

COUNCIL ON COURT PROCEDURES
Minutes of Meeting of March 14, 1998
Oregon State Bar Center
Lake Oswego, Oregon

Present: J. Michael Alexander Robert D. Durham
 David V. Brewer William A. Gaylord
 Bruce J. Brothers Bruce C. Hamlin
 Anna J. Brown Daniel L. Harris
 Lisa C. Brown Rodger J. Isaacson
 — Ted Carp Michael H. Marcus
 Kathryn S. Chase John H. McMillan
 Allan H. Coon David B. Paradis
 Diana L. Craine Karsten H. Rasmussen
 Don A. Dickey

Absent: Stephen Kanter
 Rudy R. Lachenmeier
 Virginia L. Linder
 Nancy S. Tauman

The following were also in attendance: Maury Holland, Executive Director, and Gilma Henethorne, Executive Assistant.

Agenda Item 1: Call to order. Mr. Hamlin called the meeting to order at 9:35 a.m.

Agenda Item 2: Approval of minutes. On motion duly made and seconded, the minutes of the 2-14-98 meeting were approved as distributed with the agenda of this meeting.

Agenda Item 3: Report from ORCP subcommittee (Judge Brown). Mr. Hamlin recognized Judge Brown to lead discussion of this item. Reference was made to a 3-13-98 memo prepared by Judge Brown as Chair of the ORCP 55 subcommittee entitled "Summary of Work to Date," copies of which were distributed to all members at the beginning of this meeting and a copy filed with the original of these minutes.

Referring to a flow chart set forth as Attachment B to the aforementioned memo, Judge Brown said that many provisions throughout the present Rule 55 are characterized by some instances of problematic drafting such that consideration might be given to an effort completely to redraft the rule. She added, however, that the most acute and urgent problems appear to exist in connection with sections 55 H and I, and the lack of parallelism between those sections. She stated that, before deciding whether to undertake a complete redrafting of Rule 55, as opposed to focusing its efforts exclusively on sections H and

I, the subcommittee wished to get the Council's guidance.

Mr. Rasmussen observed that he thought the effort should be to make the rule more procedural, to which Judge Brown responded that the subcommittee was already inclined to proceed in that direction. Mr. Hamlin stated that, whatever their faults might be, sections 55 H and I are fairly neutral in the sense of not purporting to affect the variety of restrictions on discoverability of hospital and medical records imposed by state and federal law. Mr. Brothers said that he favored an effort to redraft Rule 55 in its entirety. Mr. Gaylord expressed his view that the redrafting effort should be limited to sections H and I, where the greatest difficulties appear to be. Prof. Holland mentioned that perhaps FRCP 45 should be considered by the subcommittee as a possible model of a rule that is shorter and less convoluted than ORCP 55, and which seemed to be more cleanly procedural. He added that the U.S. District Court in Oregon appears to be using FRCP 45 satisfactorily in the same legal environment as the Oregon trial courts, including subpoenaing of hospital and medical records, and suggested that the subcommittee might wish to find out if the federal court is experiencing none, or fewer of, the difficulties reportedly being encountered in connection with sections 55 H and I. Mr. Paradis cautioned against any effort to amend those sections substantively.

Mr. McMillan asked whether the subcommittee could obtain the views of lawyers experienced with sections 55 H and I, but who do not represent hospitals or health care providers. Ms. Craine responded that such views were represented on the subcommittee. Mr. Alexander mentioned that a recurring problem is that health care providers sometimes do not respond to a subpoena by providing all the documents requested, and also fail to indicate that some documents falling within the request are being withheld, apparently because of a belief that the pertinent regulations prohibit even disclosure that they hold certain kinds of records protected by privacy laws.

At the conclusion of this discussion a consensus emerged that the subcommittee should focus its work on sections 55 H and I; Judge Brown stated that that is what it would do. Mr. Hamlin underlined the point, previously made by Mr. McMillan, that the subcommittee should avail itself of the expertise and views of health care law practitioners who are not Council members to the extent that would prove helpful.

Agenda Item 4: Report regarding ORCP 68 C(4)(c)(ii) (Justice Durham). Mr. Hamlin recognized Justice Durham to lead discussion of this item. Justice Durham agreed at the Council's 2-14-98 meeting to undertake further redrafting of proposed amendments requiring findings of fact and conclusions of law in connection with attorney fee awards in light of discussion at that meeting.

