FYI only

January 31, 1998

To: OSB Procedure & Practice Committee (via Karsten Hans Rasmussen)

Fm: Maury Holland[1] Maury Holland

Re: The Need to Clarify Oregon's "Sanskrit" Statute, ORS 12.220

Most U.S. jurisdictions have a so-called "savings statute," a few do not, and one could debate whether having such a statute represents good policy.[2] Oregon has, in fact, long had a savings statute, currently codified as ORS 12.220 (copy attached), but if there were a Nobel Prize for lousy statutory drafting, it would be a strong entry. Read literally, it provides that if one timely commences an action and loses, either at trial or on appeal, one "may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section."

While rather awkwardly providing that the subsequent action relates back to the first for purposes of limitations, the fatal flaw in ORS 12.220 is its failure to make clear that its relation-

[1]Although I am Executive Director of the Council on Court Procedures, I should say that this proposal is not submitted in that capacity or on behalf of the Council, which bears no responsibility for it and has in no way endorsed it. I've merely copied Council members on this for whatever interest it might have.

[2]Regarding savings statutes generally, *see* 51 AM. JUR. 2d §§ 301-318, 54 C.J.S. §§ 240-251, 6 A.L.R.3d 1043, 79 A.L.R.2d 1333, 79 A.L.R.2d 1290, and 54 A.L.R.2d 1229. While I have not made a count of all other states, my impression is that a considerable majority of them do have savings statutes of one kind or another. Federal law provides at least the following example of a savings statute:

> 28 U.S.C. § 1367(d). The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. {Although not as clear as it might be, this provision is intended to protect against so-called pendent or supplemental state law claims becoming time-barred while pending in a U.S. district court.}

back provision comes into play only when the first action is dismissed on some procedural ground, not going to the merits. Without this limitation being expressly stated, the provision makes no sense because, in addition to "all defenses that would have been available against the [original] action," the subsequent action would presumably be subject to the additional defense of claim preclusion. As presently worded, anyone reading 12.220 might pardonably wonder why any statute would authorize people to sue, lose, and then sue again on the same cause of action when the only result could be dismissal on basis of claim preclusion merely because the second action would not be time-barred. If a lawyer took 12.220 literally, and reinstituted an action on a claim precluded by any sort of previous merits dismissal merely because the action would not be time-barred, he or she would likely be looking at sanctions.

My suggestion is that your Committee consider drafting new statutory language either replacing 12.220 or performing drastic surgery on it, for sponsorship by the OSB in the 1999 legislative session if it gets the required approvals up the line to the BOG. The new or amended savings statute should, at a minimum, contain the following three elements: 1. the defendant(s) must receive actual notice of the action within the time prescribed by ORS

12.020(2)[3] for service of summons;[4] 2. the original action must be dismissed, either by the trial or appellate court, on some procedural ground not implicating the merits,[5] and; 3. a new

[3] "**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."

One would not want the new or amended provision to state that the first action must have been "begun" or "commenced" as provided in ORS 12.020, because that statute requires that summons be served within 60 days of filing of the complaint, and "service of summons" is understood to mean sufficient service in accordance with ORCP 7. This would largely defeat the purpose of this or any good savings statute, the most frequent application would probably be in those considerable number of cases where service was insufficient despite having afforded defendant actual notice of the action. While I haven't fully thought this point through, I'm inclined to think that triggering of the savings statute should be conditioned upon defendant having received actual notice of the action within the time prescribed by ORS 12.020(2), most often as a result of insufficient service.

[4] In addition to its failure to differentiate between merits and non-merits dismissals, another serious flaw in the present ORS 12.220 is the language: "[I]f an action is commenced within the time prescribed therefor . . ." The reason this is bad is because under ORS 12.020, the key statute in most cases posing the issue of whether an action is time-barred, the first action would not be deemed to have been "commenced" unless there was sufficient service of summons within the prescribed time. Retaining the "if an action is commenced" phraseology would be unwise because it would render the savings statute inapplicable in precisely those many cases where it is probably most appropriate and most frequently needed, namely, cases where the defendant gains actual knowledge of the action within the time prescribed by ORS 12.020 by means of service that is insufficient. The thought that somehow must be captured is that, in the first action, the complaint was filed and the defendant somehow got actual notice within the prescribed time, almost always by way of insufficient service.

[5] Great care should naturally be taken as how, precisely, this concept is expressed. The obvious procedural grounds that come to mind as bases for prior dismissals which should trigger application of the savings statute are those listed in ORCP 21 A(1) through (7), but not A(8) or (9). Although in

action, asserting one or more of the claims asserted in the original action, must be commenced within some relatively short time following the date of the entry of judgment of dismissal in the first action.[6]

An amended ORS 12.220, or an entirely new savings statute, will not be easy to draft, although there are plenty of models in other states to provide inspiration and guidance. Should you decide to act on this suggestion, and if you would care to have me assist, or consult with you in connection with your drafting, I'd be happy to do so. Drafting a workable savings statute obviously presents several knotty problems, some of which should perhaps be addressed in the statutory language, but others of which are probably best left to the courts and judicial technique Examples of such problems are whether the statute should apply when the first action is dismissed in some other jurisdiction and the second is filed in an Oregon court,[7] what happens when there are additional claims or some different parties in the second as opposed to the first action, and how specifically to express the non-merits grounds of dismissal in the first action that would trigger the statute's application.

The rationale of savings statutes is simple and, in my opinion, sound as a matter of policy. It is that, provided it results in actual notice to defendant within the time prescribed for service of summons, institution of the first, timely action, serves the primary purpose of statutes of limitations, which is to let prospective defendants know, within a reasonable time following whatever events give rise to litigation, that they are being sued, by whom, and more or less about what, even if the action is dismissed on some ground not going to the merits. The requirement that the second litigation be instituted quite

Oregon practice improper venue is not a ground for dismissal, it might be wise to include that defense to cover instances of dismissals for improper venue in federal court or a court of another state in cases where Oregon limitations law is generally applicable as a matter of choice of law. Perhaps the best solution would be to use some generic phrase such as "dismissed without prejudice" or "dismissed on any ground not involving the merits of a claim or any substantive defense."

[6]The current ORS 12.220 provides for one year, which strikes me as much too long. Savings statutes of other jurisdictions should be consulted, but something like 90 days following entry of judgment dismissing the first action seems to me more appropriate.

[7]As a matter of choice of law, Oregon's new or amended savings statute should probably apply in all cases wherein Oregon's limitations law generally is applicable, and therefore should not depend upon whether the subsequent action is in an Oregon or non-Oregon court. This is a rather complicated matter which almost certainly should not be addressed in statutory text.

promptly after dismissal of the first serves what is probably the secondary purpose of statutes of limitations, which is to enhance the reliability of fact-finding by barring stale claims. In any event, Oregon has, I believe since statehood, resolved the policy question in favor of having a savings statute, but the current one is so poorly drafted as to be almost useless.

I've attached copies of all the appellate opinions in which the Supreme Court or Court of Appeals have interpreted ORS 12.220. Actually, those courts have done a remarkably good job making sense of this statutory hash, despite its defective wording. It is worth noting that, in *Hatley*,[8] the Supreme Court characterized ORS 12.220 as a savings statute, and applied it accordingly.

The problem with ORS 12.220 is not that the appellate courts have misconstrued it, because for the most part they have not done so, but that its opaque language camouflages its intended meaning to the point where many Oregon lawyers appear to ignore it. Since first becoming interested in this procedural quirk, I've made something of a point of asking perfectly competent trial lawyers whom I've encountered what they believe the situation is when a timely action is dismissed for insufficiency of service or the like and the pertinent limitations period expires while the action is pending, prior to entry of judgment. Each one of the dozen or so lawyers to whom I have put this question have answered that there would be no point in refiling the action because it would then be time-barred! All of these lawyers, of course, were at least vaguely aware of ORS 12.020 and what it means, but none of them had any understanding of what ORS 12.220 must be understood, and has been judicially interpreted, to mean. Of course, it can always be said that any competent lawyer should understand the arcane meaning of ORS 12.220 from the appellate opinions that have construed it. But I assume you'd agree that, insofar as attainable, the meaning of any statute should appear as clearly as possible from simply reading its language. I wonder, for example, whether plaintiff's attorney in *Baker v. Foy*[9] was aware that ORS

[8]261 Or 606, 494 P2d 426 (1972).

[9]310 Or 221, 797 P2d 349 (1990). Although the Supreme Court was almost certainly correct in holding service in this case insufficient, and therefore had no choice but to order the action dismissed, from all that appears in the opinion it involved a serious miscarriage of justice and was a kind of rebuke to the legal system. The defendant got actual notice of the action by reading the summons and complaint at his mother's residence, where the papers had been delivered on the basis of his residence address given by defendant at the scene of the accident and as also shown on the DMV driver records. Since this was, in fact, no longer the defendant's residence, this was not good substituted service, and the Court had no choice but to also hold it insufficient under the "backstop" standard of being "reasonably calculated." Under the circumstances of this case, could it be seriously argued that plaintiff should by limitations be prevented from refiling this action,

12.220 apparently gave him or her the option of refiling that case for up to a year after dismissal of that action, even though that dismissal probably occurred as much as two years after filing. While I have no way of knowing, I'd be willing to make a modest bet that, each year in Oregon trial courts, something on the order of a dozen timely actions are dismissed for insufficiency of service or similar procedural grounds, during the pendency of which limitations has run, but they are not refiled because plaintiff's lawyers did not understand the intended meaning of ORS 12.220. If such failure would warrant a claim for malpractice, I question whether it shouldn't be against the Legislature rather than plaintiffs' attorneys, though of course I recognize that if claims were recognized against legislators for inept drafting of statutes, none of them could afford the cost of liability insurance.

Apart from making it more likely that plaintiffs whose claims should be adjudicated on their merits would obtain that result, clarifying ORS 12.220 seems to me would carry another benefit. That benefit would be to remove much of the incentive, indeed the professional obligation, competent defense lawyers apparently feel to litigate the issue of sufficiency of service to the hilt, even in cases where sufficient alias service could almost certainly be effected following granting of their motion to dismiss, and where their clients received actual notice of the action. Granting that defendants are entitled, pursuant both to the due process clause of the 14th amendment and ORCP 7 D(1), to sufficient service, i.e., service that is "reasonably calculated to apprise the defendant of the pendency of the action," the fact almost certainly is that their lawyers would seldom seek dismissal for insufficient service if the only result of obtaining it were to put plaintiff to the trouble and expense of refiling and then making good alias service. The only plausible reason for what appears from the appellate reports to be a considerable amount of wasteful litigation about sufficiency of service is the apparent assumption that when the limitations period runs while the first action is pending, any filing subsequent to its dismissal would be futile because the action would then be time-barred.

To conclude, I believe that Oregon's existing savings statute should be either repealed or made intelligible. I also believe that the latter is the better choice.

cc: Chair and Members, Council on Court Procedures (fyi)

however promptly, if good alias service could then be effected?

12.220. Commencement of new action within one year after dismissal or reversal.

Except as otherwise provided in ORS 72.7250, if an action is commenced within the time prescribed therefor and the action is dismissed upon the trial thereof, or upon appeal, after the time limited for bringing a new action, the plaintiff, or if the plaintiff dies and any cause of action in the favor of the plaintiff survives, the heirs or personal representatives of the plaintiff, may commence a new action upon such cause of action within one year after the dismissal or reversal on appeal; however, all defenses that would have been available against the action, if brought within the time limited for the bringing of the action, shall be available against the new action when brought under this section.

(Amended by 1961 c. 726 s 397)

< General Materials (GM) - References, Annotations, or Tables >

NOTES, REFERENCES, AND ANNOTATIONS

12.220

NOTES OF DECISIONS

1. Dismissal

Dismissal for want of jurisdiction of the cause, whether requiring determination of issues of law alone or of issues of both law and fact, is dismissal within meaning of this section. Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 426, 495 P2d 1196 (1972)

Voluntary nonsuit granted before commencement of trial is not dismissal within meaning of this section. Vandermeer v. Pacific Northwest Dev. Corp., 284 Or 517, 587 P2d 98 (1978)

Party could refile case which was originally brought within proper period and dismissed without reaching merits because there was another action pending on same cause in federal court where dismissal was upheld on ground federal court lacked jurisdiction of that cause and refiling occurred within one year of effective date of decision on appeal. Beetham v. Georgia-Pacific, 87 Or App 592, 743 P2d 755 (1987)

For dismissal of inactive case to have additional consequence of preventing refiling of action because of failure to prosecute, dismissal procedure must follow ORCP 54B (3). Moore v. Ball, Janik & Novack, 120 Or App 466, 852 P2d 937 (1993), Sup Ct review denied

2. Reversal on appeal

Reversal for new trial is not within purview of this section. Vandermeer v. Pacific Northwest Dev. Corp., 284 Or 517, 587 P2d 98 (1978)

To qualify for refiling after dismissal at trial or on appeal, trial proceeding must have been original action rather than court review of action by different tribunal. U.S. West Communications, Inc. v. Eachus, 124 Or App 325, 862 P2d 102 (1993)

3. In general

Action brought in federal court and dismissed for lack of diversity jurisdiction was within saving clause of this section. Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 426, 495 P2d 1196 (1972)

The words "upon the trial" in this section include the trial of questions of law as well as of fact. Hatley v. Truck Ins. Exch., 261 Or 606,

Attachment A

Summary of 1999 Session of the Legislative Assembly

1. None of the ORCP amendments promulgated by the Council at its Dec. 12, 1998 meeting was disapproved or modified.

2. The amendments to ORCP 70 A(2)(a) proposed by the OSB on behalf of the Debtor/Creditor Section, which were endorsed but not promulgated by the Council, were enacted as part of SB 415, which also amended ORS 18.350 and 46.488.

3. ORCP 46 B(1) and 55 C(1) were amended by SB 564 to delete the obsolete references to "district court." (These should have been done by the Council, and I apologize for my failure to catch them in time.)

4. ORCP 47 C was amended by HB 2721 as follows (language deleted in strikeout; language added in bold):

> C **Motion and proceedings thereon**. The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The ~~judgment sought shall be rendered forthwith~~ **court shall enter judgment for the moving party** if the pleadings, depositions, **affidavits** and admissions on file~~, together with the affidavits, if any,~~ show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. **The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. The adverse party may satisfy the burden of producing evidence with an affidavit under section E of this rule.** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The LAC was not consulted, or invited to testify, about this statutory amendment.

MEMORANDUM

TO: All OSB Procedure and Practice Committee Members

FROM: Jeffrey A. Johnson, David A. Hytowitz and Steve D. Larson

DATE: January 10, 1998

RE: Proposed Amendment to ORCP 39 Concerning Conduct of Depositions

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The following is proposed as an amendment to ORCP 39. The proposed changes to ORCP 39 are italicized. These italicized sections have been taken from FRCP 30(d) and the Multnomah County Deposition Guidelines.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

E. Motion to terminate or limit examination.

E(1) At any time during the taking of a deposition, on motion by any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. Those persons described in Rule 46 B(2) shall present the motion to the court in which the action if pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

E(2) *Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (1).*

E(3) *By order or local rule, the court may limit the time permitted for the conduct of the deposition, but shall allow additional time consistent with [ORCP 39 C(3)] if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.*

FRCivP 26(b)(2)

E(4) *If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a privacy right, privilege or an area protected by the constitution, statute or work product.*

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Re: ORCP 7 Review Committee

January 20, 1998

Dear Colleagues:

At the January 10, 1998 Council meeting, Maury Holland raised a former student's concern that ORCP 7E may prevent parties or their attorneys from personally making service by mail where permitted as a primary service method, including the new Steinkamp mail service provided for in ORCP 7D.(3)(a)(i).

