Hon. Robert D. Durham, Justice
Oregon Supreme Court
1163 State Street
Salem, Or. 97310

Karsten H. Rasmussen
1600 Executive Parkway, Suite 302
Eugene, Or. 97401

Professor Maurice Holland
University of Oregon
School of Law
Eugene, Or. 97403-1221

Mr. David B. Paradis
Brophy, Mills
201 West Main, Suite 5A
Medford, Or. 97501

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

RAPID Service
1750 SW Skyline Blvd, Suite 22, Portland, OR 97221
(503) 297-9980 Fax (503) 297-9108

January 24, 1998

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

RE: Service of Process via Certified Mail

Dear Mr. Holland,

My wife Kathie and I own the Royal Academy of Legal Investigations, Inc., with a d. b. a. of Rapid Service. I am compelled to write this letter in reference to my concerns of the new Service of Process by Certified Mail.

My concerns stem from the fact that the U. S. Postal Service is now in the Service of Process arena.

Although I have faith in the U. S. Postal Service in general, I have had many occasions where my request for Certified Mail Delivery and Certified Mail - Restricted Delivery Return Receipt cards have been returned to me with no printed name or signature of the person who accepted this specialized delivery. When I contacted the U. S. Postal Service to inquire why my delivery procedure was not performed as I requested, the most common answer was that the local mail person must have missed this one. Another common reason for improper delivery was that the mail person must have been in a rush that day.

On one occasion that comes to mind is that a Certified Mail, Restricted Delivery was signed for by a relative of the person that was supposed to receive the restricted delivery service. When an inquiry was made as to why this occurred, the answer was that the local mail person knew the family and the person named as restricted delivery all lived in the same residence. Other Certified mail is often returned as unclaimed or refused.

I firmly believe that on many occasions the Service of Process by Certified Mail does an injustice to all parties involved in the legal process.

Thank you for taking the time to read this letter. If you have any comments or concerns please contact me.

Respectfully,

Scotty

J. R. (Scotty) Pettigrove

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(541) 923-6315
Fax: (541) 923-6354

Bend Office
65 N.W. Greeley Avenue
Bend, OR 97701-2911
(541) 317-5680

January 27, 1998

Maurice J. Holland, Executive Director
1221 Counsel on Court Procedures
University of Oregon School of Law
Eugene, OR 97403-1221

Dear Mr. Holland;

I am writing concerning the issue of service of process at a private mail box office (an example would be Mail Box Alternatives). Our office serves legal documents from attorneys, collection agencies, private companies, and individuals. We also serve documents from the State of Oregon, Department of Justice and Support Enforcement. While serving documents for the above mentioned, we have found many individuals and companies, being served, use these mail drop addresses as a front to avoid any service of process. Our office receives services for these mailing fronts on a very frequent basis. With the Postal Service, we can request information and street addresses using their forms. But with these mail box offices, they are not governed by the same laws and refuse to tell you how to contact the individual, or provide a street address for the subject.

As the immediate past President of the Oregon Association of Process Servers, Director of Public Relations for Oregon Legal Secretary Association, a member of the National Association of Process Servers, a board member of Consumer Credit Counseling, and owner of the largest process serving firm in Central Oregon, it has been my experience that individuals use the private boxes as a way to avoid service of process and there for making it difficult to serve them and allow the legal process to go forward.

I feel that service of process on the person in charge of the private box office would be a very effective type of service to be allowed in Oregon. This type of service would enable the person being served to be notified and a consequent mailing via regular first class mail with ensure that the person did indeed receive their documents. This type of service of process is already allowed in many states such as California and Washington. California has been allowing this type of service upon defendants since 1989 and Washington began allowing it in 1997. This type of service, if allowed, will allow the justice system to proceed in its due course. If you have any questions, please feel free to contact the undersigned.

Respectfully yours,

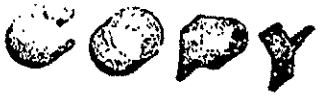
Paul G. Helikson

cc: Scotty Pettigrove, OAPS President
Jason Crowe, OAPS Legislative Chair

BARRISTER SUPPORT SERVICE

8700 SW 26th, Suite L
Portland, OR 97219
503/246-8934
Fax: 503/246-0098

February 14, 1998



Maurice J. Holland
Executive Director
1221 Council on court Procedures
University of Oregon
Eugene, Or 97403-1221

Dear Mr. Holland:

Barrister Support Service would like to express our support for the Oregon Association of Process Server's proposed rule allowing service upon **private rented mailboxes**.

