

# HOFFMAN, HART & WAGNER

Attorneys at Law

TWENTIETH FLOOR  
1000 S.W. BROADWAY, PORTLAND OR 97205  
503/222-4499 FAX 503/222-2301

Michael D. Hoffman\*  
John E. Hart  
Mark H. Wagner  
James P. Martin\*  
David K. Miller  
Robert S. Wagner\*

Janet M. Schroer  
Delbert J. Brenneman  
Brian M. Perko  
Ruth J. Hooper  
Jeffrey R. Street\*  
Martha J. Hodgkinson

Lawrence P. Blunck  
Maryann Yelnosky-Smith  
Gordon L. Welborn  
Stephen R. Rasmussen\*•  
Michael R. Fendall  
Steven A. Kraemer

Eli D. Stutsman  
Richard L. Fortner  
William E. Goshert  
Theresa A. Healy  
Robert E. Kabacy

**Legal Assistants**  
Martha J. Gold  
Carol V. Thayer  
Evelyn J. Kelley  
Sandra M. Morris  
Lisa A. Fenton

\* Admitted in Oregon & Washington  
• Also admitted in California

December 28, 1993


Mr. Maurice Holland  
Council on Court Procedures  
University of Oregon  
School of Law  
Eugene, OR 97403-1221

Dear Maury:

Another suggested issue for Council consideration has been received through Bernie Jolles from the PLF. I wanted you to be aware of this in advance of our January 15, 1994 meeting-- although we will not need to place it on the agenda since it is a little premature at this point.

Thanks for your continuing assistance.

Best regards,

  
JOHN E. HART

JEH:mfh  
Enclosure

# JOLLES, SOKOL & BERNSTEIN, P.C.

ATTORNEYS AT LAW

721 SOUTHWEST OAK STREET  
PORTLAND, OREGON 97205-3791



TELEPHONE  
(503) 228-6474  
FACSIMILE  
(503) 228-0836

BERNARD JOLLES  
LARRY N. SOKOL  
HARLAN BERNSTEIN  
MICHAEL T. GARONE  
EVELYN M. CONROY \*  
KARL G. ANUTA \*

\* ALSO MEMBER OF  
WASHINGTON STATE BAR

December 20, 1993

John E. Hart  
Hoffman, Hart & Wagner  
Attorneys at Law  
KOIN Center, Suite 1200  
222 S.W. Columbia  
Portland, Oregon 97201

Re: ORCP Changes

Dear John:

Enclosed is a suggestion for reconsidering Rule 7 to simplify service problems. I understand that the PLF will be making some sort of a proposal for a change in the rule that we can consider.

By copy of this letter to Barbara Fishleder, I am asking her to get together Pat Rothwell's proposal so we can place it on our agenda.

Yours very truly

  
Bernard Jolles

BJ:wh

cc: Barbara S. Fishleder



## PROFESSIONAL LIABILITY FUND

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5200 S.W. MEADOWS ROAD  
P. O. BOX 1600  
LAKE OSWEGO, OREGON 97035-0889

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CHIEF EXECUTIVE OFFICER

(503) 639-6911  
OREGON WATS: 1-800-452-1639  
DOCUMENT TRANSMISSION: (503) 684-7250

December 17, 1993

Bernard Jolles, Esq.  
Jolles Sokol & Bernstein  
721 S.W. Oak St.  
Portland, OR 97205-3791

Re: ORCP Changes

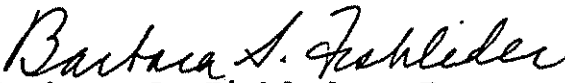
Dear Bernie:

As you know, I have been keeping my eye open for changes needed in the ORCP and other statutes. At this point, I am particularly concerned about ORCP 7G, as outlined in Pat Rothwell's article in the February 1993 issue of *In Brief*. I am enclosing a copy of the article for your review.

Pat has graciously offered to help in amending the Rule and I have forewarned him that I am going to take him up on the offer. I have already mentioned to him that you are working with the Council and that he can expect to be hearing from us shortly.

Thanks again for contacting the PLF and inviting our feedback. I look forward to working with you on this project.

Sincerely,

  
Barbara S. Fishleder, Esq.  
Director of Loss Prevention

BSF/clr

cc: Patrick Rothwell

enclosure



# IN BRIEF

FEBRUARY 1993

## SERVICE OF PROCESS — WHAT IS ADEQUATE SHORT OF PERSONAL SERVICE?

There are few things in a plaintiff attorney's life more distressing than a phone call or letter from a defense attorney advising that attempts at service of the complaint were inadequate and the statute of limitations has now run. This article reviews Oregon cases on service and a change in ORCP 7 dealing with DMV service. This article provides recommendations for the filing and service of complaints in Oregon.

