



OSB

Professional Liability Fund

Avoiding Malpractice When Filing and Serving a Complaint

Wednesday, June 3, 2015

2.25 MCLE General or Practical Skills Credits

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Tigard, Oregon

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MCLE FORM 1: Recordkeeping Form (Do Not Return This Form to the Bar)

Instructions:

Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:		Bar Number:	
Sponsor of CLE Activity:			
Title of CLE Activity:			
Date:		Location:	
<input type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i> <div style="text-align: center;"> <p>___ General</p> <p>___ Prof Resp-Ethics</p> <p>___ Access to Justice</p> <p>___ Child Abuse Rep.</p> <p>___ Elder Abuse Rep.</p> <p>___ Practical Skills</p> <p>___ Pers. Management Assistance</p> </div>	<input type="checkbox"/> Full Credit. <i>I attended the entire program and the total of authorized credits are:</i> <div style="text-align: center;"> <p>___ General</p> <p>___ Prof Resp-Ethics</p> <p>___ Access to Justice</p> <p>___ Child Abuse Rep.</p> <p>___ Elder Abuse Rep.</p> <p>___ Practical Skills</p> <p>___ Pers. Management Assistance</p> </div>	<input type="checkbox"/> Partial Credit. <i>I attended _____ hours of the program and am entitled to the following credits*:</i> <div style="text-align: center;"> <p>___ General</p> <p>___ Prof Resp-Ethics</p> <p>___ Access to Justice</p> <p>___ Child Abuse Rep.</p> <p>___ Elder Abuse Rep.</p> <p>___ Practical Skills</p> <p>___ Pers. Management Assistance</p> </div>	

***Credit Calculation:**

One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:

If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

About our Speakers

Lindsey H. Hughes received her J.D. from Willamette College of Law. She is a partner with Keating Jones Hughes, P.C. and is a member of the Oregon, Washington, and Idaho Bar Associations. Ms. Hughes focuses her practice on the defense of medical and legal malpractice cases and on appellate litigation. She recently served as a member of the Oregon Appellate Rules and the Oregon Trial Court Rules Committees. She has for many years chaired the Amicus Brief Committee for the Oregon Association of Defense Counsel. Ms. Hughes also serves on the Executive Board for the Litigation Section of the Oregon State Bar and is a current Fellow of the American Academy of Appellate Attorneys.

Terry Sheldon is the owner of Barrister Support Services, Inc, a process service company that he founded in 1984. He is the past President and Treasurer of the Oregon Association of Process Servers (OAPS). Barrister Support Services, Inc. is a member of the Washington State Process Servers Association (WSPSA) and the National Association of Professional Process Servers (NAPPS). Barrister Support Services, Inc. has offices in both Portland and Salem.

SERVICE ISSUES AND AVOIDING CLAIMS

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June 3, 2015

I. An Action is Commenced by Filing and Service

ORS 12.010 and ORS 12.020

ORS 12.020 provides:

“12.020 When action deemed begun. (1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.

“(2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed.”

Other than for purposes of statutes of limitations, an action is commenced by filing a complaint with the clerk of the court. ORCP 3. To avoid any time bars, however, the action must be timely filed *and* served. The action is commenced as to each defendant for statutes of limitations purposes upon service within sixty days of timely filing. ORS 12.020.

A. Know How to Compute Time

ORCP 10
ORCP 174.120
ORS 187.010(3)

B. Know the Applicable Statutes of Limitations and Repose

ORS 12.010 provides that actions shall be commenced only within the times prescribed in ORS Chapter 12, after the cause of action shall have accrued, unless a different limitation is prescribed by statute.

When the case involves multiple claims for relief, the complaint should be filed with the trial court not later than the time provided by the shortest statute of limitations that applies. Also, keep in mind that the time limits specified in statutes of repose are considered to be absolute, and they will bar claims regardless of whether the statute of limitations on the claim has run. *E.g.*, ORS 12.110(4), barring claims for medical negligence filed more than five years from the date of treatment, omission or operation.

See generally, Bell v. Tri-Met, 247 Or App 666, 271 P3d 138 (2012), for discussion of distinction in statutes of limitation and repose and interplay with OTCA limitations.

When preparing to file a case, counsel should try to build in adequate time to address problems that may arise, whether in filing the complaint, or in serving the defendant(s).

C. Don't, don't, don't forget about providing Tort Claims Notice to a public body defendant

ORS 30.275 provides that notice must be given within one year after the alleged loss or injury for wrongful death claims, and within 180 days after the alleged loss or injury for all other claims. Watch out. Neither ORCP 10 nor ORS 174.120 applies to the requirement for notice of a claim under a provision of the Oregon Tort Claims Act. In *Tyree v. Tyree*, 116 Or App 317, 320, 840 P2d 1378 (1992), *rev den*, 315 Or 644 (1993), the court held that the one-year limit applicable at the time was a “substantive condition precedent to recovery,” not a procedural requirement. Thus, the court held that notice received on a Monday was untimely because Saturday was the last day of the time period.