As a process serving company serving the Portland Tri-met area and surrounding cities we have experienced many times being given documents to serve on a defendant only to find that the address we were given is a private mailbox company. The people who run these company's will not give us any information for fear of reprisal from one of their customers, and they will not allow us to use the freedom of information act to find out the physical address behind the mailbox which we can do at the post office. The act of serving process on a defendant is not supposed to be **a game of hide and seek,** but instead should be an efficient manner in which to appraise the defendant of the pendency of the action against him or her. Therefore, we strongly urge the council's serious consideration of the proposed rule to allow service of process at private rented mailboxes.

Respectfully yours,

Terry Sheldon

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
FAX (541) 682-7437

March 10, 1998

Hon. Robert D. Durham
Oregon Supreme Court
1163 State St.
Salem, Or. 97310

Hon. Michael H. Marcus
Multnomah County Courthouse
1021 SW 4th Ave.
Portland, Or. 97204

Professor Maurice Holland
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid St.
Eugene, Or. 97403

Dear Colleagues:

Enclosed are materials received from the process servers. Despite the March 2 date, I just received them on the 10th. If any of you would like to discuss them before Saturday's meeting, please drop me a fax, or give a call. If not, we can talk on Saturday. See you then.

Sincerely,

Dave Brewer

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 "or her" and "or she"; added subsec. (16); and 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

Process, 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, 875 P.2d 636.

Service, coupled with voluntary presence in state, was sufficient to confer personal jurisdiction over former husband with respect to former wife's petition to modify child support provisions of California dissolution decree where children and former wife moved to state and where husband had made support payments, had maintained regular telephone contact, and had exercised visitation rights in state. In re Marriage of Peterson (1993) 68 Wash. App. 702, 843 P.2d 1107, amended on denial of reconsideration.

22.7. Substitute service

Substitute service of process by leaving copy at defendant's usual abode is designed to allow injured parties reasonable means to serve defendants in manner reasonably calculated to accomplish notice. Gross v. Evert-Rosenberg (1997) 85 Wash. App. 539, 933 P.2d 439.

In order to satisfy requirements for substitute service of process copy of summons must be left at defendant's usual abode, with a person of suitable age and discretion, then residing there. Scott v. Goldman (1996) 82 Wash.App. 1, 917 P.2d 131, review denied 130 Wash.2d 1004, 925 P.2d 989.

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.

Personal service of summons and complaint on unknown individual in defendant's business office who had previously denied to process server that he was defendant was insufficient to give trial court personal jurisdiction over defendant in personal injury action in which defendant denied receiving personal service within 90–day period following filing of complaint so as to toll three-year statute of limitations; defendant presented considerable evidence that he could not have been individual served at his business, plaintiff offered nothing to refute that evidence, and plaintiff presented no evidence that individual served at defendant's business was 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 appellants1394made 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 better method of obtaining service by serving process 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. 458, 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 >>

June 16, 1998

To: Judge Dave Brewer (via fax) (9) 984-7437
Justice Skip Durham (via fax) (91)(503) 986-5730
Judge Michael Marcus (via e-mail) (also fax) (91) (503) 248-3425

Fm: Maury Holland M.J.H.

Re: Revised Mail Agent Service ("MAS") Amendment

Below is the Dave's latest revision of what will henceforth be referred to as the MAS amendment. It incorporates many of the changes suggested by Mike in his 6-10-98 fax, plus some changes of Dave's own devising. Dave would like to confer about this revision by phonecon on Wednesday, June . at 12:00 p.m. if everyone is able to participate. Gilma will phone to check your availability. Dave hopes to have language, agreed upon by this subcommittee, ready to take to the Council at the July meeting:

[Language to be added in **bold underlined**; to be deleted in ~~strikeover~~]

D(3)(a) Individuals.

D(3)(a)(i) Generally. . . .