ORCP 7E expressly prohibits service of summons by a party or attorney for a party except as provided in ORS 180.260 (DOJ employees and officers). I see several issues as ORCP 7E relates to primary mail service, and no doubt you will see others.

1) If this is a problem, it was not created by the 1997 revisions to ORCP 7. Rather, it was already there, and we simply missed it in our overhaul. ORCP 7D.(3)(a)(i) doesn't create a service by mail procedure; it simply adopts the pre-existing procedure authorized by ORCP 7D.(2)(d). Remember that even before the 1997 revisions, service by mail was acceptable in certain situations (e.g. ORCP 7D.(6)(a)), and the procedure for such service was provided for in ORCP 7D.(2). Thus, the conflict, if any, is between what some lawyers or parties may have already been doing (and by hypothesis might keep doing) and the prohibition of ORCP 7E. Moreover, there is no patent conflict between ORCP 7D.(2)(d) and ORCP 7E. The former simply provides how service shall be made, and does not limit or identify persons authorized to

make such service.

2) Part of the confusion regarding this issue may stem from a failure to faithfully distinguish between the actual service of summons, and the certification of such service. It is clear that the certification of service by mail may be made by the attorney for a party. See ORCP 7F.(2)(a)(i), last sentence. In my experience, careful practitioners usually do not certify that they personally mailed summons (that's normally not the case anyway), but that they caused summons to be mailed. Law office mailings are normally made by staff, and careful lawyers should make that distinction.

3) ORCP 7E does not appear to prohibit an attorney's agent or employee from serving summons by mail, although it does prohibit a plaintiff's employee from making service by mail

4) Misunderstanding may also arise from the fact that various sections in ORCP, for example ORCP 7D.(6)(d), actually direct the plaintiff to mail a copy of the summons. However, ORCP 7E only prohibits party or lawyer service of summons. It does not apply to follow-up or confirmatory mailings, nor does it apply to service of other pleadings or documents.

5) The only decisions I located dealing with ORCP 7E. are the Court of Appeals and Supreme Court decisions in Jordan v. Wiser, 76 Or App 500 (1985), reversed 302 Or 50 (1986). The Court of Appeals in Jordan expressly held that (in that case personal) service of summons by a party did not invalidate service by virtue of the savings provision of ORCP 7G. The Supreme Court reversed on other grounds. Bottom line: the first sentence of ORCP 7G. makes the identity of the server relatively inconsequential if it is shown that the defendant had "actual notice".

6) Finally, it is worth asking ourselves what are the policy reasons behind prohibiting service of summons by a party or attorney for the party? The restriction doesn't apply to other documents filed in a legal proceeding. Is the distinction important? Should the Council consider revisiting the prohibition? Although I haven't had time to study its history, I suspect that the rationale might be to avoid relying on the word of the plaintiff or his lawyer that a defaulting defendant actually was served with summons. However, we rely on the word of lawyers that service of legally significant (sometimes dispositive) papers has occurred in many litigation settings. May be something to ponder.

Let's consider the issue raised by this "troublesome" former student, and discuss it in a conference call before the next Council meeting. By copy of this memo, I'm asking Gilma Henthorne to check with you for available dates and to arrange the call if possible.

Best Wishes,

Dave

MEMORANDUM

TO: All OSB Procedure and Practice Committee Members

FROM: Jeffrey A. Johnson, David A. Hytowitz and Steve D. Larson

DATE: February 7, 1998

RE: Proposed Amendment to ORCP 39 Concerning Conduct of Depositions

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ISSUE:

1. Why does the first sentence of FRCP 30(d)(1) use the language "objection to evidence" rather than "objection to a question?"

DISCUSSION:

FRCP 30(d)(1) states:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (1). (emphasis added)

This portion of FRCP 30(d) was adopted in the 1993 Amendments to Rule 30. A search of legislative history and case law does not definitively answer why the Amendment uses the terms "objection to evidence" as opposed to "objection to a question." The answer to this issue must be inferred from the legislature's purpose in enacting the Rule and the context in which this sentence is found.

The Advisory Committee, in suggesting the 1993 adoption of FRCP 30(d)(1), wrote:

> Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often while suggesting how deponent should respond. . . . Directions to a deponent not to answer a question can be even more disruptive than objections.

> The second sentence of new paragraph (1) prohibits such directions except in three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product) to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

These comments and those found in case law suggest that the 1993 Amendment to this Rule resulted from frustration over abuses of the litigation and discovery processes. Courts often cite the need to expedite discovery, decrease litigation costs, and deter misuses of discovery procedures. *See Armstrong v. Hussmann Corp.*, 163 FRD 299 (E.D.Mo. 1995); *Harp v. Citty*, 161 FRD 398 (E.D.Ark. 1995).

Depositions are not immune from systematic abuses by attorneys. "One of the primary reasons that a party may choose a deposition---as opposed to interrogatories or requests for production---is for spontaneity. Suggestive objections and instructions not to answer often thwart this purpose---and may well be designed to do so." *Harp v. Citty*, 161 FRD 398 (E.D.Ark. 1995). Rule 30(d)(1) prevents misuse of the discovery process by stating that any objection to evidence in a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. As a result, attorneys cannot make grandiose, narrative objections that slow down depositions and suggest responses to their clients.

> A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.

Wall v. Clifton Precision, 150 FRD 525, 528 (E.D.Pa. 1993).

"In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." *Armstrong v. Hussman Corp.*, 163 FRD 299, 303 (E.D.Mo. 1995) (citing *Van Pilsum v. Iowa State Univ. of Science and Technology*, 152 FRD 179, 180 (S.D.Ia. 1993). The amended Rule 30(d) clearly endeavors to prevent obstructions to the discovery process.

The first sentence of FRCP 30(d)(1) is closely tied to the second. The second sentence states that one of the three reasons for instructing a witness not to answer is to enforce a limitation on evidence directed by the court. One can infer that the use of the term "objection to evidence" rather than

"objection to a question" reflects this portion of FRCP 30(d)(1). The resulting language ventures to be all inclusive of restrictions. A lawyer must be concise, non-argumentative, and non-suggestive both when objecting to the form of a question and when acting to enforce a limitation on evidence directed by the court.

CONCLUSION:

The terminology "objection to evidence" raflects the purpose behind the 1993 Amendment to Rule 30(d). Civil litigation has become costly, slow, and extremely adversarial. Rule 30(d) attempts to set the atmosphere in a deposition to encourage counsel to behave in the same manner as if a judicial officer was present. The first sentence of Rule 30(d)(1) injects the same level of professionalism into all deposition objections, whether to question form or when enforcing a court-directed limitation on evidence.

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February 10, 1998

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Re: Oregon State Bar Procedure and Practice Committee

Dear Bruce:

On February 7, 1998, the Oregon State Bar Procedure and Practice Committee adopted a subcommittee's recommendation to amend ORCP 39 bringing it into line with its federal counterpart and with portions of the Multnomah County deposition guidelines. Jeff Johnson is the Chair of that subcommittee. Karsten Rasmussen, as you know, is the liaison between the Procedure and Practice Committee and the Council on Court Procedures.

I enclose copies of the memoranda which Jeff Johnson's subcommittee prepared. In short, the subcommittee recommended adoption of the language from the Federal Rules of Civil Procedure governing depositions, along with portions of the Multnomah County deposition guidelines. When the first memorandum (dated January 10, 1998) was presented to the full Procedure and Practice Committee, there was extensive discussion regarding the term "objection to evidence." The committee thought that the term should have been "objection to the question." The subcommittee was requested to further research this point.

In response, the subcommittee prepared the enclosed memorandum dated February 7, 1998. Following submission of this second memorandum, there was again discussion in the full committee regarding the term "objection to evidence." A motion to amend the recommendation to read "objection to evidence or to the question" was discussed, but ultimately defeated. This motion to amend was defeated primarily because the full committee reasoned that the decisional authority cited the February 7 memorandum indicates that the federal courts read the current language of Fed R Civ P 30 as including objections to the question.

The Procedure and Practice Committee would ideally like to submit its recommendation to the Oregon State Bar Board of Governors as a bill for introduction during the 1999 legislative session. At the same time, however, the Procedure and Practice Committee does not wish to undermine the Council on Court Procedures' important role in reviewing and recommending changes to the Oregon Rules of Civil Procedure.

If you would like further information on this recommendation, please do not hesitate to contact Jeff Johnson or me.

Very truly yours,

Vivian Solomon

Vivian Raits Solomon

VRS:jls
Enclosures

cc: ✓Maury Holland, Esq. (w/encls.)
Karsten Rasmussen (w/o encls.)
Jeff Johnson (w/o encls.)
Susan Grabe (w/o encls.)

{For distribution at 2-14-98 meeting.}

February 11, 1998

To: ORCP 7 Subcommittee (Dave Brewer, Chair; Skip Durham, Rudy Lachenmeier,* Dave Paradis, and Karsten Rasmussen, members)

Fm: Maury Holland

Re: Suggested Fix to ORCP 7 E Problem

At the conclusion of our 2-10-98 teleconference a consenus was reached that, despite the saving provision of 7 G, the technical problem respecting mail service pursuant to D(2)(d)(i) probably created by 7 E's exclusion of attorneys from those eligible to serve summonses should be fixed by the simplest and most straightforward amendment possible. There was also tentative agreement that such amendment belongs in section 7 E itself. Below is drafting I propose for your consideration (language added shaded and underlined, deleted redlined):

E. BY WHOM SERVED; COMPENSATION

A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise~~.~~, except that service pursuant to subparagraph D(2)(d)(i) of this rule may be made by an attorney for any party. . . .

As you see, there's nothing very spiffy or elegant about this, but nothing possibly more deft has occurred to me.

*Owing to mistaken misinformation to the effect that Rudy had resigned from the Council, he did not participate in this telecon, for which oversight we apologize.

DAVE BARROWS & ASSOCIATES

March 2, 1998

Judge David V. Brewer
Lane County Circuit Court
Lane County Courthouse
125 E 8th Ave.
Eugene, Oregon 97401

Re: Service Upon Rented Mailboxes

Dear Judge Brewer,

Thank you for your attention to this issue. Per your request, copies of the following statutes are enclosed:

Cal. Civ. Proc. Code §415.20 (West 1973, 1998 Supp.)
Wash. Rev. Code Ann. §4.28.080 (West 1988, 1998 Supp.)

In addition, I have enclosed the following California cases:

Bein v. Brechtal-Jochim Group, Inc., 6 Cal. App. 4th 1387, (1992)
Bonita Packing Company v. O'Sullivan, 165 F.R.D. 610 (C.D. Cal. 1995)

I could not find any Washington cases interpreting the applicable section of R.C.W.A 4.28.080.

I hope this information is useful. Please don't hesitate to contact us if the subcommittee needs any further assistance.

Very truly yours,

Amanda E. Williams

Amanda E. Williams
Associate, Dave Barrows & Associates

1201 S.W. 12th Avenue, Suite 200. Portland, Oregon 97205
Phone: 503.227.5591 · Fax: 503.227.1781

4.28.080. Summons, how served

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

(3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.

(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.

(5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.

(6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.

(7) If against a foreign or alien insurance company, as provided in chapter 48.05 RCW.

(8) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state.

(9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

(10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

(11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.

(12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.

(13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.

(14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

Amended by Laws 1991, Ex.Sess., ch. 30, § 28, eff. Jan. 1, 1992; Laws 1996, ch. 223, § 1; Laws 1997, ch. 380, § 1.

Historical and Statutory Notes

1991 Legislation

Laws 1991, Ex.Sess., ch. 30, § 28, inserted subsec. (14); and renumbered former subsec. (14) as (15).

1996 Legislation

Laws 1996, ch. 223, § 1, in the introductory paragraph, inserted the first sentence; in subsecs. (11) and (15), inserted r her" and "or she"; added subsec. (16); d deleted a former last paragraph, which read: "Service made in the modes provided in this section shall be taken and held to be personal service."

1997 Legislation

Laws 1997, ch. 380, § 1, rewrote subsec. (16), which previously read:

"(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing:

"(a) By leaving a copy at his or her usual mailing address other than a United States postal service post office box with a person of suitable age and discretion then resident therein or, if the address is a place of business, with the secretary, office manager, vice-president, president, or other head of the company, or with the secretary or office assistant to such secretary, office manager, vice-president, president, or other head of the company, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address other than a United States postal service post office box; or

"(b) By leaving a copy at his or her place of employment, during usual business hours, with the secretary, office manager, vice-president, president, or other head of the company, or with the secretary or office assistant to such secretary, office manager, vice-president, president, or other head of the company, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her place of employment."

Cross References

Gambling devices, seizure of real or personal property, removal of hearing to court of competent jurisdiction, service of process in accordance with this section, see § 9.46.231.

Seizure of property used in felony, ownership claims, service of process, see § 10.105.010.

Library References

rocess, see Wash.Prac. vol. 3A, Orland, CR 4; vol. 4A, Orland, CRLJ 4.

Notes of Decisions

2.8. Compliance with statute

There is difference between constitutionally adequate service, and service required by statute; beyond due process requirements, statutory service requirements must be complied with in order for court to finally adjudicate dispute between parties. Weiss v. Glemp (1995) 127 Wash.2d 726, 903 P.2d 455.

8. Railroads

Purported service of process on receptionist for railroad was ineffective and did not commence action so as to toll limitations period, where it was uncontradicted that receptionist had no authority to accept service, had never done so, and was instructed to refer all legal matters to law department. Lockhart v. Burlington Northern R. Co. (1988) 50 Wash.App. 809, 750 P.2d 1299, reconsideration denied, review denied.

12. Foreign corporations—Doing business

"General jurisdiction" under Washington law, sufficient to confer personal jurisdiction on defendants in diversity action, flows from nonresident defendant's continuous, systematic business contacts in Washington, sufficient to require nonresident defendant to submit to jurisdiction of court sitting in state, even though pending cause of action does not arise out of defendant's forum-related activities. Van Steenwyk v. Interamerican Management Consulting Corp., E.D.Wash.1993, 834 F.Supp. 336.

"Specific jurisdiction" under Washington law, sufficient to provide basis for personal jurisdiction of federal court in diversity action, exists when court agrees to entertain cause of action arising from forum-related activities, when nonresident defendant has had "fair warning" that its activities in state may subject it to jurisdiction of courts. Van Steenwyk v. Interamerican Management Consulting Corp., E.D.Wash.1993, 834 F.Supp. 336.

Under Washington's long-arm statute, which provides for service on foreign corporation "doing business" in Washington, doing business and due process inquiries are the same, and courts have general jurisdiction over nonresident defendants who conduct substantial and continuous business in Washington of such character as to give rise to legal obligation. Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc., C.A.9 (Wash.)1993, 1 F.3d 848.

District court lacked personal jurisdiction, under Washington's long-arm statute, over Philippine corporation which owned vessel in action arising from collision in Egyptian waters; exercise of personal jurisdiction would have been unreasonable, since corporation had no connections with Washington and no agent or office elsewhere in United States, plaintiffs had their bases of operations in Egypt, and maritime liability limitation proceedings were pending in Egypt. Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc., C.A.9 (Wash.)1993, 1 F.3d 848.

Activities of contract bridge league were continuous and substantial, and league was thus "doing business" within Washington for purposes of asserting general jurisdiction over it as foreign corporation. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

In order to support personal jurisdiction, in state activities of nonresident defendant must be continuous and substantial. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

Statute permitting assertion of general jurisdiction over foreign corporation "doing business" in Washington subsumes due process requirement. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

Louisiana ship builder did not engage in "continuous or substantial activity" in forum, such as would permit Washington court to exercise general in personam jur-

isdiction, by performing vessel repair work for Washington residents at their solicitation, by placing ads in magazines which were allegedly distributed in state, or by attending Seattle trade show, MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc. (1991) 60 Wash. App. 414, 804 P.2d 627.