In *Cannon v. Dept. of Justice*, 261 Or App 680 (2014), the court held that one option for giving notice of a claim is commencement of an action on the claim. For purposes of the OTCA's notice provision, an action is “commenced” as of the date the complaint was filed so long as the summons is served within 60 days after the complaint was filed.

D. Filing Complaint With the Circuit Court Clerk

ORCP 9 E defines filing with the court. *But see Stull v. Hoke*, 326 Or 72, 948 P2d 722 (1997) (Court examined the meaning of “filing” under ORS 12.020(1), and, construing former ORS 12.020, held that the “operative moment for ‘filing’ an action is when the court clerk or person exercising the duties of that office receives the complaint.”). Avoid problems by filing before the end of the statute of limitations.

Beware that the clerk is not required to receive any document for filing if the required information is not correct. Rejected documents may not be accepted until problems with the document are corrected. Documents, including complaints, not accompanied by a filing fee will be rejected.

Electronic filing requires familiarity with UTCR Chapter 21. The court considers a document submitted for an electronic filing when the electronic filing system receives the document. UTCR 21.080(3). The electronic system will send an email noting receipt of the filing, and date and time of the receipt, and if the document is accepted for filing, the date and time of entry into the register will relate back to the date and time of receipt by the court’s electronic filing system. UTCR 21.080(3) & (4). If a document submitted electronically is rejected, an e-mail will be sent explaining the reason. The filer has three days from the date of rejection to request that the date of filing the resubmitted document relate back to the date of submission of the original. UTCR 21.080(5)(a). A filer seeking relation back to the date of original submission must comply with the requirements of UTCR 21.080(5).

Filing fees are required, as set forth in ORS 21.100 *et. seq.* Filing fees for tort and contract actions are specified in ORS 21.160, for domestic relations proceedings in ORS 21.155, and for probate matters in ORS 21.170. Documents submitted without a filing fee may be rejected.

E. Service by Person Over 18 Who is Neither a Party nor Attorney or Agent for a Party

Service may be made by any competent person 18 years or older who is a resident of Oregon or the state where service is made and is not a party to the action, nor an officer, director, or employee of, nor attorney for, any party,

corporate or otherwise. ORCP 7 E. Exceptions are found in ORS 180.260 and when service is made by mail, as specified in ORCP 7 D(2)(d)(i). ORCP 7 E.

F. Methods of Service in Oregon State Courts

The specifications for a summons in Oregon state courts are set out in ORCP 7.

ORCP 7 D(2) – Service Methods

The acceptable methods of service are found in ORCP 7 D(2). They include personal service, substituted service, office service and service by mail. ORCP 7 D(2)(a)-(d).

Care should be taken to familiarize yourself and your staff with the specific requirements of the method of service chosen. Note specifically that substituted service and office service require follow-up mailings, and that service is technically not effected until the mailing is completed. ORCP 7D(2)(b) and (c). Service by mail , ORCP D(2)(d)(i) is complete only as specified in the rule.

The methods of service permitted depend on the nature of the particular defendant. ORCP 7 D(3). Be prepared to substantiate that the prerequisites for service on a particular defendant have been met, whether a minor, an incapacitated person, corporation, a tenant of a mail agent, or the state of Oregon or other public bodies. See ORCP 7D(3)(a)-(i).

ORCP 7 D(4) – Motor Vehicle Accidents

The Oregon rules provide for a particular method of service when the action arises out of any “accident, collision, or other event giving rise to liability in which a motor vehicle may be involved” while being operated on streets, roadways, or premises open to the public. In such claims, service may be made as specified in ORCP 7D(4)(a) as follows:

“D(4)(a) Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.

“D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law, of this state, if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant’s behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

“(A) any residence address provided by that defendant at the scene of the accident;

“(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

“(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by (A) and (B) that reasonably might result in actual notice to that defendant.

“Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered or express mailings required by (A), (B) and (C) above was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by (A), (B) and (C) above is made. If the mailing required by (C) is omitted because the plaintiff did not know of any address other than those specified in (A) and (B) above, the proof of service shall so certify.”

The courts require that strict compliance with the elements of ORCP 7 D(4) in order for service under that rule to be effective. *Roberts v. Laughlin*, 176 Or App 227, 235, 31 P3d 453 (2001) (The rule prescribes three sets of mailings, the first two of which – including subparagraph 7 D(4)(a)(i)(B) – are mechanical and do not require or permit the exercise of judgment. We are not free to rewrite the rule to infuse it with a futility exception that the drafters and the legislature omitted”).

ORCP 7 D(5) – Service in a Foreign Country

Service on a party in a foreign country is also sufficient if service is effected pursuant to the law of that foreign country, or as directed by order of the court or by the foreign authority, so long as the service shall be reasonably calculated to give actual notice. ORCP 7 D(5).

ORCP 7 D(6) – Court Order for Service and Service by Publication

The rules also provide that the court, at its discretion, and upon a showing that service cannot be made by any method otherwise specified, may order service “by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action. ORCP 7 D(6)(a). The court may order service by publication under this rule, or by other means. See ORCP D 7(6)(a)-(g). The court may also order the time for response if the order under this section is for service other than by publication. ORCP 7 D(6)(a).