Justice Durham began by referring to his 3-13-98 memo to Prof. Holland, and to a 3-13-98 letter to him from Marion County Circuit Court Presiding Judge Paul Lipscomb, copies of both of which were distributed to members at the beginning of this meeting and a copy of each filed with the original of these minutes.

Justice Durham began by stating the importance of the Council's maintaining effective lines of communication with trial judges, and possibly others, who have expressed thoughtful concerns about the possibility of a Rule 68 amendment requiring findings and conclusions. He emphasized that he knew such concerns did not stem from unwillingness on the part of trial judges to shoulder a heavier workload, but from a sense on the part of some of them that such requirement would prove unproductive as a matter of trial court priorities and could force trial judges to state things, formally and on the record, which might often be better left unsaid. He reiterated the importance of the Council's maintaining close communications with trial judges generally, both so that the Council fully understands their concerns about this proposed amendment, and so that the judges in turn understand the serious problem prompting the Council to reach a fairly broad consensus that some amendment of this kind is now needed.

Justice Durham continued by recalling the three questions eliciting the most discussion and divergence of views at the 2-14-98 meeting, which he stated were: (1) the kind of findings that would satisfy the amendment's requirement, (2) the time and manner by which findings and conclusions must be requested, and (3) what would constitute waiver of the requirement, both in the trial court and for purposes of appeal. He then referred to Proposal A on p. 2, and Proposal B on p. 3, of his memo, which, he stated, in their respective second sentences reflected two contrasting views expressed at the 2-14-98 meeting with regard to the time by which findings and conclusions must be requested. He explained that the limit imposed by Proposal A would allow for timely requests about as late as is feasible. Proposal B, he further explained, is somewhat more specific and distinguishes between instances where there is no hearing in contrast to where there is a hearing.

Mr. Gaylord commented that if the deadline for making requests is too early, that would result in a large number of requests being made as a matter of course even when no one ultimately wanted or needed findings, and stated that he favored a later deadline than is provided in either Proposal A or B, perhaps something such as within 24 hours of written notice of the ruling. Judge Marcus said that, as a trial judge, he regarded it as extremely important that he be informed about what decisions he is required to make prior to, not after, going

through the decision-making process. Judge Brown expressed strong agreement with this point. Judge Dickey, referring to the aforementioned letter from Presiding Judge Lipscomb, stated that this letter reflected the views of many trial judges, and added that he was inclined to think that timely requests should be required before trial. He also stated that the Council should make an effort to obtain the views of as many circuit court judges as possible. Judge Isaacson suggested the amendment might require requests to be made in conjunction with a prevailing party's fee statement or a losing party's objections. Mr. Paradis said that he did not favor amending Rule 68 in this context because the prevailing standard of review is for abuse of discretion, which he described as working well.

Judge Marcus remarked that he favored requiring findings when timely requested, not only for the purposes they serve on appeal, but also because, if a trial judge knows that he or she is obligated to provide findings, the judge will be more strongly impressed with the obligation carefully to follow the law. However, he reiterated his strong objection to a timing provision that would necessitate trial judges having to go back to a decisional process reasonably regarded by them as having been concluded days or weeks earlier.

Mr. McMillan stated that it had become clear to him that the Council would very likely promulgate some kind of Rule 68 amendment, and raised the question of how the Judicial Conference might best be consulted before any drafting is finalized. Several members expressed agreement with the thought that the Council should take advantage of the April 27 '98 meeting of the Judicial Conference to obtain broader judicial input concerning timing of requests for findings and perhaps other specific issues as to which the Council has not yet reached full agreement.

Mr. Gaylord then moved that the Council tentatively and provisionally adopt Proposals A and B in the alternative, together with a Proposal C, as an additional alternative, that would provide that findings must be requested not later than the end of the hearing if there is one, and otherwise no later than within 24 hours of receipt of written notice of the court's ruling. He added, as part of this motion, that these three alternative proposals be published in time to obtain reactions and suggestions generated by the April meeting of the Judicial Conference. Judge Harris seconded this motion. Judge Isaacson then advanced two suggestions, namely, that the phrase "unless otherwise ordered by the court" be added at the appropriate place in each proposal, and that a written communication be addressed to the Judicial Conference asking for comments and suggestions, but not a vote on whether any proposal should be acted on by the Council, or if so, which one.