'Doing business' provision of this section conferred general jurisdiction over nonresident restaurant operator for cause of action arising out of personal injuries sustained by restaurant patron in another state, where operator had been registered as a foreign corporation in Washington for 24 years and had at least 16 restaurants in one city alone. Hein v. Taco Bell, Inc. (1991) 60 Wash.App. 325, 803 P.2d 329.

Contacts of Tennessee businesses with Washington were not sufficient to provide Washington court with general jurisdiction over Tennessee businesses for negligence claim based on slip and fall suffered by Washington resident in Tennessee; Washington resident could have pursued his suit in Tennessee, no evidence was presented as to extent of economic benefits obtained from Washington by Tennessee businesses, and foreseeability of injury consideration pointed to Tennessee as the most appropriate forum. Banton v. Opryland U.S.A., Inc. (1989) 53 Wash.App. 409, 767 P.2d 584.

14. —— Jurisdiction, foreign corporations

General jurisdiction enables court to hear cases unrelated to defendant's activities within the forum. Harbison v. Garden Valley Outfitters, Inc. (1993) 69 Wash. App. 590, 849 P.2d 669.

General jurisdiction statute subsumes due process requirements of long-arm statute that addresses jurisdiction arising out of or relating to defendant's activities within the forum. Harbison v. Garden Valley Outfitters, Inc. (1993) 69 Wash. App. 590, 849 P.2d 669.

Court could not exercise general jurisdiction over out-of-state outfitter which participated at sports show within the state. Harbison v. Garden Valley Outfitters, Inc. (1993) 69 Wash.App. 590, 849 P.2d 669.

Courts may assert either specific or general jurisdiction over nonresident business defendants. Hein v. Taco Bell, Inc. (1991) 60 Wash.App. 325, 803 P.2d 329.

15. —— Agents, foreign corporations

Whether person is "agent" of foreign corporation for purposes of accepting service of process is determined from review of all surrounding facts and proper inferences therefrom. Fox v. Sunmaster Products, Inc. (1991) 63 Wash.App. 561, 821 P.2d 502, review denied 118 Wash.2d 1029, 828 P.2d 563.

Although statute authorizing service of process on agent of foreign corporation should be liberally construed, "agent" status will not be conferred on employee whose duties are purely mechanical and who has neither expressed nor implied authority to represent corporation. Fox v. Sunmaster Products, Inc. (1991) 63 Wash.App. 561, 821 P.2d 502, review denied 118 Wash.2d 1029, 828 P.2d 563.

Person who was employee of successor corporation at time process server attempted to serve predecessor corporation, and who was emancipated daughter of owners and registered agents of predecessor corporation but did not own any interest in predecessor corporation at time of attempted service, was not "agent" of predecessor corporation for purposes of statute authorizing service of process on agent of foreign corporation, particularly in view of fact that attempted service was not at usual abode of registered agents. Fox v. Sunmaster Products, Inc. (1991) 63 Wash. App. 561, 821 P.2d 502, review denied 118 Wash.2d 1029, 828 P.2d 563.

Board member of contract bridge league, a foreign corporation, was proper party to receive service of process in contract bridge team's suit, even though he was not registered agent and did not have express authority to receive process; board member was official state representative of league, and it was reasonable to infer that he would turn process over to those called upon to answer. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

Service of process on agent of foreign corporation who is merely present in state cannot alone confer general in personam jurisdiction. MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc. (1991) 60 Wash.App. 414, 804 P.2d 627.

22. Personal service, in general

Attempted service in which process server sought to give legal documents to defendant at defendant's temporary residence and was refused admittance, observed defendant through window for about two hours, yelled at defendant that he had been served, and then placed documents on windowsill four feet from where

defendant had been sitting after defendant looked at server did not comply with specific terms of service statute and was invalid; server did not deliver summons to defendant personally or leave summons with someone of suitable age and discretion. Weiss v. Glemp (1995) 127 Wash.2d 726, 903 P.2d 455.

In personam jurisdiction requires service on defendant either personally or by substitute service. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

Rule permitting substitute service need not be strictly construed, even if it was intended to change common law requiring personal service; rather, rule was to be construed to give meaning to its spirit and purpose, guided by principles of due process. Wichert v. Cardwell (1991) 117 Wash.2d 148, 812 P.2d 858.

Test to determine validity of substitute service upon defendant's adult child who was overnight resident in and sole occupant of defendant's house was whether plaintiff desiring to actually inform defendant might reasonably adopt method of serving adult child. Wichert v. Cardwell (1991) 117 Wash.2d 148, 812 P.2d 858.

Service of summons and complaint to personal secretary of defendant attorneys was defective, absent any indication in the affidavits that attorneys had authorized their secretaries to accept service on their behalf. French v. Gabriel (1990) 57 Wash. App. 217, 788 P.2d 569, review granted 114 Wash.2d 1026, 793 P.2d 976, affirmed 116 Wash.2d 584, 806 P.2d 1234.

22.5. —— Resident, personal service

In personam jurisdiction over resident individuals is obtained either by serving defendant personally or by substitute service. Lepeska v. Farley (1992) 67 Wash. App. 548, 833 P.2d 437.

Defendant's adult child who was a overnight resident in and sole occupant of defendant's residence was "resident therein" capable of receiving substitute service. Wichert v. Cardwell (1991) 117 Wash.2d 148, 812 P.2d 858.

22.6. —— Nonresident, personal service

Failure to comply with statutes pertaining to service of process on out-of-state defendants rendered default judgment against those defendants void. Dubois v. Kapuni (1993) 71 Wash.App. 621, 860 P.2d 431, review denied 123 Wash.2d 1021, 8 P.2d 636.

Service, coupled with voluntary pre ence in state, was sufficient to confer pe sonal jurisdiction over former husba with respect to former wife's petition modify child support provisions of Califo nia dissolution decree where children a former wife moved to state and whe husband had made support payments, h maintained regular telephone contact, a had exercised visitation rights in state. re Marriage of Peterson (1993) 68 Was App. 702, 843 P.2d 1107, amended on de al of reconsideration.

22.7. Substitute service

Substitute service of process by leavi copy at defendant's usual abode is d signed to allow injured parties reasonab means to serve defendants in manner re sonably calculated to accomplish notic Gross v. Evert-Rosenberg (1997) 85 Was App. 539, 933 P.2d 439.

In order to satisfy requirements fc substitute service of process copy of sun mons must be left at defendant's usu abode, with a person of suitable age an discretion, then residing there. Scott Goldman (1996) 82 Wash.App. 1, 917 P.2 131, review denied 130 Wash.2d 1004, 92 P.2d 989.

In personam jurisdiction requires se vice on defendant either personally or b substitute service. Sheldon v. Fetti (1995) 77 Wash.App. 775, 893 P.2d 113 review granted 127 Wash.2d 1016, 90 P.2d 300, affirmed and remanded 12 Wash.2d 601, 919 P.2d 1209.

Personal service of summons and com plaint on unknown individual in defen dant's business office who had previousl denied to process server that he was de fendant was insufficient to give trial cour personal jurisdiction over defendant i personal injury action in which defendan denied receiving personal service withi 90–day period following filing of complain so as to toll three-year statute of limita tions; defendant presented considerabl evidence that he could not have been indi vidual served at his business, plaintiff of fered nothing to refute that evidence, an plaintiff presented no evidence that indi vidual served at defendant's business wa resident therein. Jones v. Stebbins (1992 67 Wash.App. 896, 841 P.2d 791, review granted 121 Wash.2d 1008, 852 P.2d 1090 affirmed 122 Wash.2d 471, 860 P.2d 1009.

Substitute service on defendant at his parents' home was invalid, where defen-

dant maintained his own separate home. Lepeska v. Farley (1992) 67 Wash.App. 548, 833 P.2d 437.

22.8. Usual place of abode

Under substitute process service statute, home owned by defendant but leased by her daughter and son-in-law was not additional "place of usual abode," though defendant continued to list home as voter registration and property tax billing address, where defendant and her husband moved to new address in same jurisdiction, notified creditors, notified post office, and obtained new driver's license. Gross v. Evert-Rosenberg (1997) 85 Wash.App. 539, 933 P.2d 439.

Defendant's "house of usual abode," as used in statute allowing substituted service of process, is to be liberally construed to effectuate service and uphold jurisdiction of court. Sheldon v. Fettig (1996) 129 Wash.2d 601, 919 P.2d 1209.

Term "usual place of abode", as used in statute allowing for substituted service of process, refers to place at which defendant is most likely to receive notice of pendency of suit and is taken to mean such center of one's domestic activity that service left with family member is reasonably calculated to come to one's attention within statutory period for defendant to appear. Sheldon v. Fettig (1996) 129 Wash.2d 601, 919 P.2d 1209.

Home of parents of defendant was defendant's "usual place of abode," and thus service of process left with defendant's brother at parents' home was reasonably calculated to accomplish notice of action and was valid under statute allowing substituted service of process, notwithstanding fact that defendant was living in another city training as flight attendant and maintained apartment there, where she was registered to vote in state, she used her parents' address on her car registration, car's bill of sale, and on her speeding ticket, she told her car insurer that address was her parents, she returned home frequently when not in flight, and when plaintiff's attorney sent correspondence to parents' home, response was immediately given. Sheldon v. Fettig (1996) 129 Wash.2d 601, 919 P.2d 1209.

In appropriate circumstances, defendant may maintain more than one house of usual abode, for purposes of statute allowing for substitute service of process, if each is center of domestic activity or it would be most likely that defendant would promptly receive notice if summons were left there. Sheldon v. Fettig (1996) 129 Wash.2d 601, 919 P.2d 1209.

Plaintiff did not serve process on defendant in manner reasonably calculated to give her attorneys in fact and at law reasonable notice of pending action, when he served papers on son and at son's home; at time defendant was living in another town. Scott v. Goldman (1996) 82 Wash. App. 1, 917 P.2d 131, review denied 130 Wash.2d 1004, 925 P.2d 989.

Question of whether party's ties to address are sufficient to qualify that residence as "usual place of abode" for purposes of service of process statute is question of law. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

Finding that motorist against whom action was brought following automobile accident was resident of state at time other driver involved in accident attempted to effect substituted service of process was supported by evidence that motorist was registered to vote in state, had automobile registered in state, and went "home" whenever she could, even though motorist was in training as flight attendant in another city and had apartment there. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

Term "usual place of abode" is used in statute allowing substituted service of process because it is place at which defendant is most likely to receive notice of pendency of suit, and term should be interpreted with that purpose in mind. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

Controlling factor in determining defendant's "usual place of abode" for purposes of statute allowing substituted service of process is not how much time defendant spends at given address, or whether defendant maintains other residences, but whether service at address in question is likely to result in notice to defendant that she has been sued. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

Home of parents of defendant was "usual place of abode" of defendant, and service at parents' home was reasonably cal-

culated to accomplish notice of action and was valid under statute allowing substituted service of process where defendant was living in Chicago for probationary training as flight attendant and maintained apartment there but went "home" whenever she could, had mail forwarded to parent's home, was registered voter and had automobile licensed in state, and maintained savings account in state; of potential choices of addresses for service of process, parents' address was most likely to, and in fact did, result in notice of pendency of suit. Sheldon v. Fettig (1995) 77 Wash. App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

24.6. Guardian

Holder of general power-of-attorney would not be deemed guardian of principal issuing power, so as to be authorized to accept service of process under statute covering guardians; each legal entity was different, with guardianships governed by statute and powers-of-attorney largely by text of power. Scott v. Goldman (1996) 82 Wash.App. 1, 917 P.2d 131, review denied 130 Wash.2d 1004, 925 P.2d 989.

27. Waiver

Defendant waived defense of insufficient service, where, prior to asserting it, he engaged in discovery not directed toward determining whether facts existed to support such defense; moreover, prior to expiration of statute of limitations, defendant's counsel knew that plaintiff's counsel was relying upon the allegedly defective service, but chose to say nothing until after the statute of limitations had expired. Romjue v. Fairchild (1991) 60 Wash.App. 278, 803 P.2d 57, review denied 116 Wash.2d 1026, 812 P.2d 102.

28. Presumptions and burden of proof

Party who asserts change of residence in connection with attempted service of process has burden of proof. Sheldon v. Fettig (1995) 77 Wash.App. 775, 893 P.2d 1136, review granted 127 Wash.2d 1016, 904 P.2d 300, affirmed and remanded 129 Wash.2d 601, 919 P.2d 1209.

29. Injury in state

State's interest in providing forum for its residents is less compelling, for personal jurisdiction purposes, where acts causing alleged injury did not occur in state and had only a resulting effect in state. MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc. (1991) 60 Wash. App. 414, 804 P.2d 627.

30. Amount, kind and continuity of activities

Contract bridge league could be sued in Washington by bridge team seeking injunctive relief from league's reversal of ruling disqualifying team that had finished ahead of them in tournament; amount, kind, and continuity of league's activities in Washington were sufficient to justify jurisdiction, Washington's interest in providing forum for team member who was Washington citizen additionally weighed in favor of jurisdiction, and factors of ease of gaining access to another forum and economic benefit were of neutral effect. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

Number, kind, and continuity of activities carried on by nonresident defendant is the only factor relevant to analysis of whether assertion of general jurisdiction is proper; however, analysis of this factor is not the same as "doing business" analysis. Hartley v. American Contract Bridge League (1991) 61 Wash.App. 600, 812 P.2d 109, review denied 117 Wash.2d 1027, 820 P.2d 511.

31. Evasion of service

Failing to come to door to receive service of process does not constitute evasion of service; those who are to be served with process are under no obligation to arrange time and place for service or to otherwise accommodate process server. Weiss v. Glemp (1995) 127 Wash.2d 726, 903 P.2d 455.

32. Notice of special sentencing proceedings

Service of notice of special sentencing proceedings in death penalty case is governed by civil rule for service and filing of written motions, rather than statute governing service of process in civil litigation. State v. Cronin (1996) 130 Wash.2d 392, 923 P.2d 694, reconsideration denied.

Personal "hand-to-hand" service is not required for notice of special sentencing proceedings in death penalty case; compliance with civil rule governing service and filing of written motion is adequate. State v. Cronin (1996) 130 Wash.2d 392, 923 P.2d 694, reconsideration denied.

4.28.100. Service of summons by publication—When authorized

victed of causing the death of another child through abuse or neglect" (Welf. & Inst. 1377 Code, § 361.5, subd. (b)(4)) greater rights than parents who once used drugs. Only the Legislature has the right to make that decision; a pair of appellate judges certainly does not.

In espousing this notion, the majority purports to rely on the dissent in *Santosky v. Kramer, supra,* 455 U.S. at p. 766, 102 S.Ct. at p. 1401. But the dissenting justices there did not see an exception for drug addicted parents to the long-standing and universally recognized principle "that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." (*Santosky v. Kramer, supra,* 455 U.S. at p. 774, 102 S.Ct. at p. 1405 (dis. opn. of Rehnquist, J.).)[6]

I reiterate: The adoptability finding adds an extra measure of protection to the dependent minor. But it cannot be interpreted to strip mothers and fathers of their fundamental constitutional right to parent. It cannot give the juvenile court carte blanche to make parental unfitness decisions based on how cute or desirable a prospective adoptee may be. No government should have such power.[7]

6 Cal.App.4th 1387

1387 **Robert BEIN, et al., Plaintiffs and Respondents,**

v.

BRECHTEL-JOCHIM GROUP, INC., et al., Defendants and Appellants.

