



PROFESSIONAL LIABILITY FUND  
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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

## FILING AND SERVICE TIPS AND TRAPS

Filing and service mistakes form a large percentage of the claims handled each year by the Professional Liability Fund. With diligence and proper follow-through, most of these errors can be avoided. Here are some of the most common traps and a few simple tips to help you avoid becoming a malpractice statistic.

### SAFE FILING

ORCP 9E states that pleadings and other papers shall be filed with the clerk of the court. To avoid mistakes, stamp every document for court filing with the designation ORIGINAL or, if it is a courtesy copy for the judge or staff, with the designation COPY. The visual impact of ORIGINAL is eye-catching for every person in the legal system. It always gets a second look, special treatment, and due consideration. Always file the original with the court clerk. Delivery of documents to the judge's clerk, staff, or even the judge is **NOT** filing according to ORCP 9E. See *Averill v. Red Lion*, 118 Or App 298, 846 P2d 1203 (1993), *rev den*, 317 Or 271, 858 P2d 1313 (1993).

Be sure to include the correct filing fee. Documents that don't include the correct filing fee may be rejected or not filed.

### SERVE WITHIN 60 DAYS OF FILING

Generally, an action is deemed commenced only after the complaint is filed and the summons served. ORS 12.020(1). For the action to be deemed commenced on the date the complaint is filed, the summons and complaint *must be served*

*within 60 days of filing the complaint.* ORS 12.020(2). If the complaint is filed close to the running of the statute of limitations, it is critical to serve it within 60 days of the date the complaint was filed. Otherwise, the "commencement date" will be the date of service (not the date of filing), and the plaintiff's rights may be time-barred. Whenever possible, do not wait until the last minute to file or serve the complaint – even if you hope the case will settle.

When you are handling a case with time-limitation deadlines, identify and docket the deadline for the time limitation, the date by which service must be accomplished, and additional reminders in intervals before the ultimate deadline. Remember, service must be made within 60 days of filing the complaint for the action to be deemed commenced on the date the complaint in the action was filed. ORS 12.020(2).

### VERIFY SERVICE

Select a reputable process server with errors and omissions coverage. Give the process server a certified true copy of the summons and complaint, with as much lead time as possible before the ultimate deadline. Provide the process server with complete written instructions for service. (See sidebar.) Use your calendar and/or tickler systems to remind you to call the process server before the service deadline to verify that service has been accomplished and by what method.

If personal service was used, obtain the return of service, review it, file it promptly with the court, and docket the deadline for the defendant's first appear-

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#### DISCLAIMER

THIS NEWSLETTER INCLUDES CLAIM PREVENTION TECHNIQUES THAT ARE DESIGNED TO MINIMIZE THE LIKELIHOOD OF BEING SUED FOR LEGAL MALPRACTICE. THE MATERIAL PRESENTED DOES NOT ESTABLISH, REPORT, OR CREATE THE STANDARD OF CARE FOR ATTORNEYS. THE ARTICLES DO NOT REPRESENT A COMPLETE ANALYSIS OF THE TOPICS PRESENTED, AND READERS SHOULD CONDUCT THEIR OWN APPROPRIATE LEGAL RESEARCH.

ance. If substitute or office service was used, obtain the return of service, file it promptly with the court, do the necessary follow-up mailing by first-class mail, file the appropriate affidavit with the court, and docket the first appearance deadline. Service is not complete until the follow-up mailing has been accomplished. See ORCP 7D.

The PLF claim files are full of good reasons why you should never wait until the last minute to provide the papers to your process server. For example, the process server may not understand the need to immediately serve the documents and may not timely accomplish service. If the deadline runs, you may be faced with a legal malpractice claim.

**Practice Tip:** On September 29, 2005, the Oregon Supreme Court in *Burden v. Copco Refrigeration, Inc.*, 339 Or 388, 121 P3d 1133, reversed the Oregon Court of Appeals and held that a certificate of service is prima facie evidence of the material facts that it recites, and that a plaintiff can rely on those facts to meet the burden of production on sufficiency of service of process. The court of appeals had ruled that the plaintiff could only meet that burden through an affidavit or “other competent evidence,” and that a certificate of service was not sufficient evidence of service.