D(3)(a)(ii) ~~Minors~~ **Mail Agent. Provided the proof of service certifies that, after exercise of reasonable diligence in attempting to do so, the defendant could not be otherwise found, an individual defendant contracting with a mail agent as defined in ORS 646.221(1) to receive, store, sort, hold, or forward any United States mail on such defendant's behalf may be served by delivery of a true copy of the summons and the complaint to any person apparently in charge of such mail agent's office or place of business. The plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at the mailing address**

provided to the defendant by the mail agent, and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which service upon the mail agent was made.

D(3)(a)(~~ii~~ iii) Minors. . . . .

D(3)(a)(~~iii~~ iv) Incapacitated Persons. . . . .

MEMO

TO: **Judge Dave Brewer**
Judge Michael Marcus
Prof. Maury Holland

FROM: **Robert Durham**

RE: **Mail Agent Service**

DATE: **June 17, 1998**

I have no substantive concerns to share at this time regarding the MAS amendment set forth in Maury's June 16, 1998 memo. However, I should state a toe-in-the-door reservation of the right to address and decide arguments in future cases that may challenge the Council's ultimate rule on this issue.

I have some suggestions to offer that I hope will improve the clarity and usefulness of our proposal. For example, the current draft purports to add a new subsection, ORCP 7 D(3)(a)(ii), but its structure and phrasing depart from the form now used in the other subsections of ORCP 7(1)(3)(a) and the mail agent statute. Those departures could suggest, unintentionally, that a different interpretation is intended. Additionally, the proposed amendment is hard to read (to me), and we could eliminate some of its "tax code-itis" by redrafting it. I offer

the following as a straightforward restatement of the proposed amendment, with no substantive alterations intended:

D(3)(a)(ii) Tenants of a Mail Agent. For purposes of this subsection, the terms "mail agent," "mailbox," and "tenant," have the definitions stated in ORS 646.221(1), (2), and (3), respectively. Service may be made on a tenant of a mail agent by delivering a true copy of the summons and the complaint to any person apparently in charge of the mail agent's office or place of business, provided that:

(1) the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and complaint to the mail agent's mailbox address for the tenant, and to any other mailing address of the tenant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff served the mail agent, and

(2) the plaintiff files a proof of service that certifies that the plaintiff, after exercising reasonable diligence, could not find the tenant.

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
FAX (541) 682-7437

June 19, 1998

Hon. Robert D. Durham
Oregon Supreme Court
1163 State St.
Salem, Or. 97310
Via Fax- (503) 986-5730

Hon. Michael H. Marcus
Multnomah County Courthouse
1021 SW 4th Ave.
Portland, Or. 97204
Via Fax- (503) 796-1234

Professor Maurice Holland
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid St.
Eugene, Or. 97403
Via Fax (541) 346-1564

Post-it® Fax Note 7671	Date	# of pages ▶
To Prof. Maury Holland	From Dave Brewer	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 541-346-1564	Fax # 682-7437	

RE: Mailbox Service- Process Servers' Proposal

Dear Colleagues:

I have reviewed Skip's memo of June 18, and proposed redraft of the mail agent rule. I agree that another conference call before the July meeting of the Council makes good sense. I will ask Gilma to set one up, if possible, for the week of June 29, or at latest, the week of July 6.

A couple of quick reactions follow:

1) Memo, p. 2, line 8. I vote for "individual".

2) Memo, p. 2, line 12. I don't believe we need to include "sole proprietorship," since a sole proprietor is no more or less than an individual in business. No strong bias, however.

3) Memo, pp. 2-5, (certification of service). My instinct is that the certification required in Maury's first draft is the most the rule should mandate. My preference is to delete the requirement altogether. I believe that the requirement that the defendant could not be found

despite due or reasonable diligence satisfies due process, without the need to so certify. However, I am moved sufficiently by the depth of Michael's contrary view that I do not object to certification provided that the detailed factual showing he suggests is not required.

4) Memo, p. 5 (Effective date of Service). I have no problem with use of the "3 or 7" rule, which I believe ought to run from the last date of followup mailing.

I'd like to reflect further on the draft pending our next conference call. Thanks for the prompt and excellent work, Skip.