No. G011445.

Court of Appeal, Fourth District, Division 3.

May 28, 1992.

Review Denied Aug. 20, 1992.

Engineering firm sued shareholders of corporation, seeking to hold them personally liable for work firm claimed it had completed but for which it had not been paid. The Superior Court, Orange County, No. X644480, David C. Velasquez, J., entered default judgment against shareholders. Shareholders appealed. The Court of Appeal, Sonenshine, J., held that: (1) a firm exercised reasonable diligence in attempting to effect personal service before it effected substitute service on gate guard at residential community in which shareholders resided, and (2) substitute service on guard was appropriate.

Affirmed.

1. Corporations ⇐266

Plaintiffs established "reasonable diligence" in attempting to effectuate personal service on plaintiffs prior to defendants' substitute service on guard at entrance of gated community in which plaintiffs lived; process server made three separate attempts to serve plaintiffs at their residence, but each time gate guard denied access. West's Ann.Cal.C.C.P. § 415.20(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Corporations ⇐266

In action seeking to hold corporate shareholders individually liable, substitute service on gate guard at gated community in which shareholders resided was proper, as gate guard was "person apparently in charge of the corporate office" and "competent member of the household"; shareholders authorized guard to control access to them and their residence, and this relationship ensured delivery of process. West's Ann.Cal.C.C.P. § 415.20(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

3. Process ⇐69

Liberal construction of process statutes extends to substituted service as well

6. Nonetheless, the dissenters thought a preponderance-of-the-evidence standard adequate to protect parental rights. How my colleagues can defend their position based on a dissenting opinion in the United States Supreme Court is beyond me.

7. The Supreme Court should grant review of or depublish today's decision.

as to personal service. West's Ann.Cal. C.C.P. § 415.20(a, b).

4. Process ⇐67

Litigants have right to choose their abodes; they do not have right to choose who may sue or serve them by denying them physical access. West's Ann.Cal. C.C.P. § 415.20.

5. Corporations ⇐507(5)

Service may be made on either corporation's agent or on officer. West's Ann. Cal.C.C.P. § 415.20(a).

6. Process ⇐153

Minor, harmless deficiencies will not defeat service. West's Ann.Cal.C.C.P. § 415.20.

[1390] Draper & Pherson and Douglas S. Draper, Los Angeles, for defendants and appellants.

McGuire & Walker and William M. Walker, Santa Ana, for plaintiffs and respondents.

OPINION

SONENSHINE, Associate Justice.

Brechtel-Jochim Group, Inc., Thomas W. Brechtel, Linda Brechtel, Randy Jochim and Ann Jochim appeal from a default judgment. They argue the trial court had no personal jurisdiction over them. They maintain service of summons and complaint upon a guard at the entrance of a gated community does not meet the requirements of Code of Civil Procedure section 415.20 [1] because a gate guard is neither a competent member of the household nor a person apparently in charge of the business. We disagree and affirm.

I

Robert Bein and William Frost & Associates ("Bein") entered into written contracts with Brechtel-Jochim Group, Inc. et al., for engineering work. Bein, claiming it had completed the job, filed the underlying action when Brechtel refused to pay. The complaint alleged breach of contract and common counts, and named Brechtel and its sole shareholders, the Brechtels and the Jochims, as defendants. Asserting the individuals were alter egos of the corporation, Bein sought to pierce the corporate veil. The complaint prayed for damages in the sum of $69,347.01 plus interest, reasonable attorneys' fees and costs of the suit.

Bein attempted to serve the Jochims at their home on three separate occasions. They were finally served by substitute service on a "Linda Doe" when she emerged from the residence. As she was handed the papers, she ran back into the house and turned out the lights. Two days later, Bein mailed copies of the summons and complaint to the Jochims' residence. Proofs of service and declarations verifying the attempted service were filed with the court.

Service upon the corporation and the Brechtels was equally difficult. Bein unsuccessfully attempted to serve the business and the Brechtels at the Brechtels' residence. Each time, the process server was denied access to the [1391] area by the gate guard stationed at the community's entrance. The process server finally resorted to substitute service upon the guard who, in response, threw the papers on the ground. As the process server drove away, he saw the guard retrieve the papers.

Bein mailed copies of the summons and complaint to the Brechtels' residence within a few days. Thereafter, the declaration of attempted service on the Brechtels and the corporation was timely filed, along with the proof of service of summons and complaint.

Neither the corporation nor its shareholders responded to the complaint. Bein filed requests to enter defaults as to all of the defendants and notified each defendant by mail.

At the default prove-up hearing, Douglas Frost, a Bein corporate officer, testified his counsel told him no stock was ever issued by Brechtel. Following testimony, the court entered default judgment against all

1. All further statutory references are to the Code of Civil Procedure unless otherwise specified.

named defendants in the amount prayed for in the complaint. No motions to quash service or set aside the judgment were filed by any of the defendants.

II

[1] Appellants challenge the court's jurisdiction, arguing service was ineffective.[2] They maintain Bein did not establish reasonable diligence in attempting to effectuate personal service. They are wrong. Section 415.20, subdivision (b) states: "If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, usual place of business, ... in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, ... at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

"'Ordinarily, ... two or three attempts at personal service at a proper place should fully satisfy the requirement of reasonable diligence and allow [1392] substituted service to be made.' [Citation.]" (*Espindola v. Nunez* (1988) 199 Cal.App.3d 1389, 1392, 245 Cal.Rptr. 596.) The process server made three separate attempts to serve the Brechtels at their residence. Each time, the gate guard denied access. Substitute service was appropriate.

[2] Appellants next maintain service on the gate guard fails to satisfy the statutory requirements.[3] Despite the great number of gated communities in the state, no California court has addressed this issue. Specifically, we must determine whether a residential gate guard is a person apparently in charge of the corporate office (§ 415.20, subd. (a)) and a competent member of the household (§ 415.20, subd. (b)).

[3] We first note that pre–1969 service of process statutes required strict and exact compliance. However, the provisions are now to be liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant, "'"and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint...."'" (*Pasadena Medi–Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778, 108 Cal.Rptr. 828, 511 P.2d 1180.) The Supreme Court's admonition to construe the process statutes liberally extends to substituted service as well as to personal service. (*Espindola v. Nunez*,

2. Appellants did not seek relief in the trial court; however, they attack the court's jurisdiction. Thus, they have not waived their right to appellate review of this issue. (*Bristol Convalescent Hosp. v. Stone* (1968) 258 Cal.App.2d 848, 859, 66 Cal.Rptr. 404; see also *Corona v. Lundigan* (1984) 158 Cal.App.3d 764, 766–767, 204 Cal.Rptr. 846.)

3. The requirements for substitute service on a person are found in section 415.20, subdivision (b), set forth *ante*.

Section 415.20, subdivision (a) provides: "In lieu of personal delivery of a copy of the summons and of the complaint to the person to be served as specified in Section 416.10, ... a summons may be served by leaving a copy of the summons and of the complaint during usual office hours in his or her office with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing."

Section 416.10 permits service on a corporation by delivery "(a) [t]o the person designated as agent for service of process ...; [¶] (b) [t]o the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process."

Section 417.10, subdivision (a) explains the procedure for substituted service on a corporation. "If served under Section 415.10, 415.20, ... [s]uch affidavit shall recite or in other manner show the name of the person to whom a copy of the summons and of the complaint were delivered, and, if appropriate, his [or her] title or capacity in which he [or she] is served...."

supra, 199 Cal.App.3d 1389, 1391, 245 Cal. Rptr. 596.) "To be constitutionally sound the form of substituted service must be 'reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard ... [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied.' [Citations.]" (*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1416, 232 Cal.Rptr. 653.)

1393The gate guard in this case must be considered a competent member of the household [4] and the person apparently in charge. Appellants authorized the guard to control access to them and their residence. We therefore assume the relationship between appellants and the guard ensures delivery of process. *F.I. duPont, Glore Forgan & Co. v. Chen* (1977) 41 N.Y.2d 794, 396 N.Y.S.2d 343, 364 N.E.2d 1115 is instructive. There, the court found substitute service on an apartment building doorman was statutorily sufficient. A deputy sheriff twice attempted to serve defendants and, finding no one at home, left a card under the door. On the third try, when the doorman refused to allow him to go past the building's front entrance, the deputy served the doorman.[5] The court reasoned "it cannot be held as a matter of law on this record that the action of the doorman in refusing permission to the Deputy Sheriff to proceed to apartment 4A was not attributable for purposes of this statute to defendants." (*Id.* at p. 798, 396 N.Y.S.2d at p. 346, 364 N.E.2d at p. 1118.) [6] "While the defendant may control the acceptance of mail by his [or her] household, he [or she] may not thereby negate the effectiveness of service otherwise effective under the law." (*Bossuk v. Steinberg* (1982) 88 A.D.2d 358, 453 N.Y.S.2d 687, 689–690.)

[4] Litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying them physical access. In *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal.App.3d 1009, 269 Cal.Rptr. 687, where a corporation attempted to avoid service by refusing to unlock its door, the court determined a "defendant will not be permitted to defeat service by rendering physical service impossible." (*Id.* at p. 1013, 269 Cal. Rptr. 687.) "The evident purpose of Code of Civil Procedure section 415.20 is to permit service to be completed upon a good faith attempt at physical service on a *responsible person*...." (*Ibid.*, emphasis added.) Service must be made upon a person whose "relationship with the person to be served makes it more likely than not that they will deliver process to the named party." (*50 Court St. Assoc. v. Mendelson et al.* (1991) 151 Misc.2d 87, 572 N.Y.S.2d 997, 999.) Here, the gate guard's relationship with appellants 1394made it more likely than not that he would deliver process to appellants. We note they do not claim they failed to receive notice of service.[7]

[5] The corporation raises two other objections to its service. We are not impressed. First, they argue no good faith attempt was made to serve its designated agent. A good faith attempt to serve the

4. The Legislature's choice of the term household over family indicates that household is to be liberally construed. (See Note, *Substitute Service of Process on Individuals:* Code Civ.Proc., § 415.20, subd. (b) (1970) 21 Hastings L.J. 1257.)

5. New York's corresponding service statute, 7 Civil Practice Law and Rules section 308, subdivision 2, authorizes personal service of process on a natural person "by delivering the summons within the state to a person of suitable age and discretion at the actual dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence...."

6. In contrast, where the doorman did not hinder entrance, substitute service upon him was deemed unacceptable. (*Reliance Audio Visual Corp. v. Bronson* (1988) 141 Misc.2d 671, 534 N.Y.S.2d 313.)

7. There is an additional reason to find the service here adequate. Pursuant to section 415.20, subdivision (b), the guard gate constitutes part of the dwelling. Although the parties do not address this issue, we look to *F.I. duPont.* "In our analysis if a process server is not permitted to proceed to the actual [residence by the gate guard or some other employee] the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested." (*F.I. duPont, Glore Forgan & Co. v. Chen, supra*, 41 N.Y.2d 794, 797, 396 N.Y.S.2d 343, 346, 364 N.E.2d 1115, 1117.)

agent was unnecessary because service may be made on *either* the corporation's agent *or* an officer. (*M. Lowenstein & Sons, Inc. v. Superior Court* (1978) 80 Cal.App.3d 762, 145 Cal.Rptr. 814.) Thomas Brechtel, as president of the corporation, was an appropriate person to be served on behalf of the corporation.

[6] Appellants further maintain the declaration of attempted service was invalid because it failed to identify the person to be served on behalf of the corporation. But minor, harmless deficiencies will not be allowed to defeat service. (*Espindola v. Nunez, supra*, 199 Cal.App.3d 1389, 1391, 245 Cal.Rptr. 596.)

III

Appellants argue the evidence was insufficient to find they were the alter ego of the corporation and to sustain the damage award. We note they did not seek relief from their default in the trial court. Sufficiency of the evidence is not reviewable unless relief from the default proceedings has been sought. (*Corona v. Lundigan, supra*, 158 Cal.App.3d at p. 767, 204 Cal. Rptr. 846.) [8]

1395The judgment is affirmed. Respondents to recover costs on appeal.

SILLS, P.J., and WALLIN, J., concur.

8. Moreover, the evidence was sufficient. To disregard the corporate entity and fasten liability upon individual stockholders, there must be "'"such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and ... if the acts are treated as those of the corporation alone, an inequitable result will follow."'" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249, 1 Cal.Rptr.2d 301.)

Bein's complaint alleged that Brechtel-Jochim Group, Inc., the Brechtels, and the Jochims wholly owned and controlled each other and that piercing of the corporate veil was necessary to prevent great injustice and irreparable damage. Bein's corporate officer testified at the default prove-up hearing that counsel told him no stock had ever been issued by Brechtel.

6 Cal.App.4th 1448

1448EASTERN AVIATION GROUP, INC., Plaintiff and Appellant,

v.

AIRBORNE EXPRESS, INC., et al., Defendants and Respondents.

No. B054232.

Court of Appeal, Second District, Division 5.

May 29, 1992.

Certified For Partial Publication *

Assignee of investor in seller of aircraft noise reduction systems brought action against seller's alleged successor and buyer of systems alleging breach of contract by buyer and breach of contract, inducing breach of fiduciary duty, constructive trust and conspiracy against seller's successor. The Superior Court of Los Angeles County, No. NCC 42619, Joseph R. Kalin, J., granted summary judgment in favor of defendants on all causes of action and plaintiff appealed. The Court of Appeal, Ashby, J., held that plaintiff was not third-party beneficiary of contract between seller's predecessor and buyer.

Affirmed in part and reversed in part.

1. Judgment ⇐181(5)

Defendant is entitled to summary judgment if defendant conclusively negates nec-

As recognized in *Uva v. Evans* (1978) 83 Cal.App.3d 356, 147 Cal.Rptr. 795: "The power of an appellate court to review the trier of fact's determination of damages is severely circumscribed. An appellate court may interfere with that determination only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption ... or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]" (*Id.* at pp. 363–364, 147 Cal.Rptr. 795.) The damages awarded here were exactly those prayed for in the complaint based on the contract, including interest, costs and attorney's fees.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Part II.

mental examination. *Tomlin v. Holecek*, 150 F.R.D. at 628; *Galieti v. State Farm Mutual Automobile Ins. Co.*, 154 F.R.D. 262, 264 (D.Colo.1994). Moreover, Dr. Lees–Haley does not propose to use unorthodox or potentially harmful techniques in his examination of plaintiff, requiring a third party to be present. *Duncan v. Upjohn Co.*, 155 F.R.D. at 27. The potential for a third party observer to interfere with, or even contaminate, a mental examination is recognized in California Code of Civil Procedure Section 2032(g)(1), which provides that an observer may be present at a physical examination but does not provide for an observer at a mental examination. Accordingly, plaintiff's request for a third party observer during her mental examination is without merit.

Defendants' Motion to Compel a Mental Examination of Plaintiff does not fully comply with the provisions of Rule 35. It does not specify the time or date for the mental examination.[7] Nevertheless, as the court found in the *Galieti* case, with trial forthcoming it is too late to require defendants to refile their motion specifying date and time.

WHEREAS, good cause appearing,

IT IS HEREBY ORDERED:

Defendants MCA's and Portelli's Motion to Compel the Mental Examination of Plaintiff Claire E. Ragge, pursuant to Fed.R.Civ.Proc. 35, is GRANTED. The mental examination shall take place within the next sixty (60) days, and shall commence at 9:00 a.m. and continue to no later than 5:00 p.m., with a one hour lunch break mid-day, as determined by Dr. Paul Lees–Haley.

7. Perhaps these requirements were discussed by the parties during their attempt to enter into a stipulation regarding the mental examination, but they are not set forth in the Motion to Compel or Joint Stipulation.

