MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 13, 2020, 9:30 a.m.
Zoom Teleconference/Video Conference
Originating at Lewis & Clark Law School, 10101 S. Terwilliger Blvd., Portland, Oregon

ATTENDANCE

Members Attending by Teleconference or Video Conference:

Kelly L. Andersen
Hon. R. Curtis Conover
Kenneth C. Crowley
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Drake A. Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Scott O'Donnell
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Travis Eiva
Meredith Holley
Margurite Weeks

Council Staff (In Person):

Shari C. Nilsson, Executive Assistant
Hon. Mark A. Peterson, Executive Director

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 21 ORCP 23 ORCP 23/34	Discovery ORCP 7 ORCP 15 ORCP 21/23 ORCP 23/34C ORCP 27/GAL ORCP 31 ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 7 ORCP 9 ORCP 10 ORCP 17 ORCP 22 ORCP 32 ORCP 36 ORCP 39 ORCP 41 ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 62 ORCP 69 ORCP 79		ORCP 7

I. Call to Order

Ms. Gates called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Approval of May 9, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft May 9, 2020, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Judge Norby made a motion to approve the draft minutes. Mr. Crowley seconded the motion, which was approved with no objections.

III. Old Business

A. Committee Reports

1. ORCP 21/23

Ms. Gates stated that the ORCP 21/23 committee had circulated a memorandum (Appendix B) to the Council. The memorandum was drafted by the committee after the reconstituted or refreshed membership met again last month to talk about the comments the committee received from the full Council at the May meeting and how the previously suggested amendment language might be changed to address those comments. The memorandum contained new language recommended as an amendment to ORCP 21 E. Ms. Gates stated that the change uses the same formulation as is used for a motion to strike. She asked for Council members' reactions.

Judge Roberts stated that the Council talked at great length at the last meeting, and it does not seem to her that the committee's change makes any difference. It simply includes a kind of hedge word that basically says that there is no right to respond to a new pleading unless the court somehow wants you to respond or finds that you are responding appropriately, which does not meet any issue. Judge Roberts pointed out that the only issue that was raised about the existing rule was a concern when overly expansive responses to amendments are made just prior to trial. She noted that there is nothing in the proposed amendment that is confined to last-minute changes, and that the amendment is far more expansive than any problem that was raised with the Council. She pointed out that the draft amendment suggests that, at any point in the litigation, even if there is a year until trial, the defendant can be denied the opportunity to raise any defense that they have, in the completely unfettered, as far as the rule goes, discretion of the

court. Judge Roberts emphasized that this is not a problem that has ever been raised with the Council before, and that nothing suggests that the current rule is inadequate. She stated that the only issue that the person who made the suggestion was concerned about were those changes that are made just before trial. She opposed the draft amendment proposed by the committee.

Mr. Andersen respectfully disagreed with Judge Roberts. He stated that he believes that the "when justice so requires" language in the proposed subsection E(3) addresses the last-minute changes, even though the words "last minute" are not used. He opined that, if there is an amended pleading filed at the beginning of litigation, there is no reason that justice would require not allowing that amendment. However, if the amendment is sought just before trial and introduces a new matter, justice requires that not it be allowed. Mr. Andersen stated that he believes that the amendment is needed and that the language is as perfect as the Council can get it.

Judge Norby stated that she was more inclined to be in favor of this amendment after reviewing the case law on the "justice so requires" language. Her only remaining hesitation is that she is not certain that the phrase itself suggests that one should go looking for case law to interpret it. Rather, it feels like a phrase that invites action. She observed that trial judges are the ones who will be using it, and trial judges are usually making decisions on the fly. She expressed concern that, if there is not something that hints at the fact that there is an explanation that is found in the case law, judges may not go looking for it. She stated that this would be a shame, because that would leave it closer to what Judge Roberts is talking about. However, having looked at the case law, and thinking about parity, she is now in favor of the proposed amendment.

Judge Roberts noted that the proposed amendment is not parallel to the provisions for amending a pleading, which specifically state that amendments will be freely granted. She stated that the proposed amendment treats defendants as more confined than plaintiffs, as plaintiffs can presumptively make late changes but, apparently, defendants are more confined.

Mr. Andersen stated that there were both plaintiff and defense attorneys on the committee, and both agreed that the proposed amendment was evenhanded. Ms. Gates asked Judge Roberts whether her concern would be alleviated if the proposed amendment could somehow incorporate the case law that all Council members think is invoked by using the phrase "as justice so requires"? She wondered whether providing specific parameters would be helpful, because she shares the concern that it is not totally obvious that this is what is being invoked. Judge Roberts stated that would certainly help. She noted that it is her hope that

this proposed amendment would be rarely used and only in circumstances where there is a clear abuse. She opined that amendments should be granted freely up until very shortly before trial for both plaintiffs and defendants.

Ms. Payne stated that the committee's, and the Council's, intent is clearly to incorporate the standards in Rule 23 and not to make them more narrow. The goal is to make things evenhanded, not to make it harder for defendants to amend than it is for plaintiffs. She stated that anything the Council can do to show this intent, whether it is a staff comment, or to say "as provided in Rule 23 A," at the end of the sentence, the Council should do it. It must be made clear to practitioners and to judges that the Council is trying to incorporate the "when justice so requires" standard from Rule 23.

Judge Leith agreed and pointed out that the reason that the "leave shall be freely given" language was not also borrowed from Rule 23 A is that the committee did not want to require the defendant to have to seek leave to respond to an amended pleading. In other words, there was not going to be a reason to have any leave of the court be granted or denied. Instead, it is a plaintiff's motion that would seek to challenge an amendment as being not permitted under the "as justice so requires" standard. He stated that he understands Judge Roberts' concern and, if there is a way to use the "leave shall be freely given" type of language without suggesting that a defendant needs to seek leave, he would support that. He observed that the idea is to borrow the entire standard from Rule 23 A, not just part of it.

Mr. O'Donnell agreed with Judge Roberts that there has not been a showing that this change is needed, and stated that amending a rule based on aspirational information or anecdotal information seems unnecessary. He observed that there could be unintended consequences if someone like Judge Roberts has concerns about how it will be interpreted. He stated that he believes that the defense bar has a concern generally that other judges may not understand or agree with what the committee thinks is a proper interpretation. He stated that he does not support the draft amendment.

Ms. Stupasky stated that she feels that the draft amendment would even the playing field a little bit. Plaintiffs actually have to move to amend and, in this case, all defendants have to do is file a responsive pleading. They can file whatever answer they want to file and add new allegations that have nothing to do with the new issues brought up in the plaintiff's amended pleading. Further, defendants can add these new issues right before trial if they want to, and then it becomes the plaintiff's burden to move to strike. So the onus is still on the plaintiff to do something. While this may not seem to be a problem, in practice, it is a problem.

Ms. Stupasky noted that this is something that is unfair that the Council can make fair, and she stated that she does not understand why it is so difficult to interpret what "when justice so requires" means. She observed that trial judges make those kinds of rulings all of the time. To her, that seems like a really fair standard. She stated that she supports the draft amendment.

Judge Roberts pointed out that defendants must move to amend unless there has been an amended or a new pleading first put in by the plaintiff. She stated that she has yet to hear an explanation of why this is an issue at any time except in the circumstance when trial is pending. She asked whether there is any other circumstance where a defendant should be prohibited from filing a new pleading to raise any issue that they have. Ms. Stupasky stated that, if the issue would be prejudicial to the plaintiff, it should be prohibited. Judge Roberts asked for an example. Ms. Stupasky gave the example of a plaintiff, during trial, changing the amount of the medical bills, which happens all of the time. Judge Roberts noted that she had stated that this does not seem to be an issue other than immediately before trial. She again asked for an example of circumstances under which a defendant should be prohibited from raising a new issue, for example, six months before trial.

Judge Norby explained that the draft amendment is not written as a prohibition but, rather, is written in a way that allows and instructs a judge, under the case law, to consider whether an amendment would be prejudicial and under what circumstances it would qualify as prejudicial. She stated that she understands that Judge Roberts feels strongly about it, but emphasized that the word "prohibition" is inappropriate for the context.

Ms. Gates addressed Judge Roberts' question about whether this would ever apply in any situation other than right before trial. She stated that she believes that the draft amendment is intended to address that specific situation; however, she could imagine availing herself of such a rule in a discovery-intensive case where discovery had concluded, the parties were on the cusp of motions for summary judgment, the plaintiff had made an amendment to make a very modest change, and the defense at that point introduced brand new defenses that would require more or different discovery than had already been taken. She stated that, if the parties raise the standards that are used in Rule 23, she believes it would give the court enough discretion to decide whether to reopen discovery and just push the litigation calendar back or to agree with the plaintiff and move the case forward because the defense could have raised the defenses earlier.

Judge Leith agreed and stated that he believes that the cases show that it is usually later in the process that a proposed pleading gets limited under the "as

justice so requires" language. If it is early in the case, it is unlikely that anyone is going to be prejudiced by changing the pleadings. He stated that it is generally going to be late, but it does not necessarily have to be on the exact eve of trial. For example, if trial is two or three weeks out and everybody thinks that discovery is done, and then all of a sudden there is a new pleading, that is still clearly within the scope of the proposed rule. He stated that the committee tried to consider ways to limit the proposal in terms of timing and lateness and it just turned out to be a Pandora's box that they were opening. In the final analysis, just adopting the "as justice so requires" standard seemed to properly apply the concerns about timeliness that the committee had been trying reinvent the wheel about, so that is how the committee ended up coming back around to simply adopting the existing standard that is covered so well in the case law. He pointed out that this standard is also covered well in law school, and every every first year civil procedure student knows that leave to amend the pleadings shall be freely granted as justice requires.

Mr. Andersen explained that he believes that the draft amendment is appropriate. A rule change is needed because, as it stands right now, a plaintiff could amend to move the amount of medical bills slightly upward based on the latest medical treatment, and the defense could respond with a new and amended answer that raises an entirely new issue. Under the current rule, a judge would only be able to say that it is a defendant's right to do so and that there is no rule that allows the judge to prevent it; the plaintiff took their chances when filing the amended pleading. The proposed rule change would allow the defendant's response to an amended pleading to be stricken when justice so requires, which is a standard that is as close as the Council can get to allowing the judge the freedom to do what is just under the circumstances. He stated that he agrees that, most of the time, the issue will come up right before trial, but there needs to be a fix for that circumstance. This proposed rule amendment would clarify what a judge can do, and he thinks it is needed.

Ms. Gates emphasized that she did not hear anyone on the committee state that this proposed amendment would create a new right or a new ability that was not already there.

Mr. Crowley believed that the right to raise a challenge like this already exists. However, he thinks that the language of the proposed amendment lacks clarity, and that is a problem that could cause unintended consequences. He stated that plaintiffs can already challenge late pleadings and they do not need this amendment to do so. He noted that he does not think there is anything wrong with challenging late pleadings, but that he worries about unintended consequences that could occur if this amendment were to be implemented.

Mr. Andersen asked Mr. Crowley what rule a party would cite to challenge a late amendment. Mr. Crowley stated that they could cite the inherent discretion of the court to control trial proceedings, as well as case law, like the Council has been discussing. Mr. Andersen wondered, instead of having to go to case law or fumble around through all of the ORCP, what is the harm in having language in Rule 21 that identifies that the judge has this authority when justice so requires. Mr. Crowley stated that, because parties already have the ability to make that challenge, he does not believe that a rule change needs to be created, especially one that parties may interpret to mean something broader than what already exists. Mr. Andersen asked for an example of a broader interpretation. Mr. Crowley stated that he could see parties challenging amended pleadings earlier in the litigation. He stated that the draft amendment seems like it just invites more dispute.

Mr. O'Donnell noted that, if practitioners think that this practice already is available and exists, some could infer that such a rule change is adding something more and that, even the language "as justice so requires," may have a different meaning in this context. He pointed out that some people may not be reading the Council's minutes or staff commentary and might assume that the change gives them more authority to deal with a problem that never really existed in the first place. He stated that this is the potential unintended consequence of the draft amendment.

Judge Norby opined that, when we think like that, we are thinking like members of the Council. She pointed out that, before she was a Council member, she did not know the ORCP as well as she does now. She did not read them regularly and analyze them to try to figure out what was new and what was old; she only referred to them when she wanted to find law. She looked for a rule that related to the law and did not question whether it was a new provision that was just adopted. She would find the language and use it. She stated that the only person she knows who would think about what the rule used to look like is Judge Peterson, or perhaps some longstanding members of the Council. In her opinion, a majority of practitioners and lawyers, although they use the rules every day, would not necessarily notice a new provision but, rather, would just use it.

Ms. Gates stated that she feels that the draft amendment would actually narrow whatever previously unwritten understandings existed, because it puts constraints on the discretion of the court per the case law that exists under interpretations of "when justice so requires." She stated that those standards actually provide guardrails that were not in place before. Judge Roberts disagreed. She stated that the law is that, any time a court has discretion, the judge can only use that discretion as justice requires. They cannot use it whimsically, in a way that is

unjust; that is to say, “as justice so requires,” actually adds nothing to the exercise of discretion. She stated that it seems to her that, if this standard is adequate, those who agree should be advocating for replacing all of the Oregon Rules of Civil Procedure with a simple rule that says that the court should act as the court feels is just. That one rule would then serve for all purposes.

Ms. Payne disagreed strongly with the idea that adding “when justice so requires” adds nothing. She noted that the case law states that “when justice so requires” under Rule 23 is a legal standard with four specific factors tied to it. It is not “as justice so requires” in a very vague, undefined way where a court just exercises its subjective discretion. As Judge Rick Haselton stated in *Ramsey v. Thompson*, 162 Or App 139, 147, 986 P3d 139 (1999), *rev den*, 329 Or 589 (2000), the phrase very much limits the court’s discretion, and courts are reversed regularly for denying amendments under Rule 23. Ms. Payne stated that she disagrees with the idea that this proposed amendment would permit courts to deny amendments six months before trial, because she believes that amendments must be granted freely and, unless there is a timeliness issue or the plaintiffs can show undue prejudice, an amendment should not be denied. She noted that the draft amendment would provide very limited discretion.

Judge Roberts pointed out that the language in Rule 23 A is different than the language proposed in the draft amendment, because the language in Rule 23 A states affirmatively that amendments shall be granted freely as justice requires She noted that the language “shall be granted freely” puts a thumb on the scales and indicates that proposed amendments should be granted, which is not present in the language of the draft amendment. Judge Leith pointed out again that there is no requirement for the responding party to seek leave, and this is why the committee did not include the language about leave being freely given. He stated that, to him, the question is not whether the court *should* have the authority to disallow an amendment that raises new issues at an inappropriate time. He noted that the committee was unanimous that the court should have that authority. There was some disagreement about whether the court already does. But everyone agreed that the rules should provide a tool for the court to address this problem. He noted that Judge Roberts seems to have taken the position that the court does not yet have this authority. He asked whether Judge Roberts disagrees that the court *should* have this authority, or whether there is language she would propose to accomplish it.

Judge Roberts observed that the committee always talks about untimely amendments in relation to a trial, but that language is not part of the proposed rule. If the amendment were limited to the only problem that anyone ever raised, which is to say, an unexpected response to an amendment that is untimely in

relation to the progress of the case, that would be a completely different situation. She stated that she agrees that this is something that the Council should do. However, to say broadly that, at any time in the case, for any reason that tickles the fancy of the judge, a defendant can be blocked from raising a defense to an amended pleading strikes her as being entirely inappropriate. Judge Leith stated that he trusts judges not to rule based on whimsy and fancy. He stated that he believes that the "as justice so requires" standard is a standard that has been fleshed out extensively in case law and has parameters and is real. Judge Roberts wondered how there could be case law for a rule that does not exist. Judge Norby pointed out that *Ramsey v. Thompson* arose under Rule 23 A, but it applies to that phrase that is being taken from Rule 23 A. Judge Roberts suggested that the whole phrase be used.

Ms. Gates asked whether any Council member believes that the draft amendment presented by the Council is not ready to be voted on. Judge Roberts stated that she would prefer to amend subsection E(3) of the proposed draft before the vote takes place. Ms. Payne explained that the committee carefully considered the "untimely" language and rejected it in favor of the "as justice so requires" language because the latter incorporates the timeliness factor under the *Ramsay* standard and a prejudice factor as well as the nature and merits of the proposed amendment. She opined that the proposed draft already incorporates the timeliness standard that Judge Roberts wants. Judge Roberts stated that, if her motion to amend were not to be seconded, there would be no need for further discussion.

Judge Peterson stated that the use of the word "untimely" is unfortunate, and that "adversely affecting the docketing of the case" might be a better choice, since "untimely" could also have an impact under Rule 15 as to whether that the response was filed within Rule 15's time requirements, not just on the eve of trial. He explained that this was one of the reasons that the committee rejected the word "untimely." He agreed that anyone should certainly have the right to make an amendment, but he offered a friendly suggestion that, if Judge Roberts were to offer an amendment to the proposed language, the word "untimely" should not be chosen. Judge Roberts did not object to this suggestion.

Ms. Gates asked for input from defense counsel, because one consideration when the committee rejected a focus on the timeliness language was that defendants could file an amended pleading and a court could do exactly what Judge Peterson suggested and strike it or strike some component of it, taking the stance that the response was late and calling out the timeliness factor alone without consideration of whether there is prejudice to the docket.

Judge Leith asked for clarification about what the suggested amendment is. He wondered whether the language about adversely affecting the docket would be used instead of "as justice so requires," or be added before or after that language. Judge Roberts stated that it could be added just before or just after, but that it would not replace it. Ms. Payne expressed confusion because she stated that "when justice so requires" already includes the timing of the proposed amendment and related docketing concerns. Judge Roberts opined that this is packing a lot into those words, particularly when the rule does not put a thumb on the scale in favor of allowing responsive amendments as it does for the complaint. She noted that the rule makes it clear that, for complaints, denying the ability to amend is unusual, whereas the proposed amendment for responsive pleadings does not. It just says, "Well, whatever." Ms. Payne explained that this is because the defendant does not have to move to amend the complaint. Judge Roberts stated that this does not make any difference at all because, once the issue is raised, the issue has been raised and it should be determined in the same way, one way or the other. She stated that she is just trying to write a rule that alleviates the problem that was proposed to the Council.

Ms. Payne stated that she understood, but that she was frustrated because the committee came together and agreed on language. She stated that she would appreciate just voting on the language that the committee suggested instead of spending time on wordsmithery.

Ms. Gates asked whether there was a second to the motion to amend that was suggested by Judge Roberts and modified by Judge Peterson:

> E(3) any response or part thereof that raises new issues that affect the docketing of the case when justice so requires.

Mr. Andersen asked for clarification as to whether the Council would be voting on whether to accept Judge Roberts' amendment to the committee's proposed rule change. Ms. Gates explained that the Council would first determine whether all members have the same understanding of what that amendment is; once there is a mutual understanding of that language, she will ask if any member will second Judge Roberts' motion to amend.

Judge Peterson stated that the language could be changed to use the word "scheduling" instead of "docketing," but otherwise the language seems to address Judge Roberts' concerns. He stated that what he understood her main concern to be is that judges do not have a tool for these unseemly responses to amendments, so having a tool would be good, but the question is what that tool should look like. He stated that, if there are four factors like the committee

pointed out, judges should not have a problem striking a response to an amendment that does not have any colorable merit. He noted that he thinks it is unfortunate that lawyers must go to the Council minutes and to the staff comments, but the minutes are replete with comments that it is very rare that this is going to be a motion that would be granted other than just before trial, where it would have an adverse impact on the trial scheduling. He noted that there is certainly something to be said about the fact that it could disrupt discovery that has been closed, but it seems that is pushing a larger rock up a steeper hill.

Mr. Young stated that he is opposed to a change in the rule. However, if there are four *Ramsay* factors, why not just incorporate all four factors into a subpart within the rule so that we are not dancing around whether or not people need to look to the case law, the Council minutes, or the staff comments. This would make it plainly evident to anyone who looks at the rule because they want to file such a motion. Ms. Gates stated that she does not have an objection to that, but asked what other Council members think. She stated that it is not something that the Council normally does, but that it is not necessarily a bad idea.

Judge Norby stated that she thinks that perhaps what might be happening is that there were so many people on the reconstituted committee who have already had this discussion that they do not really feel the need to continue discussing it. She noted that the people who have been dominating the discussion are the people who were not at the committee meetings. While those members may be waiting for committee members to speak, the committee members have already talked about all of these issues at some length and are ready to vote

Mr. Andersen agreed. He stated that the committee was composed of members from the plaintiffs' bar, the defense bar, and judges, and the issue has been discussed from many angles. He suggested voting on the committee's draft.

Ms. Gates asked for a second to Judge Roberts' motion to amend the committee's proposed language as suggested by Judge Roberts and as modified by Judge Peterson. No Council member seconded the motion. The motion was tabled.

Ms. Gates moved to approve the original language proposed by the committee for ORCP 21. Mr. Andersen seconded the motion. The motion passed with 12 in favor and 5 opposed, so the language will be placed on the publication agenda for the September meeting.

