April 5, 1998

To: Chair and Members, Council on Court Procedures

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

Re: <u>The Problem about Rule 68 Findings and Conclusions</u>

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 "bystander'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.

GAYLE A. NACHTIGAL
JUDGE

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

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.

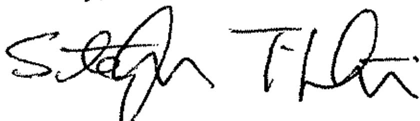
On the other hand, bad faith or frivolous claim cases present a different problem. Mattiza v. Foster, 311 Or 1 (1990) involved an award of attorney fees under ORS 20.105. McCarthy v. Oregon Freeze Dry, Inc., 327 Or 84 (1998) involved an award of fees by the Court of Appeals where defendant contended 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.

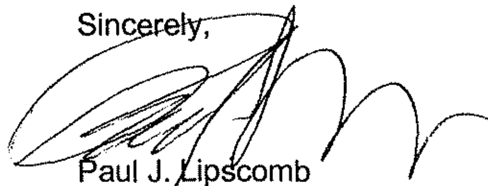
I don't think the general provision, Rule 68 itself, should be changed, however, and certainly not just to make appellate review more "meaningful." First, most cases (indeed the vast majority of cases) are not appealed. Accordingly, we would be adding additional costs to all attorney fee cases at the 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.

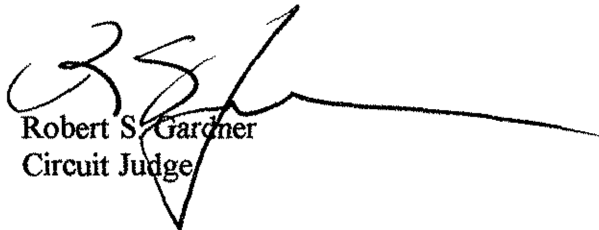
2. Oftentimes attorneys are not able to get the dissolution decree finalized right away and so quite a bit of time can elapse before the judgment is submitted along with the attorneys fees request. The best thing a judge can do in these circumstances in 95%of the cases is to carefully review the written 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)

RICHARD L. BARRON
Judge

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

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

COUNCIL ON COURT PROCEDURES

1221 University of Oregon
School of Law
Eugene, OR 97403-1221

Telephone: (541) 346-3990
FAX: (541) 346-1564

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**

Sent to all Presiding Judges

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

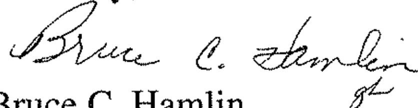
C (4)(e) **Heading Needed.** On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make any request for findings and conclusions pursuant to this paragraph 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
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.

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

Don A. Dickey
Circuit Court Judge
(503) 373-4445
Fax: (503) 373-4360

June 15, 1998

Bruce Hamlin
Attorney at Law
Suite 800
520 SW Yamhill Street
Portland, OR 97204

Re: ORCP 68

Dear Bruce:

I have considered your draft letter to the Judges. I suggest three considerations:

1. Replace the word "the" in the second line of paragraph one with the word "a".

2. Delete the phrase "(now imposed by case law and statute)" in the first paragraph. My reasoning is that the requirement imposed by the Supreme Court is only in limited situations and those are dealt with in paragraph 4.

3. Change "could" in paragraph 2, line 2 to "would".

Please excuse my absence from the meeting scheduled for July 11, 1998, as I will be in Washington D.C. with my family.

I trust that a "final" vote on the Rule 68 will not occur on that date. I continue to support a proposal (Proposal Two in your letter) which provides for the earliest notice to the Court for a requirement to make findings.

See yá in August, 1998.

Very truly yours,

Don A. Dickey
Circuit Court Judge

DAD:kat
cc: Gilma Hinthorne
061598hamlin.ltr

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

March 13, 1998

The Honorable Robert D. Durham
Supreme Court Justice
Supreme Court Bldg.
1163 State Street
Salem OR 97310

Re: Proposed changes to ORCP 68 to require special findings.

Dear Skip:

As you know, I have a great deal of respect for you personally, and for the Supreme Court in general. I also realize that all our perceptions are shaped by the perspective of our own specific circumstances and life experiences. I suspect that this difference in perspective explains my strong disagreement with the changes you propose to Rule 68 to require specific written findings to support any award of attorneys fees.