Mr. Hamlin commented that perhaps something as general as "before the court begins to determine the issues" might be worth considering. Judge Brewer suggested that, before voting began on any motion, each member should be asked briefly to state his or her view with regard to the question of the timing of requests, which suggestion was acted upon and a variety of views were expressed. Mr. Alexander remarked that the existing problem with subparagraph 68 C(4)(c)(ii) might be most easily and satisfactorily solved simply by adding the phrase: "unless otherwise required by law." Justice Durham commented that the Legislature's purpose in creating the Council was for it to take on and resolve occasionally tough procedural issues, and that, while he favored communication with the Judicial Conference, he did not think the Council should defer making a perhaps difficult decision until trial judges record themselves as being unanimously in favor of something the Council is persuaded must be done.

Following a short break, Mr. Gaylord, with Judge Harris's consent, withdrew his previous motion. He then offered a substitute motion, seconded by Mr. Alexander, that the Council provisionally approve all proposed amendments presently under consideration for the limited purpose of forwarding them, under covering letters from Mr. Hamlin, for comment by the Judicial Conference, as well as all other identifiable bar and judicial organizations. In response to Judge Marcus's question whether the amendments as proposed in the alternative would be sent to the Judicial Conference prior to its April 27 meeting, Mr. Hamlin responded that, if the substitute motion were adopted, he would certainly forward them well before that date.

Justice Durham suggested that, since no member present seemed to support Proposal A, further discussion should focus on Proposal B as marked up during the break to read as follows:

Proposal B

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 [*that are*¹] material to the award of 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

¹ The words *that are* were subsequently deleted by a friendly amendment.

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 the court's determination of the issues is not supported by adequate findings of fact and conclusions of law.

Justice Durham commented that he favored making this proposed amendment a new paragraph 68 C(4)(e), which would necessarily entail a further amendment deleting the second sentence of the present subparagraph 68 C(4)(c)(ii). Mr. Brothers moved to strike the word "state" and the entire last sentence of Proposal B as shown above, but subsequently withdrew the motion in response to Justice Durham's explanation that, in ORCP usage, the word "state" has a different meaning than "make" as applied to findings.

Mr. Hamlin then called for a vote on the pending motion to approve provisionally, for forwarding to the Judicial Conference and other interested organizations, Proposal B as set forth above. The motion carried by a vote of 14 in favor, 5 opposed, and no abstentions. Judge Dickey then offered a motion, duly seconded, that a second version of the proposed amendment be provisionally approved for forwarding to the Judicial Conference and other interested organizations, to read as follows:

Proposal C

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 the court's determination of the issues is not supported by adequate findings of fact and conclusions of law.

Judge Dickey's motion also included deletion of the second sentence of subparagraph 68 C(4)(c)(ii). Judge Dickey's motion carried by a vote of 15 in favor, 4 opposed, and no abstentions.

Mr. Gaylord, seconded by Justice Durham for the purpose of allowing discussion, then moved that the Council provisionally approve a third alternative proposed amendment for forwarding to the Judicial Council and other interested organizations, as follows:

Proposal D

(e) [Heading needed.] Upon the court's verbal announcement of the decision on attorney fees, within 24 hours from the date a party shall make any request for findings and conclusions pursuant to this paragraph, upon the court's verbal announcement of the decision on attorney fees, or within one day after receipt of the court's decision.

Judge Brown stated that she was concerned about possible ambiguities in this proposed language. She also said that she thought the word "verbal" should be changed to "oral," and asked whether it assumed that the parties would be present in court when the decision is orally announced. On the call of the question, this motion failed to carry by a vote of 4 in favor, 15 opposed, and no abstentions. At the conclusion of discussion on this item, Mr. Hamlin stated that he would forward alternative proposals B and C to the Judicial Conference and other interested organizations.

Agenda Item 5. Report on ORCP 7 E (Judge Brewer). The report on this item was deferred to the next meeting.

Agenda Item 6. New business. Mr. Hamlin suggested that the Council meeting scheduled for April 18, 1998 might best be canceled in order to allow the subcommittees more time to advance their work. There being general agreement with this suggestion, Mr. Hamlin stated that the April 18, 1998 meeting was canceled and that the Council's next meeting would be, as scheduled, on May 16, 1998.

Agenda Item 7. Old business. No item of old business was raised.

Agenda Item 8. Adjournment. Without objection Mr. Hamlin adjourned the meeting at 12:55 p.m.

Respectfully submitted,

Maury Holland
Executive Director