COUNCIL ON COURT PROCEDURES

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June 23, 2000

To: ORCP 54 E Subcommittee (Lisa Amato, Skip Durham, Mark Johnson, and Nancy Tauman)

Fm: Maury Holland

Re: Judge Lipscomb's Letter re Proposed 54 E Amendments

The enclosed letter from Judge Lipscomb criticizing the presently proposed amendments to ORCP 54 E will be sent to all members with the agenda of the July 15 meeting, but I thought you folks should get an earlier "heads up." I'm sure that Skip will be delighted to read that these amendments are attributed solely and personally to him, but might take some consolation in being likened to Homer.

Enc.

MEMORANDUM

To: **Court Practices and Procedures Committee**
From: **Hon. Paul J. Lipscomb**
Date: **June 20, 2000**
Re: **Justice Durham's Proposed changes to Rule 54E**

Many years ago my Greek professor taught me that "even Homer nods," so it is with considerable respect for Justice Durham that I submit the following for your committee's consideration. However, Justice Durham's proposed amendment appears to me to be one where the new and broadly applied "cure" is going to be worse than any occasional "disease" occasioned by the current rule, particularly when the various adverse "side effects" are considered.

I understand that the intent of Justice Durham's proposal is to change existing law to prohibit all-inclusive lump sum offers under Rule 54E, now that the Supreme Court has specifically determined that the current rule permits such offers. I further understand that the principal reason for the change is to attempt to avoid potential ethical conflicts of interest which can occur when an all-inclusive offer is made under the current rule. I submit, however, that in practice such an amendment would merely substitute one potential ethical conflict for another, and that, unlike the existing problem, the new conflict cannot be easily avoided by the written fee agreement.

Under the current rule, if a substantial lump sum, all-inclusive offer is made, the client and the attorney's respective interests may be put in conflict, or at least potentially so, dependent upon the provisions of their written fee agreement. Under certain circumstances the client may be naturally inclined to accept such an offer, whereas the attorney may wish that it would be rejected so as to preserve a separate claim for attorney's fees. (For example, a $30,000 all-inclusive offer is made on a $50,000 claim.)

Alternately, under the proposed rule revision, if a statutory offer for a discounted payoff were made, then a similar conflict would arise. The attorney would be interested in having the client accept the statutory offer 1) to lock in the claim for full attorney fees, and 2) to avoid the risk of all additional attorney fees being cut off if the judgment came in even slightly smaller than the offer. If the client were somewhat tempted by the offer, but still hesitant, the attorney's truly objective assessment of the pros and cons of the offer would be critical.

Essentially, this is the same conflict issue that exists under the current rule if a non-inclusive offer is made. However, Justice Durham's proposal further specifies that if the parties agree by "a

separate agreement" then the attorney's fees may be discounted or avoided entirely. This sets up a new and separate potential conflict between the lawyer and the client. Usually the client's "costs" will be far less than the lawyer's "fees." In my view this is a worse potential conflict than the one it replaces, and in any event, there is no good reason to change the existing rule so as to simply substitute one conflict situation for another.

The proposed amendment will no doubt also involve further litigation over how "separate" the "separate agreement" must be. (What if the first offer is contingent upon acceptance of the "separate" offer also?)

Presumably, most attorneys also will have written fee agreements that are based, in some degree, on the existing rule and are successfully able to avoid the current pitfalls. I submit that it would be very difficult if not impossible to create a fee agreement that would avoid conflicts under the proposed rule, particularly with the "separate agreement" language.

Moreover, any broadly applied change like that under consideration is bound to have a limiting effect on settlements, which should be encouraged rather than discouraged. Generally the insurance company for the defense is seeking to quantify its risk and needs to get rid of the entire problem, not just the 'merits' of the case. While some such offers may occasionally happen, in my experience few adjusters will authorize settlement of only part of a case, leaving other aspects still open. Accordingly, the effect of the change will probably be to reduce the number of statutory offers, which in turn, will hamper settlements between the parties and provide less incentive in any settlement environment, including judge assisted settlement conferences.

The Judicial Department's Vision 2020 calls for all of us to 1) promote peaceful, cost effective problem solving, and 2) reduce jury trials by mediation, arbitration and fair settlements. The proposed change to Rule 54E runs counter to our collective vision by reducing settlements and increasing jury trials, with the attendant expense to the parties and taxpayers.

The rule will also automatically make more work for the courts even if the offer is made and accepted. By settling only a portion of the case, the proposed rule change would then require a separate hearing on attorneys fees and costs. (At which the judge must then make special findings to support the fee award so as to insure against a potential, but statistically rare, appeal.)

To recap, there are at least three significant undesirable results from the proposed rule change: 1) the attorney/client issue is not avoided, merely one set of conflicts is substituted for another, and the new potential ethical conflicts are harder to avoid through written agreements, 2) the new rule would unavoidably hamper settlements and increase costs, and 3) the new rule will unnecessarily create more work for the trial bench.

Although I do not necessarily speak for every other Marion County Judge, all those in attendance at our meeting where the proposal was discussed, voiced opposition to the proposed change, and asked me to express our disagreement. Accordingly, for the reasons stated above, this Presiding Judge asks that the Council on Court Procedures reject the proposed change to Rule 54E as both flawed in theory and counterproductive in practice.