BONITA PACKING COMPANY, Plaintiff,

v.

James L. O'SULLIVAN, doing business as H & M Produce, etc. et al., Defendants.

DIAZTECA COMPANY, INC., et al., Intervening Plaintiffs,

v.

James L. O'SULLIVAN, individually and doing business as H & M Produce, etc., et al. Defendants.

No. CV 95–5915–ER(RMCx).

United States District Court, C.D. California.

Dec. 14, 1995.

Packing company brought action against produce seller alleging violation of Perishable Agricultural Commodities Act, and second packing company sought to intervene in action and attempted to effect service of process on produce seller through substituted service. After produce seller failed to answer intervenor's complaint, intervenor moved for entry of default, and the District Court, Chapman, United States Magistrate Judge, held that: (1) mailing of copy of summons and complaint to private post office box was insufficient to establish substituted service of process, and (2) court accordingly would decline to enter default despite failure of produce seller to answer intervenor's complaint.

Motion denied.

1. Federal Civil Procedure ⇐411

Federal court does not have jurisdiction over defendant unless defendant has been served properly with summons and complaint as provided by Federal Rules of Civil Procedure, and without substantial compliance with rule, neither actual notice nor simply

naming defendant in complaint will provide personal jurisdiction. Fed.Rules Civ.Proc. Rule 4, 28 U.S.C.A.

2. Federal Civil Procedure ⇐422

Summons and complaint in intervention may be served in accordance with Federal Rules of Civil Procedure by serving attorney for party who has appeared unless intervenor's complaint states claim entirely independent of original complaint. Fed.Rules Civ. Proc.Rule 5(b), 28 U.S.C.A.

3. Process ⇐69, 73

Under California law, all means other than personal delivery to defendant are considered "substituted service"; personal service must have been diligently attempted before substituted service may be performed, and ordinarily two or three attempts at personal service at proper place should fully satisfy requirement of reasonable diligence and allow substituted service to be made. West's Ann.Cal.C.C.P. § 415.10 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Civil Procedure ⇐414
Process ⇐78

Federal Rules of Civil Procedure are more limited than California law regarding locations at which substituted service may be made. West's Ann.Cal.C.C.P. § 415.20; Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

5. Federal Civil Procedure ⇐414

Attempt at substituted service of process by intervenor to action which was made by mailing summons and complaint to defendant's private post office box was insufficient to effect service of process; owner of private post office box company is not person with sufficient relationship with renter of box to assure that renter will receive actual notice of pending legal proceeding, and even if method was not legally deficient, method was insufficient under circumstances because bet-
method of obtaining service by serving ...ocess on defendant's attorney was readily available. West's Ann.Cal.C.C.P. § 415.10 et seq., Fed.Rules Civ.Proc.Rules 4, 5(b), 28 U.S.C.A.

6. Process ⇐82

Substituted service at private mail box address does not comply with provision of California Code of Civil Procedure governing substituted service. West's Ann.Cal.C.C.P. § 415.20(b).

7. Constitutional Law ⇐251.6

Elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present their objections. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⇐309(2)
Federal Civil Procedure ⇐414

For substituted service to be reasonably calculated to give interested party notice of pendency of action and opportunity to be heard, as required to comport with due process, service must be made upon person whose relationship to person to be served makes it more likely than not that they will deliver process to named party. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.; West's Ann.Cal.C.C.P. § 415.20.

9. Process ⇐82

Under California law, private post office box is not location at which substituted service of process may be effected; owner of private post office box company is not person with sufficient relationship with renter of box to assure that renter will receive actual notice of pending legal proceeding, and private post office box is unlike dwelling house, place of abode, or place of business, where substituted service may be effected. West's Ann. Cal.C.C.P. § 415.20(b).

10. Federal Civil Procedure ⇐2416

District court declined to enter default against defendant based on defendant's failure to answer complaint filed by intervenor in action where attempt by intervenor in action to effect service of process on defendant through substituted service had been ineffective.

11. Federal Civil Procedure ⇐2411

Law does not favor defaults, and any doubts as to whether party is in default should be decided in favor of defaulting party.

12. Federal Civil Procedure ⇐2411

It is within court's discretion whether to enter default, even when defendant is technically in default for failing to answer or otherwise appear.

Douglas B. Kerr, Dressler & Quesenbery, Irvine, CA, Jeanne Charlotte Wanlass, Western Legal Assoc., Irvine, CA and R. Jason Read, Rynn & Janowsky, Newport Beach, CA, for plaintiffs.

Alan Ross, Alan Ross Law Offices, Los Angeles, CA, for defendants.

MEMORANDUM DECISION AND ORDER

CHAPMAN, United States Magistrate Judge.

BACKGROUND

On September 1, 1995, plaintiff Bonita Packing Company filed a complaint against defendant James L. O'Sullivan, doing business as H & M Produce, Jose Saucedo, doing business as H & M Produce, and DOES 1 through 5, alleging, *inter alia*, a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a, *et seq.* Defendant O'Sullivan answered the complaint on September 14, 1995. Defendant O'Sullivan's answer was filed by Alan Ross, an attorney at law, whose office is in Los Angeles, California.

On September 21, 1995, plaintiff Diazteca Company, Inc., a corporation, filed a complaint in intervention against defendants O'Sullivan and Saucedo. District Judge Edward Rafeedie, on September 22, 1995, issued an order permitting plaintiff Diazteca to intervene. On October 5, 1995, plaintiff Diazteca and plaintiff Nat Feinn Sales Corp.[1] filed a First Amended Complaint in Intervention against defendant O'Sullivan, individually and doing business as H & M Produce, and defendant Saucedo.

Intervening plaintiff Diazteca and "intervening plaintiff" Nat Feinn (hereafter collectively "intervening plaintiffs") on November 20, 1995, lodged a request for entry of default against defendant O'Sullivan, individually and doing business as H & M Produce, pursuant to Fed.R.Civ.P. 55(a). In support of their request, intervening plaintiffs filed the declaration by R. Jason Read, a Proof of Service, and the purported declaration of A. Robles. In paragraph 4 of his declaration, Mr. Read states that: "On October 18, 1995, Plaintiff duly served Defendant with the First Amended Summons and Complaint via substitute service at Defendant's private post office box, located at 3010 Wilshire Boulevard, Suite 100, Los Angeles, California 90010." The Proof of Service consists of the declaration of A. Robles, an individual employed by Express Network, Inc., a registered California process server, who states that on October 18, 1995, he/she served defendant O'Sullivan, in his individual capacity and doing business as H & M Produce, by leaving (an unspecified number of) copies of the First Amended Summons and Complaint in Intervention and other documents "with or in the presence of: Mina Han, owner of the Private P.O. Box" at 3010 Wilshire Boulevard, Suite 100, Los Angeles, California, and by mailing (an unspecified number of) copies to defendant O'Sullivan at the same address. The purported declaration of A. Robles[2] states that he/she made three attempts to serve defendant O'Sullivan at two different business addresses prior to October 18, 1995. Intervening plaintiffs did not mail the First Amended Summons and Complaint in Intervention to defendant O'Sullivan's attorney of record.

[1, 2] "A federal court does not have jurisdiction over a defendant unless the defendant has been served properly [with the sum-

1. Judge Rafeedie's Order of October 5, 1995, permitting a complaint in intervention by plaintiff Diazteca, does not pertain to "intervening plaintiff" Nat Feinn, who has not received permission from the Court to intervene.

2. This purported declaration is not under penalty of perjury and does not comply with either federal law, 28 U.S.C. § 1746, or California law, C.C.P. § 2015.5.

mons and complaint] under Fed.R.Civ.P. 4.... [W]ithout substantial compliance with Rule 4 'neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction.'" *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies*, 840 F.2d 685, 687 (9th Cir.1988) (citing *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987)). A summons and complaint in intervention, however, may be served in accordance with Rule 5(b), by serving the attorney for a party who has appeared unless the intervenor's complaint states a claim entirely independent of the original complaint. 7C Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1919 (1986).

Rules 4(d) and (e) provide that service of process of the summons and complaint may be made: (1) by mailing a copy of the summons and complaint to the individual defendant with a notice and request for waiver; (2) pursuant to state law; (3) by delivering a copy of the summons and complaint to the individual defendant personally; (4) by leaving a copy of the summons and complaint at the individual defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or (5) by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. Under California law, Code of Civil Procedure (C.C.P.) §§ 415.10, *et seq.*, provide that service of process of the summons and complaint may be made: (1) by mailing a copy of the summons and complaint to the individual defendant with a notice and acknowledgment of receipt; (2) by delivering a copy of the summons and complaint to the individual defendant personally; (3) by leaving a copy of the summons and complaint at the individual defendant's office; or (4) by leaving a copy of the summons and complaint at the individual defendant's "dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box;" plus mailing to the location at which the summons and complaint have been left.

[3] All means other than personal delivery to the defendant are considered substituted service, and personal service must have been diligently attempted before substituted service may be performed. "'Ordinarily, ... two or three attempts at personal service at a proper place should fully satisfy the requirement of reasonable diligence and allow substituted service to be made.'" *Bein v. Brechtel-Jochim Group, Inc.*, 6 Cal.App.4th 1387, 1390, 8 Cal.Rptr.2d 351, 352 (1992) (citing *Espindola v. Nunez*, 199 Cal.App.3d 1389, 1392, 245 Cal.Rptr. 596 (1988)). Assuming that a proper declaration could be filed by the process server, apparently three attempts were made to personally serve defendant O'Sullivan at two different business addresses before intervening plaintiffs attempted substituted service, and it, thus, appears that reasonable diligence was made to personally serve defendant O'Sullivan.

[4–6] For whatever reason, intervening plaintiffs did not serve the First Amended Summons and Complaint in Intervention in accordance with Rule 5(b). Rather, they attempted substituted service on defendant O'Sullivan by a means not in compliance with either federal or California law. Federal law requires service of process by leaving a copy of the summons and complaint at the individual defendant's dwelling house or usual place of abode or delivery to an authorized agent. Under C.C.P. § 415.20, substituted service may be made in California by leaving a copy of the summons and complaint at the individual defendant's office, dwelling house, usual place of abode, usual place of business, or "usual mailing address other than a United States Postal Service post office box." The federal rules are more limited than California law regarding the locations at which substituted service may be made. Intervening plaintiffs attempted substituted service on defendant O'Sullivan at a location providing a private post office box; not at defendant O'Sullivan's office, dwelling house, usual place of abode, or usual place of business. Substituted service at a private mail box address does not comply with C.C.P. § 415.20(b).

[7, 8] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *Bein v. Brechtel–Jochim*, 6 Cal.App.4th at 1392, 8 Cal.Rptr.2d 351. For substituted service to be reasonably calculated to give an interested party notice of the pendency of the action and an opportunity to be heard, "[s]ervice must be made upon a person whose 'relationship to the person to be served makes it more likely than not that they will deliver process to the named party.'" *Bein v. Brechtel–Jochim*, 6 Cal.App.4th at 1393, 8 Cal.Rptr.2d 351.

[9] The owner of a private post office box company is not a person who has a sufficient relationship to the renter of a private post office box to assure that the renter will receive actual notice of a pending legal proceeding. Moreover, the Legislature, in specifically excluding United States Postal Service post office boxes from coming within the phrase "usual mailing address," has shown its intention to preclude substituted service at postal boxes.[3] In the Court's opinion, a private post office box is akin to a United States Postal Service post office box; and unlike a "dwelling house," "place of abode" or "place of business."

"[A]lthough it cannot be unequivocally said that the substituted service must be of the best type available, a statutory method has occasionally been held insufficient where a better method could just as well have been prescribed." 3 Witkin, B.E., California Procedure, Juris. § 89. *See Mullane*, 339 U.S. at 315, 70 S.Ct. at 657–58. Here, if intervening plaintiffs were unable to effect personal delivery of the summons and complaint on defendant O'Sullivan, service of process could easily have been made on his attorney pursuant to Rule 5(b). Even if not legally deficient, the method of service selected by intervening plaintiffs was, thus, insufficient because a better method of service was easily available.

[10–12] The Court's determination that intervening plaintiffs have not properly served the summons and complaint on defendant O'Sullivan is consistent with the general law regarding default judgments. "The law does not favor defaults; therefore, any doubts as to whether a party is in default should be decided in favor of the defaulting party." *Lee v. Bhd. of Maintenance of Way Employees—Burlington N. Sys. Fed'n.*, 139 F.R.D. 376, 381 (D.Minn.1991) (citing 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2681 (1983)). *See also United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 194–5 (3rd Cir.1984). It is within the Court's discretion whether to enter a default even when a defendant is technically in default for failing to answer or otherwise appear. *Lee*, 139 F.R.D. at 381. Here, the Court declines to enter a default.

ORDER

Intervening plaintiffs' request for entry of default against defendant James L. O'Sullivan, individually and doing business as H & M Produce, is DENIED.

Ann PRICE, an individual; Ann Price, as Guardian ad Litem of Benjamin Price, a Minor and Unborn Baby Price, a Minor in Utero; Robert Price; Margaret Price and the Estate of Daniel L. Price, deceased, through its Administrator, Ann Price, Plaintiffs,

v.

COUNTY OF SAN DIEGO; John Groff; Steven Clause; Mark Talley; Jim Roache; and Does 1–50, inclusive, Defendants.

Civ. No. 94–1917 R(AJB).

United States District Court,
S.D. California.

April 2, 1996.

In § 1983 action based on wrongful death of arrestee after he was hogtied by

3. Since 1989, when the Legislature amended C.C.P. § 415.20(b) to add "usual mailing address other than a United States Postal Service post office box," there has been significant development and growth of private postal box facilities, which serve the same role as United States Postal Service post office boxes and are in existence, for the most part, because of their convenient locations and the dearth of available United States Postal Service post office boxes.

Landlord–Tenant, Friedman, Garcia & Hagarty, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.

Probate, Ross & Moore, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.

Legal Secretary's Handbook, Legal Secretaries, Inc., see Handbook's Table of Codes for paragraph number references to paragraphs discussing this section.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

1. In general

Service of process was properly effectuated upon corporate defendants in breach of contract action under provisions of § 413.10, this section, and § 416.10 governing service upon corporations rather than under Corp.C. § 6501 governing service upon secretary of state. Ameron v. Anvil Industries, Inc., C.A.9 (Cal.)1975, 524 F.2d 1144.

Service upon attorney of subpoena duces tecum directing witness to appear at trial of civil action was not sufficient to confer personal jurisdiction over the witness, and therefore, witness could not be criminally punished for failure to obey the subpoena. In re Abrams (App. 4 Dist. 1980) 166 Cal.Rptr. 749, 108 Cal.App.3d 685.

Where law requires service of process by delivery of copy of complaint with summons, copy of complaint must conform with original; and although inconsequential irregularities between original and copy do not necessarily invalidate service, substantial and misleading deviations in copy that is served will defeat court's jurisdiction. In re Marriage of Van Sickle (App. 5 Dist. 1977) 137 Cal.Rptr. 568, 68 Cal.App.3d 728.

Where copy of divorce complaint served upon wife correctly described certain land as owned by parties in joint tenancy, while original complaint on which Nevada court granted divorce incorrectly alleged that land was community property, thus enabling court to award all property to husband, service of process was invalid, Nevada court lacked jurisdiction over wife and Nevada divorce decree was void. In re Marriage of Van Sickle (App. 5 Dist. 1977) 137 Cal.Rptr. 568, 68 Cal.App.3d 728.