If relying on service by publication, be aware that, upon good cause shown, a defendant served by publication, or his representative, may “be allowed to defend after judgment and within one year after entry of judgment,” and if collection has commenced, restitution may be ordered if the defendant is successful in the defense.

II. Common Mistakes to Avoid with Filing and Service

Top ten tips to help ensure a good defense:

1. Waiting until the last minute to file the complaint
2. Failing to include filing fee with complaint
3. Waiting until the last minute to have the summons and complaint served and failing to follow up with the process server when the time for service is expiring
4. Naming the wrong defendant, or serving the wrong defendant, or both
5. Failing to update address information with DMV or other services
6. Failing to serve proper corporate or other business representative
7. Failing to obtain sufficient information to effect substitute or office service in compliance with ORCP 7 D (2)(b) or (c)
8. Failing to see that necessary follow up mailings are made timely
9. Failing to mail to all three addresses specified in ORCP 7 D(4) when relying on mail service in motor vehicle accident cases
10. Failing to review and file proofs of service with summons. ORCP 7 F(1).

III. Challenges to Service

Defendants may raise objections to service in any variety of ways. You may receive a request for a copy of the proof of service that was made. Defendant may identify in a letter that the action has been filed against the wrong defendant. Defendant may simply wait for the applicable time periods to run and then file an answer asserting affirmative defenses. Alternately, the defendant may file a motion to dismiss or motion for summary judgment.

To help avoid potential problems in your case based on defects in service:

1. Carefully read defense counsel's letters advising that they have been retained to represent the plaintiff and will file an appearance. *See Williams v. Jett*, 183 Or App 611, 54 P3d 624 (2002).
2. Consider requiring that defendant file its responsive pleading, or conditioning any extension in which to file on the assurance that no issue about service exists.
3. Review defendant's answer carefully; does it assert a service or statute of limitations defense, or raise an issue of improper party? Why is that defense alleged?
4. Understand that defendant may file a motion for summary judgment months after the litigation has been filed, or even bring a motion to dismiss later in the case.
5. Do not assume that the issue is not a real one just because the defense has not actively litigated it.
6. Develop your legal responses and arguments in opposition to the likely motion.
7. See that proofs of service are filed, conduct necessary discovery and be prepared to respond to the affirmative defense with admissible evidence if the court has not made a dispositive ruling before trial.
8. Remember that the PLF may be able to offer assistance if you run into trouble. Let them know there is a potential problem and consider any potential conflict you may have.

IV. Effective Service Despite Technical Non-Compliance

Although some problems simply cannot be corrected, frequently all is not lost when a defendant raises an argument or defense or files a motion based on insufficiency of service. Be an advocate. Look for legal arguments that the defendant waived the service issues, or that the statute of limitations is tolled. In addition, develop the factual record about the efforts that were made and argue why the attempted service should be considered sufficient under ORCP

7D(1). The courts have a stated pre-disposition to allow litigants their day in court. If a problem with service is identified, consider picking up the phone and conferring with defense counsel about curing the problem and avoiding the expense of motions.

A. Know and Utilize the Rules of Statutory Construction in Responding to Defense Motions

The Oregon Rules of Civil Procedure are construed as statutes. *See State v. Arnold*, 320 Or 111, 119, 879 P2d 1272 (1994) (construing ORCP 64 B(4)). The statutory construction methodology can be very helpful to your arguments about service. The court frequently has explained:

“In interpreting a statute, this court’s task is to discern the intent of the legislature. ORS 174.020. To do that, this court examines both the text and context of the statute. The text of the statute is the starting point for interpretation and is the best evidence of the legislature’s intent. If the legislature’s intent is clear after an inquiry into text and context, further inquiry is unnecessary.”

Arnold, 320 Or at 119, citing *PGE v. Bureau of Labor & Ind.*, 317 Or 606, 610-611, 859 P2d 1143 (1993). As the court stated in *England v. Thunderbirds and SAIF*, 315 Or 633, 638, 848 P2d 100 (1993), “[t]he best indication of legislative intent is the words of the statutes themselves.” The court should not insert what has been omitted or omit what has been inserted. ORS 174.010; *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 171-172, 650 P2d 1006 (1982). The court has the obligation to arrive at the correct construction of the statute. *Salinas v. One Stop Detail*, 194 Or App 457, 460, 95 P3d 745, *rev den*, 337 Or 556 (2004).

State v. Gaines, 346 Or 160, 206 P3d 1042 (2009), provides the current framework for statutory construction.

ORCP 7 D(1), and a plain reading of that rule, frequently affords a savings for defective service. ORCP 7D(1) provides, in relevant part:

“D Manner of service.

“D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. * * * ”

Frequently, as discussed below, defective service may be saved by arguing that service was sufficient under “all the circumstances.”