2. ORCP 57

Justice Nakamoto stated that she was not aware of any progress with the committee. Judge Wolf agreed. Judge Peterson stated that his recollection was that the committee was waiting for the pandemic to settle down before contacting potential members for a work group.

B. Review of Draft Amendments for September Publication Agenda

Ms. Nilsson stated that she had included in the meeting packet the drafts of Rule 15, Rule 27, Rule 31, and Rule 55 (Appendix C) that the Council had previously voted to place on the September agenda to be voted on for publication. She asked that members review them carefully and let her know of any errors or problems. Judge Peterson agreed that any questions or concerns should be shared with both him and Ms. Nilsson before the September meeting, because last-minute wordsmithery in September can lead to unintended consequences.

Ms. Gates re-emphasized the importance of informing Ms. Nilsson and Judge Peterson of any issues with the draft amendments, but also asked that the Council listserv be copied so that the entire Council will be aware of potential issues and be prepared to discuss them at the September meeting.

C. Review of Recommendation to Legislature

1. ORCP 23/34

Judge Peterson discussed the status of the Council's suggestion to the Legislature (Appendix D) regarding the problem that now exists with the situation of a defendant who dies without the knowledge of the plaintiff, and when the death is not discovered until after the complaint has been filed. He explained that the Oregon State Bar's Board of Governors has approved including the Council's suggestion to amend ORS 12.190 as a part of its legislative law improvement package. He noted that the most recent issue of the Bar's Public Affairs Committee electronic pamphlet incorrectly stated what the law was and what the suggested amendment was, and stated that he would contact Susan Grabe and attempt to correct it. He stated that he suspects that having the suggestion as a part of the Bar's legislative package will enhance the likelihood that it will be will be enacted.

Ms. Gates asked whether the Council would still send a separate letter to the Legislature, even though the Bar is taking action. Judge Peterson stated that he thought it would be appropriate to mention in the Council's transmittal letter that

the proposed amendment to ORS 12.090 was part of the work that the Council did, but note that the proposal is being put forward by the Oregon State Bar.

IV. New Business

Judge Peterson stated that the Council had received a comment from Zach Holston, a process server, asking about Rule 7 (Appendix E). He stated that the Clackamas County sheriff's office had interpreted that, under Rule 7, serving a Salem-based registered agent for a corporation or equivalent organization located in Clackamas County is alternative service. Mr. Holston objected to the need for a follow-up mailing in such a case and wondered why the Rule is crafted in the way that it is.

Judge Peterson agreed with Clackamas County's interpretation of the rule. He stated that Ms. Nilsson had pulled together a lot of the history of Rule 7 and, the way the rule has been written, service on a clerk in the office of the registered agent is primary service. It is only in the next subparagraph, if the registered agent is not in the county where the case is filed, that you get to the point that service on the registered agent's clerk is an alternative method of service. Judge Peterson stated that he is not sure that there is any real justification, but it seems to be that finding the person in the county in which the action is commenced is part of the issue.
Judge Peterson stated that he had let Mr. Holston know that the Council was at the point in its biennial work schedule where it was not considering any new amendments; however, Rule 7 is almost always a matter that gets looked at by each new Council. He stated that he is not sure whether the rule can be written a little more clearly so that it is clear from the beginning that service on a registered agent in a different county is an alternative method of service as opposed to primary.

Ms. Gates stated that she thought that the complaint was legitimate and that the language seems somewhat outdated or unnecessary. She stated that, if Judge Peterson did not find history that made it clear why the language was included, the issue should probably be added to the agenda for next biennium.

Judge Norby asked whether there was anyone who disagreed that this is a problem that should be fixed. She stated that it appears that it could be a simple fix. However, if there is any disagreement, it should be discussed further. Judge Roberts stated that she feels that the issue should be sent to a committee for further investigation. She noted that, at first look, she did not understand why it is a problem, because one can serve by mailing to the registered agent, which makes it easier to serve.

The Council agreed that the issue should be sent to the agenda for next biennium's Council.

V. Adjournment

Ms. Gates reminded the Council that its next meeting will be on September 12, 2020. She also reiterated the importance of reviewing the rules that will be voted on for publication during that meeting, and alerting Ms. Nilsson, Judge Peterson, and the entire Council to any problems.

Ms. Gates adjourned the meeting at 10:36 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 9, 2020, 9:30 a.m.
Zoom Teleconference/Video Conference
Originating at Lewis & Clark Law School, 10101 S. Terwilliger Blvd., Portland, Oregon

ATTENDANCE

Members Attending by Teleconference or Video Conference:

Kelly L. Andersen
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Tina Stupasky
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. Norman R. Hill

Guests (by Teleconference or Videoconference)

Matt Shields

Council Staff (In Person):

Shari C. Nilsson, Executive Assistant
Hon. Mark A. Peterson, Executive Director

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
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I. Call to Order

Ms. Gates called the meeting to order at 9:45 a.m.

II. Administrative Matters

A. Approval of April 11, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft April 11, 2020, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Mr. Crowley made a motion to approve the draft minutes. Judge Roberts seconded the motion, which was approved with no objections.

B. Court of Appeals Opinion: *Lacey v. Saunders*

Ms. Gates asked for more information on the recent Court of Appeals opinion, *Lacey v. Saunders*, 304 Or App 23 (2020). Judge Peterson explained that the case touches on a different area than the issue that the Rule 23/34 committee considered and addressed with a proposed amendment to ORS 12.190. In the *Lacey* case, the plaintiff sued the defendant prior to the defendant's death, and was notified of the death by the defendant's personal representative. Plaintiff failed to move to substitute the personal representative for the defendant within the 30 day period provided by ORCP 34 B(2), which *Lacey* held is similar to a statute of limitations. Judge Peterson stated that the case proves that this is an area where problems can arise and mistakes can happen, and shows that some deadlines stated in the ORCP cannot be enlarged. Mr. Andersen agreed that the *Lacey* case involves an entirely different principle and that it does not negate the Council's work this biennium at all.

III. Old Business

A. Committee Reports

1. ORCP 7

Mr. Young stated that the committee had met and discussed a new draft amendment that Judge Peterson was gracious enough to put together (Appendix B) that addressed various concerns that were raised in last month's Council meeting. One change includes providing notice to the insurance carrier, if known, with respect to the waiver of service provision. Mr. Young reminded the Council that this was a concern raised by Mr. Goehler. Public bodies and vessel owners are excluded from the waiver of service, which is consistent with the federal rule. There is also a notice to the defendant to contact an attorney in the form waiver

of service. With this latest iteration of the amendment, the timelines were much shorter, with 14 days to return the waiver, and 45 days to respond, which was the source of a lot of discussion in the committee's meeting. Mr. Young explained that the committee reached a consensus on 28 days to return the waiver, which will give a defendant enough time to seek and retain counsel if needed, and decide whether or not to waive service and return the waiver. He stated that the committee could not reach agreement on the amount of time for a defendant to respond, so the committee would like the Council's feedback on whether 45 or 60 days would be appropriate. The committee would also like the Council's feedback on whether or not to adopt the amendment.

Ms. Gates asked whether the committee's discussions had raised any new information that might have an impact on the Council's discussion today, or whether anyone on the committee had changed their position. Mr. Young explained that committee members' positions had not changed. The defense side feels that 45 days is an inadequate incentive to want to use the waiver provision. Defense counsel would rather just work cooperatively with plaintiff's counsel and accept service without a deadline. He stated that he believes that the plaintiffs' perspective is that 60 days is far too long and encumbers their ability to prosecute the case to a timely resolution. The sticking point seems to be 45 or 60 days, if the Council chooses to adopt the amendment at all.

Ms. Gates asked whether the plaintiffs on the committee have a preference between just adopting the amendment at all and adopting it at 45 days or at 60 days. Ms. Stupasky stated that the committee's preference was to put both time periods up for a vote before the Council to see what preference emerged. She agreed that the plaintiffs' lawyers think that 60 days is far too long. The incentive for the defendant is that they do not have to pay the service costs if they accept service. She stated that she felt that it is important for the Council to pass something, especially given what is going on with the current COVID-19 pandemic, but 60 days would make it ripe for a malpractice trap.

Mr. Eiva stated that he believes that he federal rule got passed at a time that was different from Oregon's current situation of most courts trying to get trials scheduled within a year. He opined that basically to shave a month off of litigation time is problematic, particularly because newer attorneys who are trying to save money might be the ones who would try to take advantage of this amendment, and they would be shooting themselves in the foot by shaving 30 days off of their litigation time. This would cause concern about how the rule would be used and the possibility of creating more delay when the goal is to make trials more timely.

Judge Peterson explained that his latest draft was an attempt to craft a product that the Council could fairly examine and think about. He noted that he does not have a vote, but that he would like to express a few thoughts. He stated that he does not think that the Council should add a provision to the rule if no one will use it, and he is concerned that the plaintiffs will not use it if it is 60 days. He pointed out that 45 days is consistent with the discovery rules, Rule 43 and Rule 45, for responding to requests for documents or for admissions. He explained that he had left out government entities because, thinking about the reason for adding a waiver provision, it should not be directed at good attorneys who are trying to do it right. It would be directed at defendants who run like hell from the process servers, delay things, and ultimately make things expensive. If the Council decides to add the waiver provision, it seems to him that it should serve a purpose, and the purpose it would serve would be a way to have a consequence for those people who delay litigation and drive up the cost of litigation by playing games. Most government entities would not do that.

Ms. Gates asked how many votes were needed to add the amendment to the publication docket. Ms. Nilsson explained that there are no rules governing this and that a simple majority vote has always been the custom. Judge Peterson agreed that, since a quorum was present, a majority vote was appropriate.

Ms. Gates asked members to first vote on whether they preferred 60 days or no change to the rule at all. Ms. Nilsson polled the members. The vote was 18-1 for no change. Ms. Gates then asked members to vote on whether they preferred 45 days or no change to the rule. The vote was 10-9 for no change. Therefore, any amendment to add a section ORCP 7 H and create a waiver of service provision failed.

Ms. Gates thanked committee members for their time and effort, and stated that both the committee and the Council had done good work to address the concern that was brought to it by the suggestion in the bar poll.

2. ORCP 23

Ms. Gates explained that the committee was presenting three options (Appendix C) to solve the problem that the ORCP 23 committee was tackling. These options were not the same options presented at the last Council meeting, although they are still trying to solve the issue of the perceived unfairness of a defendant raising new defenses that could have been raised earlier after a plaintiff amends a complaint to make minor changes. The committee came up with three potential ways to address the issue, none of which are actually in ORCP 23. Ms. Gates stated that the idea was to signal to a party that is experiencing this unfairness that there

is a potential remedy, or at least a process to obtain court review. She stated that the most simple solution would be adding a sentence to the end of ORCP 15 C. The second option is adding a third basis for a motion to strike to ORCP 21 E, and the language used there was intended to mirror ORCP 23, using similar language, "as justice requires." The third option was also a motion to strike, but using different and slightly more detailed language that talks about what the answer or response to the amended pleading should contain and that the amended response should not go beyond new matters raised in the amended pleading. Ms. Gates explained that this language came from cases that the committee looked at that address this particular issue. She asked other committee members to weigh in and whether the Council in general had questions or comments.

Judge Roberts stated that she was not certain that the problem was necessarily as terrible as some on the Council were making it out to be. She also asked which cases the committee was looking at when they chose the language for the third option. She stated that she did not believe that there were any published cases. Ms. Gates explained that the committee had looked at federal cases because there were no Oregon cases that they could find. She stated that no one was saying that Oregon should adopt a federal standard. She just wanted to alert the Council as to the source of the language, and she stated that she was happy to circulate the list of federal cases. Judge Roberts asked whether they were just federal trial court cases. Ms. Gates stated that some were appellate cases. Judge Roberts noted that they all would have been decided under the federal rules. Mr. O'Donnell also expressed concern that notice pleading in federal court is entirely different from Oregon.

Ms. Gates stated that her understanding is that it actually only applies to the responsive pleadings. She reiterated that the committee is not saying that Oregon should adopt a federal standard by any means. This is just language that was found in some federal cases. The committee just wanted to provide different options that address the issue in different ways. Overall, the committee probably supports a less robust description than what appears in the third option.

Ms. Payne stated that she did not want to get too sidetracked by federal versus state. She opined that Ms. Gates provided helpful information as to what federal courts were doing with these sorts of cases, and it seems like the majority of federal courts were granting motions to strike when defendants came in without seeking leave and added defenses that did not respond to the specific new allegations that were included in the amended complaint. She stated that Oregon courts are not doing that, but the language in the federal rule [Federal Rule of Civil Procedure 15(a)(3)] that the federal courts were relying on is not different than Oregon's Rule 15 C. The committee's concern was whether Oregon's rule allows

the motion to strike procedure, and there seemed to be some consensus that the answer is not clear. Ms. Payne stated that the committee wanted to look at Oregon's rules and not try to create any substantive rights in either direction, but perhaps to make sure that there is a procedure to take the issue to the court.

Mr. O'Donnell asked for clarification whether federal courts are allowing motions to strike without any language that is different from what is in Oregon's rule. Ms. Gates agreed that this is correct. Ms. Payne stated that federal courts are relying on FRCP 15(a)(3) and relating it to responsive pleadings, and it did not seem any different from Oregon's rule. Mr. O'Donnell asked how certain the Council is that courts are not doing this in Oregon. He asked how many anecdotes there really are. He stated that the Council is aware of Judge Leith having granted a motion to strike a defense because it was untimely, but he asked how many others there have been. He reiterated Judge Roberts' question of whether this is a problem or some sort of aspirational issue.

Ms. Stupasky stated that she has seen this problem in the past. Ms. Gates noted that the Council had initially received a suggestion in the survey and that Ms. Stupasky had noted that she had encountered the problem. She explained that when she and Mr. Bundy had reached out to their respective peer groups, they both had received comments saying that it had affected people. In particular, lawyers were upset because these expanded responses to amended complaints had pushed the trial date out much further, because of new issues being raised at a late date.

Judge Roberts stated that it appeared that the drafts before the Council were not limited to amendments that happen just before trial but, rather, they could apply in the first week of the case being in existence. They would potentially cut off the ability to raise defenses without regard to whether it is a surprise, whether any discovery has taken place, or whether trial is approaching. She expressed concern that the solution is much broader than the problem of timeliness that was originally raised. She noted that there are some provisions [ORCP 21 F and G] that indicate that, if defenses like the statute of limitations are not raised in the first responsive pleading, regardless of how quickly thereafter the attempt to raise them is made, they are barred. Ms. Gates explained that the use of the phrase, "as justice requires" is imperative to allow the court to say that there is no timing problem or that the defense can be raised regardless of the timing. It basically leaves it in the judge's hands to make that evaluation. She stated that the intent is definitely not to set the standard about what is the right or wrong timing.

Judge Roberts expressed concern that this means that there are no standards and that the court has unfettered ability to stop a defendant from raising a defense.

Ms. Gates stated that the trial court would still be evaluated on whether it acted within its discretion, but that the Council is not trying to proscribe that with any of these three changes. Mr. Eiva pointed out that, with regard to the "as justice requires," language, there are plenty of standards and a good deal of case law about the phrase "when justice so requires" with regard to Rule 23. When a trial court denies amendments, it is often legal error, not pure, unfettered discretion, because there really has to be a showing of prejudice as to when that defense has been raised. With a showing of prejudice, or that the new pleading is purely without merit, trial courts do get reversed for denying motions to amend. Basically, it is the same exact standard: is the defendant prejudicing the plaintiff by raising the issue now? Mr. Eiva noted pointed out *Franke v. Oregon Dep't of Fish & Wildlife*, 166 Or App 660, 2 P3d 921 (2000), where the Court of Appeals found that the trial court committed legal error by denying a motion to amend two months ahead of trial when a new issue was brought in, because two months is plenty of time to acknowledge the motion to amend from the defense. He stated that he believes that there is a standard, and it is an equal standard about whether this pleading creates undue prejudice.

Ms. Payne reiterated that the committee used that specific language because it is in Rule 23 and the intent was to incorporate the standard described in that case law. She stated that she believes that there already are guidelines for judges based on exactly what Mr. Eiva was saying, and that was the committee's hope in using that language that is already used in Rule 23. Mr. Eiva stated that the upshot is that just about every new issue that the defense raises is going to be allowed as long as it is not raised on the eve of trial.

Ms. Stupasky stated that her understanding is that Judge Roberts thinks that she would not have the ability to refuse a defendant from bringing up a denial of liability for the first time when a plaintiff simply amends the complaint during trial to conform to the evidence, for instance of medical bills. She stated that it would be a huge problem if the judges do not have the authority to prevent the defense, at a very late and prejudicial time, from bringing in a completely new defense that no one foresaw being raised at that point in the case. She stated that she believes that the committee's first two options do a good job of addressing that concern and give judges the ability to use their learned discretion and use the same standard that plaintiffs have to meet for filing an amended complaint. So, those two options would really level the playing field.

Judge Roberts stated that she was not saying that judges would lack discretion to do anything but, rather, that there are no bounds. She expressed concern that the language stating that amendments should be freely allowed does not appear in the draft amendments. She stated that she does not think that the possibility that,

after an appeal and three or four years down the line and $100,000 later, a party can get a reversal and a new trial is an adequate remedy for having a poor rule. She stated that, if the amendment is meant to deal with untimely amendments raising new issues, it should say that an amendment can be struck as untimely, not that it can be struck at any time, for any reason.

Mr. Goehler stated that he believes that the Council should amend the rule and that it should have some standards, as Judge Roberts expressed. The amendment could specify, for example, untimely or unduly prejudicial, which is also a reasonably well defined term. He stated that, to him, it makes sense to include it as part of a motion to strike, rather than in an amendment to Rule 15, but he does not believe that either of the two versions of Rule 21 has enough specificity. Ms. Gates explained that, at the last Council meeting, the committee had actually proposed what Mr. Goehler just described. She noted that the Council provided a lot of feedback that the draft was either not specific enough because it did not include standards, or too specific because it included untimeliness and prejudice.

Mr. Andersen stated that he thought that amending ORCP 15 was the cleanest way to make the change and uses the clearest language. Mr. Eiva asked whether anyone recalled the name of the court case that provides the standard for the four factors for what justice requires. Ms. Gates stated that she would e-mail it to Mr. Eiva. Judge Peterson questioned whether it was appropriate for the amendment to appear in Rule 15, which is only about timing. Having the amendment, which adds content, appear there, seems wrong. Judge Peterson stated that he agreed with Mr. Goehler that, if the judge ought to have the authority to strike what appears in a response to an amendment, putting it in Rule 21 make sense. Ms. Gates agreed with Judge Peterson, and stated that she preferred the change to appear in a location that a practitioner might actually look at to see if there is anything that can be done about it.

Ms. Gates asked Council members to take an informal poll on whether the Council should continue discussions on this issue, or whether it should stop work because it is just attempting to create a solution to a problem that does not really exist. Ms. Nilsson polled the members, and a simple majority agreed that the Council should continue its efforts.

Ms. Gates then asked the Council whether it was prepared to vote to move any of the draft amendments from the committee to the September publication agenda. Judge Roberts stated that she was concerned about voting when the drafts seem to be based on research or cases that have not been shared with the entire Council. She also expressed concern that the draft amendments appear to go far beyond the original issue, which was the timeliness of amendments or raising new

issues just before trial. Justice Nakamoto agreed that the draft amendments were not ready for a vote. She suggested that, between an amendment to Rule 15 versus Rule 21, the suggestion put to the Council should be a reworking of an amendment to Rule 21. Mr. O'Donnell agreed that the amendments were not ready to be voted on and stated that he would like to do some independent research on the issue.

Judge Norby stated that it seems like the proposed amendments are very soft in that they just say that judges can strike the response if justice requires. She stated that she does not understand how it enhances anything that does not already exist or change what judges already are doing. She stated that, if there is a real problem, it would seem that the solution would have to be a bit more than simply restating a judge's generic authority to do things that justice requires. She explained that she is not really sure what direction the amendment is intended to take, and wondered whether the Council ever needs to make an amendment that is so soft that it just sort of mirrors a lot of things that are already stated in the law about judges having authority to do things that justice requires.

Ms. Gates stated that Judge Norby's point is definitely well taken. She stated that the committee spent a fair amount of time trying to find a spot between too many standards or too many factors to be considered versus the other end of the spectrum of just sort of alerting practitioners that there could be a remedy without providing any commentary or standards. She stated that part of the reason the committee engaged in that discussion was because of comments received from the Council. She stated that there is probably even more room for discussion about at what level the rule should describe the circumstances that are intended to be addressed or how they should be addressed by a judge. Judge Norby asked whether the Council is simply trying notify people that this is an issue of concern, rather than shape any response to it. Ms. Gates replied that there seems to be a lack of consensus at this moment about the direction in which the Council should go.

Mr. Eiva reiterated that "when justice so requires" is not a discretionary standard but, rather, a legal standard. He stated that he would circulate a memo before the next Council meeting with regard to the case law on that term and what it means. He explained that he believes that none of the factors that are laid out in the case law describing the term are offensive, and that the more difficult issue would be for someone to argue why a pleading that violates one of those factors should be allowed to proceed. He opined that it is a very elegant way to say it, based on what the case law has done with that phrase so far.