Dave

MEMO

TO: Judge David Brewer
Judge Michael Marcus
Prof. Maury Holland

FROM: Judge Robert D. Durham (by fax) Skip

RE: Mail Agent Service

DATE: June 18, 1998

Accompanying this memo is my revision (with some optional wording) of the draft rule that we discussed by telephone on June 17, 1998. Listed below are the decision points or questions that we should address and resolve (if possible) before submitting a final draft to the Council on July 11, 1998.

1. Scope of potential defendants.

On June 17, we agreed that we should take an incremental approach to mail agent service, and extend the rule to service on natural persons, not corporations or partnerships. The statutory definition of "tenant," ORS 646.221(3), includes a "person" and a "sole proprietorship," as well as partnerships, corporations and other entities. ORCP 7 D(3) describes the procedures for serving specified defendants, but uses somewhat different terminology, i.e., "individual defendant," not

"person" or "natural person." We deduce from the context of ORCP 7 D(3) that an "individual defendant" under that rule is a natural person. The rule creates special procedures for serving other kinds of "individual defendants," such as corporations. Consequently, the term "individual defendant" applies only to natural persons. The current rule's categorization of defendants is not very clear, but seems to work well enough. Consequently, I list "an individual" on p 1:4. Do you agree, or do we need to say, instead, "natural person?"

I have included "sole proprietorship" within the scope of the defendants to whom the draft rule applies. Do you agree, or should the rule omit that reference? Keep in mind that ORCP 7 D(3) does not refer expressly to service on a sole proprietorship.

2. Subsection 2 (plaintiff's certification of service).

After looking more carefully at ORCP 7 in its entirety, I am persuaded that our proposal should not require the plaintiff to certify in a proof of service that he could not find the defendant. Consider the following. Under our proposal, the fact that the plaintiff cannot find the defendant authorizes the plaintiff to use mail agent service. That scheme equates roughly

with a plaintiff's authorization under ORCP 7 D(6)(d) to use mail service at the defendant's last known address if the plaintiff does not know and cannot ascertain, after a diligent inquiry, the defendant's current address. That rule does not obligate the plaintiff to certify either the fact of or the basis for the assertion that the plaintiff cannot locate the defendant's current address.

In addition, ORCP 7 F(2) describes the certification of all forms of service (except upon the defendant's admission). That rule makes no reference to certification of any fact that supposedly justified the plaintiff in choosing a particular service method. In fact, that rule imposes no obligation on a plaintiff to certify anything, probably because plaintiffs do not effect service. Rather, that rule requires a server, mailer, or attorney to certify the facts showing what occurred in delivering documents to the defendant. Requiring the plaintiff to file a proof of service describing why the plaintiff claims he was entitled to use a particular service method seems like an error to me.

A closer analogy is the procedure specified in ORCP 7 D(6). Under that rule, a plaintiff who claims he cannot serve by another method may file a motion, supported by an affidavit that

demonstrates the necessary facts, and obtain authorization through a court order to perform service by publication or by a combination of service methods. In that context, the plaintiff must make his showing ("I cannot find and serve the defendant by other methods, despite due diligence") directly to a judge, and the defendant, I assume, still can attack the accuracy of the plaintiff's factual assertions in a motion to quash service or for relief from default.

If we wish to follow that model, we can do so. We would condition mail agent service on the plaintiff's prior showing to the court in an affidavit that, despite diligent inquiry, he cannot locate the defendant. At present our proposal requires the plaintiff to make a diligent inquiry and be unable to locate the defendant, but it does not require the plaintiff to complete an affidavit that certifies the truth of those facts to a judge or anyone else before using mail agent service.

Right now, I do not think that that is a due process problem. I rely for that conclusion on two facts. First, the contractual relationship between a mail agent and tenant. ORS 646.221. Second, the certifications that occur by operation of ORCP 17 C. If a plaintiff files a proof of service showing mail agent service, that act constitutes a certification that the

plaintiff has made "such inquiry as is reasonable under the circumstances," ORCP 17 C(1), that the certification of service is not presented for any improper purpose, ORCP 17 C(2), and that the certification of service is warranted by existing law, ORCP 17 C(3), including the requirement in our proposal that the plaintiff cannot locate the defendant despite making a diligent inquiry. Those certifications seem to be a sufficient due process protection, so that we do not need a prior judicial determination that the plaintiff's facts are true.