By statute, trial court judges are already directed to consider each of the specific factors set forth in ORS 20.160 when considering any attorney fee award. Presumptively, trial judges follow the law, just like appellate judges. The burden should be on the appellant to demonstrate that the trial court did not follow the law. The trial judge should not be burdened with a requirement that he or she document compliance with the statute by setting forth written findings.

There is a statutory presumption relied upon at least at the trial level that an "Official duty has been regularly performed." ORS 40.135(j). I am not at all sure why this statutory presumption is no longer regularly followed by the appellate courts when reviewing the actions of trial court judges. It used to be.

When I was a law clerk for Judge Howell, most of the appellate judges were former trial court judges, and a great deal of deference was paid to the judgment of experienced trial court judges. If anything, trial court judges are even better trained now than they were then. Yet, over the years, the

make up of the appellate court bench has changed, and with it, the degree of respect and deference paid to the trial courts decisions appears to have eroded. As an apparent direct result, we find ourselves burdened with requirements for more and more special findings at every turn. Cases are now routinely reversed, not because the trial court committed error, but because the appellate court determines that "we can't tell."

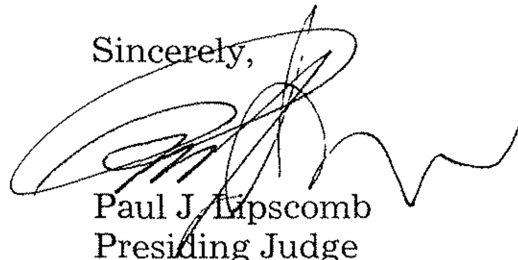
Worse yet, with this proposed change to Rule 68, we would be required not only to make specific findings on the record, but also, for the very first time, to make written findings. I suggest that the pendulum has clearly swung too far. So long as the trial court's decision is regular on its face, the burden should be on the appellant to prove that a mistake was made, not on the respondent to prove that it was not.

Finally, from a large scale, overall systems perspective, I would submit that it is a poor management practice to burden the 95% or more of the cases that won't be appealed with added requirements designed to improve appellate practices for those 5% or less of the cases that do get appealed, unless a very significant advantage can be assured at the appellate level. From a cost benefit consideration, that just doesn't make sense. There is a very real cost to the system, and to the litigants, whenever requirements are added at the trial level.

I appreciate the appellate courts' desire to do the best job they possibly can with the cases they do get, but at the trial court level we have to work up the other 95% that you folks never see, as well. I respectfully suggest that the perceived problem you seek to remedy can be better served by simply presuming that the trial court followed the law set forth in ORS 20.160, unless the appellant can show that it didn't, rather than requiring the trial court judges to document in writing or on the record that we did.

What you propose is a bit like being back in grammar school when our papers got returned for correction, even when we got the right answer, because we didn't "show all our work." Attorney fee awards should continue to be reviewed only for abuse of discretion unless the appellant can show that the court did not follow ORS 20.160.

Sincerely,



Paul J. Lipscomb
Presiding Judge

cc: Don Dickey, Circuit Court Judge

COUNCIL ON COURT PROCEDURES

Established by the Oregon Legislature in 1977

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Nancy S. Tauman, Esq.

February 14, 1997

Thomas C. Holmes, President
Oregon Paralegal Association
P. O. Box 8523
Portland, OR 97207

Mike E. Campbell,
Research & Professional Development Committee
Oregon Paralegal Association
P.O. Box 8523
Portland, OR 97207

Dear Messrs. Holmes and Campbell: Re: Proposal to Amend <u>ORCP 68 C(2)</u>

Many thanks for your January 9 letter and enclosed proposed amendment to ORCP 68 C(2). The Council on Court Procedures does not meet on a regular basis during legislative sessions. It will resume its cycle of public meetings about October 1, 1997. Please be assured that I shall distribute copies of your letter and proposed amendment to all members of the Council, who I am sure will give them the most careful consideration. When this item is scheduled for discussion on the agenda of a specific Council meeting, I will give you

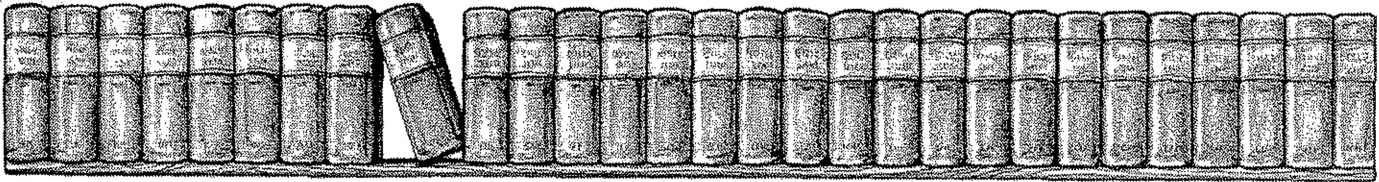
advance notice in case you, or some other representative of your organization, might wish to appear personally at the meeting and speak in support of your proposal.