Ms. Gates recalled that Judge Leith was a very passionate proponent of that

specific phrase for those reasons, because it is well defined in case law and it is already used in the rules. However, she agreed that it results in a more soft and undefined phrasing in the rule. Judge Leith stated that it made sense to him that, if the Council is trying to establish the court's authority to disallow a pleading in the specific circumstances, because there is apparently ambiguity on that point, then simply incorporating the Rule 23 language as the standard for when the court should allow or disallow part of a responsive pleading would just incorporate that same standard. He stated that it was deliberately a light touch in terms of not trying to dig in and create new standards but to just base it off of what Rule 23 had already established. Ms. Gates clarified that judges were not the only ones who liked that language; the whole committee did. The same standard was used in the option for amending Rule 15 and is one of the choices for Rule 21. However, the committee has heard today, obviously, that some people would like it to be more robust. Judge Leith stated that Rule 23 has already established a body of law, and he wondered why the Council would want to reinvent that wheel.

Judge Roberts asked whether the scope of the work of the committee has ever been defined. She stated that her understanding was that the committee's charge was originally untimely amendments, and it seems to have expanded. Ms. Gates stated that her understanding of the committee's charge was to address circumstances where a party files a response to an amended complaint that raises new issues that have some unfair impact on the case, that are late in the game, or that are prejudicial for some reason. She stated that most of the circumstances that have been discussed are timing issues that will either affect the trial or require reopening discovery after discovery has been closed for some period of time, but everyone on the committee surely has their own take on the scope of the committee's work.

Judge Peterson stated that his recollection was that the concern that came in from the survey of bench and bar members was a concern over a new issue having an impact on trial scheduling very late in the game. He noted that this does not mean that the Council cannot go further than that. He stated that some Council members have mentioned that it can have an adverse impact on litigation because it can reopen discovery, so that does expand the scope, but he thinks there may be more support if it is linked to the impact on trial scheduling instead of the more expensive view. Judge Peterson noted that Mr. Young had made a good point in the April Council meeting about the word "untimely" being problematic because it would make a responsive pleading susceptible to a motion to strike if the response to the amended pleading was untimely under Rule 15, which was not the intention. So he thinks that the word "untimely" by itself is not sufficient.

Ms. Payne stated that the discussion at the last committee meeting was that the original comment received by the Council was not so limited as to just be addressing the issue of untimeliness but, rather, prejudicial impact in general, using the example of an amendment right before trial. So she did not believe that the comment itself was limiting the concern to responsive pleadings right before trial. She agreed that there are other situations, although that may be an example of the most egregious, where prejudice can exist. She opined that the Council should be looking at all of these situations.

Mr. O'Donnell asked whether a defendant who first admitted liability but then denied it was adding a new defense or just changing the wording of a pleading from "admit" to "deny." Mr Eiva stated that it certainly is a change of the issues at trial, but that it does not have to be a change to a defense. Mr. O'Donnell stated that this is the problem we get into with unforseen consequences, because it is not a defense, just changing the pleading. Mr. Eiva stated that, in most cases, admitting liability will probably be allowed, because all parties have done full discovery and are aware of the issues. However, there could be cases where that is unique. Mr. Eiva emphasized that trial judges have very limited authority. There is a high risk of reversal for error when a trial judge denies a motion to amend without some real showing of prejudice or a another deep problem, and that would apply with a Council amendment as well. He stated that almost all of the factors point to a timing issue where it really is just kind of a surprise for which no one can be prepared. He opined that it is almost like a loophole that, for some reason, this one aspect of pleading did not have that standard applied to it. The amendment would just seal that up. When a judge looks at the factors that are in the case law, they will not be looking at random stuff; it will mostly be timeliness around the motion, timeliness around certain discovery availability, and timeliness. around trial. These are the same arguments defendants use all of the time to try to deny plaintiffs' motions to amend. When defendants win those motions, it is because something significant has been shown. This is going to be a very narrow read for courts, but it makes it clear that, within the rules, the courts do have this authority.

Mr. Eiva agreed that it is appropriate to delay a vote until all Council members have had a chance to ponder the issue more. He suggested that members who were interested could circulate memoranda on the issue. He stated that it is important for Council members to think about why it might be problematic to give the court authority in allowing amendments, and to think about why they might be troubled by a trial court having this authority in striking responses to those amendments. Mr. O'Donnell stated that he did not disagree with that generally. He stated that the first issue for him Is whether the courts do it now, and the second issue is unforeseen consequences with whatever language the Council

might adopt. He agreed that Council members drafting cross memos would be helpful.

Ms. Gates asked any Council members who are interested in the issue to join the next committee meeting. She stated that added diversity would be helpful. Mr. Andersen, Mr. Crowley, Judge Norby, Mr. O'Donnell, and Ms. Stupasky, asked to be included in the next committee meeting.

3. ORCP 31

Mr. Goehler explained that the committee was presenting what is hopefully a final draft (Appendix D) to the Council. He reminded the Council that the committee was considering amending the interpleader rule to provide authority for awarding attorney fees in cases where it is not the plaintiff filing an interpleader, because there are interpleader claims filed by defendants as well. The amendment basically expands the attorney fee provision. It also changes the current mandatory award of attorney fees to discretionary and provides factors for making the award of attorney fees. The committee's prior draft articulated factors in addition to referring to ORS 20.075, and justice Nakamoto suggested a rewrite of those factors. The current draft includes that rewrite, along with some cleanup by Judge Peterson to make the language of the rule consistent with other rules. Mr. Goehler stated that the committee was ready to submit the draft amendment for a vote, but was also open to more discussion if the Council felt that it was warranted.

Mr. Eiva emphasized that there is an article that the committee has circulated to the Council [Franklin L. Best, Jr., *Reforming Interpleader: The Need for Consistency in Awarding Attorneys' Fees*, 34 Baylor L. Rev. 541 (1982)] that discusses the different reasons why it is necessary for judges to have discretion on this issue. He stated that he wanted to have this information included in the Council's history so that, in the future, people can look to that article to provide some guidance on how to address this issue.

Ms. Gates asked whether Council members were prepared to vote on whether to move the draft amendment to the September publication docket. Council members agreed, and Ms. Nilsson polled the membership. The Council voted unanimously to move the draft amendment to the September publication docket.

Ms. Gates thanked the Rule 31 committee and everyone involved in preparing the draft amendment.

4. ORCP 57

Ms. Gates asked whether Ms. Holley had an update on the committee's work. Ms. Holley explained that the committee was continuing to wait for the quarantine to ease up before reaching out to form a workgroup, and that they would hopefully be able to do so soon.

IV. New Business

No new business was raised.

V. Adjournment

Ms. Gates reminded the Council that the June 13, 2020, meeting is the last one before the September publication meeting, unless an issue arises that requires the Council to meet in July or August.

Judge Peterson encouraged all Council members to look carefully at the draft amendments that will be put on the September publication docket to make sure that there are no glitches in terms of structure, form, or substance. He explained that it is better not to have to make edits on the fly during the publication meeting. Ms. Nilsson stated that she would include all draft amendments in the June meeting packet so that members can look over them again in a timely manner.

Ms. Gates adjourned the meeting at 11:15 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

TO: **Council on Court Procedures**

FROM: **ORCP 23 Committee – Remedy for Response to Amended Pleading**

DATE: **June 4, 2020**

Following the May Council meeting, several new members joined the committee for further discussion of whether and how to amend the ORCP to make clear that a party may seek to strike responses to amended pleadings raised late in the pre-trial process that may prejudice the opposing party or impact the trial date.

While not everyone on the reconstituted committee agreed that it was necessary to add explicit language, all agreed that the following amendment to ORCP 21 remains neutral, while clarifying the mutuality of the standard:

> **E Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; **or (3) any response to an amended pleading, or part thereof, that raises new issues, when justice so requires.**

In the Committee's view, use of the phrase "when justice so requires" is important because it mirrors the language and standards of ORCP 23 for consideration of motions to amend a complaint, providing guidance to trial courts. ORCP 23 currently allows a court to deny amendments to a complaint that are unduly prejudicial if brought by a plaintiff right before trial. The addition of the proposed language would make explicit that a court also has the discretion to strike a new defense in response to an amendment on the same grounds applied to the amendment (*i.e.*, what's good for the goose is good for the gander). The Court of Appeals has articulated factors for review of the grant or denial of a motion to amend that would apply equally here. Although a court has discretion to grant or deny such an amendment, that discretion is limited by four factors the court must consider in exercising its discretion: "(1) the nature of the proposed amendments and their relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendments and related docketing concerns; and (4) the colorable merit of the proposed amendments." *Ramsey v. Thompson*, 162 Or App 139, 147, 986 P3d 139 (1999), *rev den*, 329 Or 589 (2000); *see also Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or App 690, 699, 60 P3d 1076 (2002), *rev den*, 335 Or 255, 66 P3d 1025 (2003); *Alexander v. State*, 283 Or App 582, 590, 390 P.3d 1109, 1113–14 (2017).

The Court of Appeals has discussed application of individual factors as well. Under the first factor, leave shall freely be given unless the amendments are the product of a unilateral effort to interject entirely new claims into the litigation. *Caldeen Const.*, 248 Or App 82, 88 (2012). Regarding the second factor, the opposing party generally must identify how the amendment would impair the party's ability to prepare or present a defense. *Id.* As for the third factor, considerations include whether the amendment would require a trial set over or otherwise materially impact the docket. *Id.*

The Committee believes that ORCP 21E best accommodates this language because ORCP 21 is the most likely place for practitioners would look when trying to identify whether a potential remedy exists when an amended pleading adds new defenses or counterclaims at a late date that could delay trial or otherwise unduly prejudice the opposing party.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

[*A How presented.* *Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

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of judgment.]

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third party claim shall be asserted in the responsive pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule.

A(1) The following defenses may, at the option of the pleader, be made by motion to dismiss:

A(1)(a) lack of jurisdiction over the subject matter;

A(1)(b) lack of jurisdiction over the person;

A(1)(c) that there is another action pending between the same parties for the same cause;

A(1)(d) that plaintiff has not the legal capacity to sue;

A(1)(e) insufficiency of summons or process or insufficiency of service of summons or process;

A(1)(f) that the party asserting the claim is not the real party in interest;

A(1)(g) failure to join a party under Rule 29;

A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and

A(1)(i) that the pleading shows that the action has not been commenced within the time limited by statute.

A(2) A motion to dismiss asserting any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule must be filed before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(g) of this rule, the facts constituting the asserted

defenses do not appear on the face of the pleading and matters outside the pleading including affidavits, declarations, and other evidence are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations, and other evidence, and the court may determine the existence or nonexistence of the facts supporting the asserted defenses or may defer any determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of a defense described in paragraph A(1)(c) of this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment.

B Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C Preliminary hearings. The defenses specifically [*denominated (1) through (9) in section A of this rule,*] **enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,** whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on [*application*] **the motion** of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D Motion to make more definite and certain. [*Upon*] **On** motion made by a party before responding to a pleading[,] or**,** if no responsive pleading is permitted by these rules**,** [*upon*] **on** motion by a party within 10 days after service of the pleading, or [*upon*] **on** the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the [*charge*] **claim**, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service of the order**,** or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make [*such*] **any** order [*as*] it deems just.

E Motion to strike. [*Upon*] **On** motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, [*upon*] **on** motion made by a party within 10 days after the service of the pleading [*upon*] **on** such party or [*upon*] **on** the court's own initiative at any time, the court may order stricken: *[(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.*]

E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;

E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; or

E(3) any response to an amended pleading, or part thereof, that raises new issues, when justice so requires.

F Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party [*which*] **that** this rule permits to be raised by motion, the party [*shall not*] **cannot** thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G Waiver or preservation of certain defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or

insufficiency of service of summons or process, is waived under either of the following circumstances: [*(a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.*]

G(1)(a) if the defense is omitted from a motion in the circumstances described in section F of this rule; or

G(1)(b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted [*upon*] **on** a showing by the party seeking to amend that [*such*] **the** party did not know and reasonably could not have known of the existence of the defense**,** or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B**,** [*or*] by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B in light of any evidence that may have been received.

G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court [*shall*] **must** dismiss the action.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

[*A How presented.* *Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

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of judgment.]

A Defenses. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third party claim shall be asserted in the responsive pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule.

A(1) The following defenses may, at the option of the pleader, be made by motion to dismiss:

A(1)(a) lack of jurisdiction over the subject matter;

A(1)(b) lack of jurisdiction over the person;

A(1)(c) that there is another action pending between the same parties for the same cause;

A(1)(d) that plaintiff has not the legal capacity to sue;

A(1)(e) insufficiency of summons or process or insufficiency of service of summons or process;

A(1)(f) that the party asserting the claim is not the real party in interest;

A(1)(g) failure to join a party under Rule 29;

A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and

A(1)(i) that the pleading shows that the action has not been commenced within the time limited by statute.

A(2) How presented.

A(2)(a) Generally. A motion to dismiss asserting any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule must be filed before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

A(2)(b) Factual basis. The grounds on which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. If, on

a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(g) of this rule, the facts constituting the asserted defenses do not appear on the face of the pleading and matters outside the pleading including affidavits, declarations, and other evidence are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations, and other evidence, and the court may determine the existence or nonexistence of the facts supporting the asserted defenses or may defer any determination until further discovery or until trial on the merits.

A(2)(c) Remedies available. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of a defense described in paragraph A(1)(c) of this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment.

B Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C Preliminary hearings. The defenses specifically [*denominated (1) through (9) in section A of this rule,*] **enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,** whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on [*application*] **the motion** of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D Motion to make more definite and certain. [*Upon*] **On** motion made by a party before responding to a pleading[,] or**,** if no responsive pleading is permitted by these rules**,** [*upon*] **on** motion by a party within 10 days after service of the pleading, or [*upon*] **on** the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the [*charge*] **claim**, defense, or reply is not apparent. If the motion is granted and the

order of the court is not obeyed within 10 days after service of the order**,** or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make [*such*] **any** order [*as*] it deems just.

E Motion to strike. [*Upon*] **On** motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, [*upon*] **on** motion made by a party within 10 days after the service of the pleading [*upon*] **on** such party or [*upon*] **on** the court's own initiative at any time, the court may order stricken: *[(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.*]

E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;

E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; or

E(3) any response to an amended pleading, or part thereof, that raises new issues, when justice so requires.

F Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party [*which*] **that** this rule permits to be raised by motion, the party [*shall not*] **cannot** thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G Waiver or preservation of certain defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: [*(a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.*]

G(1)(a) if the defense is omitted from a motion in the circumstances described in section F of this rule; or

G(1)(b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted [*upon*] **on** a showing by the party seeking to amend that [*such*] **the** party did not know and reasonably could not have known of the existence of the defense**,** or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B**,** [*or*] by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as

provided in Rule 23 B in light of any evidence that may have been received.

G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court [*shall*] **must** dismiss the action.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must be filed with the clerk within the time required by Rule 7 C(2) to appear and defend. If the summons is served by publication, the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.

B Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required must be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, that pleading must be filed within 10 days after service of the order, unless the order otherwise directs.

C Responding to amended pleading. A party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D Enlarging time to [*plead or do other act.*] file and serve pleadings and motions. [*The*] **Except as otherwise prohibited by law, the** court may, in its discretion, and upon any terms as may be just, allow [*an answer or reply*] **any pleading** to be made, or allow any [*other pleading or*] motion**, or response or reply to a motion,** after the time limited by the procedural rules, or by an order enlarge [*such time*] **the time limited by the procedural rules**.

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[*MINOR*] UNEMANCIPATED MINORS OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator or guardian ad litem. [*When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought*.] **In any action, a party who has a guardian or a conservator or who is a person described in section B of this rule shall appear in that action either through their guardian, through their conservator, or through a guardian ad litem (that is, a competent adult who acts in the party's interests in and for the purposes of the action) appointed by the court in which that action is brought.** The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B [*Appointment*] Mandatory appointment of guardian ad litem for unemancipated minors; incapacitated or financially incapable parties. When [*a*] **an unemancipated** minor or a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and

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answer after service of a summons; or

B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor, or other interested person;

B(3) when the plaintiff or petitioner is a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons or, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor, is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

E Notice of motion seeking appointment of guardian ad litem. Unless waived under section H of this rule, no later than 7 days after filing the motion for appointment of a guardian ad litem, the person filing the motion must provide notice as set forth in this section, or as provided in a modification of the notice requirements as set forth in section H of this rule. Notice shall be provided by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of notice prescribed in section F of this rule.

E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the motion; and, if the minor has no living parents, to any person nominated to act as a fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

E(2) If the party is 18 years of age or older, notice shall be given:

E(2)(a) to the person;

E(2)(b) to the spouse, parents, and adult children of the person;

E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

E(2)(d) to any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

E(2)(e) to any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

E(2)(f) if the person is receiving moneys paid or payable by the United States through the

Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the person;

E(2)(g) if the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a representative of the department;

E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a representative of the authority;

E(2)(i) if the person is committed to the legal and physical custody of the Department of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

E(2)(k) to any other person that the court requires.

F Contents of notice. The notice shall contain:

F(1) the name, address, and telephone number of the person making the motion, and the relationship of the person making the motion to the person for whom a guardian ad litem is sought;

F(2) a statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 14 days from the date of the notice; and

F(3) a statement indicating that the person for whom the guardian ad litem is sought may object in writing to the clerk of the court in which the matter is pending and stating the desire to object.

G Hearing. As soon as practicable after any objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make any order that is appropriate.

H Waiver or modification of notice. For good cause shown, the court may waive notice

entirely or make any other order regarding notice that is just and proper in the circumstances.

I Settlement. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of any settlement must be sought and obtained by a conservator unless the court, for good cause shown and on any terms that the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

INTERPLEADER

RULE 31

A Parties. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not **a** ground for objection to the joinder that the claims of the several claimants**,** or the titles on which their claims depend**,** do not have a common origin or are not identical but **are** adverse to and independent of one another, or that the plaintiff alleges that plaintiff is not liable in whole or in part to any or all of the claimants.] A defendant exposed to similar liability may obtain [*such*] interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by rule or statute.

B Procedure. Any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted. The court may thereafter enjoin all parties before it from commencing or prosecuting any other action regarding the subject matter of the interpleader action. Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto.

C Attorney fees. [*In any suit or action or for any cross-claim or counterclaim in interpleader filed pursuant to this rule by any party other than a party who has been compensated for acting as a surety with respect to the funds or property interpled, the party filing the suit or action in interpleader shall be awarded a reasonable attorney fee in addition to costs and disbursements upon the court ordering that the funds or property interpled be deposited with the court, secured or otherwise preserved and that the party filing the suit or action in interpleader be discharged from liability as to the funds or property.*]

C(1) Generally. In any action or for any cross-claim or counterclaim in interpleader

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filed pursuant to this rule, the party interpleading funds may be awarded a reasonable attorney fee in addition to costs and disbursements upon the court ordering that the funds or property interpled be deposited with the court, secured, or otherwise preserved. Further, the party interpleading funds will be discharged from liability as to the funds or property. The attorney fees awarded shall be assessed against and paid from the funds or property ordered interpled by the court. **In determining whether to deny or to award in whole or in part a requested amount of attorney fees, the court must consider any factors ORS 20.075 permits the court to consider and the following additional factors:**

C(1)(a) whether, as a matter of equity, the party interpleading funds is involved in the dispute in a way that it should not be awarded attorney fees as a result of the dispute;

C(1)(b) whether the party interpleading funds was subject to multiple litigation; and

C(1)(c) whether the interpleader was in the interests of justice and furthered resolution of the dispute.

C(2) Sureties. Section C of this rule does not apply to a party who has been compensated for acting as a surety with respect to the funds or property interpled.

SUBPOENA

RULE 55

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number; [*and*]

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this [*rule.*] **rule; and**

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraphs A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a) or B(3)(b) of this rule, and the option to object or move to quash or modify under subsection A(7) of this rule.

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

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A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify

requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or to produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Nonresidents. A nonresident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by the court or by the judge who issued the subpoena or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

A(7) Recipient's option to object, to move to quash, or to move to modify subpoena [*for production*]. A person [*who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule,*] **to whom a subpoena is directed** may object, [*or*] move to quash **the subpoena,** or move to modify the subpoena[*, as*

provided] as follows.

[***A(7)(a) Written objection; timing.*** *A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.*]

A(7)(a) Written objection to subpoena to appear; timing. A written objection to a subpoena to appear and testify must be served on the party who issued the subpoena and on the clerk of the court in which the subpoena originated, not later than 7 days after service of the subpoena and, in any case, no less than 1 judicial day prior to the date specified in the subpoena to appear and testify.

A(7)(b) Written objection to subpoena for production; timing. A written objection to a subpoena that commands a person to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, must be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

[*A(7)(a)(i)*] A(7)(b)(i) Scope. The written objection may be to all or to only part of the command to produce.