B. Consider Whether Defendant Has Waived Sufficiency of Service as an Affirmative Defense

Has the defendant waived the defenses of sufficiency of summons, sufficiency of service, and the statute of limitations by failing to raise them in a responsive pleading or motion to dismiss under ORCP 21? ORCP 21 G provides that these defenses are waived if not raised in a responsive pleading, and that they may not be raised by amendment.

C. Examine Whether Any Tolling Provisions Apply, Potentially Extending the Period in Which the Action May Be Commenced

Under ORS 12.160, for example, an action may be tolled if, at the time the cause of action accrues, the person is under 18 years old or insane. The time of such disability is not considered part of the time limited for the commencement of the action, but the action shall not be extended more than five years by such disability, or in any case longer than one year after such disability ceases. ORS 12.160. *See also*, ORS 12.150 (suspension of statute of limitations by absence from state or concealment within the state); ORS 12.170 (disability must exist when right of action accrued). Further, see ORS 12.180, 12.190, 12.195, 12.200, and 12.210 and related statutes.

Another potential tolling provision is ORS 12.155. This statute applies most often in motor vehicle accident cases, although it is not limited to those cases. It provides:

“12.155 Effect of notice of advance payment on running of period of limitations. (1) If the person who makes an advance payment referred to in ORS 31.560 or 31.565 gives to each person entitled to recover damages for the death, injury or destruction, not later than 30 days after the date the first of such advance payments was made, written notice of the date of expiration of the period of limitation for the commencement of an action for damages set by the applicable statute of limitations, then the making of any such advance payment does not suspend the running of such period of limitation. The notice required by this subsection shall be in such form as the Director of the Department of Consumer and Business Services prescribes.

“(2) If the notice required by subsection (1) of this section is not given, the time between the date the first advance payment was made and the date a notice is actually given of the date of expiration of the period of limitation for the commencement of an action for damages set by the applicable statute of limitations is not part of the period limited for commencement of the action by the statute of limitations.”

See Blanton v. Beiswenger, 195 Or App 335, 97 P3d 1247 (2004) (applying ORS 12.155).

D. Arguments That Service Was Effective, Either Because it Complied Technically with Rule 7, or, in the Totality of Circumstances, it Was Reasonably Calculated to Afford a Reasonable Opportunity to Appear and Defend

The trial court acquires jurisdiction under ORS 12.020 when the requirements of ORCP 7 are satisfied. *Baker v. Foy*, 310 Or 221, 224, 797 P2d 349 (1990); *Paschall v. Crisp*, 138 Or App 618, 622, 910 P2d 407, *rev den*, 424 Or 176 (1996). ORCP 7 D(1) is frequently critical to a response to a motion to dismiss based on inadequate service. It provides:

“D(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated,

under all the circumstances to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: Personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication."

In *Baker v. Foy*, the Supreme Court stated a two-part test for determining the adequacy of service under ORCP 7. First, if "service was accomplished in accordance with one of the methods specifically described in the rule, then we [the court] presume[s] that service was adequate, and, if nothing in the record overcomes that presumption, the inquiry ends." *Mitchem v. Rice*, 142 Or App 214, 217-18, 920 P2d 1121, *adhered to as modified*, 143 Or App 546 (1996). Second, if service was not accomplished in compliance with one of the methods specified under the rule, the court "must determine whether the method that the plaintiff did employ nevertheless was reasonably calculated to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." *Id.* at 218. See ORCP 7D(1). *Baker*, 310 Or at 228-29; *Paschall v. Crisp*, 138 Or App 618, 624, 910 P2d 407, *rev denied*, 324 Or 176 (1996). In *Williams v. Jett*, 183 Or App 611, 617, 54 P3d 624 (2002), the court held that the "totality of circumstances" is not limited to the point of service; rather, for the purposes of ORCP 7 D(1), "all of the circumstances" includes all circumstances occurring during the period in which steps necessary to effect service – in that case follow-up mailing – could have been accomplished.

An Opinion and Order in a recent Multnomah County case, *Salessi v. Dunham*, 2013 WL 5293983, Multnomah County Circuit Court No. 1207-09157, involving purported substitute service and the totality of circumstances is appended. The trial court ruled that misrepresentations made by a process server about the substitute service effected would not be attributed to the plaintiff, and that the information conveyed contributed to the reasonableness of plaintiff's belief that adequate notice of the action had been provided.

Another recent Multnomah County case involved service on a defendant driver at the address he had provided to DMV after the accident in question. The address was a homeless shelter, and the process server was told by a staff person at the shelter that the defendant did not reside at the address but that clients did receive mail there from time to time. Ultimately the process server delivered the service documents to a staff person apparently in charge of the shelter office, and then provided follow-up mailing by regular and certified mail to the same address. In circumstances in which the mail was never returned, the trial court denied defendant's motion for summary judgment based on lack of service and the statute of limitations. *See also Gallogly v. Calhoun*, 126 Or App 366, 869 P3d 346 (1994).