Since individual defendant, a resident of France, who was served with process while he was in Florida for the sole purpose of giving a deposition in federal court litigation, and defendant overseas corporations could have been served at their places of residence or business in Europe, the "immunity rule" had no legitimate application to them, so that service of summons in California action should not have been quashed where §§ 410.10, 413.10, and this section authorized, if jurisdiction of the subject matter existed, personal service of summons on a defendant "within this state * * * Outside this state but within the United States * * * [and] Outside the United States.", and where such service outside the state could be made in a manner permitted by California law. Severn v. Adidas Sportschuhfabriken (App. 1 Dist. 1973) 109 Cal.Rptr. 328, 33 Cal.App.3d 754.

2. Service of copy of complaint

Section 1013 extending time for filing a responsive pleading is not applicable to substituted service, even though part of service is by mail. Highland Plastics, Inc. v. Enders (Super. 1980) 167 Cal.Rptr. 353, 109 Cal.App.3d Supp. 1.

Personal service of copy of summons and complaint after original summons had been filed with clerk was sufficient to bring defendants under court's jurisdiction where each defendant received actual notice by receiving copy of summons and complaint and where original summons and proof of service were filed within three years. Torgersen v. Smith (App. 4 Dist. 1979) 159 Cal.Rptr. 781, 98 Cal.App.3d 948.

5. Amended complaint

Amended complaint which is filed and served by a new attorney for plaintiff is not void and ineffective to fulfill service of process requirements even though the new attorney has not first filed and served a formal substitution in the absence of prejudice. Baker v. Boxx (App. 2 Dist. 1991) 277 Cal.Rptr. 409, 226 Cal.App.3d 1303.

Defendant's original complaint seeking damages for injury to intangible financial interests was not validly amended where purported amendments were not served in the manner provided for service of summons, and thus trial court correctly determined that default judgment granted to defendant had to be vacated since it granted relief not requested in the original complaint. Engebretson & Co., Inc. v. Harrison (App. 4 Dist. 1981) 178 Cal.Rptr. 77, 125 Cal.App.3d 436.

6. Person served

Judgment creditor's defective service of notice of sister state judgment upon limited partnership did not commence running of 30–day period for bringing motion to vacate entry of such judgment where creditor attempted service by leaving copy of notice with receptionist at office of limited partnership's attorney, receptionist was not person to be served on behalf of limited partnership, and creditor failed to mail copy of notice to limited partnership. Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (App. 4 Dist. 1993) 15 Cal.Rptr.2d 585, 12 Cal.App.4th 74, review denied.

§ 415.20. Leaving copy of summons and complaint at office, dwelling house, usual place of abode or business or usual mailing address; mailing copy

(a) In lieu of personal delivery of a copy of the summons and of the complaint to the person to be served as specified in Section 416.10, 416.20, 416.30, 416.40, or 416.50, a summons may be served by

leaving a copy of the summons and of the complaint during usual office hours in his or her office with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(b) If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, * * * usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

(Amended by Stats.1989, c. 1416, § 15.)

OFFICIAL FORMS

Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.

Historical and Statutory Notes

1989 Legislation

The 1989 amendment in two places inserted "or her" and "or usual mailing address other than a United States Postal Service post office box".

Cross References

Manner of proof, see Code of Civil Procedure § 684.220.
Small claims court, service of claim under this section, see Code of Civil Procedure § 116.340.

Law Review and Journal Commentaries

Dismissal for failure to serve and return summons in state and federal courts in California. William R. Slomanson (1982) 19 Cal.W.L.Rev. 1.

Making a federal (or state?) case of it. William R. Slomanson, 12 Cal.Law. 43 (February 1992).

Library References

California Practice Guide:
Civil Procedure Before Trial, Weil & Brown, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.
Enforcing Judgments and Debts, Ahart, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.
Family Law, Hogoboom & King, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.
Landlord-Tenant, Friedman, Garcia & Hagarty, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.

Legal Secretary's Handbook, Legal Secretaries, Inc., see Handbook's Table of Codes for paragraph number references to paragraphs discussing this section.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

Substituted service 5

1. In general

Minor, harmless deficiencies will not defeat service. Bein v. Brechtel-Jochim Group, Inc. (App. 4 Dist. 1992) 8 Cal.Rptr.2d 351, 6 Cal.App.4th 1387, review denied.

Deficiency judgment in foreclosure action may properly be entered against person who was served with summons by substitute service. Korea Exchange Bank v. Myung Hui Yang (App. 2 Dist. 1988) 246 Cal.Rptr. 619, 200 Cal.App.3d 1471.

Victim's failure to give dog's owner at least 30 days notice of her damages prior to entry of default judgment did not render default "void," so that reasonableness of notice given could be determined only by timely direct attack on judgment, where owner conceded that he was personally served with victim's statement of damages 27 days before she filed for default judgment; declining to follow *Plotitsa v. Superior Court*, 140 Cal.App.3d 755, 189 Cal.Rptr. 769 (2 Dist.). Connelly v. Castillo (App. 2 Dist. 1987) 236 Cal.Rptr. 112, 190 Cal.App.3d 1583, review denied.

Requiring personal injury plaintiff to personally serve defendant who had not appeared after valid service of summons and complaint with "statement of damages" will not result in plaintiff's being unable to obtain default where defendant is not locatable in that §§ 415.20 and 415.50 provide for substituted service and service by publication if reasonable diligence in effecting personal service is not successful. Plotitsa v. Superior Court of Los Angeles County (App. 2 Dist. 1983) 189 Cal.Rptr. 769, 140 Cal.App.3d 755.

Even though defendant doctors were out of state for more than 30 days prior to time summonses were served, period of their absence was not required to be excluded from five-year period after filing of action within which time action was required to be brought to trial, where defendants' offices remained open and there was someone at their home who could have accepted service of summons on their behalf. Gentry v. Nielsen (App. 3 Dist. 1981) 176 Cal.Rptr. 385, 123 Cal.App.3d 27.

Service on individual defendants was properly effected within three years where copies of summons and complaint were mailed and returns made within such period, although substituted service was not deemed "complete" until several days after expiration of such period and return showed service on named defendants, that service was made by leaving a copy with named individual, as supervisor, address where served and a declaration of mailing in the exact words of § 415.20. Billings v. Edwards (App. 2 Dist. 1979) 154 Cal.Rptr. 453, 91 Cal.App.3d 826.

There is no irreconcilable conflict between § 351 providing that time of a defendant's absence from state after cause of action has accrued against him is not period of time limited for commencement of action and this section and §§ 415.30, 415.40, and 415.50 governing substituted service, as legislature may have justifiably concluded that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within limitation period and that, at the same time, a plaintiff should be provided alternate forms of service so as to encourage plaintiff to adjudicate his claim expeditiously if possible. Dew v. Appleberry (1979) 153 Cal.Rptr. 219, 23 Cal.3d 630, 591 P.2d 509.

Where copy of divorce complaint served upon wife correctly described certain land as owned by parties in joint tenancy, while original complaint on which Nevada court granted divorce incorrectly alleged that land was community property, thus enabling court to award all property to husband, service of process was invalid. Nevada court lacked jurisdiction over wife and Nevada divorce decree was void. In re Marriage of Van Sickle (App. 5 Dist. 1977) 137 Cal.Rptr. 568, 68 Cal.App.3d 728.

Where law requires service of process by delivery of copy of complaint with summons, copy of complaint must conform with original; and although inconsequential irregularities between original and copy do not necessarily invalidate service, substantial and misleading deviations in copy that is served will defeat court's jurisdiction. In re Marriage of Van Sickle (App. 5 Dist. 1977) 137 Cal.Rptr. 568, 68 Cal.App.3d 728.

Service of summons upon defendant in civil action was timely when substituted service was made and returned within three years after action was commenced, even though ten-day grace period following proof of substituted service extended beyond such three-year period. Ginns v. Shumate (App. 2 Dist. 1977) 135 Cal.Rptr. 604, 65 Cal.App.3d 802.

Ten-day period following proof of substituted service required by this section before service is "deemed" complete is simply a matter of grace to allow actual notice to be brought to defendant before beginning of period allowed for filing of answer prior to default; service is complete when all required acts are done. Ginns v. Shumate (App. 2 Dist. 1977) 135 Cal.Rptr. 604, 65 Cal.App.3d 802.

Where plaintiff waited until last moment to attempt to serve nonresident corporation and summons failed to comply with this section, no implied exception to § 581a requiring that action be dismissed unless summons and complaint is served and return made within three years after commencement of action applied. Schering Corp. v. Superior Court For Santa Barbara County (App. 2 Dist. 1975) 125 Cal.Rptr. 337, 52 Cal.App.3d 737.

2. Diligence to effect personal service

Default judgment would not be entered against bar examiners in action challenging bar admission practices for failure to respond to service of process where service was made pursuant to this section but no showing was made that personal delivery could not be made. Giannini v. Real, C.D.Cal.1989, 711 F.Supp. 992, affirmed 911 F.2d 354, certiorari denied 111 S.Ct. 580, 498 U.S. 1012, 112 L.Ed.2d 585, rehearing denied 111 S.Ct. 1031, 498 U.S. 1116, 112 L.Ed.2d 1111.

Alternative method of serving process upon city officials, in suit arising from refusal to permit nonconforming curb cut access to property from street following redevelopment, was invalid; owners failed to use reasonable diligence to complete personal delivery, despite two-month extension of time granted by court, and after being told by opposing counsel that attempted service was ineffective. Burchett v. City of Newport Beach (App. 4 Dist. 1995) 40 Cal.Rptr.2d 1, 33 Cal.App.4th 1472, rehearing denied, review denied.

Plaintiffs established "reasonable diligence" in attempting to effectuate personal service on plaintiffs prior to defendants' substitute service on guard at entrance of gated community in which plaintiffs lived; process server made three separate attempts to serve plaintiffs at their residence, but each time gate guard denied access. Bein v. Brechtel-Jochim Group, Inc. (App. 4 Dist. 1992) 8 Cal.Rptr.2d 351, 6 Cal.App.4th 1387, review denied.

Actions of process server that were calculated to and did result in actual notice to civil defendant served by substituted service satisfied requirement of reasonable diligence in attempting personal service before resort to substituted service; process server made three unsuccessful attempts to serve husband and wife at their current

address, on fourth attempt, wife was found at home, so she was served individually and another set of summons and complaint were left for husband, and copy of summons and complaint was mailed to husband. Espindola v. Nunez (App. 4 Dist. 1988) 245 Cal.Rptr. 596, 199 Cal. App.3d 1389, review denied.

Substitute abode service on petitioner by real party in interest was ineffective and void where, except for very short periods that petitioner was available for service at his residence, real party failed to attempt personal service for two years and 363 days and, thus, failed to comply with mandatory prerequisite to abode service by exercising reasonable diligence to effect personal service. Evartt v. Superior Court of Stanislaus County (App. 5 Dist. 1979) 152 Cal.Rptr. 836, 89 Cal.App.3d 795.

3. Abode

Substituted service to estranged wife's parents' address in action against husband and wife for breach of restaurant equipment lease was ineffective despite parents' address appearing on her driver's license where wife had established separate legal household, where she resided with her children, which was matter of public record. Zirbes v. Stratton (App. 2 Dist. 1986) 232 Cal.Rptr. 653, 187 Cal.App.3d 1407.

4. Place of business

Service of process on corporation was effected where process server attempted to leave a copy of the summons and complaint during usual office hours with the person who was apparently in charge of the office but was denied admittance to the office and then, in view of that person, left the summons on the doorstep and where copy of the summons was thereafter mailed to the corporation. Khourie, Crew & Jaeger v. Sabek, Inc. (App. 1 Dist. 1990) 269 Cal.Rptr. 687, 220 Cal.App.3d 1009, rehearing denied, review denied.

Service of process on estranged wife was not effective by leaving summons and complaint at restaurant with estranged husband, for purpose of suit for breach of restaurant equipment lease, where wife had not been working at restaurant and had not been employed there for several years, despite wife's community interest in restaurant. Zirbes v. Stratton (App. 2 Dist. 1986) 232 Cal.Rptr. 653, 187 Cal.App.3d 1407.

5. Substituted service

Employer failed to properly serve employee with complaint, even though method of service complied with that required by state law, and even though employee had actual notice of complaint, where employer's attempted service was invalid under federal law (because acknowledgment was signed by employee's wife), and employer failed to make additional attempt at service in compliance with state law; employer could not rely upon service that was attempted but not validly completed under federal law to satisfy different federal requirement permitting service pursuant to state law. Mason v. Genisco Technology Corp., C.A.9 (Cal.)1992, 960 F.2d 849.

Under California law, all means other than personal delivery to defendant are considered "substituted service"; personal service must have been diligently attempted before substituted service may be performed, and ordinarily two or three attempts at personal service at proper place should fully satisfy requirement of reasonable diligence and allow substituted service to be made. Bonita Packing Co. v. O'Sullivan, C.D.Cal.1995, 165 F.R.D. 610.

For substituted service to be reasonably calculated to give interested party notice of pendency of action and opportunity to be heard, as required to comport with due process, service must be made upon person whose relationship to person to be served makes it more likely than not that they will deliver process to named party. Bonita Packing Co. v. O'Sullivan, C.D.Cal.1995, 165 F.R.D. 610.

In action seeking to hold corporate shareholders individually liable, substitute service on gate guard at gated community in which shareholders resided was proper, as gate guard was "person apparently in charge of the corporate office" and "competent member of the household"; shareholders authorized guard to control access to them and their residence, and this relationship ensured delivery of process. Bein v. Brechtel-Jochim Group, Inc. (App. 4 Dist. 1992) 8 Cal.Rptr.2d 351, 6 Cal.App.4th 1387, review denied.

Service may be made on either corporation's agent or on officer. Bein v. Brechtel-Jochim Group, Inc. (App. 4 Dist. 1992) 8 Cal.Rptr.2d 351, 6 Cal.App.4th 1387, review denied.

Liberal construction of process statutes extends to substituted service as well as to personal service. Bein v. Brechtel-Jochim Group, Inc. (App. 4 Dist. 1992) 8 Cal. Rptr.2d 351, 6 Cal.App.4th 1387, review denied.

6. Service on counsel

Judgment creditor's defective service of notice of sister state judgment upon limited partnership did not commence running of 30-day period for bringing motion to vacate entry of such judgment where creditor attempted service by leaving copy of notice with receptionist at office of limited partnership's attorney, receptionist was not person to be served on behalf of limited partnership, and creditor failed to mail copy of notice to limited partnership. Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (App. 4 Dist. 1993) 15 Cal.Rptr.2d 585, 12 Cal.App.4th 74, review denied.

7. Private post office box

Attempt at substituted service of process by intervenor to action which was made by mailing summons and complaint to defendant's private post office box was insufficient to effect service of process; owner of private post office box company is not person with sufficient relationship with renter of box to assure that renter will receive actual notice of pending legal proceeding, and even if method was not legally deficient, method was insufficient under circumstances because better method of obtaining service by serving process on defendant's attorney was readily available. Bonita Packing Co. v. O'Sullivan, C.D.Cal.1995, 165 F.R.D. 610.

Substituted service at private mail box address does not comply with provision of California Code of Civil Procedure governing substituted service. Bonita Packing Co. v. O'Sullivan, C.D.Cal.1995, 165 F.R.D. 610.

Under California law, private post office box is not location at which substituted service of process may be effected; owner of private post office box company is not person with sufficient relationship with renter of box to assure that renter will receive actual notice of pending legal proceeding, and private post office box is unlike dwelling house, place of abode, or place of business, where substituted service may be effected. Bonita Packing Co. v. O'Sullivan, C.D.Cal.1995, 165 F.R.D. 610.