[*A(7)(a)(ii)*] A(7)(b)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

[*A(7)(b)*] A(7)(c) Motion to quash or to modify. A motion to quash or to modify [*the command for production*] **a subpoena** must be served and filed with the court no later than **1 judicial day prior to the date specified to appear and testify, or** the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of

appearance or production.

A(8) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, [*and prisoners.*] prisoners, and parties.

B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or out of court, including:

B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein.

B(1)(b) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or by any officer empowered by the laws of the United States to take testimony; or

B(1)(c) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of nonparty individuals or nonparty organizations; payment of fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place [*required.*] **specified in the subpoena.**

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the

witness expressly declines payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed to the witness, but mail service is valid only if all of the following circumstances exist:

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; and

B(2)(c)(iii) Signed mail receipt. The subpoena was mailed more **than** 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be [*delivered*] **delivered, along with fees for one day's attendance and mileage** in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with **fees for** one day's attendance [*fee*] and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace

officer in a professional capacity may be served by substitute service of a copy, along with **fees for** one day's attendance [*fee*] and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location [*identified*] **specified** in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by

deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

B(5) Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations. A subpoena directed to a party who has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this Rule.

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must [*do*] **comply with** the following:

C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Time for production. The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) Originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective orders. A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) Compliance with state and federal law. A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that demonstrates:

D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficiency. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) Information regarding objections. The party must certify that either no written objection was made within 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) Statement to secure personal attendance and production. The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(8) is insufficient for this subpoena.

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case

name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense. Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the subpoena at the expense of the party who requested the copies.

D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. The declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) Declaration of custodian of records when not all CHI produced. When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.

OREGON COUNCIL ON COURT PROCEDURES
FINAL REPORT ON ORCP 23 AND ORCP 34

Oregon has made a policy choice that civil legal claims against persons who have died, and such claims that could have been pursued by persons who are now deceased, survive to some degree the death of the would-be defendant or plaintiff. *See* ORS 12.190.

However, in a specific set of cases, there are two classes of victims of tortious conduct or other wrongdoing—those cases in which a victim can recover for the defendant's wrongful acts and those cases where the victim cannot. That specific set of cases is comprised of civil actions where the defendant dies before the statute of limitations expires but the fact of the defendant's death is unknown to the victim. As a matter of policy, ORS 12.190(2) extends the period during which the victim can sue for one year after the death of the defendant. Further, application of ORS 12.190(2) has the effect of allowing the lawsuit to be filed after the applicable statute of limitations has expired, so long as the case is filed within one year of the defendant's death.

If the defendant has died, the victim is authorized to sue the defendant's personal representative. However, if the victim is not aware that the defendant died and files suit against the defendant, some victims, but not all, will be able to recover. If, after filing the lawsuit, the victim learns of the defendant's death and is able to amend the case to name the defendant's personal representative as the defendant, and to obtain service of the summons and amended complaint on that personal representative, the victim can recover. In fact, ORS 12.020(2) affords the victim 60 days after the case is filed to effect service, even if the date of service occurs after the statute of limitations has expired. However, if the fact of the defendant's death remains unknown to the victim until after the statute of limitations expires, no matter how meritorious the claim, that victim has no remedy.

As a practical matter, the discovery of the defendant's death will occur during the 60-day period ORS 12.020(2) allows for service of the summons and complaint. Of course, this problem could be avoided: 1) by filing the case and attempting service well before the statute of limitations expires; or 2) by keeping close tabs on the health of the defendant. However, for a number of reasons, victims may be unaware of the applicable statute of limitations or may not obtain legal representation until near the end of the statute of limitations period. In addition to leaving some victims with no remedy for the harm inflicted by the defendant, the statutory gap creates malpractice liability for the victim's attorney who agrees to represent the victim without knowledge of the defendant's health or whereabouts.

Two appellate cases illustrate the problem. In *Wheeler v. Williams*, 136 Or App 1, *rev. den*., 322 Or 362 (1995), the plaintiff, Rolana Wheeler, was injured on April 3, 1991. Ms. Wheeler filed her lawsuit against the defendant, Ira Williams, on March 31, 1993, not knowing that Mr. Williams had died on April 26, 1992 (11 months earlier) and that a small estate had been opened and closed shortly after Mr. Williams' death. After the 2-year statute of limitations had expired, Ms. Wheeler attempted to substitute the personal representative of Mr. Williams' estate,

suggesting that this was merely an amended complaint under ORCP 23 C and, therefore, the amended complaint should relate back to the date that the original complaint had been filed. The *Wheeler* court ruled that, even if the small estate had not already been closed when the case was filed, the personal representative was a different entity from Mr. Williams. Therefore, the amendment to name Mr. Williams' personal representative as the defendant did not relate back to the date of the filing of the original complaint and the case was properly dismissed, having been filed after the statute of limitations expired.

In *Worthington v Estate of Davis*, 250 Or App 755 (2012), the plaintiff, Peggy Worthington, was injured in a collision on December 10, 2007. Ms. Worthington filed suit on December 9, 2009, not realizing that the other driver, Milton Davis, had died in September of 2008, 14 months earlier. As in *Wheeler*, Ms. Worthington attempted to amend the complaint to substitute a personal representative in place of the decedent. Ms. Worthington argued that the amendment was simply a correction of a name, allowable under ORCP 23 C. The *Worthington* Court distinguished between misnaming a party (a "misnomer"), that enjoys the benefit of the "relation back" doctrine, and suing the wrong party (a "misidentification"), that does not. In finding that Ms. Worthington had originally sued a deceased person, the Court ruled that she had not incorrectly named an existing defendant; she was attempting to amend her complaint to name a new party. The amendment to substitute the personal representative for the decedent would not save the case.

Although a fix of this statutory gap appears to be wonkishly procedural, the Council determined that potential amendments to ORCP 23 (amended pleadings) or ORCP 34 (substitution of parties) were not available. The Council's enabling statutes, specifically ORS 1.735(1), define the Council's authority to "…promulgate rules governing pleading, practice and procedure…which shall not abridge, enlarge or modify the substantive rights of any litigant." Statutes of limitations are unquestionably substantive rights. Therefore, the problem identified here requires a legislative fix. Therefore, the Council has decided to recommend to the Legislative Assembly an amendment to ORS 12.190 to remedy this problem.

In working through possible solutions, the Council intentionally avoided injecting into any proposal the concept of "discovery" of the defendant's death. If the statute includes "learns of" or "learns of or with reasonable diligence would have discovered," the stage is set for litigation over whether the plaintiff did know or should have known of the defendant's death, a litigation path that will increase the cost of litigation with no discernable benefit. The Council considered numerous proposals and debated the ease and efficacy of different approaches. Since the Council is merely suggesting a legislative solution, it modestly includes the following proposed amendment to ORS 12.190:

> 12.190 Effect of death on limitations.
>
> (1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement, an action may be commenced by the personal representative of

the person after the expiration of that time, and within one year after the death of the person.

(2) **(a)** If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person.

(b) If a complaint is filed against a person who dies before the expiration of the time limited for commencement of the action or within 60 days after the action is filed, then notwithstanding subparagraph (a), within 90 days after the complaint is filed, a party may amend the pleading to substitute the personal representative of the defendant's estate in place of the deceased defendant. That amendment shall relate back to the date the complaint was filed.

Shari Nilsson <nilsson@lclark.edu>

RE: Suggested Amendment to Various ORCP 7D(3) Statutes RE: Service on Corporations

1 message

Zack Holstun <zack@mercurypdx.com> Thu, May 21, 2020 at 2:27 PM
To: Mark Peterson <mpeterso@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

It's about 1000x a better answer than I am getting from clerks and judges at Clackamas County. I appreciate your time and willingness to engage.

Thank you.

Zack Holstun

MercuryPDX

Office (day)-503-247-8484

Cell (after hrs)-503-793-9150

Remember to email service@mercurypdx.com for general MercuryPDX communications!

MercuryPDX is taking every precaution to protect ourselves and the community during the CoVID-19 crisis, and has trained drivers on sanitation technique and distancing. If you observe any of our staff not distancing, or doing anything you consider unsafe, please call us right away

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From: Mark Peterson <mpeterso@lclark.edu>
Sent: Thursday, May 21, 2020 2:04 PM
To: Zack Holstun <zack@mercurypdx.com>
Cc: Shari Nilsson <nilsson@lclark.edu>
Subject: Re: Suggested Amendment to Various ORCP 7D(3) Statutes RE: Service on Corporations

Zack,

It has been a while since I dug into that portion of Rule 7 and, in any case, I've learned that the Council's take on a

question is generally more informed than my personal opinion. The Council's next meeting is on June 13, 2020. If I can keep you guessing until then, I'll give you a better answer.

Mark

--

Mark A. Peterson

Executive Director

Council on Court Procedures

Clinical Professor of Law

Lewis & Clark Law School

10015 SW Terwilliger Blvd

Portland OR 97219

mpeterso@lclark.edu

(503) 768-6505

On Thu, May 21, 2020 at 12:32 PM Zack Holstun <zack@mercurypdx.com> wrote:

> Thanks for the quick reply…
>
> I would be interested to know the authors' opinion on the intent of those statutes, especially as pertains to that "in the county" language of alternative methods, and whether the primary service method is valid regardless of county (since it does not discern), or if the assumption is that *anything* served outside the county of service should default to the alternative service rules.
>
> I know you might not feel comfortable answering that, but it is truly just a curiosity and not an opinion I would use in debate or share with anyone.
>
> Thank you.
>
> Zack Holstun
>
> ***MercuryPDX***
>
> Office (day)-503-247-8484
>
> Cell (after hrs)-503-793-9150

From: Mark Peterson <mpeterso@lclark.edu>
Sent: Thursday, May 21, 2020 12:15 PM
To: Zack Holstun <zack@mercurypdx.com>
Cc: Shari Nilsson <nilsson@lclark.edu>
Subject: Re: Suggested Amendment to Various ORCP 7D(3) Statutes RE: Service on Corporations

Zack,

Thank you for your inquiry regarding the requirement (ORCP 7 D(3)(b), (c), and (d)) that personal service on a corporation, limited liability company, or general partnership specifies service in the county in which the case has been filed. I can appreciate your questioning whether the "in the county" language in the respective subparagraphs (ii) for those three kinds of entities adds anything other than a requirement to send a subsequent mailed copy of the summons and complaint.

As you may know, The Council on Court Procedures works on a biennial schedule and has largely completed its work on amendments that will be published for this biennium. I will raise this issue with the Council at its June meeting and provide to you any response that results. If the Council wishes to examine the issue further and is not convinced that it can complete any potential amendment prior to its publication deadline, your proposal will be placed on the agenda for the next biennium.

Thank you for your proposal. While the turnaround time from receipt of proposals to their publication and promulgation can be frustrating, it is difficult to maintain well-written and effective rules without the deliberation that is built into the Council's schedule.

Best,

Mark

--

Mark A. Peterson

Executive Director

Council on Court Procedures

Clinical Professor of Law

June 13, 2020, Meeting
Appendix E-3

Lewis & Clark Law School

10015 SW Terwilliger Blvd

Portland OR 97219

mpeterso@lclark.edu

(503) 768-6505

On Wed, May 20, 2020 at 1:18 PM Zack Holstun <zack@mercurypdx.com> wrote:

> Hello again!
>
> This won't be short and I am sorry for that. I hope you will make time at some point to review.
>
> I am writing to request a review and possible wording change to ORCP 7D(3)(b), ORCP 7D(3)(c), and ORCP 7D(3)(d), the statutes dealing with service upon corporations. ORCP 7D(3)(b) and ORCP 7D(3)(c) deal with Corporations and LLCs, respectively, and have (I believe) identical verbiage as to Primary and Alternative service methods. ORCP 7D(3)(d), for Limited Partnerships, is worded somewhat differently, so I am mainly trying to address the language in "b" and "c"
>
> In recent months, Clackamas County has been sending out 63 day notice pursuant to UTCR 7.020(2) for Defendants that have been served (in the eyes of Plaintiff and Process Server) by way of the Primary service method, to a clerk on duty in the Office of a Registered Agent.
>
> The reason Clackamas County gives for sending these notices out is that they feel that these types of service are Substituted Service, pursuant to D(3)(d)(ii)(A), despite accepting the eFiling without comment, rejection, or insistence on reclassification as Substituted Service within Odyssey eFiling system. They are focusing on the verbiage in the lead paragraph of D(3)(d)(ii) "If a registered agent or a general partner of a limited partnership cannot be found *in the county* where the action is filed".
>
> For example, if I file a case in Clackamas County against your company, Oregon City Flooring, but you have chosen to make your Registered Agent one of the large Corporation Service companies headquartered in Salem, when I serve the complaint against you, I take it to them, and serve the clerk on duty, authorized to accept. I have satisfied personal service to a clerk on duty in the office of a Registered Agent, per the Primary Service method.
>
> D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.
>
> Clackamas County argues that despite this service satisfying all the language of Primary Service Method, server should refer to Alternative verbiage and call this Substituted service, which triggers a mailing, as well.

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served: D(3)(d)(ii)(A) by substituted service upon such registered agent or general partner of a limited partnership;

D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

My questions to you good folks are these;

1. Why would we look to verbiage in the Alternative section when we have completed service via the Primary? The Primary does not make the County distinction.
2. What bearing does the County of service have on anything at all, if served in this state, and we are physically driving the papers to the office of the Registered Agent and leaving them with a clerk in their employ?
3. Are the words "in the county" needed at all in this day and age in those alternative rules?

The main issue here is Attorney and Process Server believing service is complete and that the clock is ticking on Answer or Default Judgment. The court believes differently, but fails to inform for 60 days. That is not your issue, and I have been in touch with Clackamas County about that.

The lesser issue, for me, is the seemingly unnecessary printing and mailing of paper redundantly and the costs associated. We do a lot of mailings and do them gladly and with understanding of the purpose, especially in the cases of Substitute Service of in individual. They need the best chance of knowing of the action and responding.

This type of mailing is, in my view and the view of many, extraneous, redundant and wasteful when you have driven to another city and dropped those papers into the office of the Agent hired to handle process for a Corp. or LLC.

I am hoping you will agree with that and possibly re-word these rules to prevent misinterpretation by the clerks of the court.

Sorry to bug and I know this is somewhat trifling to anyone other than a guy who runs a Process Serviing biz…

Thank you.

Zack Holstun

MercuryPDX

Office (day)-503-247-8484

Cell (after hrs)-503-793-9150

Chapter 15

1977 REPLACEMENT PART

Commencement of Actions and Suits; Summons

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15.010 Action provisions applicable to suits. The provisions of ORS 15.020 to 15.080, 15.100 to 15.120, and 15.140 to 15.160 shall apply to and govern the mode of proceedings in suits as well as actions, except as otherwise provided by statute.

15.020 How action is commenced; issuance of summons. Action shall be commenced by filing a complaint with the clerk of the court. Any time after the action is commenced the plaintiff or his attorney may issue as many original summonses as either may elect and deliver one of such summonses to a person authorized to serve summons under ORS 15.060.
[Amended by 1977 c 877 §2]

15.030 When jurisdiction is acquired; appearance. From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him.

15.040 Contents and form of summons; time to answer; demand for relief. (1) The summons shall contain the name of the court in which the complaint is filed, the names of the parties to the action, and the title thereof. It shall be subscribed by the plaintiff if the plaintiff is a resident of this state, or by a resident attorney of this state, either of whom shall state his residence or post-office address thereon, and be directed to the defendant, and shall require him to appear and answer the complaint, as in this section provided, or for want thereof the plaintiff will apply to the court for the relief demanded therein.

(2) The summons shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:
READ THESE PAPERS CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion," "demurrer" or "answer." This paper must be given to the court within —— days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff or his attorney to show that the other side has been given a copy of it.

If you have questions, you should see an attorney immediately.

---

(3) If the defendant is served within the state, he shall appear and answer within 20 days from the date of the service.

(4) If a defendant is served by service upon the Corporation Commissioner as provided by law in certain cases, the defendant shall appear and answer within four weeks from the date of service on the Corporation Commissioner.
[Amended by 1963 c.310 §1, 1967 c 297 §1, 1969 c 181 §1, 1971 c 192 §1, 1977 c 877 §3]

15.050 [Repealed by 1969 c 181 §2]

15.060 Officer or person to serve summons; return; indorsement of delivery date; compensation of person serving summons taxed as disbursements. (1) The summons shall be served:

(a) By the sheriff, or his deputy, of the county where the defendant is found; or

(b) By any competent person 18 years of age or older who is a resident of the State of Oregon and is not a party to or an attorney in the action.

(2) The summons shall be returned to the clerk with whom the complaint is filed with proof of such service, or that the defendant cannot be found. A person making service shall make proof thereof in the manner provided in ORS 15.160. When served out of the county in which the action is commenced, the summons may be returned by mail. The person to whom the summons is delivered shall indorse thereon the date of such delivery.

(3) Compensation to a sheriff or his deputy serving the summons shall be prescribed by law. If the person serving the summons is not a sheriff or his deputy, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.
[Amended by 1955 c 165 §1; 1973 c 827 §5, 1977 c 877 §4]

15.070 Procedure where defendant not found. Whenever it appears by the return that the defendant is not found, the plaintiff may deliver another summons to be served, and so on, until service is had; or the plaintiff may proceed by publication, at his election.

15.080 Upon whom summons and copy of complaint to be served. The summons shall be served by delivering a copy thereof, with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows:

(1) If the action is against a private corporation:

(a) To the registered agent of the corporation or to any clerk on duty in the office of the registered agent;

(b) To the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent;

(c) In case none of the persons identified in paragraph (a) or (b) of this subsection have an office in the county where the cause of action arose, summons may be delivered to any clerk or agent of the corporation who may reside or be found in the county;

(d) If none of the persons identified in paragraph (a), (b) or (c) of this subsection can be found, then by leaving a copy thereof with any person over 14 years of age residing at the usual place of abode of any person identified in paragraph (b) or (c) of this subsection;

(e) Where service is made under paragraph (d) of this subsection, the plaintiff shall cause immediately to be mailed a certified true copy of the summons and complaint to the person to whom the summons is directed at his usual place of abode, together with a statement of the date, time and place at which service was made.

(2) If the action is against a limited partnership:

(a) To the registered agent of the limited partnership or to any clerk on duty in the office of the registered agent;

(b) To the Corporation Commissioner as provided in ORS chapter 69;

(c) To any general partner or managing agent thereof;

(d) In case none of the persons identified in paragraph (a) or (c) of this subsection have an office in the county where the cause of action arose, summons may be delivered to any clerk or agent of the limited partnership who may reside or may be found in the county; or

(e) If none of the persons identified in paragraph (a), (c) or (d) of this subsection can be found, then by leaving a copy thereof with any person over 14 years of age residing at the usual place of abode of any of the persons identified in paragraph (c) or (d) of this subsection.

(f) Where service is made under paragraph (e) of this subsection, the plaintiff shall cause immediately to be mailed a certified true copy of the summons and complaint to the person to whom the summons is directed at his usual place of abode, together with a statement of the date, time and place at which service was made.

(3) If against any county, incorporated city, school district or other public corporation, commission or board in this state, to the clerk or secretary thereof. If any such commission or board does not have a clerk or secretary, to any member thereof.

(4) If against a minor under the age of 14 years, to the minor personally, and also to his father, mother, conservator of his estate or guardian, or, if there be none within this state, then to any person having the care or control of the minor, or with whom he resides, or in whose service he is employed.

(5) If against an incapacitated person for whom a conservator of the estate or guardian has been appointed, to the conservator or guardian and to the defendant personally.

(6) If against a person who has appointed some officer of this state or person who is a resident of this state his agent or attorney to receive and accept the service, then to the agent or attorney.

(7) If service on the Corporation Commissioner, the Secretary of State or other state official is authorized by applicable law, summons may be delivered to the Corporation Commissioner, Secretary of State or other state official so authorized, or to a clerk on duty in any office of the Corporation Commissioner, Secretary of State or other state official so authorized.

(8) In all other cases to the defendant personally. If the defendant cannot be found personally at his usual place of abode, then service may be made by leaving a copy thereof with any person over 14 years of age who resides at the abode. Where service under this subsection is made on one other than the defendant, the plaintiff shall cause to be mailed a certified true copy of the summons and complaint to the defendant at his usual place of abode, together with a statement of the date, time and place at which service was made.

[Amended by 1961 c.344 §98; 1963 c.310 §2; 1967 c.581 §1; 1973 c.823 §87, 1975 c.604 §1, 1977 c.877 §5]

COUNCIL ON COURT PROCEDURES

Agenda

9:30 a.m., July 28, 1978

Room F, Willamette College of Law

Salem, Oregon

(THIS IS AN ALL-DAY MEETING).