Look for cases with facts similar to yours, develop arguments showing why, in a particular case, the service made – for example, substitute service – was sufficient under all the circumstances. If the person who accepted service at defendant's residence lived there but was three days shy of his fourteenth birthday, should service nonetheless be considered adequate? What about the college student who maintains his parents' address on his license at DMV, but actually lives elsewhere, at least most of the time? How do you show that the address where substitute service was made was his actual residence, or, at a minimum, that plaintiff reasonably believed that service at that address was likely to apprise him of the action? *See also Benavidez v. Benavidez*, 161 Or App 73, 984 P2d 307 (1999) (father trying to protect his pregnant daughter who lived elsewhere misrepresented to process server that the defendant daughter lived with him; service considered adequate in all the circumstances).

Of course, technical compliance with Rule 7 is best. Short of that, plaintiff will need to develop a factual record that demonstrates why, although not technically proper, service was designed to afford defendant a reasonable opportunity to appear and defend. ORCP 7 D(1). It helps when the efforts to serve actually accomplished its purpose and, within a few days of service, defense counsel notifies plaintiff of the intent to appear. *See generally, Williams v. Jett*, Or App 611, 59 P3d 624 (2002); *Beckett v. Martinez*, 119 Or App 338, 343, 850 P2d 1148, *rev denied* 317 Or 583 (1993); *Duber v. Zeitler*, 118 Or App 597, 848 P2d 642, *rev denied* 316 Or 527 (1993) (court held service was adequate under ORCP 7D(1) because it was reasonably calculated to give defendant notice of the lawsuit); *Marriage of Boyd*, 131 Or App 194, 884 P2d 556 (1994) (same).

The Oregon federal courts apply a similar view. In *Travelers Cas. & Sur. Co. of Am. v. Brennecke*, 2006 U.S. Dist. LEXIS 67956 (D. Or. Sept 6, 2006), service on the defendant was held sufficient when the process server left the documents on the doorstep after the defendant answered his intercom and then refused to answer the door, but stood at the window in the front door as the server held out the complaint and summons and announced, “You are served.” Even if the defendant was not personally served, the court said there could be no dispute that he and his counsel had known of the existence of the action since his notice of appearance was filed.

E. Relation Back to the Date of Original Filing Under ORCP 23 C

When the argument is that plaintiff named and/or served the wrong defendant, plaintiff’s counsel should consider whether there is any possibility that an amended complaint naming the right defendant will relate back to the date of filing of the original complaint.

The trial court has broad discretion to allow an amended complaint to be filed under ORCP 23 A. ORCP 23 A provides that leave to amend “shall be freely given when justice so requires.” See *Franke v. Oregon Dep’t of Fish & Wildlife*, 166 Or App 660, 2 P3d 921 (2000) (Court held trial court abused its discretion in refusing amendment where record contained no evidence of prejudice).

Relation back is governed by ORCP 23 C, which provides that: “For an amendment changing a party defendant to relate back to the filing of a prior pleading, three conditions must be met: (1) the cause of action asserted against the new party must have arising out of the condition, transaction, or occurrence described in the prior pleading; (2) within the period of the statute of limitations, the new party must have received notice of the litigation; and (3) within the period of the statute of limitations, the new party must have known or had reason to know that, but for a mistake in identity, he was an intended party defendant.”

Johnson v. MacGregor, 55 Or App 374, 637 P2d 1362, 1364 (1981).

Several reported decisions have permitted relation back when the elements of ORCP 23 C are met. See, e.g., *McLain v. Maletis Bev.*, 200 Or App 374, 115 P3d 938 (2005); *Waybrant v. Clackamas Cty.*, 54 Or App 740, 746, 635 P2d 1365 (1981); *Mitchell v. The Timbers*, 163 Or App 312, 319-320, 987

P2d 1236 (1999) (court held plaintiff's proposed second amended complaint related back to his original complaint because defendant, although misnamed, should reasonably have understood, and in fact did understand, that he was the entity intended to be sued.); *Johnson v. Manders*, 127 Or App 147, 152, 872 P2d 420, *rev denied*, 319 Or 149 (1994) (amended complaint related back and was timely where defendant was adequately identified in the body of the complaint). The rationale is that the party opposing the amendment has received the notice that the statute of limitations was intended to insure. *See Welch v. Bancorp Mgt. Advisors, Inc.*, 296 Or 208, 221, 675 P2d 172 (1983).

Richlick v. Relco Equipment, Inc., 120 Or App 81, 852 P2d 240, *rev denied*, 317 Or 605 (1993), and the cases that follow it, hold that it is not sufficient to show that the new defendant named in the amended complaint knew of the action within the sixty days for service permitted by ORS 12.020. Rather, in order for relation back to apply, the defendant to be added had to know about the action on or before the date the statute of limitations would expire. *See Smith v. American Legion Post 83*, 188 Or App 139, 71 P3d 136, *rev denied*, 336 Or 60 (2003).