§ 415.21. Access to gated communities; identification

(a) Notwithstanding any other provision of law, any person shall be granted access to a gated community for a reasonable period of time for the purpose of performing lawful service of process, upon

May 26, 1998

To: Private Mailbox Service Subcommittee (Judge Dave Brewer, Chair; Justice Skip Durham and Judge Michael Marcus, members)

Fm: Maury Holland M.J.H.

Re: What I've Learned and Tentatively Concluded

After our 4-22-98 telecon Dave and I agreed that I would try my hand at some preliminary drafting, for this subcommittee's consideration, intended to amend ORCP 7 D to authorize service of summons on defendants whose only known address is a private mailbox, by delivery of papers to the proprietor or manager of the appropriate private mailbox. I have not yet provided any proposed language to Dave because it soon became clear to me that the difficulties posed by this issue relate far more to operational factors and legal analysis than to mere drafting, the latter appearing to me to be a fairly simple task once the required analysis has been done. I believe what I can now most usefully do is share with you what I've discovered that has a bearing on the problem assigned to this subcommittee.

1. Private mailbox services ("PMS") are essentially unregulated private businesses. They are subject to some federal and state statutory provisions,[1] but none of these provisions deals with matters relevant to our task, such as capacity or obligation to accept service or duty to forward summonses to mailbox clients.[2]

These services are sprouting up like mushrooms, apparently everywhere throughout the U.S. I counted five such operations in the Eugene yellow pages alone, and have visited three of them in an effort to pry loose what information I could.[3] There is now a national chain of PMS's called "Mailboxes-Etc." Everyone with whom I spoke agreed that this is a booming industry and a fairly recent and sudden development. I asked, as discreetly as possible, a couple of the PMS managers in Eugene why people use these

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[1]State of Oregon statutory provisions relating to private mailboxes are shown on Attachment A, and the federal statutory provision on Attachment B, to this memo.

[2]Contrary to what I suspected and hoped, since it would probably make our task easier, private mailboxes are not in any manner regulated by the USPS.

[3]Since I did not misrepresent myself as a potential customer, I have not been able to get a copy of any written agreement between PMS's and their clients. I have attached a copy of a flyer description of various services and fees as Attachment C to this memo.

services. Naturally, the answer I got was that their customers seek privacy, perhaps including being difficult to serve, which these gents seemed to regard as a perfectly understandable and legitimate purpose.

However, a desire to evade service appears not to be the likely motivation of the vast majority of PMS customers. There are lots of people who are, at any given time, more or less in transit and have not, for the time being, established a long-term residence. Such people presumably would normally seek to rent a USPS P.O. box, but these have long been in short supply and there is a waiting period of several months before one can be obtained. This fact might have at least some minor bearing on judicial determination of the constitutionality of any provision authorizing service on defendants by delivery of summonses to their PMS. That is to say, if courts could accurately assume that mere employment of a PMS evidences some purpose of evading service, they might tolerate a lesser assurance that service on PMS's would achieve actual notice to defendants, but that does not appear to be the case.

When I spoke with the lawyer for the California process servers who was instrumental in drafting Cal. C.C.P. § 415.20(b),[4] he told me that, as recently as 10 years ago, PMS's were hardly ever encountered by servers in that state, but had since then become very common and were posing serious difficulties for servers there, which is what prompted the California provision. Much the same thing was said to me by the counterpart attorney in Washington State,[5] whom I tracked down through the Washington Bar.

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[4]"If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, usual place of business, *or usual mailing address other than a United States Postal Service post office box,* in the presence of a competent member of the household or a person apparently in charge of his *or her* office, place of business, *or usual mailing address other than a United States Postal Service post office box,* at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after *the* mailing. (Italicized language added by Stats. 1989, c. 1416, § 15.)

[5]The Washington provision is as follows: "RCW 4.28.080 (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident,

2. In order fully to understand this context, I made some inquiries of the USPS to learn how it figures in service of summons, particularly with regard to the "P. O. Boxes" it offers for rent. First, in order to get a USPS P.O. Box, the customer must fill out a form including the customer's actual residence address. This information remains on file and can be obtained by a private process server or deputy sheriff by filing a request for it. A couple of Oregon process servers have told me that the USPS is very cooperative about providing this information if the proper request form is used. The USPS will not provide residence address information to anyone just for the asking.

Secondly, although I did not, of course, learn this from the USPS, a defendant who has a USPS P.O. Box can presumably be served, pursuant to ORCP 7 D(2)(d)(i) and (3)(a)(i), by certified, registered, or express mail, return receipt requested. The way this would work is that a postal clerk signs the return receipt, places a notice in the addressee's box while retaining the mailing, and then hands it over to the addressee provided the latter in turn signs something acknowledging receipt from the postal clerk.[6]

The USPS will under no circumstance accept service of summons or process of any kind on behalf of any customer by means of personal delivery to any of its employees. In other words, the USPS refuses, as a matter of policy, to function as an agent for service, although it does, of course, participate in service when

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proprietor, or agent thereof, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment." (This provision was added by Laws 1996, ch. 223, § 1, and Laws 1997, ch. 380, § 1.) The subsection 15 referred to above is as follows: "(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein."

Another closely related problem has been created by the proliferation of so-called "gated communities," especially in areas with a large number of wealthy retirees. Since the Oregon process servers have not asked the Council to deal with that problem, I assume the subcommittee will leave it to another biennium. Or perhaps an effort should be made to deal with it now.

[6]This might pose a problem regarding our recently authorized service by mail pursuant to ORCP 7 D(2)(d)(i) and (3)(a)(i). This method requires that the receipt be signed by the defendant personally. There might be some room for doubt whether service by this method would be valid where the receipt is signed by a postal clerk, even if there is a subsequent receipt signed by the defendant. I'd suppose the answer should be yes, but I'm not certain that is the answer that would follow from the present language of 7 D(2)(d)(i). Does the subcommittee wish to clarify this?

service is accomplished by mailing. This is the reason why the California and Washington provisions both expressly exclude USPS P.O. boxes from their purview. The USPS treats papers that are part of process of effecting service like any other piece of mail within its class.

3. Now, as to the interrelationship between the USPS and PMS's. If an ordinary letter or package is addressed to: "Maury Holland, Suite or #, The Eugene Mailbox Center, Inc., 1430 Willamette St., Eugene, OR 97401," the USPS will simply deliver my mail there, no questions asked. As far as I can tell, the USPS has no authority over PMS's and makes no effort to regulate their service or their legal relationship with their customers. Some PMS customers pay extra to have their mail forwarded to them, presumably to their actual residence addresses, but others pay a lower fee and pick up their accumulated mail at the PMS, right out of their box. Each of the PMS managers with whom I have spoken told me emphatically that information concerning the actual residence addresses of their customers is private and will not be revealed to anyone, including a private process server, but they did say this information would be disclosed to "law enforcement." When I asked them whether "law enforcement" would include a deputy sheriff attempting to make personal service on a PMS customer by personal delivery to a PMS proprietor or manager, each answered "no way." One PMS manager told me that disclosure of this information would violate some "privacy law," but I have not been able to locate any such law and doubt that one exists.

If a mailing has the above address, but requires a signed return receipt, the USPS will deliver the mailing to my PMS and will accept the signature of the manager or anyone else behind the counter, provided the addressee has placed on file with the PMS written authorization for its manager or other employee to thus receipt for return receipt mail on his or her behalf. Similarly to the USPS, the PMS will place a notice of return receipt mail in the customer's box or forward it to the customer's actual residence, and will turn over such mail to the customer only when the latter signs some kind of acknowledgement of receipt.[7]

4. Now, to come to the nub of our problem. I asked each of the PMS managers with whom I spoke what they would do if either a deputy sheriff or private process service attempted to serve one of their customers by personal delivery of the papers to them. Each was emphatic that he would refuse to "accept" delivery of the papers, which they understood would have the effect of refusing to accept service effective on their customer-defendant. And, as mentioned above, each of the managers said he would not reveal, either to a deputy sheriff or private server, the actual residence

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[7]This obviously poses the same question about service pursuant to ORCP 7 D(2)(d)(i) and (3)(a)(i) as noted in fnt. 6 above.

address of the customer-defendant. Each added, in effect, that "accepting" service of summonses or the like is no part of its business, and that PMS's have no authority or obligation to have anything to do with such matters. One relatively friendly guy conceded that accepting service on behalf of customers might well defeat part of the purpose of having private mailboxes.

Obviously, PMS's cannot plausibly be regarded as their customers agents in fact, by actual appointment, for purposes of "accepting" service by personal delivery on their behalf. If asked, both the customers and the PMS's would adamantly deny that any such agency relationship existed in fact.[8] While I did not pause to argue the point with them, what the PMS managers I spoke with overlooked is that, within due process and perhaps other constitutional limits, the law can designate one person the agent of another person for various purposes, including service, so that the agency relationship does not in the least depend upon what the parties themselves think or would prefer. There are plenty examples in ORCP 7 D of agency imposed by law for purposes of service on certain defendants by personal delivery of papers to such agents. Among these are D(2)(b) substituted service by delivery of papers to a resident of the defendant's "dwelling house or usual place of abode" who is "over 14 years of age,"[9] office service under D(2)(c) by personal delivery of papers to "the person who is apparently in charge" of on office maintained by the defendant, and the individuals specified in D(3)(b)(i) for the primary method of serving corporations and limited partnerships.

Bearing in mind that service by mail can already be accomplished by mailing to a defendant at his or her PMS address, at least if the possible doubt noted in fnt. 6 and 7 above is removed, the first question seems to me to be whether it would be good procedural policy for the Council now to attempt to frame a provision that would authorize, presumably as an alternative or secondary service method, service on a defendant who is a PMS customer by delivery of papers to the proprietor or manager of such defendant's PMS. This is obviously what the Oregon process

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[8]Interestingly, the California lawyer whom I interviewed by phone told me that Mailboxes--Etc. had initially refused to accept service on their customers by personal delivery of papers to its branches for some time after the enactment of the California provision shown in fnt. 4 above. But he added that, more recently, Mailboxes--Etc. has become much more "cooperative," and that its branch managers were now regularly accepting service by personal delivery. He was not as clear about PMS's apart from Mailboxes--Etc.

[9]By the way, does "over 14 years of age" mean anyone who is past his or her 14th birthday, or must he or she be past the 15th birthday? Should the subcommittee propose to the Council that this little ambiguity be cleared up, such as by changing to: "is 14 or more years of age"? How would any of you judges like to see that question have to be adjudicated?

servers want. They obviously have no interest in the validity of mail service by mailing to PMS addresses, and would probably prefer that that method not be deemed valid. They also seem to understand that another way of solving their problem--by compelling PMS's to disclose to process servers the actual residence addresses of their customers in the same manner as the USPS does upon completion of a request form--could be achieved only by action of the Legislature.

The crucial thing to understand about effecting service by delivery of papers to an agent designated as such by law is that, if the law's designation is valid, whatever that means, then the agent thus appointed can no more refuse to "accept" or "receive" service than could the actual defendant refuse to accept or receive service by personal delivery of the papers to him- or herself. If I am the defendant, and am approached by a deputy sheriff or private server to make service by personal delivery of the papers to me, I can tell them to go to hell, to go away, or say or do anything I want, but, provided the server tells me that "these are legal papers for you" or words to that effect, and says the magic words, "you're served," then I will have been effectively personally served even though I have not "accepted" or "received" the papers in the ordinary, colloquial sense of the word. By parity of reasoning, if, like a resident of a defendant's house of abode, or a person apparently in charge of a defendant's office, a PMS manager were to tell a server to take the papers away, the defendant still will have been effectively served, provided the PMS manager has been validly appointed by law as the defendant's agent for purpose of effecting service.[10]

The point I am frankly hung up on, which I think now needs your collective wisdom, is whether it would make good sense, and whether it would comport with due process, for the Council now to promulgate an amendment to ORCP 7 D in effect designating managers of PMS's their customers' agents for the limited purpose of accepting or receiving service of summonses, on behalf of defendants who are their customers, by means of personal delivery

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[10]My guess is that if, as the California lawyer told me, the Mailboxes-Etc. branches in that state have lately become more cooperative about "accepting" delivery of papers on behalf of their customers, *see* fnt. 8 above, this might have been because branch managers were informed by their superiors that, regardless of whether they actually agree to accept the papers and see that the customers named as defendants get them, the server's mere proffer of the papers, by what in Oregon is called "drop service," suffices effectively to serve such customer-defendants, and that failure to ensure that customer-defendants actually get the papers might give rise to some form of liability on the part of Mailboxes--Etc. in the event these defendants neglect to appear and defend and are therefore defaulted.

of papers to such managers.[11] One consideration which occurs to me, and which first the subcommittee and then the full Council should give whatever weight it might warrant, is that if the Oregon process servers do not get what they want from the Council, they will almost certainly seek it from the Legislature, which might well produce a very bad ORCP amendment. However, the Council might persuade the process servers to give it more time, to get the benefit of similar efforts nationally, including some better reasoned cases than Dave found, which my research confirms are the only published opinions yet extant.[12]

At a recent meeting of the Lien Certificate Working Group of the OSB Debtor-Creditor Section concerning its proposed amendments to ORCP 70 A(2), I had an opportunity to discuss this issue with some attorneys engaged in collections practice. All of these

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[11]Note that if this were done, it would create a new kind of personal, not substituted, service. That is because of the following language in ORCP 7 D(1): "Service may be made, . . . by the following methods: personal service of summons upon defendant or an agent of defendant authorized [by appointment or law] to receive [not necessarily "to accept] process; . . . ." Incidentally, D(1)'s definition of personal service as including service on an agent is somewhat inconsistent with the definition of personal service in D(2)(a), which does not include delivery of papers to an agent unless "the person to be served" is read to mean either the defendant or defendant's agent. Does "the person to be served" as the phrase appears in D(2)(a) mean only the defendant, or also an agent of the defendant? The latter meaning is inconsistent with the definition of personal service in D(1) unless resident of defendant's place of abode to whom papers may be delivered under D(2)(b) is not an agent of the defendant, and unless the person apparently in charge of defendant's office is not, for purposes of office service under D(2)(c), the defendant's agent.

[12]The one case which sustained the validity of service pursuant to California's provision against a due process challenge, *Burrows v. City of League City, Texas,* is virtually worthless as authority. This is not merely because (sorry, Dave and Mike) it is a trial court opinion, but also because it relied upon the specific circumstance that the server sought and obtained from the PMS employee the latter's personal assurance that he would see that the defendant got the papers. As we happy few know full well, this was very faulty analysis under the prospective due process standard articulated by *Mullane,* under which happenstance is not supposed to count.

Dave's other case, *Bonita Packing Company v. O'Sullivan,* held service by delivery of papers to a PMS invalid as a matter of supposed legislative intent. The *O'Sullivan* opinion is truly terrible. It reasons from the fact that the California provision specifically excludes service by delivery of papers to a USPS P.O. Box a legislative intent also to exclude service by delivery of papers to a PMS, thus ignoring the actual reason for exclusion of the former. Having botched the question of legislative intent, the opinion then goes on gratuitously to assert that service by delivery of papers to PMS's would violate due process according to the *Mullane* standard.

attorneys agreed that, as far as they knew, the difficulties for making service in Oregon created by PMS's are considerably less urgent than what the OAPS would have the Council believe. They said that, of course, they have long had difficulties with service on hard-to-find defendants, but did not believe these are any worse now than heretofore. They added that, when confronted by defendants who cannot be found, they have no substantial problem obtaining ORCP 7 D(6) orders for service by publication. I even got a sense that these attorneys regard PMS's as a non-problem and would just as soon stay with publication. Dave and Mike will, of course, have a sense of how substantial a burden ruling on 7 D(6) motions, with their attendant affidavits, imposes on trial courts.