1. Process committee report and suggested rules.

2. Trial committee report and suggested rules.

3. Discovery committee report on interrogatories, insurance limits, experts and admissions.

4. Law - equity revisions. Receiving suggested changes.

5. Revisions to the pleading rules as suggested at the last meeting.

6. Pleading and proving attorney fees (Hamlin proposal).

7. Discussion of schedule to complete work and prepare report -- further meetings.

8. NEW BUSINESS.

7/20/78

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of July 28, 1978

Willamette University College of Law

Salem, Oregon

Present:	Anthony L. Casciato	Donald W. McEwen
	John M. Copenhaver	James B. O'Hanlon
	William M. Dale, Jr.	Charles P.A. Paulson
	Wendell E. Gronso	Val D. Sloper
	Lee Johnson	Wendell H. Tompkins
	Garr M. King	William W. Wells
	Berkeley Lent	
Absent:	Darst B. Atherly	James O. Garrett
	E. Richard Bodyfelt	Laird Kirkpatrick
	Sidney A. Brockley	Harriet Meadow Krauss
	Alan F. Davis	Gene C. Rose
	Ross G. Davis	

Chairman Don McEwen called the meeting to order at 9:35 a.m., in Room F, Willamette University College of Law, Salem, Oregon.

The Council approved the minutes of the meeting held June 3, 1978, as submitted.

The Chairman announced that Roger B. Todd had resigned as a Council member and that Randolph Slocum of Roseburg had been appointed to take his place.

The Council then discussed the report of the discovery committee. Committee Chairman Garr King reported that the majority of the committee members present at the committee meeting had voted not have any interrogatories.

A motion was made by Wendell Gronso, seconded by Chuck Paulson, that written interrogatories not be adopted at all. Jim O'Hanlon, Chuck Paulson, Garr King, Judge Casciato, Wendell Gronso, and Judge Dale voted in favor of the motion, and Judge Sloper, Judge Tompkins, Judge Johnson, Judge Copenhaver, Judge Wells and Don McEwen voted against the motion, and Justice Lent abstained. Justice Lent explained that he planned to abstain in all future votes to avoid any questions in the future if the rules should be the subject of litigation before the Oregon Supreme Court. The Chairman then requested that Garr King contact the absent members for their expression in the matter.

Garr King then stated that the committee had decided that if the Council wanted interrogatories, the limited interrogatories rule submitted by the committee should be adopted. After discussion, Judge Johnson made a motion, seconded by Don McEwen, that the word, "facts", be added after the word, "following", in Rule 108 B., to make it clear that interrogatories could only be used to find out facts and not legal theories. The motion passed unanimously. Judge Sloper moved, seconded by Chuck Paulson, that the proposed limited interrogatories rule, as modified, should be adopted if the majority of all Council members favored some interrogatories rule. The motion passed unanimously.

The Council next discussed the proposed committee Rule 101 B.(4), relating to experts. Upon motion made by Judge Sloper, seconded by Chuck Paulson, the Council voted unanimously to insert the word, "immediately," in Rule 101 B.(4)(f) between "duty" and "to supplement." After further discussion of the rule, upon motion made by Judge Sloper and seconded by Judge Casciato, the Council voted to adopt proposed Rule 101 B., as modified. The motion was opposed by Judge Dale and Judge Johnson.

The Council next discussed the proposed changes to Rule 101 B.(2), relating to insurance agreements. Upon motion by Garr King, seconded by Don McEwen, the Council voted unanimously to accept the committee recommendations.

After discussion concerning Rule 111, REQUESTS FOR ADMISSION, upon motion by Garr King, seconded by Judge Sloper, the Council voted unanimously to adopt that rule as modified by the committee.

Judge Sloper presented the report and proposed rules of the process committee. Judge Sloper reported that the process committee had decided the Council probably had the authority to promulgate rules governing proper basis for personal jurisdiction and they had submitted such rules as Rules 4 A. through 4 D. It was suggested that the matter be finally left to the Legislature, which could reject the proposed rules relating to personal jurisdiction if they did not intend to grant rule-making authority in this area. Judge Sloper also reported that the committee favored rules that would reduce technicality in service of process. He called attention to proposed Rules 4 E.(3) and 4 H., and stated the committee recommended that the proposed language at the bottom of Page 1 of the committee memorandum dated July 16, 1978, be added to Rule 4 F.(3). Chuck Paulson moved, seconded by Judge Copenhaver, that such language be added as the introduction ro Rule 4 F.(3), followed by a statement that "service shall be accomplished substantially in the following manner," before the specific methods of service discussed in Rule 4 F.(3)(a) through 4 F.(3)(g).

The Council next considered the proposed rules submitted by the process committee in detail and made the following changes.

Rule 1. After discussion, upon motion by Judge Wells, seconded by Chuck Paulson, the Council voted unanimously that the last sentence of this rule be redrafted to also include actions pending as of the effective date of the rules.

Rule 3. After discussion, upon motion by Don McEwen, seconded by Judge Johnson, the Council voted unanimously to delete the reference to the statutes of limitations being governed by ORS 12.020 in the second sentence and that the rule read, "Other than for purposes of statutes of limitations, an action shall be commenced by filing a complaint with the clerk of the court."

Rule 4. After discussion, upon motion made by Wendell Gronso, seconded by Judge Johnson, the Council voted to change subsection C.(4) to specify that defendants appear and defend within 30 days for all types of service, by publication or otherwise, and wherever process is served. Jim O'Hanlon, Garr King, Judge Dale, Judge Sloper, and Judge Copenhaver opposed the motion.

After discussion, on motion made by Judge Johnson, seconded by Chuck Paulson, the Council voted unanimously to change "shall" to "may" in the next to the last sentence of section 4 D., relating to a reasonable fee being paid for the service. After discussion, on motion by Justice Lent, seconded by Judge Sloper, the Council voted unanimously that a lawyer for a party not be permitted to serve summons. Upon motion made by Judge Sloper, amended by Wendell Gronso, and seconded by Chuck Paulson, the Council voted to change the language in the first sentence of Section 4 D. so that it would read: "...nor an officer, director or employee of any party, corporate or otherwise." Judge Johnson opposed the motion.

It was decided that "promptly" should be inserted between "shall be" and "returned" in the first line of subsection 4 E.(1).

Upon motion by Judge Sloper, seconded by Justice Lent, the Council voted unanimously to change the first line of subparagraph 4 F.(3)(a)(ii), at the bottom of Page 9, to read: "If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service..." Upon motion by Judge Dale, seconded by Garr King, the Council voted to accept the language of Rule 4 F.(3)(a)(ii) as modified. Jim O'Hanlon and Judge Johnson opposed the motion.

After extensive discussion of Paragraph 4 F.(3)(d), Chuck Paulson moved, seconded by Judge Sloper, that the service by mail specified in subparagraph 4 F.(3)(d)(ii) be changed to a third alternative available under subparagraph 4 F.(d)(iii). The motion passed unanimously. Upon motion by Judge Dale, seconded by Judge Copenhaver, the Council voted unanimously to change the language of subparagraph 4 F.(d)(iii) to make the methods of service provided therein available when a registered agent, officer, director, general partner or managing agent could not be found in or did not have an office in the county of this state where the action was filed and to provide for service on any clerk or agent who could be found in the county where the action was filed and to then accept the language of 4 F.(d) as modified. It was suggested that the language of Paragraph 4 E.(2)(a) be changed to reflect the changes in Paragraphs 4 F.(3)(a) and 4 F.(3)(d).

Judge Dale made a motion, seconded by Judge Johnson, to delete Paragraph 4 F.(3)(e) in its entirety. The motion failed, with Judge Copenhaver, Judge Johnson, Judge Dale, and Jim O'Hanlon voting in favor of the motion. Judge Wells moved to reconsider the motion, seconded by Garr King. The Council then voted to delete the whole subsection. Chuck Paulson, Judge Casciato, Judge Sloper, Judge Tompkins and Don McEwen opposed the motion.

After discussion, upon motion by Judge Johnson, seconded by Don McEwen, the Council voted unanimously to delete the second sentence of Paragraph 4 F.(3)(f), relating to service upon the Adult and Family Services Division.

After discussion, Judge Johnson made a motion, seconded by Judge Wells, to strike the last sentence from Paragraph 4 F.(3)(g), relating to service upon the District Attorney when a county is a party to an action. The motion failed. Judge Johnson, Chuck Paulson, Judge Wells, and Wendell Gronso were in favor of the motion.

After discussion, upon motion by Don McEwen, seconded by Wendell Gronso, the Council voted unanimously to change the last sentence of Section 4 G.(3) to read: "Such publication shall be four times, to be in successive calendar weeks." It was also suggested that the word reference to "due" diligence in subsection 4 G.(1) be changed to "reasonable" diligence and "45 days" be changed to "30 days" in subsection 4 G.(2) to conform to prior Council action.

Upon motion by Chuck Paulson, seconded by Garr King, the Council voted unanimously to delete in the third line of Section 4 H. the words, "and the manner of service of summons."

It was suggested that the cross reference in section 4 I., "Telegraphic transmission," to Rule 5 E. should be to Rule 5 D.

Rule 6. It was suggested, to conform to the language of prior rules, that the word, "apparently," be inserted between "person" and "in charge" in the eighth line of section 6 B. and "over fourteen years of age" be substituted for "of suitable age and discretion" in the eleventh line of section 6 B.

After discussion, upon motion by Judge Tompkins, seconded by Judge Wells, the Council voted unanimously to delete the following from the first sentence of section 6 E.: "except that the judge may permit the papers to be filed with him, in which event the judge will note thereon the filing date and forthwith transmit them to the office of the clerk or the person exercising the duties of that office." It was also suggested that the sentence following should read: "The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of the day, day of the month and the year."

Rule 7. After discussion, upon motion made by Judge Sloper, seconded by Justice Lent, the Council voted unanimously to delete section 7 B.

Rule 4 A. Judge Sloper reported that the process committee recommended changing the proposed draft of subsection 4 A., A.(5) by eliminating the words, "whether by appointment of agent for service of process in this state or otherwise." Upon motion made by Chuck Paulson, seconded by Wendell Gronso, the Council voted unanimously to insert "distributed" between "things" and "processed" in subsection 4 A., D.(2).

The process committee reported that it had voted to adopt the language at the bottom of Page 13 of the commentary to the rules and that it would be inserted in the appropriate place in the rule.

The Executive Director stated the process committee had deleted the last two sentences in Rule 4 D., B., beginning with "The issues..." The following new language would be inserted: "The court shall rule upon the issues raised by this motion before trial. If any motion is made pursuant to Rule K (1), a motion to stay proceedings under this rule shall be joined with such motion. Failure to do so shall constitute a waiver of this motion to stay proceedings."

After further discussion, upon motion by Chuck Paulson, seconded by Justice Lent, the Council voted to delete Rule 4 D. in its entirety.

Judge Dale then submitted the report and proposed rules of the trial committee. He pointed out that the committee had recommended no requirement for a demand for jury trial. The Council then reviewed the proposed rules in detail.

After discussion relating to whether a motion by the parties should be required, upon motion by Judge Dale, seconded by Judge Wells, the Council adopted Rule 53. Garr King and Wendell Gronso opposed the motion.

After discussion concerning the number of peremptory challanges in Rule 57 B.(4), upon motion by Judge Sloper, seconded by Judge Tompkins, the Council voted unanimously to adopt Rule 57 as written.

It was decided to cross out subsection 58 A.(1) and to have subsection 48 A.(2) read: "Trial by the court shall proceed..." After discussion, upon motion by Chuck Paulson, seconded by Don McEwen, the Council voted unanimously to reverse the order of subsections 58 B.(4) and B.(5).

After discussion, upon motion by Lee Johnson, seconded by Judge Sloper, the Council voted to delete the words in the seventh line of section 59 B., "as written, without any oral explanation or addition," and to change the word, "given," to "read." The motion was opposed by Judge Casciato, Wendell Gronso, Judge Dale, and Garr King.

It was agreed that subsections 59 C.(5) would be changed by substituting the word, "shall," for "may either decide in the jury box or" in the second line and the words, "either orally or in writing," would be added to the fourth line of section 59 C. after the word, "given." Upon motion by

Johnson, seconded by Sloper, the Council voted unanimously to delete the last sentence in subsection 59 G.(1) and the last sentence would read: "If the foreperson answers in the affirmative, the verdict shall be read." It was decided that the second sentence of subsection 59 G.(5) would be deleted.

Judge Dale stated he felt that the committee's draft of section H(6), "Requests for finding or objections to findings are not necessary for purposes of appellate review," should be included as part of Rule 62, and upon motion by Don McEwen, seconded by Chuck Paulson, the Council voted unanimously to include it.

After discussion, upon motion by Paulson, seconded by Gronso, the Council voted unanimously to delete section H. of Rule 63, "Remittitur and additur," from this rule. Judge Dale said that the committee's Rule J should be included in the rules.

The Council decided that pleading and proving attorney fees be deferred.

The Executive Director reported that the Oregon State Bar CLE Committee wished to incorporate any new proposed rules in its civil procedure programs scheduled between October 7 and October 27 throughout the state and would print up the proposed rules for distribution to the Bar if they would be available by mid-September. He also reported that the procedure section of the State Bar wished to have proposed rules available by the time of the State Bar Convention.

The next meeting of the Council will be held in Bend, Oregon, at 9:30 a.m., on Friday, August 25, 1978, at the law offices of Panner, Johnson, Marceau, Karnopp and Kennedy, 1026 N.W. Bond Street. A complete set of proposed rules, with suggested comments, will be distributed before the meeting, and the Council will consider this draft of the rules and comments for submission to the Bar and publication as a tentative draft of rules to be adopted.

The meeting was adjourned at 5:10 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

RULE 4

SUMMONS

A. Plaintiff and defendant defined. For purposes of issuance and service of summons, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule K.(4) shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer."

This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule K.4(a) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CARREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule K.4(b) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you shoud see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served within the state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 20 days from the date of service.

C.(4)(b) If the summons is served outside this state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(c) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 45 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer or director

of a corporate party. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the

E.(2)(b) Service by publication shall be proved by the affidavit of the owner, editor, publisher, manager or advertising manager of the newspaper or the principal clerk of any of them, or the printer or foreman of such newspaper, showing the same and shall be in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the owner, editor, publisher, manager, advertising manager, principal clerk of the _____, printer or his foreman of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper for _____ successive and consecutive weeks in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19___.

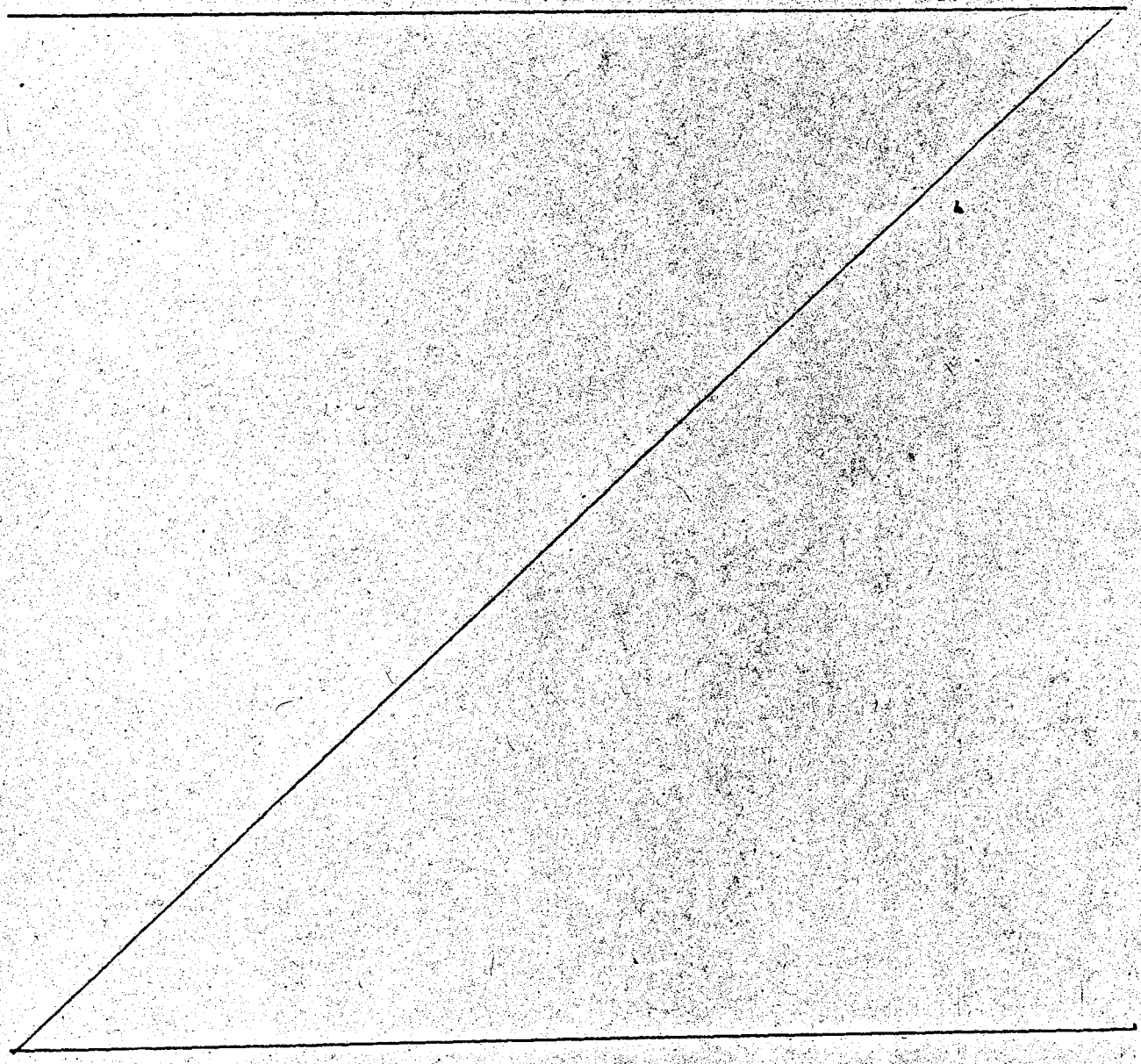
_____
Notary Public of Oregon.

My commission expires
____ day of _____, 19___.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

summons and complaint was left and such facts as show reasonable diligence in attempting to effect personal service on defendant. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.



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Affidavit of Publication

State of Oregon,)
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County of _____.)

I, _____, being first duly sworn, depose and say that I am the owner, editor, publisher, manager, advertising manager, principal clerk of the _____, printer or his foreman of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper for _____ successive and consecutive weeks in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19___.

_____
Notary Public of Oregon.

My commission expires
____ day of _____, 19____.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

E.(3) Failure to return the summons or make or file proof of service shall not affect the validity of the service.

F. Manner of service. (1) Unless otherwise specified, the methods of service of summons provided in this section shall be used for service of summons either within or without this state.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail under paragraph (d) of subsection (3) of this section or subsection (4) of this section or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested, with instructions to deliver to the addressee only. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule for service pursuant to subsections (4) and (5) of this section, service of summons shall be as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If with reasonable diligence the defendant cannot be served under subparagraph (i) of this paragraph, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge.

Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon his father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule V.(1)(b).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule V.(2)(b).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent, officer, general partner or managing agent, with the person who is apparently in charge of the office.

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent resides in this state or can be found in this state, then plaintiff

may serve such person by mail. Service by mail under this subparagraph shall be fully effective service and permit the entry of a default judgment if defendant fails to appear.

F.(3)(d)(iii) If by reasonable diligence, the defendant cannot be served pursuant to subparagraphs (i) and (ii) of this paragraph, then by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of any person identified in subparagraph (i) of this paragraph, or by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the state. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of persons identified in subparagraph (i) of this paragraph, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iv) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon a partnership or unincorporated association not subject to suit under a common name, relating to partnership or association activities, by personal service individually upon each partner known to the plaintiff, in any manner prescribed in paragraphs (a), (b) or (c) of this subsection. If less than all of the partners are served, the plaintiff may proceed against those partners served and against the partnership and a judgment rendered under such circumstances is a binding adjudication against all partnership members as to partnership assets anywhere.

F.(3)(f) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk. Service upon the Adult and Family Services

Division shall be by personal service upon the administrator of the Family Services Division or by leaving a copy of the summons and complaint at the office of such administrator with the person apparently in charge.

F.(3)(g) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) In lieu of service provided above, service upon any defendant of the class referred to in paragraphs (a) and (d) of subsection (3) may be made by mail, but such service shall not permit entry of a judgment by default. If the defendant served fails to appear, supplemental service shall be made as provided in paragraphs (a) and (d) of subsection (3) of this Rule.

F.(5) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 45 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication to be not less than once a week for four consecutive weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule because defendants are unknown heirs or persons as described in sections (9) and (10) of Rule I, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action,

if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with the provisions of this Rule relating to the form of summons, issuance of summons, the person who may serve summons, and the manner of service of summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 5 E.

COMMENT TO RULE 4

A. This section does not appear in the Oregon law or in the federal rules but was added to clarify the situation when summons is being used to join a party to respond to a counterclaim and an answer pursuant to ORS 13.180.