E-Mail from Judge Kristina Lemar

August 11, 2000

Mr. Michael Alexander
FAX: (503) 581-2421

Dear Mr. Alexander:

Re: CCP 54E proposal

I apologize for this letter being so late, and for not attending to the Council's work on this issue, which was just brought to my attention by Judge Dickey.

In reading the proposed amendments to 54E, I am unclear as to what problem is to be solved. To my knowledge, at the trial court level, 'nothing is broken.' Very few cases have made their way to the appellate courts for interpretations of the rule, and I believe most trial attorneys know and work with the existing language well.

However, I would see that changing in the event the proposed changes are adopted. First, a great number of 54E offers are made in tort cases, in which there is no separate provision for attorney fees. I cannot believe that either the trial attorneys nor the trial judges want to be involved in ORCP 68 rulings on attorney fees in contingent fee cases, and that would be the result of the proposal. Second, in contractual or other hourly fee cases, I believe that these amendments would greatly increase the workload of trial judges, who aren't particularly well suited to keep up with "reasonable" rates for attorneys' services (and grow even less so the longer they are away from private practice!)

As you're aware, my primary activities are in settlements and arbitration administration. My fear, were these changes to be adopted, is that settlements would be discouraged. I believe this would happen because defense attorneys would be less likely to make offers, now comprehensive, if the specter of court imposed attorney fees were hovering over the negotiations. Plaintiffs' attorneys are in the best position to control, by contract with their clients, the amount and distribution of fees if and when they are received, and are far better in allocating monies than the courts.

Accordingly, I urge the Council to leave the rule unmodified. Thank you for an opportunity for input.

cc: Council members

For Distribution at 4-8-00 Council Meeting

Amendments to Section 54 E Proposed by Rule 54 Subcommittee

{{Matter to be added in **bold underlined**; to be deleted in [*italics enclosed in square brackets*]

E. Compromise; Effect of Acceptance or Rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment**, exclusive of attorney fees, costs, and disbursements,** to be given against the party making the offer for the sum, or the property, or to the effect specified therein. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and wihin three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. Unless **the parties** agree[*d upon*] otherwise by **a separate agreement** [*the parties*], costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a

more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

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ROBERT D. DURHAM
ASSOCIATE JUSTICE

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OREGON SUPREME COURT

February 14, 2000

Ms. Nancy S. Tauman
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P.O. Box 1960
Oregon City, OR 97045

Mr. Mark A. Johnson
Bennett, Hartman & Reynolds
851 SW Sixth Avenue, Suite 1600
Portland, OR 97204-1376

Ms. Lisa A. Amato
Bittner & Hahs PC
1 SW Columbia Street, Suite 1800
Portland, OR 97258

Re: ORCP 54 E Subcommittee

Dear Nancy, Mark and Lisa:

Thank you for agreeing to work on the issues posed by ORCP 54 E. Enclosed for your subcommittee file are copies of ORCP 54 E, the For Counsel, Inc. decision, and Mark's first draft of a revision of ORCP 54 E.

I realize that everyone is quite busy, and that we must concentrate our meeting time in order to work efficiently. To that end, I will contact you through my judicial assistant, Ms. Linda Kinney, to determine your availability for a subcommittee meeting of two hours (or less) in Portland on February 24 or 25. I nominate Mark's office as a meeting site. I will confirm the meeting date, time, and place as soon as possible.

To facilitate our meeting, I would ask you to prepare and send to me before our meeting an informal list of the issues or problems that you identify in the current rule's text, and your suggestions for rule amendments, if any, that would address those matters. Mark, you may rely on the suggested amendments that you already have submitted, if you desire.

Thank you in advance for your efforts.

Yours truly,

Skip

ROBERT D. DURHAM
Associate Justice

RDD:lk
Enclosures (via mail)
cc: Mr. J. Michael Alexander (w/o encls.)
Prof. Maury Holland (w/o encls.)

ROBERT D. DURHAM
ASSOCIATE JUSTICE

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OREGON SUPREME COURT

February 16, 2000

Ms. Nancy S. Tauman
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P.O. Box 1960
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Mr. Mark A. Johnson
Bennett, Hartman & Reynolds
851 SW Sixth Avenue, Suite 1600
Portland, OR 97204-1376

Ms. Lisa A. Amato
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1 SW Columbia Street, Suite 1800
Portland, OR 97258

Re: ORCP 54 E Subcommittee

Dear Nancy, Mark and Lisa:

This letter is to confirm our meeting scheduled for Thursday, February 24, 2000, 2:00 p.m. at Mark's office, located at 851 SW Sixth Avenue, Suite 1600, Portland, Oregon.

I look forward to seeing you on the 24th.

Yours truly,

ROBERT D. DURHAM
Associate Justice

RDD:lk
cc: Mr. J. Michael Alexander
Prof. Maury Holland

MEMO

TO: J. Michael Alexander

FROM: Committee on ORCP 54 E:
Nancy S. Tauman
Lisa A. Amato
Mark A. Johnson
Robert D. Durham

RE: ORCP 54 E

DATE: February 25, 2000

The Committee on ORCP 54 E met on February 24, 2000 in Portland. After extensive discussion, the Committee unanimously recommends the amendments to ORCP 54 E reflected on the enclosure (new matter in boldface; existing wording to be deleted in italics and brackets).

cc: Prof. Maury Holland

ORCP 54 E

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