The death of a defendant remains a tricky area, as demonstrated in *Worthington v. Estate of Milton E. Davis*, 250 Or App 755, 282 P3d 895 (2012). The day before the statute of limitations ran, plaintiff filed an action for negligence, naming the driver of the other vehicle. When plaintiff learned that the driver had died more than a year earlier, plaintiff filed an amended complaint naming the personal representative of the driver's estate and the estate itself as defendants. The trial court granted the PR's motion to dismiss on the ground the amended complaint was filed outside the two-year limitations period and did not relate back to the original complaint. ORCP 23 C. The Court of Appeals rejected plaintiff's misnomer argument, that the amended complaint did not change the party against whom she had filed suit, and agreed with defendant that plaintiff had chosen the wrong person to sue. Substituting the personal representative for the decedent in the amended complaint changed the party, and the amended complaint did not relate back.

V. Potential for Refiling The Action Under ORS 12.220

A plaintiff may have a good faith basis to re-file his action if dismissed for procedural defects such as insufficient service. ORS 12.220 now allows a plaintiff, whose action is dismissed on procedural grounds, including ineffective

service or lack of jurisdiction, to re-file *within 180 days of the dismissal* without being barred by the statute of limitations. The conditions to re-filing are that:

- (1) the original action was timely filed;
- (2) the case was dismissed without prejudice on any ground not adjudicated on the merits;
- (3) if dismissed with prejudice, the case was dismissed on the ground that plaintiff failed to properly effect timely service of the summons and the statute of limitations expired; and
- (4) the defendant had actual notice of the action within sixty days of the original filing.

The legislative history demonstrates a desire to allow cases to be determined on their merits when the dismissal is based on procedural grounds and the defendant knew of the action within 60 days of the date of original filing. The legislative history indicates that in these circumstances, the defendant has received the notice of the action that the statute of limitations is designed to afford, and, once service is effected, defendant should be required to answer the claim.

Of course, all defenses that would have been available had the original action been timely commenced, ORS 12.020, are available in a new action commenced under ORS 12.220.

ORS 12.220 applies only when the original action is involuntarily dismissed. A plaintiff may not file a new claim pursuant to the savings statute if that same plaintiff, at any time, has voluntarily dismissed the original claim.

Terry Sheldon

Owner and Operator of
Barrister Support Services, Inc.
and
Malstrom's Process Serving Co.

Statutes of Limitations

- When action deemed begun:
 - “when the complaint is filed *and* the summons is served on the defendant” (ORS 12.020)
- Service deadline
- Time is of the essence

Bona Fide Effort

- DECLARATION OF BONA FIDE EFFORT
I, Plaintiff, have made a bona fide effort to collect this claim from the defendants before filing this claim with the court clerk.

Commencing a Case

- Small Claims and Notice of Small Claims
- Civil Complaint

Electronic Filing

- Must have an account <https://oregon.tylerhost.net/>
- Mandatory Attorney E-file
- Deadlines
- Time Sensitive documents

Electronic Filing

Myth	Fact
• All counties work the same	• Each county working <i>their</i> way
• State Forms	• Forms are county specific
• Save time and paper on <i>all</i> filings	• E-file, go to courthouse to get documents

Method of Service

- Personal Service
- Substitute Service
- Alternative Method of Service

Process Server's Viewpoint

Client perspective
vs.
Reality

Process Server's Viewpoint

- No Trespassing
- Unmarked homes
- Language barriers
- Never a dull moment

My name is Terry Sheldon, owner and operator of Barrister Support Service in Portland, Oregon and Malstrom's Process Serving Company in Salem, Oregon. I have three children, all grown adults now, and am married to my wonderful wife Tina. Most of my children have worked in this business with me in one form or another.

Process serving came to my attention while going to college for my business degree and working outside the legal industry. I have been in the process serving industry for over 30 years now. I pride myself on; providing great customer service, surrounding myself with knowledgeable staff, and the ability to pay attention to the details to get the job done right.

Statutes of Limitations:

When action deemed begun:

- a) When the complaint is filed and the summons is served on the defendant Service needs to be completed within 60 days of the complaint being filed. Time is of the essence. (ORS 12.020)

Each type of case is unique in the amount of time calculated for the Statute of Limitations. For instance, Landlord/Tenant issues- you can only file for back rent, damages, and fees owed within 12 months. (ORS 12.125) Recover Real Property on the other hand you have 10 years to file. (ORS12.050)

Nuts and Bolts of commencing a case:

First and foremost, you should have attempted to collect the debt prior to filing the case. Which could be calling the debtor or sending letter(s) to the debtor to demand payment or action before legal action will be taken. After giving the Debtor time to cure the debt or violation and no cure has been made, then you can start with legal action. There are two very basic ways to collect a debt with legal action:

Small Claims: when suing an individual or company for under \$10,000. *

Civil Complaint: when suing for over \$10,000. Typically done with the assistance of an Attorney to file a Civil Complaint. *

- a) *- when suing a company or business you must serve the Registered Agent for said business. Which can be found on the Corporation Division website http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login . If no registered agent is listed, you may serve an Officer of the company or Person in Charge at the Principal place of business. The trick is to find the correct company as so many have very similar names.

At this stage, doing your due diligence to find the correct person to serve will help in the next step, determining the appropriate service method. Service methods can vary depending on the document or the address of service.