B. This is ORS 15.020. The Rule retains the practice of having summons issued by the plaintiff or plaintiff's attorney. Because the summons is issued by a party rather than a court, it is technically not process, and this Rule deals only with service of summons. Process is presentlycovered in ORS Chapter 16 and the references to it are incorporated in Rule 5 which follows. A subpoena is also not process and is covered by Rule 500. See 6 Or. 72 (1876). ORS 15.070 provides that if a defendant is not found, the plaintiff may issue another summons. This probably was necessary prior to 1977 when the summons had to be returned in 60 days, but at the present time the summons does not expire, and therefore no alias summons would be required.

C. This section is the same as ORS 15.040 (1) and (2) with some reorganization and language clarification. The language requiring an appearance and "answer" was changed to appear and "defend." The section continues the requirement of the notices presently specified in ORS 15.040(2) and ORS 15.220 (2) with reference to proof of service eliminated (see Rule 6). The reference to K.(4) is the joinder to respond to a counterclaim rule of ORS 13.080. Special notice is required because the proper response is a reply rather than an answer, as specified in the normal notice. ORS 15.220 deals only with the attorney's fee counterclaim under 18.180(2) but seems seems to require no special notice for 13.180 (1). The Rule covers both.

Under subsection (3) of the section, a summons may be signed by the plaintiff or resident attorney. ORS 15.040 allows only resident plaintffs to sign summons. This would literally force a non-resident plaintiff to retain an attorney and seems unfair and discriminatory. The requirement that the attorney be a resident was retained.

Subsection (4) includes all of the time requirements for response as follows:

(a) This is ORS 15.040 (3) with language changed to indicate that it does not cover personal service outside the state.

(b) This is ORS 15.110 (3). Four weeks was changed to 30 days. It makes more sense to describe all the time periods in the same unit. ORS 15.110 (3) provides 6 weeks for service outside the United States. This Rule simply provides 30 days for any service outside the state.

(c) This modifies the existing time to respond under ORS 15.140, which gives the defendant until the last date of publication (four weeks) to respond. The problem with this is that theoretically a defendant might not see the published notice until the last publication and have no time to respond. See 43 Or. 513 (1903). This Rule gives the defendant an additional 15 days from the last date of publication.

D. This section replaces ORS 15.060 (1) and (2). There seems to be no reason to specify the sheriff specifically as a person to serve. The sheriff would be a competent person over the age of 18. This also takes care of the question of who serves the sheriff when the sheriff is a party. There used to be a provision for service by the coroner under ORS 207.010, but this was repealed with the coroner's statute. Under this Rule, some other person would have to serve the summons because the sheriff would be a party. The return specified below is different when the summons is served by the sheiff ut other than that, ORS 206.030 makes serving a summons part of the duties of the sheriff, and no particular reference seems necessary in this Rule.

This Rule also differs from the statute in:

(a) Allowing an attorney for a party to serve the summons. Given the ethical restrictions on attorneys, it seems useless to eliminate them from serving a summons, especially when they are entitled to serve subpoenas.

(b) Covering out-of-state service and in-state service.

(c) Making clear who is a party when the defendant is a corporation.

The compensation provions in the last two sentences are identical to ORS 15.060 (3) with a slight wording change to clarify out-of-state service. The last sentence perhaps more properly belongs under the fees rule but was left in this Rule for the present.

E. (1) This contains the substance of ORS 15.060 (2). The last sentence of the existing statute was eliminated as it relates to the repealed 60-day return requirement.

(2) This contains the return and proof of service provisions of 15.160 which incorporates 15.110. The existing difference between the sheriff's certificate and affidavit of another person to prove service is retained. The content requirements of the existing statutes are slightly expanded. Since the manner of service provision makes substituted service available only when personal service cannot be effected, the proof of service is required to show due diligence when substituted service is used.

The return for a publication is similar to that of ORS 15.160 (2) except the number of people who can make the affidavit is increased slightly. The writtten admission possibility is preserved exactly as it exists in the existing statutes. The language relating to who may notarize the affidavit comes from ORS 15.110. ORS 45.120, which provides that an affidavit may be used to prove service, is unnecessary and should be eliminated.

Subsection (3) is probably the most imprtant change in this provision. Under the existing law, a defect in the return is jurisdictional. See State ex rel School District #56 vs. Kleckner, 116 Or. 371 (1925). There seems to be no reasonable basis for invalidating a perfectly good service because a mistake is made in the return. The language is taken from the Wisconsin statutes.

F. and G. These sections should be considered together and are the most important in this Rule. Generally, they were drafted with several general objectives in mind:

(a) That the method of service specified be as simple and inexpensive as possible while guaranteeing maximum actual notice to a defendant consistent with maximum flexibility to a plaintiff to effectuate service.

(b) To avoid any distinction between in-state and out-of-state service. This Rule does not cover those circumstances which make a defendant amenable to the court's authority. The amenability rule will provide that a defendant who is served within the state or where substituted service may be effectuated within the state is amenable to the court's authority, and in this sense it makes a difference whether service is in-state or out-of-state. Other than that, with a few exceptions specifically covered in the Rule (for example, corporations), there seems no particular reason to specify different methods for in-state or out-of-state service. The key question is the same in both cases, whether the service is being effectuated in a way that will maximize notice. It should be noted that one of the most important aspects of this is that it makes substituted service available out-of-state as well as in-state where a defendant cannot otherwise be found.

(c) To eliminate service of process on any state official such as the Corporation Commissioner, Insurance Commissioner or the Secretary of State. Such services on state officials are wasteful, burdensome on the state officials involved, and conceptually not required under our present ideas of jurisdiction. Formerly, it was thought conceptually necessary that some service be effectuated within the boundaries of the state. Under the International Shoe case and the present long arm statutes, no such in-state service is required. The Rule totally eliminates any service on state officials. Thus, the entire nonresident motor vehicle statute and all of the foreign and domestic corporation service rules are eliminated.

(2) This specifies the mode of effectuating service and is that of the existing statute, ORS 15.080. The mailing provisions would relate to service of process by mail for a corporation where no one may be found in the state, mailings required supplementary to substituted service, and the alternative of service of process by mail which would not allow a default judgment. The language describing service by mail comes from the Michigan rules.

(3) This subsection brings together all methods of service of process presently specified in the Oregon statutes.

(a) The order of preference for service of process of individuals would be, first, personal service, whenever that can be accomplished, either within or without the state, and then substituted service if personal service is impossible. The provision relating to substituted service was changed from "usual place of abode" to "dwelling house or usual place of abode." This added language comes from the federal rules and would liberalize the use of substituted service. Usual place of abode has been restrictively interpreted in Oregon. See Thoenes v. Tatro, _____ Or. _____ (1974). In any case, if there is a legally appointed or specially appointed agent for an individual for receiving service of process, this would be an alternative.

(b) and (c) These two sections incorporate the existing provisions for service of minors and incapacitated persons from ORS 15.080 (4) and (5). In both cases the possibility of having the plaintiff seek appointment of a guardian ad litem under Rule V. was added to this Rule.

(d) This was one of the most difficult rules to draft. The present law for in-state service of process of ORS 15.080 (1) is basically retained but now applies to both service within or without the state. Personal service is the preferred method of service but if a domestic or foreign corporation does not have a registered agent or any other officer, etc., within the state, then the plaintiff is given a second alternative of service of process by mail. This special service of process by mail was added because under the existing law, in most cases, the statutes specify service upon some state official and the net result is that process is mailed to the defendant anyway. Eliminating the intermediate step of service on the state official, we retain the same type of notice by specifying service of process by mail. The service of process by mail could be eliminated and the same scheme followed as for individuals, but this would perhaps change the existing patterns of service and put burden on plaintiffs to make out-of-state service on domestic and foreign corporations without in-state agents. The third level of preference in service as specified in the Rule is either serving a registered agent, officer, etc., by substituted service, within or without the state, or by serving any agent that can be found within the state. This again differs slightly from the existing system; at the present time, substituted service can only be used against an agent within the state, but it can be used against any agent, not just a registered agent or an officer, provided service is made within the county. (The existing statute under ORS 15.180 (1) is very confusing because it seems to limit some types of service to within the county which is inconsistent with the rest of the statute). This subsection of the Rule also provides that process may be left at the office of a registered agent or officer, etc. Again, the alternative of service upon an appointive agent is preserved.

Note that the Rule applies to limited partnerships and any other business entity that may be sued under a common name. Existing ORS 15.180 (2) refers to limited partnerships and is virtually identical to 15.180 (1) relating to corporations. There seems to be no provision for any other business entity suitable under a common name in Chapter 15. ORS 62.155 requires cooperatives to appoint a registered agent.

(e) At the present time, there is no statute specifically covering service of process on partnerships. A partnership is not suable as an entity, and each person must be served individually. Under ORS 15.100, however, persons jointly liable on a contract can be served individually with only some joint obligors served and any judgment is effective against the joint assets for non-served parties. In other words, the partnership assets are subject to judgment if a claim is contractual, which is a joint obligation, but not for any other claim against the partnership, which is joint and several. See ORS 68.250 - 270. This Rule expands the existing situation. It does not make the partnership suable as an entity, but it

does make the partnership subject to a bind judgment as to partnership assets where only part of the partners are served, whether or not the claim is contractual in nature, providing the claim is related to partnership activities.

The language of ORS 15.100, relating to persons jointly liable, has not been retained in this Rule. That statute is part of the original Deady Code and was passed to reverse the common law rule that plaintiff had to proceed against all joint obligors or none. In that sense, ORS 15.100 (1)(a) and (b) are joinder rules; sort of a special indispensable party rule. That aspect would now be covered by Rule O, relating to indispensable parties, and the necessity of joinder or non-joinder, and proceeding against parties to a contract, would be determined under the factors specified in that rule, rather than any reference to joint or joint and several obligations.

ORS 15.100 (1)(a), however, goes beyond joinder and seems to make joint obligors agents for each other to receive process, at least to the extent of binding joint property. This was not included because it is of doubtful constitutionality. For a partnership or other unincorporated association, there is an agency relationship between the participants. Merely making a joint promise, however, does not imply any agency aspect.

ORS 15.100 (2) seems to state the obvious; if you sue two defendants and prove a case against one, you can recover against one. Apparently, there was a common law rule that if you sued parties jointly, you recovered jointly or not at all, but in light of existing joinder rules and judgment provisions, specific rejection of the common law rule seems unnecessary.

ORS 15.090 relating to serving one defendant in an equity suit is eliminated. The distinction has been abolished and the section was probably unconstitutional anyway.

(f) There is no present provision for service on the state in the Oregon statutes but with increasing waivers of sovereign immunity by the state, such a provision seems necessary. The last specific reference to the Adult and Family Services Division is ORS 15.085.

(g) This is ORS 15.080 (3). The only changes were adding "officer, director, and managing agent" to those persons who may be served and also incorporating the provisions of ORS 16.820 relating to service of summons and the District Attorney when the county is a party.

(4) Although the committee has previously indicated that it did not want to adopt service of process by mail, this Rule comes from the Judicial Conference Committee's recommended changes to Rule 4. It actually is not service in a binding sense but more in the nature of a request to appear voluntarily. Of course, without the default judgment any person anticipating trouble or facing statute of limitations problems would be advised not to use this provision. The one thing that perhaps should be clarified is whether service of process for this purpose is effective to relate back to the commencement of the action for purposes of satisfying the statute of limitations. I am not sure, however, it is within our rule-making power to do so.

(5) This does not appear in Oregon law but was adapted from Federal Rule 4 (i). It provides maximum flexibility for Oregon plaintiffs to conform to peculiarities of foreign law relating to service of summons.

G. This publication statute differs from the existing publication statutes of ORS 15.120 to 15.180 in the circumstances in which it can be used. The existing statutes make publication available under a complex set of conditions which are different for residents, nonresidents, domestic and foreign corporations which apply to different types of cases and to certain equity suits. Many of the situations specified in the Oregon statutes are of doubtful Constitutionality because under the Mullene case, publication may only be used when no better method of giving notice can be used. This Rule literally complies with the Mullene case by making this the ultimate resort when process can be effected by no more reasonable method. It also differs from the Oregon rule by making this available in any case, so there always is a last resort for service of process, which would allow the plaintiff to proceed when the defendant cannot be found or is unknown.

The procedures are not substantially changed from the existing Oregon statutes. A court order is required. The form of the summons published is generally the same. The time for response provided in the summons is changed to 45 days, and the summons must give the first publication date and a clear warning. The place of publication is changed from a newspaper to a newspaper of general circulation. Mailing of the summons and complaint continues to be required. In most cases, if you knew defendant's address, publication could not be used because either personal or substituted service would be more effective; but it is literally possible to have an address for the plaintiff which is not the plaintiff's dwelling house or usual place of abode, so publication still might be used and mailing required.

The specific provisions relating to unknown parties are ORS 15.170 and 15.180. The provision allowing the person to come in and defend after a year comes from ORS 15.150. ORS 18.160 does give a party a year to seek a vacation of any judgment by default. This section does not require vacation of judgment, but allows a defendant to defend.

H. This last section is completely new and does not appear either in the federal rules or any other statutory rule scheme which could be found. It is a response to Bob Lacy's suggestion for de-emphasizing the importance of process. Some of the language referring to amendment comes from Federal Rule 5 (b).

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

If you have questions, you shoud see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule 22 D. (2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant

or the defendant's attorney. If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within ____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer, director or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person seved is found, or such person's dwelling house or usual place of abode is located, 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 ORS 20.020.

E. Return; proof of service. (1) The summons shall be promptly returned to the clerk with whom the complaint is filed

with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action or proceeding is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a)(i) Personal service or mailing shall be proved by the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances

of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidfavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19__.

_____
Notary Public of Oregon.

My commission expires

_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

F. Manner of service. (1) Summons shall be served, either within or without this State, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action or proceeding and to afford a reasonable opportunity to appear and defend.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail or mailing of summons and complaint as otherwise required or allowed by this rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested.

Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this rule and service pursuant to subsection (4) of this section, service of summons either within or without this state may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon such minor's father, mother, conservator of such minor's estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, director, general partner or managing agent, such copies may be left at the office of such registered agent, officer, director, general partner or managing agent, with the person who is apparently in charge of the office; or

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent can be found nor has an

office in the county where the action or proceeding is filed, the summons may be served: by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of such registered agent, officer, director, general partner or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to such registered agent, officer, director, general partner or managing agent. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of a registered, agent, officer, director, general partner, or managing agent, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by

personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action or proceeding, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this rule, a published summons shall

also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot be made by another method described in section F. of this rule because defendants are unknown heirs or persons as described in sections I. and J.

of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action or proceeding was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of issuance and service of summons, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 220 shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer."

This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule ~~4.4(a)~~ 220(1) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule ~~4.4(b)~~ 220(2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you shoud see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served ~~within the state~~ personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served outside this state personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer, director

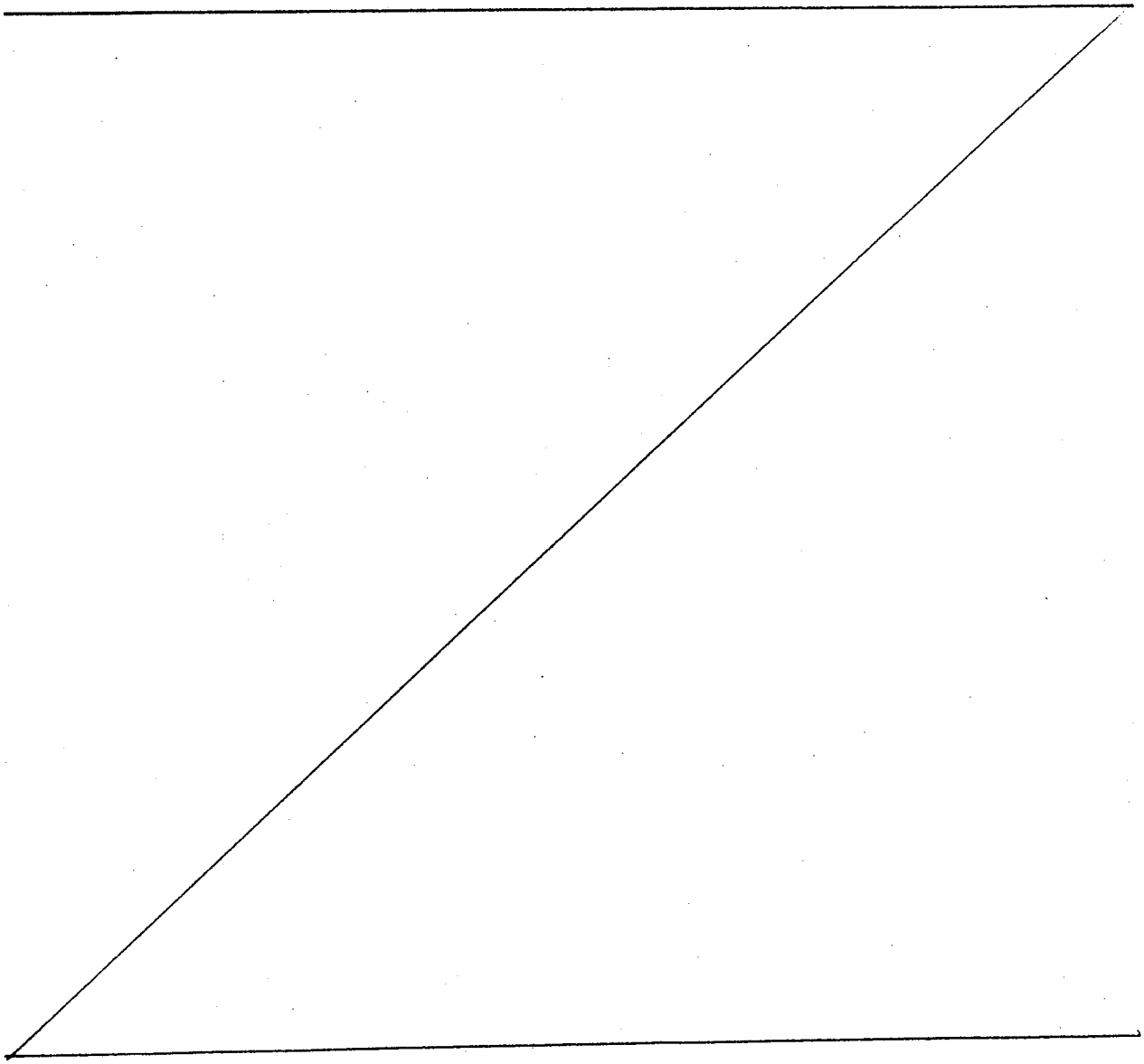
of a corporate party. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee shall be paid for the service. This compensation shall be part of the disbursements and shall be recovered as provided in ORS 20.020.

E. Return; proof of service. (1) The summons shall be returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer or director of a corporate party to the action, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left, ~~and shall state such facts as show reasonable diligence in attempting to effect personal service upon the defendant.~~ If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the

summons and complaint was left ~~and such facts as show reasonable diligence in~~ or describe in detail the manner and circumstances of service attempting ~~to effect personal service on defendant~~. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.



E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 19__.

_____
Notary Public of Oregon.

My commission expires
_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be

affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

*E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

*F. Manner of service. (1) ~~Unless otherwise specified, the methods~~ of service of summons provided in this section shall be used for service of summons either within or without this state.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail ~~under paragraph (d) of subsection (3) of this section or subsection (4) of this section~~ or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule and service pursuant to subsection (4) of this section, service of summons ~~shall~~ be as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If ~~with reasonable diligence the defendant~~ cannot be served under ~~subparagraph (i) of this paragraph~~, then by personal service upon any person

over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon his father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule ~~V.(1)(b)~~.

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule ~~V.(2)(b)~~.

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent, officer, general partner or managing agent,

with the person who is apparently in charge of the office.

~~F.(3)(d)(ii)~~ If no registered agent, officer, director, general partner, or managing agent ~~resides in this state or~~ can be found ~~in this state, then plaintiff may serve such person by mail. Service by mail under this subparagraph shall be fully effective service and permit the entry of a default judgment if defendant fails to appear.~~

~~F.(3)(d)(iii)~~ If by reasonable diligence, ~~the defendant cannot be served pursuant to subparagraphs (i) and (ii) of this paragraph, then~~ by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode ~~of any person identified in subparagraph (i) of this paragraph~~, or, by personal service on any ~~clerk~~ or agent of the ~~corporation~~, limited partnership or association who may be found in the ~~state~~. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of persons identified in subparagraph (i) of this paragraph, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)~~(iv)~~(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon a partnership or unincorporated association not subject to suit under a common name or persons jointly indebted on a contract, relating to partnership or association activities or the joint contract, by personal service individually upon each partner, association member or joint obligor known to the plaintiff, in any manner prescribed in paragraphs (a), (b) or (c) of this subsection. If less than all of the defendants are served, the plaintiff may proceed against those defendants served and against the partnership, association or joint obligors and a judgment rendered under such circumstances is a binding adjudication against all partnership or association members or joint obligors

as to partnership or association assets or joint property, wherever such assets or property may be located.

F.(3)(e) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk. Service upon the Adult and Family Services Division shall be by personal service upon the administrator of the Family Services Division or by leaving a copy of the summons and complaint at the office of such administsrator with the person apparently in charge.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot with due diligence be made by another method described in subsection (3) of section F. of this Rule, the court may order service by publication.