### REASONABLY CALCULATED TO APPRISE DEFENDANT

Seven years ago the Oregon Supreme Court decided *Lake Oswego Review v. Steinkamp*, 298 Or 607, 695 P2d 565 (1985). The plaintiff in *Steinkamp* mailed the summons and complaint to defendant with a certified, return-receipt requested letter. The mail carrier, by chance, happened to know defendant and delivered the letter containing the summons and complaint to the defendant at a different address. The defendant signed for the letter. The Supreme Court held the service on defendant was valid.

Some attorneys may have understood, after reading *Steinkamp*, that service was "liberalized" and as long as service was in some way reasonable and the defendant received notice, service was not an issue. A year later, in 1986, the Oregon Supreme Court decided *Jordan v. Wiser*, 302 Or 50, 726 P2d 365 (1986) and eliminated that understanding. In *Jordan*, the plaintiff's attorney had information from the Oregon DMV that one of the defendants resided with his mother. The attorney instructed the process server to serve that defendant at his mother's address. The process server attempted substitute service by leaving a certified copy of the summons and complaint at the mother's address. It

turned out, however, the defendant lived in Washington at the time of the attempted substitute service. About a week or two later, the defendant's mother drove to Washington and attempted to hand-deliver the summons and complaint to her son but he refused to accept. The defendant had also previously been informed by his insurance carrier a complaint had been filed.

The court in *Jordan* distinguished *Steinkamp* by noting the mother's attempt to serve the summons and complaint on her son was not authorized by the plaintiff. The *Jordan* court stated the person who makes or attempts to make personal service on a defendant must intend to serve the summons and must be authorized to do so by plaintiff or plaintiff's attorney. Here, in the court's words, the defendant's mother was a "self-starter" and could not be considered an agent for purposes of service. The court also noted that actual notice by defendant is not enough to satisfy service despite the language of ORCP 7D(1) and ORCP 7G.

### FOLLOW-UP MAILING IN SUBSTITUTED SERVICE

In 1990, the Supreme Court decided two service cases. In *Hoyt v. Paulos*, 310 Or 196, 796 P2d 355 (1990), the plaintiff personally served the Oregon DMV

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### DISCLAIMER

This newsletter includes claim prevention techniques which are designed to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented and readers should conduct their own appropriate legal research.

and mailed a copy of the summons and complaint by certified mail to the defendant. The plaintiff also mailed a copy of the summons and complaint to defendant's insurer but it was by regular mail. The issue concerned whether the follow-up mailing to the insurer must be by registered mail and whether that mailing was necessary for an action to be deemed "commenced" for statute of limitations purposes. The *Paulos* court held the mailing of the complaint to the insurer by regular mail did not deprive the court of jurisdiction and therefore the action was timely commenced.<sup>1</sup>

## TWO-PRONG TEST OF BAKER

The Supreme Court then decided *Baker v. Foy*, 310 Or 221, 797 P2d 349 (1990). In *Baker*, two days before the applicable statute of limitations ran, the plaintiff filed a complaint. The Oregon DMV records showed the defendant resided at his mother's address. The defendant also told the investigating officers at the scene of the motor vehicle accident that he resided at his mother's address. The plaintiff's attorney gave the complaint to the process server who served it by substituted service at the mother's address. The plaintiff's attorney sent a follow-up mailing to the mother's address. In fact, the defendant had not lived at his mother's address for over two years. The defendant nonetheless had actual notice of the complaint. The *Baker* court held the service invalid.

The *Baker* court pronounced a two-prong test for determining the adequacy of service under ORCP 7. The first question is whether the method of service was specifically permitted under ORCP 7 and accomplished in accordance with ORCP 7. If the answer is yes, service is presumptively adequate. If the answer is no, the next question is whether the method of service satisfies the "reasonable notice" standard under ORCP 7D(1).

This two-prong *Baker* test is not helpful in practice since obviously if service satisfies the first prong there is generally no issue. Further, the *Baker* case does not provide guidance on the second question of what method, not expressly authorized under ORCP 7, is nonetheless "reasonably calculated to apprise defendant of the existence and pendency of the action."

## RECENT CHANGE IN DMV SERVICE RULE

More recently, ORCP 7D(4) was amended. Now, in a motor vehicle accident case, DMV service is authorized on a defendant "who cannot be served with summons by any method specified in subsection 7D(3)." This language suggests a plaintiff's attorney can no longer initially turn to the Oregon DMV for service in an automobile accident case but must make some attempts at personal service. The extent of these attempts is unclear. Must the plaintiff's attorney try to personally serve the defendant twice, four times, six times, before using DMV service? No Oregon case has decided this issue.