With the foregoing in mind, I would drop what now appears (in brackets) as subparagraph (2) (at p. 1), and delete from the certificate of service any reference to an express written certification by the plaintiff that he cannot find the defendant despite a diligent inquiry. What is the committee's pleasure?

3. Effective date of service.

This proposal declares that service is complete within 3 (or 7) days of the mailing to the mail agent's mailbox address for the defendant. The wording draws heavily on ORCP 7 D(2)(d)(ii), as we discussed. Have we selected the correct event from which to calculate the completion of service? That is, should we count the days from the date of mailing to the mail

agent, or from the last date of all mailings required by the rule, including mailing(s) to defendant's other known addresses? What are your wishes?

4. Format of certificate of service rule.

My proposal would add a long sentence at the end of ORCP 7 F(2)(a)(i) that would describe the specifics about how the plaintiff effected mail agent service. The sentence borrows heavily from the present final two sentences of that rule, because mail agent service combines two separate kinds of service: (1) delivery on the mail agent, and (2) mailing to the mail agent's mailbox and to other known addresses of the defendant. We need to add something to the rule to address the certification of mail agent service, and I think my proposal gets the job done.

I am unhappy with the length and complexity of my proposed sentence, but could compose no better amendment that would say what is necessary. For example, can we develop a method for obtaining a suitable certification by a single person, instead of a number of actors? I welcome all suggestions for improving my proposal.

These issues, and others that I have not discussed, probably justify another telephone conference among our

subcommittee members. I will leave that to Maury and Chairman Brewer. If we don't have a conference, please send your suggestions to me.

Thanks for your time, attention, and helpful comments.

(RDD Draft 6/18/98)

Mail Agent Service

ORCP 7D(3)(a)(ii) Tenant of a Mail Agent. For purposes of this rule, "mail agent," "mailbox," and "tenant," shall have the definitions stated in ORS 646.221(1), (2), and (3), respectively, except that "tenant" includes only an individual or a sole proprietorship. If the plaintiff, after making a diligent inquiry, cannot find defendant, and the defendant is a tenant of a mail agent, the plaintiff may serve the defendant by delivering a true copy of the summons and the complaint to any person apparently in charge of the mail agent's office or place of business, provided that[:

[(1)] the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and complaint to the mail agent's mailbox address for the defendant, and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff served the mail agent.[, and

[(2)] the plaintiff files a proof of service that

certifies that, after making a diligent inquiry, the plaintiff could not find the defendant.]

For the purposes of computing any period of time prescribed or allowed by these rules or by statute, service on a defendant who is a tenant of a mail agent shall be complete three days after the mailing to the mail agent's mailbox address for the defendant if mailed to a mailbox address within the state, or seven days after that mailing if mailed to a mailbox address outside of the state, whichever occurs first.

ORCP 7F(2)(a)(i) (add at end of current rule):

If the defendant is served through a mail agent, (1) the server shall state in the certificate when, where, and with whom a copy of the summons and complaint was left at the mail agent's office or describe in detail the manner and circumstances of service and (2) the person completing the mailing to the mail agent's mailbox address for defendant and to any other known mailing address of the defendant, or the attorney for any party, shall state in the certificate the circumstances of mailing.[, and (3) the plaintiff shall state in the certificate that, after making a diligent inquiry, the plaintiff could not find the defendant.]

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
125 E. 8TH AVENUE
EUGENE, OREGON 97401-2926

DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
FAX (541) 682-7437

Ms. Gilma Henthorne
Executive Assistant
Council on Court Procedures
Via Fax- (541) 346-1564

June 19, 1998

Dear Gilma:

Enclosed is a copy of my memo to the mail agent subcommittee dated June 19. Would you be willing to indulge me with setting up one more conference call for us prior to the July Council meeting? I'd like to shoot for the week of June 29, following my return from travel, and Maury's as well. Of course, Sharon has my calendar in my absence. Thank you very much.