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G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

*G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times, ~~with intervals of at least 7 days between each successive publication~~ in successive calendar weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot with ~~due~~ diligence be made by another method described in subsection (3) of section F. of this Rule because defendants are unknown heirs or persons as described in sections (9) and (10) of Rule I, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in

the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

*H. Disregard of error; actual notice. Failure to strictly comply with provisions of this Rule relating to the form of summons, issuance of summons, the person who may serve summons and the manner of service of summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action and had a reasonable opportunity to appear and defend. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 80

Rule 7 Summons

Background

For service of process see Rule 8. Replaced.

ORS sections ~~Replaced. Repealed.~~

For service of subpoenas see Rule 55

15.010, 15.020, 15.030, 15.040,
15.060, 15.080, 15.090, 15.110, 15.120
15.130. 15.140, 15.150, 15.160
15.170, 15.180, 15.210, 15.220, 45.120

Comment:

Rule 7
COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met then deviations from the prescribed procedures for form of summons , issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E(3) and F(1) and Section H make this clear. Subsection F(3) is the basic rule for manner of service: Subsection F(3) describes acceptable methods of service but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendnat to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to methods of service territorial boundries.

The rule, in conjction with revisions to ORS sections relating to appointments of agents, elimates any service of process on state agents who are ficionally appointed as agents for service of process upon out of state defendants.

Modern jurisdictional theory does not require service within the boundries of the state and requiring service on the corporation commisioner or other state official is a useless act which is burdonsome and expensive for the officials and litigants.

~~(A) This is based upon~~

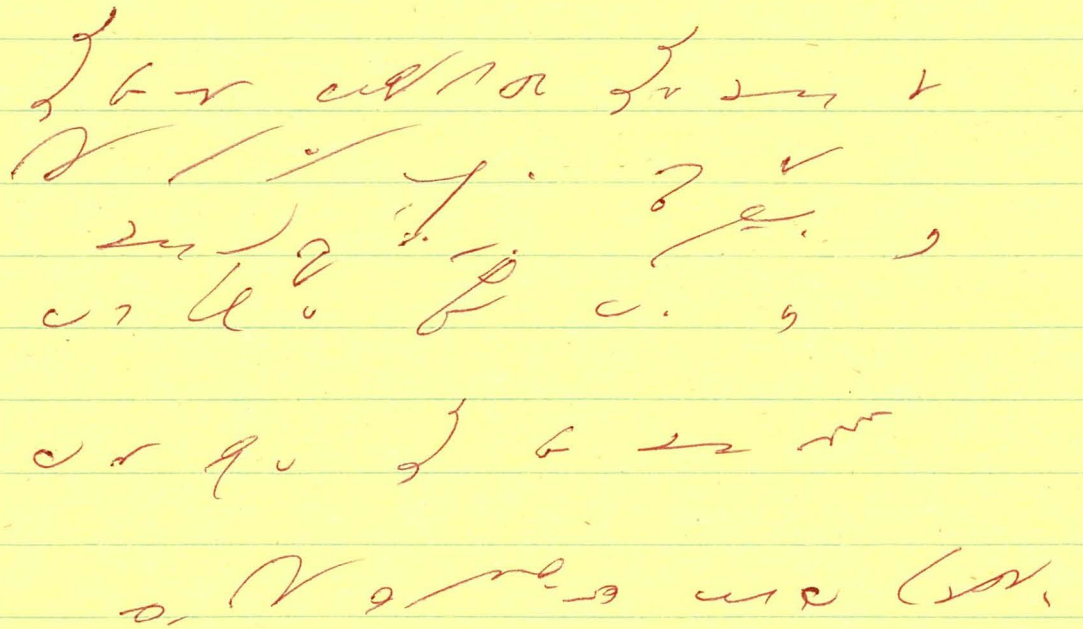
Section ~~(B)~~ B is based upon Ors 15.020

Sub ~~Section C~~ (1) to ~~(3)~~ Section C is based upon ORS 15.040 and 15.220. Subsection C. (4) ~~eliminates~~ the ~~disparate~~ time for response ~~to~~ to services in the state, in another state, outside the United states, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30 day period.

Section D is based upon ORS 15.160 ~~but eliminates~~ a specific description of the sherriff. The sherriff, as a person over 18, can of course serve unless the sherriff is a party.

Section E is based upon 15.060, 15.110 and 15.160. Subsection E(3) would avoid invalidation of ~~a~~ good service of summoms because of some techniccal defenct in the return. A return and proof of service ~~is~~ are required by subsections E(1) and (2).

The methods of service described in Subsection F(3) are modified forms of the methods of service described in 15.180. The most significant change is ~~relating to corporations or entities suable under their own names~~ F(3) (d) which proves that the preferred method of service is person service upon a responsible officer, director or agent in the county where the suit is filed; if this cannot be accomplished ~~four~~ alternatives are available to the plintiff: Personal service on such persons anywhere ~~within or without the state (including leaving at their office)~~ they may be found; Substituted service at the dwelling house or usual place of abode of such persons ~~whether located within or without the state~~; mailing to such perons; or service upon any agent who may be found in the county where the suit was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. ~~This~~ rule applys to associations and limited partnerships which may be sued under a common name; service in the case of partnerships



associations not suable under a common name is service on the named indivual defendants and is covered by section F (3) (a). The effect of service on less than all partnership or association members in terms of judgements and enforcement of judgements is left to ORS 15.100 and other rules dealing with that subject.

Subsection F(4) was adapted from Federal Rule 4(i).

The publication provisions of section G differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes publication is avaiable only in certain classes of cases depending upon location and avaiablity of a defendnat for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method, but makes such publication available in those circumstances for any case. Once publication is available the procedure followed is similar to that of the present statutes.

Section H is totally new and was drafted by the council to carry out the general purpose of this rule.

MEMORANDUM

TO: COUNCIL ON COURT PROCEDURES

FROM: PROCESS COMMITTEE

RE: SUMMONS AND PROCESS RULES

DATE: July 16, 1978

Don't put Periods into Rules Unless Rules

The process committee has met and considered in detail the specific rules relating to the form and manner of service of summons and process, as well as general introductory rules covering application of the rules, commencement of actions, service and filing of papers subsequent to the summons and computation of time. A copy of these rules, numbered 1 through 7, as approved by the committee, is attached. Those portions of the rules marked with an asterisk involve issues which the committee felt should be considered by the full Council, as discussed below. A staff commentary on each of these rules was furnished to the committee and is available to Council members upon request.

The committee is also considering rules governing bases for personal jurisdiction. A copy of a memorandum furnished to the committee, relating to rule-making authority in this area and jurisdictional rules numbered 4 A. through D., with staff commentary, is attached. The committee will report its recommendations on these rules at the meeting to be held July 28, 1978.

1. BASIC ISSUES

The committee considered the question of whether the Council has rule-making authority in the area of specifying the basis for jurisdiction. It was decided that, although the issue is not free from doubt, rules should be promulgated governing bases for personal jurisdiction. It is extremely difficult to make extensive revisions in the rules governing service of process without complementary changes relating to jurisdiction. The ultimate question should be left to the Legislature, as recommended on the last page of the staff memorandum.

Secondly, in the area of service of process under Rule 4, the committee felt that the present approach to service of summons was over-technical and placed too much emphasis on correctness of form. The basic question is whether the service of summons and complaint provides notice to the defendant. In an attempt to avoid over-technical interpretation of summons statutes, the draft accepted by the committee includes provisions 4 E.(3) and 4 H. which should be carefully examined by the Council. The committee also discussed the possibility of going even further in replacing the detailed provisions of Rule 4 F.(3), relating to the manner of service, with the following provisions:

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

Insert

3. Change 4 G.(1) to say:

"On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order..."

2. OTHER QUESTIONS

4 F.(3)(a). There is no present Oregon statute covering service of process on partnerships and unincorporated associations. This paragraph fills that gap. The issue is whether to include the existing language of ORS 15.100 relating to joint obligors. Although they are made so by existing statute, there may be some question whether one joint obligor should be the agent for service of process upon another.

4 G.(3). The language in the last sentence is designed to avoid a possible interpretation of the existing statutory language, "not less than once a week for four consecutive weeks," to require five publications.

7 B. At common law, a judgment could be modified by a court within the same term of court but not beyond that time. It is unclear whether this common law rule still applies in Oregon, but subsection (2) of this section reciting an ability of the court to relieve someone of a mistake due to excusable neglect would literally allow a judge to vacate a judgment long after it was entered by allowing late filings of motions for NOV and new trial, etc. Federal rules prohibit this by making the subsection inapplicable to those post judgment motions described in this rule. The issue is whether the Council wishes to follow the same pattern or further limit a judge's ability to allow an untimely act based on excusable neglect.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of ~~issuance and service of summons~~ this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this Rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. to "appear" you must file with the court a legal paper called a "motion" or

"answer." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney. If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in

this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within ____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer, director, ~~or~~ OR employee of NOR ATTORNEY FOR any party, corporate or otherwise. Compensation to

a sheriff or a sheriff's deputy of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, 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 ORS 20.020.

E. Return; proof of service. (1) The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, ~~or~~ director ~~or a corporate~~ or employee of any corporate or otherwise, party ~~to the action~~, nor attorney for, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or

such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____ _____(here set forth the title or job description of the person making the affidfavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19__.

_____

Notary Public of Oregon.

My commission expires

_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

F. Manner of service. (1) Summons shall be served, either within or without this State, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

F.(2) For personal service, the person serving the summons shall

deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served, by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule ~~for~~ and service pursuant to subsection (4) of this section, service of summons either within or without this State may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) by personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other ~~t-an~~ the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or

uusual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent autohrized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon such minor's father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent,

director)
officer, general partner or managing agent, with the person who is apparently in charge of the office.

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent can be found nor has an office in the county where the action or proceeding is filed, the summons may be served: by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of such registered agent, officer, director, general partner or managing agent; ~~or by mail upon such registered agent, officer, director, general partner or managing agent;~~ or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to such registered agent, officer, director, general partner or managing agent. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of ~~persons identified in subparagraph (i) of this paragraph~~ a Registed Agent, officer, director, general partner, or managing Agent, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

7th page

F.(3)(e) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service by publication.

shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with provisions of this Rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

BACKGROUND NOTE

For service of process, see Rule 8.

For service of subpoenas, see Rule 55.

ORS sections superseded: ~~15.010~~, 15.020, 15.030, 15.040, 15.060, 15.080, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, ~~15.210~~, 15.220, ~~45.120~~.

COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met, then deviations from the prescribed procedures for form of summons, issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E.(3) and F.(1) and Section H. make this clear. Subsection F.(~~3~~) is the basic rule for manner of service; subsection F.(3) describes acceptable methods of service that would meet the standard of subsection F.(~~3~~), but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in Rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule, in conjunction with revisions to ORS sections relating to appointments of agents, eliminates any service of process on state agents who are fictionally appointed as agents for service of process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants.

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Section B. is based upon ORS 15.020.

Subsections C.(1) to (3) are based upon ORS 15.040 and 15.220. Subsection C.(4) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30-day period. Service upon another authorized to accept service of summons for the defendant would include leaving a copy of the summons and complaint at a dwelling house or usual place of abode or an office or ~~other~~ type of service upon someone ~~toher~~ than the named defendant. ~~as described in these rules or by statute.~~

only

Section D. is based upon ORS 15.~~160~~ 060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section E. is based upon 15.060, 15.110 and 15.160. Subsection E.(3) would avoid invalidation of good service of summons because of some technical ~~deefect~~ in the return. A return and proof of service are still required by subsections E.(1) and (2).

The methods of service described in subsection F.(3) are modified forms of the methods of service described in 15.~~180~~ 080. The most significant change is paragraph F.(3)(d), which ~~proves~~ provides that the preferred method of service is personal service (including leaving at their office) upon a responsible officer, director or agent in the county where the suit is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service (including leaving at their office) on such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the suit was filed. Since the basic standard remains adequacy of notic e, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph F.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection F.(4) was adapted from Federal Rule 4(i).

The publication provisions of section G. differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method, but makes such publication available ~~in those circumstances~~ for any case. Once publication is available, the procedure followed is similar to that of the present statutes.

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Rule 7 p. 14

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Rule 7

October 16, 1978

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant shall include any party upon wchom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and ~~shall~~ a notification ~~notify~~ to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to section D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim.

A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on maker of contract for attorney's fees.

A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable

attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized

to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff shall cause to be mailed a certified copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which substituted service was made.

D.(2)(c) Office service. If the person to be served maintains an office ~~accessible to the public~~ for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office with the person who is apparently in charge.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified

mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or if defendant cannot be personally found, at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in sub-paragraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of such minor's estate, or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified subparagraph (i) of this paragraph upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem

appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships, unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership, or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action or proceeding is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to a registered agent, officer, director, general partner, or managing agent.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D. Service by publication or mailing to a post office address.

D.(5)(a) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the

the court may order service by publication, or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only.

D 2. (5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(3) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D 2. (5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

Hollis p 4 + com + description

D 2. (5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at

defendant's last known address. If plaintiff does now know and cannot ascertain, upon diligent inquiry, the present ~~and~~ or last known address of the defendant, mailing a copy of the summons and complaint is not required.

~~D.~~ B.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in ~~the~~ favor of the plaintiff, as effectively as if the action or proceeding was brought against such defendants by name.

~~D.~~ B.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, ~~or~~ and the judgment or any part thereof has been collected or otherwise enforced, restitution may

be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D. (5)(g) Completion of service. Service shall be complete at the date of the last publication.

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 an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. 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 ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Personal service or mailing. Personal service or mailing shall be proved by:

(2)(a)(i) The affidavit of the server indicating the time, place, and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm or corporation served was the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(iii) An Affidavit or certificate containing proof of service may be made upon the summons or as a separate ~~endorsement~~.

E.(2)(b) Publication. Service by publication shall be ~~proved~~ proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published.

Subscribed and sworn to before me this ____ day of _____, 19 ___.

_____
Notary Public of Oregon
My commission expires
_____ day of _____, 19 ___.

F. (2)(c) Making and certifying affidavit. The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F. (3) Written admission. In any case proof may be made by written admission of the defendant.

F. (4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or affidavit or certificate of service of summons and shall disregard any error in the content or

service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

✓ We left on I see. p 17 on original draft. Add as H.

that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of service of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

BACKGROUND NOTE

For service of process, see Rule 8. For service of subpoenas, see Rule 55.

ORS sections superseded: 15.020, 15.030, 15.040, 15.060, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.210, 15.220, 45.120.

COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met, then deviations from the prescribed procedures for form of summons, issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E.(3) and F.(1) and Section 7 H. make this clear. Subsection F.(1) is the basic rule for manner of service; subsection F.(3) describes acceptable methods of service that would meet the standard of subsection F.(1), but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in Rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule does not include any service of process on state agents who are fictionally appointed as agents for service of

process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants. To the extent that such service is retained in separate ORS sections, it would be within subparagraphs F.(3)(a)(iii) and F.(3)(d)(iii).

Section B. is based upon ORS 15.020.

Subsections C.(1) to (3) are based upon ORS 15.040 and 15.220. Subsection C.(4) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30-day period. Service upon another authorized to accept service of summons for the defendant would include leaving a copy of the summons and complaint at a dwelling house or usual place of abode or an office or any type of service upon someone other than the named defendant.

Section 7 D. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 E. is based upon 15.060, 15.110 and 15.160. Subsection E.(3) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections E.(1) and (2).

The methods of service described in subsection F.(3) are modified forms of the methods of service described in 15.080. The most significant change is paragraph F.(3)(d), which provides that the preferred method of service is personal service (including leaving at their office) upon a responsible officer, director or agent in the county where the action is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service (including leaving at their office) upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph F.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or

"answer." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or his attorney.

If you have questions, you should see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney. If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in

this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement wo chich defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within ____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or his attorney.

If you have questions, you should see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action, may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this Rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy

of the county in this state where the person served is found, or such person's dwelling house or usual place of abode is located, who serves a summons, shall 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 ORS 20.020.

E. Return; proof of service. (1) The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a) Personal service or mailing shall be proved by (i) the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for, any party, corporate or otherwise, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or

such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached. (iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____ _____(here set forth the title or job description of the person making the affidfavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues; (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19__.

_____

Notary Public of Oregon.

My commission expires

_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and his official seal, if he has one, shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of his official seal, if he has one, shall be prima facie evidence of his authority to make and certify such affidavit.

E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

F. Manner of service. (1) Summons shall be served, either within or without this State, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

F.(2) For personal service, the person serving the summons shall

deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail or mailing of summons and complaint as otherwise required or allowed by this Rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this Rule and service pursuant to subsection (4) of this section, service of summons either within or without this State may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) by personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at his dwelling house or

uusual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this Rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon such minor's father, mother, conservator of his estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, general partner or managing agent, such copies may be left at the office of such registered agent,

F.(3)(e) Upon the State, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this Rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at his last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot be made by another method described in section F. of this rule because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown

heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or his representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

BACKGROUND NOTE

For service of process, see Rule 8.

For service of subpoenas, see Rule 55.

ORS sections superseded: 15.020, 15.030, 15.040, 15.060, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.210, 15.220, 45.120.

COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met, then deviations from the prescribed procedures for form of summons, issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E.(3) and F.(1) and Section 7 H. make this clear. Subsection F.(1) is the basic rule for manner of service; subsection F.(3) describes acceptable methods of service that would meet the standard of subsection F.(1), but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in Rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule, in conjunction with revisions to ORS sections relating to appointments of agents, eliminates any service of process on state agents who are fictionally appointed as agents for service of process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants.

Section B. is based upon ORS 15.020.

Subsections C.(1) to (3) are based upon ORS 15.040 and 15.220. Subsection C.(4) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30-day period. Service upon another authorized to accept service of summons for the defendant would include leaving a copy of the summons and complaint at a dwelling house or usual place of abode or an office or any type of service upon someone other than the named defendant.

Section 7 D. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 E. is based upon 15.060, 15.110 and 15.160. Subsection E.(3) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections E.(1) and (2).

The methods of service described in subsection F.(3) are modified forms of the methods of service described in 15.080. The most significant change is paragraph F.(3)(d), which provides that the preferred method of service is personal service (including leaving at their office) upon a responsible officer, director or agent in the county where the suit is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service (including leaving at their office) on such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the suit was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph F.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection F.(4) was adapted from Federal Rule 4(i).

The publication provisions of section 7 G. differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon the nature of the case or location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method but makes such publication available for any case. Once publication is available, the procedure followed is similar to that of the present statutes.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action or proceeding is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summons under section D. of this rule.

C. Contents. The summons shall contain:

C.(1) The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(2) A direction to the defendant requiring defendant to appear and defend within the time required by subsection (4) of this section and shall notify defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(2)(a) All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice in a size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the plaintiff or the plaintiff's attorney.

If you have questions, you shoud see an attorney immediately.

C.(2)(b) A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within _____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant

or the defendant's attorney. If you have questions, you should see an attorney immediately.

C.(2)(c) A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice in size equal to at least 8-point type which may be substantially in the following form with the appropriate number of days inserted.

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within ____ days along with the required filing fee. It must be in proper form and a copy must be delivered or mailed to the defendant or the defendant's attorney.

If you have questions, you should see an attorney immediately.

C.(3) A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(4) The summons shall require the defendant to appear and defend within the following times:

C.(4)(a) If the summons is served personally or by mail upon defendant or served personally or by mail upon another authorized to accept service of the summons for the defendant, the defendant shall appear and defend within 30 days from the date of service.

C.(4)(b) If the summons is served by publication pursuant to section G. of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

D. 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 an officer, director or employee of, nor attorney for, any party, corporate or otherwise. Compensation to a sheriff or a sheriff's deputy of the county in this state where the person seved is found, or such person's dwelling house or usual place of abode is located, 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 ORS 20.020.

E. Return; proof of service. (1) The summons shall be promptly returned to the clerk with whom the complaint is filed

with proof of service or mailing, or that defendant cannot be found. When served out of the county in which the action or proceeding is commenced, the summons may be returned by mail.

E.(2) Proof of service of summons or mailing may be made as follows:

E.(2)(a)(i) Personal service or mailing shall be proved by the affidavit of the server indicating the time, place and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, of the county in this state where the person served was found or such person's dwelling house or usual place of abode is located, proof may be made by the sheriff's or deputy's certificate of service indicating the time, place and manner of service, and if defendant is not personally served, when, where and with whom the copy of the summons and complaint was left or describe in detail the manner and circumstances

of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

E.(2)(a)(iii) An affidavit or certificate containing proof of service may be made upon the summons or as a separate endorsement.

E.(2)(b) Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
) ss.
County of _____.)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidfavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19__.

_____
Notary Public of Oregon.

My commission expires

_____ day of _____, 19 __.

E.(2)(c) In any case proof may be made by written admission of the defendant.

E.(2)(d) The affidavit of service may be made and certified by a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

E.(3) If summons has been properly served, failure to return the summons or make or file a proper proof of service shall not affect the validity of the service.