Sincerely,

Maury Holland

Maury Holland
Executive Director

c: William A. Gaylord, Chair (w/enc.)



OREGON PARALEGAL ASSOCIATION

January 9, 1997

Maurice J. Holland
Executive Director for
The Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403-1221

Re: Recovery of fees for Paralegal work

Dear Mr. Holland

The Oregon Paralegal Association has drafted an amendment to the Oregon Rules of Civil Procedure and we are enclosing a copy of that proposed amendment for your review and consideration. This was prepared following guidelines set forth by our national affiliation, the National Federation of Paralegal Associations (NFPA).

Our purpose is to formalize an existing, albeit indefinite, situation in the Oregon legal community. The U.S. Supreme Court and the Oregon Supreme Court have held that the fees for paralegals' time in performing substantive legal work is indeed collectible on an hourly basis. All too often, however, these fees are disallowed outright because an attorney did not perform the work. For this reason and because of concerns expressed by our membership, we would like to present this proposed amendment to your council and to begin discussion between our organizations toward implementing this change.

It appears to us that the Civil Procedure rules are the appropriate site for incorporating these changes. We would like to know from your council: 1) if there are any special procedures to address or format that this needs to be in to be officially submitted to the council; 2) if it requires a resolution to be drafted in order to be presented to the legislature; 3) once submitted, what is the time line for its path through the legislative process toward acceptance and ultimate incorporation into ORCP.

Thank you for your time and courtesy. By copy of this letter, I am informing the Oregon State Bar association, and its joint committee on lawyers and legal assistants. If you have any questions or if

we can be of further assistance, do not hesitate to contact either of us at the address and phone numbers below.

Very truly yours,

Thomas C. Holmes
President
(503) 778-2024

Mike E. Campbell
Research & Professional
Development Committee
(503) 235-4638

Enclosure
cc: George Reimer, General Counsel, OSB
Steven G. Miller, OSB Joint Committee on Legal Assistants

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STATE OF OREGON

PROPOSED CHANGES IN ORCP

A PROPOSAL FOR AMENDMENT TO Oregon Rules of Civil Procedure concerning the following provisions, ORCP Rule 68C(2)

WHEREAS, the economic advantages derived from and the cost-effectiveness of employing paralegals is widely known throughout the legal and business community.

WHEREAS, the recognition by the U.S. Supreme Court [Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463 (1989)] and American Bar Association [1991 Model Guidelines for the Utilization of Legal Assistance Services and its 1993 resolution] that paralegal fees should be awardable on an hourly basis.

THEREFORE, THE FOLLOWING CHANGES ARE PROPOSED:

SECTION 68C(2) (e) TO BE ADDED TO THE OREGON RULES OF CIVIL PROCEDURE RULE 68C(2), AS A NEW SECTION TO READ AS FOLLOWS:

In any action or decision in which attorneys, fees are to be determined or awarded by the court, the court shall consider, among other things, the time and labor of any paralegal who contribute or perform nonclerical, legally substantive tasks that, in the absence of the paralegal, would be performed by the attorney. The award of such fees shall be based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services. The award of such fees shall be based on the same merits and in the same manner as with attorney services and shall be based on the hourly rate charged to the consumer of the legal service.

AS USED IN THE SECTION, "PARALEGAL" MEANS "A person, qualified through education, training or work experience, to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work." The terms "paralegal" and "legal assistant" are interchangeable and used synonymously.

RESPECTFULLY SUBMITTED BY:

The Oregon Paralegal Association
Research & Development Committee

Mike E. Campbell, Committee Chair

STATE OF OREGON

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RESPECTFULLY SUBMITTED BY:

The Oregon Paralegal Association
Research & Development Committee

Mike E. Campbell, Committee Chair