Forms and Methods of Service: Please see hand out provided for a more in-depth explanation.

- Personal Service- Personally and in person to named defendant
- Substitute Service- Serving a co-occupant 14 years of age or older. When effecting this type of service you must ask these 3 major questions:
 - Does Jim Bob (defendant) live here?
 - Do you live here with Jim Bob?
 - (If unsure) Are you over the age of 14?

If the answer is yes to all the questions then we serve co-occupant, obtain name, description and relationship if they will tell us.

- Alternative Method of service:

After attempting service with no luck there are things that we can do to obtain verification that the address being attempted is the “address of record” or “usual place of abode”. First we can send out a postal search to see if this is the address listed with the United States Postal Service. Then we can check with DMV to verify the subjects’ address of record. Once we have done both of those, then we can file Motion, Affidavit, and Order for Alternative Method of Service by posting followed up with a first class mailing. This is done on a regular basis with Small Claims and is becoming more frequent with Summons and Complaints.

This type of service is the last option when the person we are trying to find is no longer updating their address or trying to avoid. This type of service is meant to satisfy ORCP 7D(1)- Service completed in the manner reasonably calculated, under all circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

A PROCESS SERVER'S HANDBOOK

A BASIC GUIDE TO THE SERVICE
OF PROCESS

By Terry Sheldon
Barrister Support Service, Inc.
11349 SW 60th Ave.
Portland, OR 97219

THIS MATERIAL IS INTENDED FOR REFERENCE ONLY
AND IS NOT TO BE CONSIDERED LEGAL ADVICE

Document Type	Manner/Rule	Statute	Explanation
Complaint	Personal Service Substitute Service Office Service Service by Mail Tenant of Mail Agent	ORCP 7D(2)(a) ORCP 7D(2)(b) ORCP 7D(2)(c) ORCP 7D(2)(d) ORCP 7D(3)(a)(iv)	Service of Process: Serve Within 60 days from the date of filing. Response Time: 30 days from the date of service or mailing, if applicable.
(Particular Defendants) Minors	Service upon a minor under the age of 14 years, by service upon such minor AND also the minor's father, mother, conservator, or, if there be none, then upon any person having the care of control of the minor or with whom such minor resides, or in whose services such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27A(2).	ORCP 7D(3)(a)(ii)	ORCP 7H allows that a summons and complaint may be transmitted by telegraph as provided in Rule 8D (12-14-96) Rule 8D Telegraphic transmission of writ, order, or paper, for service: Any writ or order in any civil action, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy as defined in ORS 165.840, of such writ, order or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose.
Incapacitated Person	Service upon a person who is incapacitated or financially incapable, by service upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).	ORCP 7D(3)(a)(iii)	
Corporation Limited Partnership	Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the office of a registered agent.	ORCP 7D(3)(b)(i)	

Document Type	Manner/Rule	Statute	Explanation
FED- Commercial	Personal Service Posting of Commercial FED: Even if the business/Defendant cannot be found, the documents must be posted on the door, as the eviction has to do with the premises.	ORCP 10(3)(b)	An initial hearing date is set by the court clerk, minimum of 8 days from the date of filing. Service must be made by the end of the next judicial day, (from the date of filing or date accepted by E-File).
FED- Residential	Personal Service- to any occupant 14 years or older) Posting- to main entrance of premises.	ORS 105.135	Notice of Restitution: The process server or sheriff serving the restitution must mail a copy of the restitution to the defendant at the premises. The affidavit/proof of service must be filed with the court by the end of the next judicial day following service.
Notice of Restitution	Personal Service(Any occupant 14 years or older) Posting- to main entrance of premises.	ORS 105.158	
Order (Requiring Appearance or written response less than 30 days)	Personal Service Only	ORCP 7D(2)(a)	As per ORCP 9b, service of any notice or other paper to bring a party into contempt may only be served upon the party personally.
Order (Appearance nor required or written response is 30 days or more)	Personal service Substitute Service	ORCP 7D(2)(b)	Orders should, as a general rule, be served 10 days prior to any court date but courts shall have discretion to modify these stated times.
Petition	Personal service Substitute service	ORCP 7D(2)(a) ORCP 7D(2)(b)	ORCP 37A(2) provides that petitions shall be served in the same manner as a summons in ORCP 7.
Petition and Notice; Conservatorship/Guardianship	Personal service Only upon the proposed protected person, or parent of a minor. (try to have a witness present at the time of service)	ORS 125	The proposed protected person then has 15 days to respond, from the date of service.

Document Type	Manner/Rule	Statute	Explanation
Small Claim	Personal Service Substitute Service Office Service Service by Mail Tenant of Mail Agent	ORCP 7D(2)(a) ORCP 7D(2)(b) ORCP 7D(2)(c) ORCP 7D(2)(d) ORCP 7D(3)(a)(iv)	Service of process should be within 60 days from the date of filing. Response time: 14 days from the date of service or mailing, if applicable.
Subpoena: (Appearance Required) Name Person Subpoena: Organization	Personal Service Only Personal service: By personal service or office service upon a registered agent, office, director, general partner, or managing agent of the corporation of limited partnership or by personal service upon any clerk on duty in the office of the registered agent. Personal service: Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon office, director, managing agent or attorney thereof. Personal service: Upon any general partnership by personal service upon partner or any agent authorized by appointment or law to receive service for the partnership. Personal service: Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service.	ORCP 55D(1) ORCP 7D(3)(b)(i) ORCP 7D(3)(d) ORCP 7D(3)(e) ORCP 7D(3)(f)	Service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Must be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f).