Best Wishes,

Dave

Dave

Post-it® Fax Note 7671	Date 6/19	# of pages ▶ 3
To Gilma Henthorne	From Dave Brewer	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 346-1564	Fax # 682-7437	

CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY
LANE COUNTY COURTHOUSE
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DAVID V. BREWER
CIRCUIT JUDGE
(541) 682-4253
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June 19, 1998

Hon. Robert D. Durham
Oregon Supreme Court
1163 State St.
Salem, Or. 97310
Via Fax- (503) 986-5730

Hon. Michael H. Marcus
Multnomah County Courthouse
1021 SW 4th Ave.
Portland, Or. 97204
Via Fax- (503) 796-1234

Professor Maurice Holland
Council on Court Procedures
University of Oregon School of Law
1101 Kincaid St.
Eugene, Or. 97403
Via Fax (541) 346-1564

RE: Mailbox Service- Process Servers' Proposal

Dear Colleagues:

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A couple of quick reactions follow:

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I'd like to reflect further on the draft pending our next conference call. Thanks for the prompt and excellent work, Skip.

Dave

CIRCUIT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
Department Number 35
Michael Marcus, Judge
1021 SW FOURTH AVENUE, PORTLAND OR 97201
Michael.H.Marcus@OJD.State.Or.US; (503) 248-3250; fax: (503) 248-3425; home fax: (503) 796-1234

Hon. Robert D. Durham
Hon. David V. Brewer
Prof. Maurice Holland

June 24, 1998

Dear Colleagues:

I regret that my schedule has not allowed an earlier response to Justice Durham's draft and Judge Brewer's comments. Putting aside the issue of certification and its detail, I agree with Judge Brewer's votes for "individual," against expressly including "sole proprietorship," and agreeing with the "3 or 7" rule.

Apart from certification, were I allowed only to change one other thing, it would be to insert the article "the" before the first "defendant" on line 6 of Skip's draft.

I would suggest that it may be easier (or simply simpler) to provide as follows:

==========

ORCP 7D(3)(a)(ii) Tenant of a Mail Agent. Upon an individual who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff cannot find the individual notwithstanding diligent inquiry;

(B) the plaintiff, as soon as reasonably possible after delivery causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the individual and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint; and

(C) the plaintiff files a proof of service as provided in subparagraph F(2)(a)(iii) of this section.

* * * * *

(Majority version - conclusory certificate):

7F(2)(a)(iii) Certificate of Service on a Tenant of a Mail Agent. When service is made on a tenant of a mail agent as provided in subparagraph D(3)(a)(ii) of this section, the certificate of service required by subparagraph (i) or (ii) of this paragraph shall also contain or be accompanied by a certificate of the person with knowledge thereof that the defendant could not be found notwithstanding diligent inquiry.

(Marcus version - demonstrative certificate)

7F(2)(a)(iii) Certificate of Service on a Tenant of a Mail Agent. When service is made on a tenant of a mail agent as provided in subparagraph D(3)(a)(ii) of this section, the certificate of service required by subparagraph (i) or (ii) of this paragraph shall also contain or be accompanied by a certificate of the person with knowledge thereof that the defendant could not be found notwithstanding diligent inquiry and a description of the inquiry made.

The reasons behind my suggestions are these:

This format saves many words, and it is parallel to the rest of the structure of ORCP 7D(3), which is of the form "Service may be made upon specified defendants as follows: Upon an individual, by personal service . . . Upon a minor, by service in the manner specified in subparagraph (i) . . . Upon an incapacitated person . . . by service in the manner specified in subparagraph (i) . ."

In other words, the manner of service is specified by a phrase which completes the introductory sentence of 7D(3).

Another formal change is that ORCP uses capital letters for sub-subparagrahs (see ORCP 7D(4)(a)(i)(A)).

More substantively, I am concerned (even though I may have suggested the language myself) with the format in Skip's draft that we are authorizing "deliver[y] . . to any person apparently in charge of the mail agent's office or place of business" when what we really want is delivery to the person apparently in charge at the location of the mail boxes. That's why I substituted "the place where the mail agent receives mail for the tenant." This is consistent with the language of ORS 646.221, although it is also literally true that this is included within "mailbox" under ORS 646.212(2).

This approach also puts the proof of service where it belongs, with adequate cross-reference to the new subparagraph in 7F(2), which is where *it* belongs.