## RECOMMENDATION

To try to avoid statute of limitations/service issues, the plaintiff's attorney should always file and serve the complaint at least three months before the statute of limitations runs. Service defects can then be timely addressed and corrected. Sometimes that is not possible, for example, when a client comes to the attorney a few weeks or a few days before the statute of limitations is going to run. In that situation, the plaintiff's attorney needs to stay on top of service for the sixty days following the filing of the complaint to be sure personal service is obtained. (See ORS 12.020(2) which essentially allows a sixty day relation back grace period for statute of limitations purposes). If personal service is not obtained and cannot be obtained, the plaintiff's attorney needs to look closely at the substitute service method used or to be used. Is that method expressly authorized under ORCP 7 and have all aspects of the substitute service been completed within the sixty day period? It is not advisable to rely on the second prong of the *Baker* test or ORCP 7G and assume the service method was reasonably calculated to apprise the defendant of the lawsuit or to assume because defendant

## ON THE RECORD

You are in court. The judge is pressuring you. Your client expects you to take care of everything, and doesn't really understand what's going on. You think (and hope) everything will be fine. In a weak moment, you agree to waive the record.

Two weeks later, you are back at the office. The judge's decision has come in. You know the client will be upset. You believe the decision is wrong. **YOU ARE STUCK WITH NO RECORD TO APPEAL.**

You can avoid this trap by simply always putting the proceeding on the record. Never *assume* that the client will not want to appeal - after all, it is generally the *unexpected* result which causes clients to appeal in the first place. If you do proceed to waive the record on a case, explain the consequences of that action to your client, and document your explanation in the file.

## FREE FROM THE PROFESSIONAL LIABILITY FUND

The Professional Liability Fund has a number of practice aids which are available at no cost. If you are interested in obtaining any of these practice aids, please write or fax your request to Barbara S. Fishleder, Professional Liability Fund, P.O. Box 1600, Lake Oswego, Oregon 97035 (fax #684-7250). No phone orders please.

### OFFICE SYSTEMS

#### INFORMATION SHEETS:

Appointments  
Billing and Time Slips  
Client Relations  
Conflict Control Procedure  
Creating a Calendar in  
WordPerfect  
Creating a Conflict System in  
WordPerfect  
Diary/Tickler Systems  
Docket Control  
Follow-up Information Sheet  
Follow-up/Log Sheet  
Form Book  
Mail Handling  
New Client  
New Secretary  
Reception Duties

### CHECKLISTS:

Appellate Time Limitations  
Client Relations  
Construction Lien  
Corporate Case Checklist  
Criminal Case Checklist  
Defense Case Checklist  
Dissolution Case Checklist  
Dissolution Case Closing  
Checklist  
Docket Control Checklist  
File Closing Checklist  
Guardianship/Conservatorship  
Checklist  
Guardianship/Conservatorship  
Annual Accounting Checklist  
Plaintiff's Case Checklist  
Probate Case Checklist  
Sale of Small Business Checklist  
Settlement or Judgment  
Disbursal Checklist

Small Firm or Solo Practice  
Start-up Checklist  
Support Order/Decree Checklist  
Trust Deed Foreclosure

### INTAKE SHEETS:

Domestic Relations Information  
Sheet  
New Client Information Sheet  
Will Information Sheet

### TIME LIMITATION

#### SCHEDULES:

Appellate Time Limitation  
Litigation Time Limitation  
Statute of Limitations, Generally  
Workers' Compensation Time  
Limitations

### SAMPLE FORM LETTERS:

Nonengagement Letters  
Engagement Letters  
Disengagement Letters

*If you use these practice aids and have suggestions for improvements, please contact Barbara Fishleder at 639-6911 or 1-800-452-1639.*

has notice of the lawsuit service is adequate.

In addition, if the complaint is filed shortly before the statute of limitations runs and the plaintiff's attorney is aware defendant is represented by counsel, the plaintiff's attorney should agree to an open extension of time to defense counsel only on the condition no service defects will be raised. Otherwise, the plaintiff's counsel may be faced with a later motion to dismiss based on inadequate service when the defect in service could have been corrected within the sixty days of the filing of the complaint.

Patrick N. Rothwell  
Hallmark, Keating & Abbott, P.C.

<sup>1</sup> See also Korgan v. Gantenbein, 74 OR App 154, 702 P2d 427 (1985). Follow-up mailing after substituted service does not effect when an action is deemed "commenced" for statute of limitations purposes and is only a requirement of the Oregon Rules of Civil Procedure, not ORS 12.110.

## COMPUTING TIME FOR FILING

In *Tyree v. Tyree* 116 OrApp 317, \_\_\_ P2d \_\_\_ (1992), the plaintiff mailed the tort claim notice within one year of the accident (a Friday), but the government body did not receive the notice until after the one year period (a Monday). The court held that ORCP 10A did not apply in computing the time for filing. The case means that tort claims must be received by the public body within the statutory time limitations and that Saturdays and legal holidays (including Sundays) WILL BE COUNTED as days. If you have a tort claim notice, be sure to file early! If time is running out -- be sure to hand-deliver the notice and get proof that the notice is received.