Document Type	Manner/Rule	Statute	Explanation
Subpoena: Records Production	Personal Service Substitute service Office service	ORCP7 D(3)(b)(i) ORCP D(3)(d) ORCP D(3)(e) ORCP D(3)(f)	ORCP 55D(1)a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period, unless the court orders a shorter period. ORCP 55D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of records, not accompanied by a command to appear at trial.
Subpoena: Law Enforcement Agency Police Officer, State Policeman, etc.	Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. A Subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer no later than 10 days prior to the date of attendance is sought.	ORCP 55D(2)(a)(b)	If under the 10 days prior to the date attendance is sought, the subpoena must be PERSONALLY served upon the officer unless the agency will accept.

Document Type	Manner/Rule	Statute	Explanation
Subpoena Via Mail	<p>Service by Mail: Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section.</p> <p>It is certified that the attorney or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial. Arrangements for payment to the witness of fees and mileage satisfactory to the witness.</p> <p>The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.</p>	<p>ORCP 55D(3)</p> <p>ORCP 55D(3)(a) ORCP 55D(3)(b)</p> <p>ORCP 55D(3)(c)</p>	<p>Conditions of this type of service provide that the mailing needs to be done 10 days prior and signed for 3 days prior in order for service to be valid.</p>

Document Type	Manner/Rule	Statute	Explanation
Trustee's Notice of Sale	<p><u>Personal Service</u> <u>Substitute Service</u>: at the time of service, server needs to obtain names of all occupants, not personally served, 18 years or older. <u>Posting</u>- to the main entrance of premises</p>	<p>ORS 86.774 (renumbered in 2013) ORCP 7D(2) ORCP 7D(3)</p>	<p>Service must be made by serving an occupant 18 years or older 120 days prior to sale date. If no one is available on first attempt, documents must be posted. Attempt for service must be made on a day that is at least two days after the first attempt, if no one is available, documents must be posted. Attempt for service must be made on a day that is at least two days after the second attempt, if no one is available, a copy of the documents along with the statement of the time and manner of service should be mailed to the premises addressed to occupants". Service on an occupant is effected on the earlier (first attempt) date that the notice is served.</p>

Document Type	Manner/Rule	Statute	Explanation
Writ of Garnishment Individual	Personal service: A writ may be delivered to an individual having possession of the property.	ORS 18.655(1)(a)	Writs of Garnishment are valid 90 days from the date they are issued by the clerk of the court or an attorney. Writs need to be re-issued every 90 days for employers.
Limited Partnership	Personal service: To any person designated by the partnership to accept delivery of a writ or any partner, if the property is in the possession of a partnership; provided however that the partnership is limited.	ORS 18.655(1)(b)	Writs must be served within 60 days of being issued to be valid. Writs are a singular writ and the garnishee withholds the property on a one-time basis.
Corporation	Personal service: To any person designated by the corporation to accept delivery of a writ, or any officer or any managing agent of the corporation, if the property is in the possession of the corporation.	ORS 18.655(1)(c)	Following delivery of a writ of garnishment to a garnishee, the person who delivered the writ must mail or deliver promptly the following documents to the debtor whose property is being garnished by the writ:
Financial Institution	Personal service: If the property(funds) is held by a financial institution as defined in ORS 706.005, the manager, assistant manager or other designated person at any office or branch where deposits are received or that has been designated by the institution as a place for the delivery of writs. Financial institution require a search fee as outlined in ORS 29.377 and have to be included with the writ at the time of service in the amount of \$15.00. Search fee does not apply to employee's of the financial institution.	ORS 18.655(1)(e)	(a) A copy of the writ of garnishment. (b) The original of the debt calculation form. (c) A notice of exemptions (d) A challenge to garnishment with the names and addresses of the garnishor and garnishee entered by the garnishor. As stated in ORS 18.652 writs can only be delivered by the sheriff or process server if they have errors and omissions insurance with limits not less than \$100,000.00 per occurrence from a company authorized to do business in this State.

Personal Service ORCP 7D(2)(a)

Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

Substitute Service ORCP 7D(2)(b)

Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

Office Service ORCP 7D(2)(c)

If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

Tenant of Mail Agent ORCP 7D(3)(a)(iv)

Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that: **(A)** the plaintiff makes a diligent inquiry but cannot find the defendant; **and** **(B)** the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail 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 delivered the copies of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

Required Mailing

The plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the documents to the defendant to the address where service was completed together with a statement of the date, time, and place at which service was made. For the purpose of computing any period of time prescribed or allowed by these rules, service shall be completed upon such mailing.