Because this may be distributed to the Council generally, and perhaps to attempt once more to persuade the rest of you that we should require detail, I will outline my reasons for promoting a detailed certificate:

Although symmetry has its benefits (such as avoiding unintended implications of differences in meaning), it has insufficient weight to militate in favor of substantial impracticality, much less unconstitutionality. That is why symmetry is abandoned in providing for service by publication as opposed to the other types of service which have at least substantial likelihood of accomplishing actual notice (personal service, abode service, office service). I believe that the constitutionality of the provision may be at stake, and that firm public policy in favor of actual notice and an opportunity to be heard (let alone avoiding drastic increases in the numbers of motions to set aside defaults or default judgments) strongly militates in favor of a detailed certificate.

Most importantly, just because some people who use mail agents are evading service does not mean that all or most do. I suspect the retired mom and pop who are touring the USA in their Winnebago™ in their golden years are at least as numerous among tenants of mail agents as are the deadbeats presumed by the proponents of mail agent service. In fact, ORS 646.225 prohibits mail

agency contracts with people known to have provided a false name, title or address, and requires the mail agent to verify the tenant's identity and residence address. *These* are the enforceable obligations under the stautory scheme (ORS 646.235). And it bears noting that nothing in the mail agent statutes imposes any obligation on a mail agent to *forward* anything to the tenant; mail agency mail boxes can simply be places where tenants collect their mail when they get back to town.

This all goes to the difference in likelihood of actual notice between mail agent service and the other types of indirect service for which ORCP 7 requires no special certificates. And it is that likelihood which is at stake as a matter of public policy and (potentially) constitutional validity.

I think we all agree that due process requires that mail agency service only be available if the defendant cannot otherwise be found in spite of due diligence. I fear that allowing only a conclusory assertion of "due diligence" will render the provision (and judgements based on it) more vulnerable to constitutional or other collateral attack than will requiring a list of what efforts were made. I am not convinced that preparing such a list is at all burdensome for someone who has actually complied with the due diligence requirements. Routine users (e.g., collection agencies) will simply develop checklists or forms for both conducting and proving due diligence, and occasional users will find the major work is determining what constitutes due diligence and exercising it – not simply reciting in retrospect what was done.

On a less theoretical level, the presence of a statement of what was actually done should have substantial practical benefits for trial judges and parties whose interests are at stake.

When a defendant comes running to court for a stay of execution on a judgment based on mail agency service, it would be far easier to balance the interests at stake (often representing substantial expense and inconvenience for both sides) if I could compare the defendant's showing of innocence with the plaintiff's claims of diligence. And I am convinced that at hearings, the presence of a description of diligence will often eliminate or reduce the need for or extent of live testimony and court time.

The requirement of a detailed certificate would in no way significantly diminish the appropriate utility of this means of service; it would bolster its ability to withstand constitutional attack; and it would provide practical utility to the administration of justice. For all of these reasons, I am not persuaded by the approaches of other states.

Thanks for your consideration, and your hard work.

Sincerely,

Michael H. Marcus

Mail Agent Service - Marcus Proposals - July 9, 1998

ORCP 7D(3)(a)(ii) Tenant of a Mail Agent. Upon an individual who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff cannot find the individual notwithstanding diligent inquiry;

(B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the individual and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint; and

(C) the plaintiff files a proof of service as provided in subparagraph F(2)(a)(iii) of this section.

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

* * * * *

(Alternate forms of proof of service for discussion)

(conclusory certificate):

ORCP 7F(2)(a)(iii) Certificate of Service on a Tenant of a Mail Agent. When service is made on a tenant of a mail agent as provided in subparagraph D(3)(a)(ii) of this section, the certificate of service required by subparagraph (i) or (ii) of this paragraph shall also contain or be accompanied by a certificate of the person with knowledge thereof that the defendant could not be found notwithstanding diligent inquiry.

(demonstrative certificate)

7F(2)(a)(iii) Certificate of Service on a Tenant of a Mail Agent. When service is made on a tenant of a mail agent as provided in subparagraph D(3)(a)(ii) of this section, the certificate of service required by subparagraph (i) or (ii) of this paragraph shall also contain or be accompanied by a certificate of the person with knowledge thereof that the defendant could not be found notwithstanding diligent inquiry and a description of the inquiry made.

