correctly, the two proposals in the agenda are identical with respect to that rule. The issue now, as foreshadowed last time, is whether or not to simultaneously amend ORCP 69A to add a new prerequisite before a default could be entered against a party served by this method.

On balance I am still not certain I understand all of the ramifications of Judge Marcus' proposed Rule 69 amendment, but I am also not convinced that it is essential to amend that rule at this time. I think the issue that was brought to us by the process servers is successfully resolved by the proposal to permit service on a mail agent. Whether permitting such service demands amendment to the rules for default (or for that matter whether default should be made more difficult to obtain in general) seem to me to be subjects beyond the problem we were asked to solve.

Of course that has never stopped us, nor should it, from improving the rules where we see fit. But I am not yet comfortable with my own level of analysis of both fairness and practical issues associated with setting up a new hurdle to a party seeking default, either in general or for this specific service method. To the extent that we are creating a new primary service method for a particular category of defendants, I wonder about the wisdom of creating a new procedure unique to that category of service that pops up at the default stage and modifies the burden of coming forward with summary evidence. Every time the rules get more specialized and unique, the chances of our setting a trap for the unwary practitioner increases.

Again, I would emphasize that I am not sure I know enough about the Rule 69 issue raised in these two proposals to finally accept or reject it, and would prefer to have it kept for a later cycle of the Council to deal with after some experience with this new service method. I am sure Judge Marcus' concern is to avoid penalizing tenants of a mail agent as a result of our new service rule. But my concern is that we would go further than that concern warrants by giving persons who, either innocently or nefariously, hide behind a mail agent, a special advantage in comparison to those more easily identified and served by traditional methods. To the extent that that advantage effectively penalizes the plaintiff who did not choose the defendant's status as a tenant of a mail agent, I fear we would have removed rather than added balance to the playing field.

Again, I apologize for missing the August meeting. See you in September.

Very truly yours,

GAYLORD & EYERMAN, P.C.

William A Gaylord/ji

William A. Gaylord

WAG:jki

cc: Council Members