F. Manner of service. (1) Summons shall be served, either within or without this State, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action or proceeding and to afford a reasonable opportunity to appear and defend.

F.(2) For personal service, the person serving the summons shall deliver a certified copy of the summons and a certified copy of the complaint to the person to be served. For service by mail or mailing of summons and complaint as otherwise required or allowed by this rule, the plaintiff shall mail a certified copy of the summons and a certified copy of the complaint to the person to be served by certified or registered mail, return receipt requested.

Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

F.(3) Except when service by publication is available pursuant to section G. of this rule and service pursuant to subsection (4) of this section, service of summons either within or without this state may be substantially as follows:

F.(3)(a) Except as provided in paragraphs (b) and (c) of this subsection, upon a natural person:

F.(3)(a)(i) By personally serving the defendant; or,

F.(3)(a)(ii) If defendant cannot be found personally at defendant's dwelling house or usual place of abode, then by personal service upon any person over 14 years of age residing in the dwelling house or usual place of abode of defendant, or if defendant maintains a regular place of business or office, by leaving a copy of the summons and complaint at such place of business or office, with the person who is apparently in charge. Where service under this subparagraph is made on one other than the defendant, the plaintiff shall cause to be mailed a copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made; or,

F.(3)(a)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by law to accept service of summons for the defendant.

F.(3)(b) Upon a minor under the age of 14 years, by service in the manner specified in paragraph (a) of this subsection upon such minor, and also upon such minor's father, mother, conservator of such minor's estate or guardian, or if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

F.(3)(c) Upon an incapacitated person, by service in the manner specified in paragraph (a) of this subsection upon such person and also upon the conservator of such person's estate or guardian, or if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

F.(3)(d) Upon a domestic or foreign corporation, limited partnership or other unincorporated association which is subject to suit under a common name:

F.(3)(d)(i) By personal service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership or association. In lieu of delivery of a copy of summons and complaint to the registered agent, officer, director, general partner or managing agent, such copies may be left at the office of such registered agent, officer, director, general partner or managing agent, with the person who is apparently in charge of the office; or

F.(3)(d)(ii) If no registered agent, officer, director, general partner, or managing agent can be found nor has an

office in the county where the action or proceeding is filed, the summons may be served: by personal service upon any person over the age of 14 years who resides at the dwelling house or usual place of abode of such registered agent, officer, director, general partner or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to such registered agent, officer, director, general partner or managing agent. Where service is made by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of a registered, agent, officer, director, general partner, or managing agent, the plaintiff shall immediately cause a copy of the summons and complaint to be mailed to the person to whom the summons is directed, at his dwelling house or usual place of abode, together with a statement of the date, time and place at which service was made.

F.(3)(d)(iii) In any case, by serving the summons in a manner specified in this rule or by any other rule or statute upon the defendant or an agent authorized by appointment or law to accept service of summons for the defendant.

F.(3)(e) Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant or clerk.

F.(3)(f) Upon any county, incorporated city, school district, or other public corporation, commission or board, by

personal service upon an officer, director, managing agent, clerk or secretary thereof. In lieu of delivery of the copy of the summons and complaint personally to such officer, director, managing agent, clerk or secretary, such copies may be left in the office of such officer, director, managing agent, clerk, or secretary with the person who is apparently in charge of the office. When a county is a party to an action or proceeding, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

F.(4) When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

G. Publication. (1) On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action or proceeding, the court may order service by publication.

G.(2) In addition to the contents of a summons as described in section C. of this rule, a published summons shall

also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(2) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

G.(3) An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced, or if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

G.(4) If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present and last known address of the defendant, mailing a copy of the summons and complaint is not required.

G.(5) If service cannot be made by another method described in section F. of this rule because defendants are unknown heirs or persons as described in sections I. and J.

of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien or interest in the real property in controversy, at the time of the commencement of the action and served by publication, shall be bound and concluded by the judgment in the action, if the same is in the favor of the plaintiff, as effectively as if the action or proceeding was brought against such defendants by name.

G.(6) A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, or the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

G.(7) Service shall be complete at the date of the last publication.

H. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons, issuance of summons and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines

that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons or proof of service of summons and shall disregard any error in service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

I. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

BACKGROUND NOTE

For service of process, see Rule 8. For service of subpoenas, see Rule 55.

ORS sections superseded: 15.020, 15.030, 15.040, 15.060, 15.080, 15.085, 15.090, 15.110, 15.120, 15.130, 15.140, 15.150, 15.160, 15.170, 15.180, 15.210, 15.220, 45.120.

COMMENT

This rule brings all general provisions for service of summons together in one place. It is designed to give a fairly specific description of the procedure to be followed but to reduce overtechnical requirements in commencement of an action. The important standard to be maintained is adequate notice to the defendant; if this is met, then deviations from the prescribed procedures for form of summons, issuance of summons, person serving, form of return and manner of service should not invalidate the service. Subsections E.(3) and F.(1) and Section 7 H. make this clear. Subsection F.(1) is the basic rule for manner of service; subsection F.(3) describes acceptable methods of service that would meet the standard of subsection F.(1), but these are not exclusive. Note, however, that summons must be served in some manner; mere knowledge of pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in Rule 4. They include service within the state and domicile within the state and to that extent location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule does not include any service of process on state agents who are fictionally appointed as agents for service of

process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants. To the extent that such service is retained in separate ORS sections, it would be within subparagraphs F.(3)(a)(iii) and F.(3)(d)(iii).

Section B. is based upon ORS 15.020.

Subsections C.(1) to (3) are based upon ORS 15.040 and 15.220. Subsection C.(4) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication of ORS 15.040, 15.110 and 15.140 to a uniform 30-day period. Service upon another authorized to accept service of summons for the defendant would include leaving a copy of the summons and complaint at a dwelling house or usual place of abode or an office or any type of service upon someone other than the named defendant.

Section 7 D. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 E. is based upon 15.060, 15.110 and 15.160. Subsection E.(3) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections E.(1) and (2).

The methods of service described in subsection F.(3) are modified forms of the methods of service described in 15.080. The most significant change is paragraph F.(3)(d), which provides that the preferred method of service is personal service (including leaving at their office) upon a responsible officer, director or agent in the county where the action is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service (including leaving at their office) upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph F.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules

dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection F.(4) was adapted from Federal Rule 4 (i).

The publication provisions of section 7 G. differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon the nature of the case or location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method but makes such publication available for any case. Once publication is available, the procedure followed is similar to that of the present statutes.

RULE 8

PROCESS - SERVICE OF PROCESS

A. Process. All process authorized to be issued by any court or officer thereof shall run in the name of the State of Oregon and be signed by the officer issuing the same, and if such process is issued by a clerk of court, the seal of office of such clerk shall be affixed to such process. Summons and subpoenas are not process and are covered by Rules 7 and 55, respectively.

B. County is a party. Process in an action or proceeding where any county is a party shall be served on the county clerk or the person exercising the duties of that office, or if the office is vacant, upon the chairperson of the governing body of the county, or in the absence of the chairperson, any member thereof.

C. Service or execution. Any person may serve or execute any civil process on Sunday or any other legal holiday. No limitation or prohibition stated in ORS 1.060 shall apply to such service or execution of any civil process on a Sunday or other legal holiday.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summons to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any other manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to section D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim.

A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on persons liable for attorney fees.

A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should

plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant

authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff immediately shall cause to be mailed a certified copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time and place at which substituted service was made. Substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office during normal working hours with the person

who is apparently in charge. Where office service is used, the plaintiff immediately ~~thereafter~~ shall cause to be mailed a certified copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office service was made. Office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of such minor's estate, or guardian or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides or in whose service such minor is employed or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person and also upon the conservator of such person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships, unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership, or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action

or proceeding is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or, by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action or proceeding is filed; or by mailing a copy of the summons and complaint to a registered agent, officer, director, general partner, or managing agent.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk, or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed

by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D.(5) Service by publication or mailing to a post office address.

D.(5)(a) Order for publication or mailing. On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service by publication, or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only.

D.(5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in section C.(3) shall state: "This paper must be given to the court within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action or proceeding shall proceed against such unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of

the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(5)(g) Completion of service. Service shall be complete at the date of the last publication.

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 an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. 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 ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

Affidavit of service.

F.(2)(a)(i) The affidavit of the server indicating the time, place, and manner of service, that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise, and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

Certificate of service.

F.(2)(a)(ii) If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service indicating the time,

place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or ~~describe~~ describing in detail the manner and circumstances of service. If the summons and complaint were mailed, the ~~affidavit~~ certificate shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.

F.(2)(b) Publication. Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon,)
: ss.
County of_____)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth

dates of issues in which the same was published).

Subscribed and sworn to before me this ____ day of _____, 19 __.

_____
Notary Public for Oregon

My commission expires
_____ day of _____, 19 __.

F.(2)(c) Making and certifying affidavit. The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F.(3) Written admission. In any case proof may be made by written admission of the defendant.

F.(4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G. Disregard of error; actual notice. Failure to strictly comply with provisions of this rule relating to the form of summons,

issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

H. Telegraphic transmission. A summons and complaint may be transmitted by telegraph as provided in Rule 8 D.

COMMENT

For process, see Rule 8. For service of subpoenas, see Rule 55.

This rule brings all general provisions for service of summons together in one place. The basic standards of adequacy of service of summons is set forth in the first sentence of ORCP 7 D.(1). Succeeding portions of the rule provide ways in which service may be made and how these ways may be used for particular defendants, including conditional preferences. The particular methods, however, are methods which may be used. The rule does not require them to be used. Compliance with the specific methods of service would be ~~prima facie~~ presumed to be service reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and afford a reasonable opportunity to appear and defend. Other methods of service might accomplish the same thing. Subsection 4 F.(4) and section 4 G. also make clear that any technical defects in the return, form of summons, issuance of summons, and persons serving do not invalidate service if the defendant received actual notice of the existence and pendency of the action. Note, however, that summons must be served and returned; mere knowledge of the pendency and nature of the action will not require the defendant to appear and defend.

The defined methods of service apply both to in state and out of state service. The grounds for personal jurisdiction are covered in ORCP 4. They include service within the state and domicile within the state and, to that extent, location of service is related to personal jurisdiction; beyond that, there is no reason to limit methods of service by territorial boundaries.

The rule does not describe any service of process on state agents who are fictionally appointed as agents for service of process upon out of state defendants. Modern jurisdictional theory does not require service within the boundaries of the state, and requiring service on the Corporation Commissioner or other state official is a useless act which is burdensome and expensive for the officials and litigants. To the extent that such service has been left temporarily in separate ORS sections, it is incorporated by the second sentence of subsection D.(1).

Section B. is based upon ORS 15.020 but makes clear what "issued" means.

Subsections C.(1) and (3) are based upon ORS 15.040 and 15.220. Subsection C.(2) changes the disparate time for response to services in the state, in another state, outside the United States, and by publication, previously contained in ORS 15.040, 15.110 and 15.140, to a uniform 30-day period. The notices to defendant in subsection C.(3) have been changed slightly to conform to changes elsewhere in the rules.

Again, the basic test of adequate service is set forth in the first sentence of subsection D.(1). A type of service, called office service, has been added in D.(2) and a specific description of service by mail has been added. The only specific service by mail described in the rule is in D.(3)(b)(ii).

The specific methods of service described in subsection D.(3) for particular defendants are modified forms of the methods of service described in ORS 15.080. The most significant change is in paragraph D.(3)(b), which provides that the preferred method of service is personal service or office service upon a responsible officer, director or agent in the county where the action is filed; if this cannot be accomplished, four alternatives are available to the plaintiff: personal service or office service upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent

so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph D.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules dealing with that subject. ORS 17.085 and 17.090 were eliminated.

Subsection D.(4) was adapted from Federal Rule 4 (i).

The publication provisions of section D.(5) differ from ORS 15.120 to 15.180 in the circumstances when publication is available. Under the existing statutes, publication is available only in certain classes of cases depending upon the nature of the case or location and availability of a defendant for service within the state. This rule makes publication available only as a last resort, when service can be accomplished by no other reasonable method but makes such publication available for any case. Once publiation is available, the procedure followed is similar to that of the present statutes.

Note, if a defendant h a mailing address and cannot othe wise be served, sec tion D.(5)(a allows a ju to order ma ing instead publication.

Subsection E. is based upon ORS 15.060 but eliminates a specific description of the sheriff. The sheriff, as a person over 18, can, of course, serve unless the sheriff is a party.

Section 7 F. is based upon ORS 15.060, 15.110 and 15.160. Subsection F.(4) would avoid invalidation of good service of summons because of some technical defect in the return. A return and proof of service are still required by subsections F.(1) and (2)

Subsection G. prevents invalidation of service because of technical defects and would allow amendment of summons or return.

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summons to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should

plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant

authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff immediately shall cause to be mailed a certified copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. Substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office during normal working hours with the person

who is apparently in charge. Where office service is used, the plaintiff immediately shall cause to be mailed a certified copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office service was made. Office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships; unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership, or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action

is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to a registered agent, officer, director, general partner, or managing agent.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk, or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed

by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D.(5) Service by publication or mailing to a post office address; other service by court order.

D.(5)(a) Order for publication or mailing or other service. On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service: by publication; or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or by any other method. If service is ordered by any manner other than publication, the court may order a time for response.

D.(5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "This paper must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of

the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(5)(g) Completion of service. Service shall be complete at the date of the last publication.

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 an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. 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 ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

F.(2)(a)(i) Affidavit of service. The affidavit of the server indicating: the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(ii) Certificate of service. If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service

indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom the copy of the summons and complaint was left or describing in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.

F.(2)(b) Publication. Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon)
: ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues:

(here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ___ day of _____, 19 ___.

_____
Notary Public for Oregon

My commission expires
____ day of _____, 19 ___.

F.(2)(c) Making and certifying affidavit. The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F.(3) Written admission. In any case proof may be made by written admission of the defendant.

F.(4) Failure to make proof; validity of service. If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G. Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of summons,

issuance of summons, and the person who may serve summons shall not affect the validity of service of summons or the existence of jurisdiction over the person, if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, or affidavit or certificate of service of summons, and shall disregard any error in the content of or service of summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

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This rule brings all general provisions for service of summons together in one place. The basic standards of adequacy of service of summons is set forth in the first sentence of ORCP 7 D.(1). Succeeding portions of the rule provide ways in which service may be made and how these ways may be used for particular defendants, including conditional preferences. The particular methods, however, are methods which may be used. The rule does not require them to be used. Compliance with the specific methods of service is presumed to be service reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and to afford a reasonable opportunity to appear and defend. Other methods of service might accomplish the same thing. Subsection 4 F.(4) and section 4 G. also make clear that any technical defects in the return, form of summons, issuance of summons, and persons serving do not invalidate service if the defendant received actual notice of the existence and pendency of the action. Note, however, that summons must be served and returned; mere knowledge of the pendency and nature of the action will not require the defendant to appear and defend.

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service or office service upon such persons wherever they may be found within or without the state; substituted service at the dwelling house or usual place of abode of such persons, whether located within or without the state; mailing to such persons; or service upon any agent who may be found in the county where the action was filed. Since the basic standard remains adequacy of notice, the agent so served must be one likely to notify responsible persons in the corporation of the pendency of the action. This paragraph applies to associations and limited partnerships which may be sued under a common name; service in the case of partnerships and associations not suable under a common name is service on the named individual defendants and is covered by paragraph D.(3)(a). The effect of service on less than all partnership or association members in terms of judgments and enforcement of judgments is left to ORS 15.100 and other rules dealing with that subject. ORS 15.085 and 15.090 were eliminated.

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OREGON RULES OF CIVIL PROCEDURE

Promulgated By

COUNCIL ON COURT PROCEDURES

December 2, 1978

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Mailing Address: University of Oregon
School of Law
Eugene, Oregon 97403

Telephone: 686-3880
686-3990

RULE 7

SUMMONS

A. Plaintiff and defendant defined. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought.

B. Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summons to a person authorized to serve summons under section E. of this rule. A summons is issued when subscribed by plaintiff or a resident attorney of this state.

C.(1) Contents. The summons shall contain:

C.(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C.(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C.(1)(c) Subscription; post office address. A subscription by the plaintiff or by a resident attorney of this state, with the addition of the post office address at which papers in the action may be served by mail.

C.(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D.(5) of this rule, the defendant shall appear and defend within 30 days from a date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C.(3) Notice to party served.

C.(3)(a) In general. All summonses other than a summons to join a party pursuant to Rule 22 D. shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately.

C.(3)(b) Service on maker of contract for counterclaim. A summons to join a party pursuant to Rule 22 D.(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

C.(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D.(3) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should

plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal paper called a "motion" or "reply." This paper must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately.

D. Manner of service.

D.(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant

authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D.(2) Service methods.

D.(2)(a) Personal service. Personal service may be made by delivery of a certified copy of the summons and a certified copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a certified copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff immediately shall cause to be mailed a certified copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. Substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a certified copy of the summons and complaint at such office during normal working hours with the person

who is apparently in charge. Where office service is used, the plaintiff immediately shall cause to be mailed a certified copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which office service was made. Office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a certified copy of the summons and a certified copy of the complaint to the defendant by certified or registered mail, return receipt requested. Service by mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused.

D.(3) Particular defendants. Service may be made upon specified defendants as follows:

D.(3)(a) Individuals.

D.(3)(a)(i) Generally. Upon an individual defendant, by personal service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons.

D.(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor, and also upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A.(2).

D.(3)(a)(iii) Incapacitated persons. Upon an incapacitated person, by service in the manner specified in subparagraph (i) of this paragraph upon such person, and also upon the conservator of such person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.(2).

D.(3)(b) Corporations; limited partnerships; unincorporated associations subject to suit under a common name. Upon a domestic or foreign corporation, limited partnership, or other unincorporated association which is subject to suit under a common name:

D.(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation, limited partnership, or association.

D.(3)(b)(ii) Alternatives. If a registered agent, officer, director, general partner, or managing agent cannot be found and does not have an office in the county where the action

is filed, the summons may be served: by substituted service upon such registered agent, officer, director, general partner, or managing agent; or by personal service on any clerk or agent of the corporation, limited partnership, or association who may be found in the county where the action is filed; or by mailing a copy of the summons and complaint to a registered agent, officer, director, general partner, or managing agent.

D.(3)(c) State. Upon the state, by personal service upon the Attorney General or by leaving a copy of the summons and complaint at the Attorney General's office with a deputy, assistant, or clerk.

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission or board, by personal service or office service upon an officer, director, managing agent, clerk, or secretary thereof. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the District Attorney of the county in the same manner as required for service upon the county clerk.

D.(4) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of summons is made in the manner prescribed

by the law of the foreign country for service in that county in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court, provided, however, that in all cases such service shall be reasonably calculated to give actual notice.

D.(5) Service by publication or mailing to a post office address; other service by court order.

D.(5)(a) Order for publication or mailing or other service. On motion upon a showing by affidavit that service cannot be made by any other method more reasonably calculated to apprise the defendant of the existence and pendency of the action, the court may order service: by publication; or at the discretion of the court, by mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or by any other method. If service is ordered by any manner other than publication, the court may order a time for response.

D.(5)(b) Contents of published summons. In addition to the contents of a summons as described in section C. of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C.(3) shall state: "This paper must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D.(5)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks.

D.(5)(d) Mailing summons and complaint. If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained, the plaintiff shall mail a copy of the summons and complaint to the defendant. When the address of any defendant is not known or cannot be ascertained upon diligent inquiry, a copy of the summons and complaint shall be mailed to the defendant at defendant's last known address. If plaintiff does not know and cannot ascertain, upon diligent inquiry, the present or last known address of the defendant, mailing a copy of the summons and complaint is not required.

D.(5)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in sections I. and J. of Rule 20, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect, and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of

the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D.(5)(f) Defending after judgment. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D.(5)(g) Completion of service. Service shall be complete at the date of the last publication.

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 an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. 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 ORS 20.020.

F. Return; proof of service.

F.(1) Return of summons. The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by mail.

F.(2) Proof of service. Proof of service of summons or mailing may be made as follows:

F.(2)(a) Service other than publication. Service other than publication shall be proved by:

F.(2)(a)(i) Affidavit of service. The affidavit of the server indicating: the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the affidavit when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the affidavit shall state the circumstances of mailing and the return receipt shall be attached.

F.(2)(a)(ii) Certificate of service. If the copy of the summons is served by the sheriff, or a sheriff's deputy, proof may be made by the sheriff's or deputy's certificate of service

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F.(2)(a)(iii) Form. An affidavit or certificate containing proof of service may be made upon the summons or as a separate document attached to the summons.

F.(2)(b) Publication. Service by publication shall be proved by an affidavit in substantially the following form:

Affidavit of Publication

State of Oregon)
: ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____(here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues:

(here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ___ day of _____, 19 ___.

_____
Notary Public for Oregon

My commission expires
____ day of _____, 19 ___.

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