Mail Agent Service - Durham Proposal - July 10, 1998

ORCP 7 D(3)(a)(iv) Tenant of a Mail Agent. Upon an individual defendant who is a "tenant" of a "mail agent," within the meaning of ORS 646.221(1) and (3), by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry and cannot find the defendant;

(B) the plaintiff, as soon as reasonably possible, causes a true copy of the summons and complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and complaint.

Service shall be complete on the date the defendant signs a receipt for any mailing required by this subparagraph, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside of the state, whichever first occurs.

[No recommendation for changing provisions regarding proof of service.]

11
7-13-98 Agenda

Proposed Amendment to ORCP 7 E

[Language to be added in bold underlined; to be deleted in ~~strikeover~~.]

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 or, nor attorney for, any party, corporate or otherwise. **However, service pursuant to subparagraph D(2)(d)(i) of this rule may be made by an attorney for any party.** Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F A X

To: Prof. Maury Holland, Director, CCP
Company:
Fax number: +1 (541) 346-1564
Business phone:

From: Michael Marcus
Fax number: +1 (503) 796-1234
Business phone:
Home phone:

Date & Time: 7/15/98 10:09:26 PM
Pages: 3
Re: ORCP 7/69

Here's my latest attempt

CIRCUIT COURT OF THE STATE OF OREGON
for MULTNOMAH COUNTY
Department Number 35
Michael Marcus, Judge
1021 SW FOURTH AVENUE, PORTLAND OR 97201
Michael.H.Marcus@OJD.State.Or.US; (503) 248-3250; fax: (503) 248-3425; home fax: (503) 796-1234

Hon. Robert D. Durham
Hon. David V. Brewer
Prof. Maurice Holland

July 15, 1998

Dear Colleagues:

I enclose a draft which I hope is responsive to my charge. I have temporarily separated the draft with Maury's corrections from what I have to work with now (at home), but I recall that his changes were only to the 7F(2)(a)(iii) changes which the current approach deletes anyway. I will look at the office as soon as possible and follow up if there are other corrections, but I did not want to delay this further.

A minor note: although I've incorporated most of Skip's improvements on my previous draft, I've kept my approach to the "3/7 or when signed" trilemma. (Sorry, I've not fully recovered from *State v. Fish*).

Another minor note: I've kept my approach of a new subparagraph 7D(3)(a)(ii) and renumbering existing (ii) and (iii) because I think the structure of the rule is improved.

I've incorporated alternate versions of proposed new ORCP 69A(3). I think the first version literally requires the showing I advocate, but I fear that practitioners may not appreciate the requirement of a showing rather than a conclusory statement until their first mistake; the second version is harder to misread.

Finally, I recognize that the existing wording of ORCP 69(B)(1)(g) results in a clerk's default order being unavailable for mail agent service. I think that is the correct result in view of the present relationship between the availability of a clerk's default and the manner of service - if service was not "personal" (on the party, agent, officer, director or partner of a party), the order must be entered by "the court."

Sincerely,

Michael H. Marcus

Mail Agent Service - Marcus Proposal - July 15, 1998
(new language is in **12 pt. bold**)

ORCP 7D(3) Particular defendants. Service may be made upon specified defendants as follows:
* * * *
D(3)(a)(ii) Tenant of a Mail Agent. Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint.

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

D(3)(a)~~(ii)~~**(iii)** Minors. . . . . .

D(3)(a)~~(iii)~~**(iv)** Incapacitated persons. . . . . .

* * * * *

ORCP 69 A(1) In general. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, the party seeking affirmative relief may apply for an order of default.

A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an affidavit showing:
* * * *

A(3) Mail agent service. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(3)(a)(ii) of Rule 7 unless the plaintiff submits an affidavit showing that the plaintiff has complied with the requirements of that subparagraph.

Alternative for discussion purposes:

A(3) Mail agent service. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(3)(a)(ii) of Rule 7 unless the plaintiff submits an affidavit showing that the plaintiff has conducted a diligent inquiry and accomplished the mailings required by that subparagraph.