Should the subcommittee decide that promulgating an apt amendment to ORCP 7 D should at least be attempted, the question then becomes whether the Council could lawfully do so. My view is that the Council can lawfully do anything the Legislature could do, provided it stays within its statutorily limited authority over matters of "process, practice, and procedure,"[13] That is to say, if the Legislature could designate PMS managers as their customers' agents as a matter of law for the limited purpose of receiving service on their behalf, then so could the Council, subject, however, to the following single, but perhaps critical reservation. That reservation relates to due process, not to the Council's authority to legislate within its restricted domain.

My due process concern is the following. What does fourteenth amendment due process require in order for any legislative authority, including the Council, validly to designate A as B's agent for the limited purpose of service of summons? One thing that is certainly necessary is that there be some legislative provision announcing this agency relationship, so that both A and B have reasonable notice of its existence and consequences. It seems to me beyond doubt that an apt ORCP provision, whether promulgated by the Council or enacted by the Legislature, would fully satisfy this requirement.

However, bearing in mind that we are not here dealing with an agency in fact or "by appointment," as the conventional language has it--one that derives from the agreement or shared assumptions of A and B--what else is required for the imposition of an agency relationship between A and B as a matter of law? The leading U.S. Supreme Court case on this issue is still *Hess v. Pawloski*.[14] The Court there upheld, against a due process challenge, a then-new Massachusetts statute which provided that out-of-state motorists involved in accidents on Massachusetts highways could be served with summons, in actions arising out of such an accident, by their

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[13] *See*, ORS 1.735: "(1) The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons . . . ."

[14] 274 U.S. 352, 47 S. Ct. 632 (1927).

delivery to the Registrar of Motor Vehicles.[15] Essential to this holding, and most pertinent to the problem assigned to this subcommittee, was the Court's emphasis on the fact that the Massachusetts provision imposed a statutory duty on the Registrar of Motor Vehicles to forward the papers to the out-of-state motorist-defendant by a form of mail requiring a signed return receipt. *Hess* is still good law, but there must be hundreds of more recent decisions refining its holding in a variety of contexts. If the subcommittee thinks it worthwhile undertaking some in-depth research into the pertinent case law since *Hess*, I would be glad to take the plunge.

The reason some in-depth research might be necessary is, I assume, obvious. The reason is because, while I have no doubt that the Council has the authority as a matter of delegated legislative power to provide that PMS managers shall be deemed to be the agents of their customers for purpose of service of summonses in cases where their customers are defendants, I seriously doubt whether the Council, as opposed to the Legislature, has the authority to impose upon PMS managers any legal obligation to ensure that papers delivered to them actually reach the defendant-customers. Without that legal obligation, in my mind there would be grave doubt under *Hess* whether a provision imposing an agency relationship between PMS's and their customers, even for the limited purpose of service of summons, would comply with due process.

Should you share my doubt on this score, one possible alternative to the Council's promulgating an amendment, in addition to stalling for time to allow more developments in other jurisdictions and for the judicial decisions such developments will almost certainly occasion, would be for the Council to work through the OSB Practice & Procedure Committee in an effort to come up with a bill for introduction in the 1999 Legislature. A bill, if enacted, could, unlike a Council-promulgated amendment, do both things at the same time--that is, impose the necessary agency relationship and also the legal obligation on the part of PMS's. However, there might not be enough time remaining in this biennial cycle for that course of action, the drafting would be complicated, and I have no idea how the politics of such a bill would play out in the Legislature. A possibly simpler Legislative solution would be a bill requiring that PMS's disclose the current residence addresses of their customers to anyone, whether a deputy sheriff or a private process server, attempting to serve a summons on one of their customers. Again, your judgments are needed.

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[15]A very similar Oregon statute was the origin of ORCP 7 D(4)(a) prior to its recent amendment by the Council which, among other things, took the DMV out of the loop. That statute must have included a provision requiring the DMV to forward papers to defendants by some form of return receipt mailing. But, as we discovered last biennium, the DMV had, at some point in the past, ceased forwarding papers, and in recent decades was merely filing them.

That might set off a lobbying battle between the OAPS and Oregon PMS's, but that is not the Council's concern. When they spoke to the Council, the OAPS people conceded, in response to some member's question, that legislation mandating disclosure of actual residence addresses of their customers would pretty much solve this problem. Plus, it would do so without any need to tinker with ORCP 7 D.

In case I haven't yet exhausted your patience, for the sake of completeness there is possibly one other tack to take. We know that personal service can be made on any defendant by delivery of papers to an agent of defendant appointed in fact or as imposed by law. (Actually, the right way to state this is "by appointment in fact or by law.") We also know from *Hess*, and common sense, that if certain kinds of agents are to be appointed by law consistent with due process, they must be subject to a statutory or other legal obligation to see that papers are somehow forwarded to the defendant. In *Hess* that was accomplished by placing the Massachusetts Registrar of Motor Vehicles under a statutory obligation to send the papers on to the defendant by a form of mail yielding a return receipt. But, how does that bit of legal doctrine relate to substituted service under D(2)(b), office service under D(2)(c), or service on a corporation or limited partnership by delivery of papers to the individuals specified in D(3)(b). Are these individuals, or are the resident of defendant's usual abode, or the person apparently in charge of defendant's office, all agents of the respective defendants? And, if they are agents of the respective defendants, are they such by appointment in fact or by law? The individuals specified in D(3(b) are probably agents in fact of the corporation or limited partnership, and the same might be true of the person in charge of the office. However, can you imagine that a defendant served pursuant to D(2)(c) could invalidate such service by showing that the office manager was expressly prohibited from accepting service of summons? I would suppose not. Also, what about substituted service pursuant to D(2)(b). It would be quite a stretch to say that everyone resident at a particular address has appointed all other residents over the age of 14 their agent in fact for purposes of accepting service. To the extent any of these people who can accept service on behalf of a defendant are not the latter's agent in fact, they must be the defendant's agent by legal appointment. But, if that is so, where is the statutory obligation imposed on these people to make sure the respective defendants on whose behalf they are accepting service actually receive the papers? Or perhaps, as suggested by the wording of D(1), none of these people are deemed agents of any kind, but are simply people whom D(2) regards, as a matter of common sense, as sufficiently likely to get the papers to the respective defendants so that due process is satisfied. In any event, no sane person could question the constitutionality of substituted or office service.

My purpose in treating you to this little exercise is not to

engage in legal deconstruction, but simply to suggest that the entire area of service on one person being effective service on someone else is not a model of doctrinal clarity or legal consistency. It brings to mind the famous saying of Holmes about the life of the law being more experience than strict logic.

Assuming I am right that there are instances where valid service can be made on defendants by delivery of papers to someone else, but where that someone else might not, strictly speaking, be either an agent by law or an agent in fact of the defendant thus served, and where there is no statutory or other legal obligation imposed on the former to forward papers to the latter, I don't think that admittedly rather vague notion affords any help when it comes to the problem of serving defendants by delivery of papers to their PMS's. As things now stand, the factual and legal relationship between PMS's and their customers is such that, in the absence of a formal legal obligation to do so, there is not a sufficient commonsensical assurance that they will forward papers delivered to them to those customers as would satisfy due process. For the Council to authorize service on defendants by delivery of papers to their PMS's strikes me as about as dubious as authorizing service by delivery of papers to their dentists.

Thus, my conclusion is that only two solutions, neither of which could be provided by the Council, are available. One would be for the Legislature to impose a limited agency on PMS's, as a matter of law, authorizing them to receive service on behalf of their customers and, further, obligating them to forward the papers to those customers. The other, which strikes me as preferable because simpler, would be for the Legislature to require PMS's to provide servers with the actual residence addresses of their customers when named as defendants. Either of these ideas should be routed through the OSB Practice & Procedure Committee. Despite the reassuring assessment given to me by the California lawyer, in my opinion both the California and the Washington provisions are seriously vulnerable to due process challenges.

c: Bruce C. Hamlin (fyi)

Appendix A: State of Oregon Statutes Relating to Private Mail Agents

1997 OREGON REVISED STATUTES
TITLE 50. TRADE REGULATIONS AND PRACTICES
CHAPTER 646. TRADE PRACTICES AND ANTITRUST REGULATION
MAIL AGENTS

Current through End of 1997 Reg. Sess.

646.221. Definitions for ORS 646.221 to 646.240.

As used in ORS 646.221 to 646.240:

(1) "Mail agent" means any person, sole proprietorship, partnership, corporation or other entity who owns, manages, rents or operates one or more mailboxes, as defined in this section, for receipt of United States mail or materials received from or delivered by a private express carrier, for any person, sole proprietorship, partnership, corporation or other entity not the mail agent.

(2) "Mailbox" means any physical location or receptacle where United States mail or materials received from or delivered by a private express carrier are received, stored or sorted, including letter boxes.

(3) "Tenant" means any person, sole proprietorship, partnership, corporation or other entity who contracts with or otherwise causes a mail agent to receive, store, sort, hold or forward any United States mail or materials received from or delivered by any private express carrier on the tenant's behalf.

646.225. Prohibited conduct; required verifications and notice.

(1) A mail agent shall not contract with a tenant to receive United States mail or materials received from or delivered by a private express carrier on the tenant's behalf if the mail agent knows or should know that the tenant has provided a false name, title or address to the mail agent.

(2) Prior to contracting with a tenant to receive United States mail or materials received from or delivered by a private express carrier on the tenant's behalf, the mail agent shall independently verify:

(a) The identity of the tenant.

(b) The residence address of the tenant if the tenant is an individual or the business address of the tenant if the tenant is a business entity.

(c) In the case of a corporation, that the corporation is authorized to do business in this state.

(d) In the case of an entity using an assumed business name, that the name has been registered for use in the State of Oregon.

(3) The mail agent shall accept mail or materials received from or

delivered by a private express carrier on behalf of the tenant only if the mail is, or the materials received from or delivered by a private express carrier are addressed to the tenant. The mail agent shall not deposit United States mail or materials received from or delivered by a private express carrier in any mailbox unless the addressee has rented a mailbox from the mail agent.

(4) Whenever a mail agent has reason to believe that a tenant is using a mailbox to escape identification, the mail agent shall immediately notify the Attorney General and the United States Postal Inspector.

646.229. Mail agent bond; exceptions.

(1) Except as provided in subsection (2) of this section, each mail agent shall maintain a surety bond in the sum of $10,000.

(2) Subsection (1) of this section shall not apply to a mail agent whose activity as a mail agent consists solely of receiving, storing, sorting, holding or forwarding United States mail or materials received from or delivered by a private express carrier for tenants of the mail agent if:

(a) The tenant is also renting or leasing from the mail agent an office, store, residential unit or other space or unit intended for human occupancy, which space or unit is located on the same premises as the mailbox; and

(b) The mail agent services which the mail agent is providing to the tenant are incidental to and a part of the landlord-tenant relationship which exists between the mail agent and the tenant with respect to the leased space or unit.

646.235. Damages.

Upon proof by a preponderance of evidence that a mail agent has failed to satisfy any of the mail agent's duties set forth in ORS 646.225, the mail agent shall be liable for actual damages caused to any person who sent United States mail or materials received from or delivered by a private express carrier addressed to a fictitious person at any tenant's mailbox and who is damaged because the person who sent the United States mail or materials received from or delivered by a private express carrier is unable to identify the tenant. A mail agent's liability under this section shall not exceed $1,000 per occurrence.

646.240. Action by Attorney General; civil penalty; injunction; attorney fees and costs.

(1) The Attorney General may bring an action in the name of the state against any mail agent for violation of ORS 646.225 or 646.229. Upon proof by a preponderance of the evidence of a violation of ORS 646.225 or 646.229, a mail agent shall forfeit and pay a civil penalty of not more than $1,000 for an initial violation. For a second or subsequent violation, the mail agent

shall forfeit and pay a civil penalty of not more than $5,000 for each violation.

(2) The Attorney General may bring an action in the name of the state against any mail agent or other person or entity to restrain or prevent any violation of ORS 646.225 or 646.229.

(3) The court may award reasonable attorney fees and costs of investigation, preparation and litigation to the Attorney General if the Attorney General prevails in an action under this section. The court may award reasonable attorney fees and costs of investigation, preparation and litigation to a defendant who prevails in an action under this section if the court determines that the Attorney General had no objectively reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial court.

Appendix B: Federal Statutes Relating to Private Mail Services

UNITED STATES CODE ANNOTATED
TITLE 39. POSTAL SERVICE
PART IV--MAIL MATTER
CHAPTER 30--NONMAILABLE MATTER

Current through P.L. 105-165, approved 3-20-98

§ 3003. Mail bearing a fictitious name or address

(a) Upon evidence satisfactory to the Postal Service that any person is using a fictitious, false, or assumed name, title, or address in conducting, promoting, or carrying on or assisting therein, by means of the postal services of the United States, an activity in violation of sections 1302, 1341, and 1342 of title 18, it may--

(1) withhold mail so addressed from delivery; and

(2) require the party claiming the mail to furnish proof to it of the claimant's identity and right to receive the mail.

(b) The Postal Service may issue an order directing that mail, covered by subsection (a) of this section, be forwarded to a dead letter office as fictitious matter, or be returned to the sender when--

(1) the party claiming the mail fails to furnish proof of his identity and right to receive the mail; or

(2) the Postal Service determines that the mail is addressed to a fictitious, false, or assumed name, title, or address.

The Eugene Mailbox Center, Inc.
1430 Willamette Street • Eugene, OR 97401
(541) 485-1360 • FAX (541) 485-4529
1 (800) 785-1360

Appendix C

Box Rental Fees

Regular box:	$9.00	/ month* or
	$51.00	/ 6 months or
	$96.00	/ 12 months
Medium box:	$11.00	/ month* or
	$63.00	/ 6 months or
	$120.00	/ 12 months
Large box:	$16.00	/ month* or
	$93.00	/ 6 months or
	$180.00	/ 12 months

* Monthly rental requires first and last month rent.

Opening rents are pro-rated to the first of the month.

$2.00 deposit per box key. Minimum rental is one month.

Hours: 8:30 – 5:30 M–F and 9:00 – 2:00 Saturdays.
Closed Sundays and Postal Holidays.

>>> see other side for fees for other services >>>

The Eugene Mailbox Center, Inc.
1430 Willamette Street • Eugene, OR 97401
(541) 485-1360 • FAX (541) 485-4529
1 (800) 785-1360

Appendix C

Service Fees

MAIL FORWARDING — $1.00 for each forwarding, plus postage, and 10, 25 or 50 cents for envelopes as needed. Please specify how often you want your mail forwarded and what kind of mail to send (e.g.: "forward daily but omit junk mail" or "forward all mail every Friday").

PACKAGE HOLDING — 50 cents a day per package beginning the second day after delivery to the Eugene Mail Center. A package received on Monday will incur a 50 cent fee by Wednesday, a $1.00 fee by Thursday, and so forth.

BOX RENTAL LATE FEE — $2.00 on rent more than seven days past due. *The Eugene Mail Center reserves the right to close your box when rent is more than 15 days past due.*

FAX — To send: $2.00 for the first page plus $1.00 for each additional page.
To receive: $.75 per page. Local numbers are $1.00 per page
Fees are per transmission

Please Note:

DO NOT use "PO Box" as part of your address. DO use "suite" or "#" when referring to your box number. Using "PO Box" may cause the US Post Office to delay delivery of your mail.

Please inform us of all personal and business names used on mail addressed to your box. Mail addressed without a box number and/or a name listed with the Eugene Mail Center may be returned to the sender.

We require a copy of your DBA registration with Salem for any mail using a business name, and a waiver form is required for mail using an alias.

>>> *see other side for box rental rates* >>