### **SERVICE BY MAIL**

In motor vehicle cases, you can use the alternate steps for service by mail outlined in ORCP 7D(4). To qualify, you must make at least one attempt to serve the defendant by a method *other* than mailing. Multiple mailings to different addresses may be required, and care must be taken to mail to all the addresses specified. ORCP 7D(4)(a)(i). Be sure to obtain updated address information from the DMV. You should initiate service by mail under ORCP 7D(4) immediately after other service methods fail. Service under this part of the rule is completed on the latest day on which any of the required mailings is made, and it must be accomplished within 60 days if you want to rely on the filing date for statute of limitations purposes.

### **OTHER SERVICE METHODS**

Service on tenants of mail agents, service by publication, and primary service by mail are other methods of service available to practitioners; however, these methods can only be used in specific circumstances. If you have not been able to achieve

personal service on a defendant, make it a practice to review and carefully follow ORCP 7D. Use your calendar and/or tickler systems to remind you to check on the progress of the process server.

### **NEVER GRANT EXTENSIONS WITHOUT WAIVER OF SERVICE CHALLENGE**

When filing complaints close to the statute of limitations, never grant the defendant an extension of time in which to appear unless the defendant agrees to stipulate to the sufficiency of service. Otherwise, if the extension is granted and service is successfully challenged after the time limitation has run, the plaintiff’s claim will be barred.

### **SUING A CORPORATE DEFENDANT**

Many legal malpractice claims are caused by naming the wrong corporate defendant. In many instances, the lawyer was given a corporate name that was very close to the correct corporate name. Contact the Oregon Secretary of State Corporation Division to find the exact name of a business.

To search the Corporation Division’s Web site, go to [www.filinginoregon.com](http://www.filinginoregon.com) and click on Business Name Search. The site offers various search options, ranging from very restrictive, “Exact words in exact word order,” to very broad, “Extended search in any word order.” The broad approach, “Extended search in any word order,” will provide you with the names of business entities that contain the words spelled exactly as keyed, in any order, and in combination with any other words. This search also includes synonyms and words that sound similar.

Be sure to use the broad search when you are unsure of the precise name of the company. This will help to avoid a common malpractice trap and the unpleasant surprise of finding out that your entity search name was inadequate. For example, if you check for only a specific name, such as Valley Inn, and that name is matched, you will only get information on that particular entity. You will not get a list of other similar entities, such as Valley Inn Restaurant.

If you don’t have Internet access or prefer not to do the search yourself, the Corporation Division will perform the search for a fee. Call the Custom Searches & Lists department at 503-986-2343.

For more tips, traps, and resources on suing a

corporate defendant, go to [www.osbplf.org](http://www.osbplf.org) and click on News, then on the link to “Suing a Corporate Defendant.”

### **SUING AN INSURANCE COMPANY**

If you are planning to sue an insurance company, you must check with the Insurance Division (INS) of the Oregon Department of Consumer and Business Services (DCBS) to verify the correct legal name, status, and registered agent of the insurer. Be careful – you must file the suit against the insurer, not the insurance agent. Do not contact the Oregon Secretary of State Corporation Division – you may get the name of an insurance agent instead of the insurer.

Most insurance companies are groups of companies. If you look at the top of the declarations page of the typical insurance policy, you will often see several companies listed with a box next to each name. When the policy is written, the box is marked that corresponds to the insurance company that is issuing the policy. Make sure you have sued the correct insurance company within the group. For example, “The Better Insurance Group” is not a legal entity. It is probably a group of insurance companies such as Better Auto Insurance Company, Better Indemnity Company, and Better Fire and Casualty Insurance. You need to determine which one has issued the policy.

You can access the INS Web site at the following address: <http://www4.cbs.state.or.us/ex/ins/inslic/company/search/index.cfm> to get the contact information for the insurance company and its registered agent. Choose “Search for an insurance company by name or number” to search for the exact name of the insurance company as indicated on the declarations page. To contact the Oregon Insurance Division, call 503-947-7980 or e-mail [dcbs.insmail@state.or.us](mailto:dcbs.insmail@state.or.us).

### **OREGON TORT CLAIMS ACT**

In recent Oregon circuit court cases involving claims against public bodies, the government has contended that a complaint filed under ORS 30.275 must be filed and served within the two-year statute of limitations, and that the plaintiff may not take advantage of the additional 60-day relation-back period in ORS 12.020 to serve a timely filed complaint. At least one court has rejected this interpretation of

the statutes, but the issue is far from resolved in all circuits. To avoid facing this challenge, file and serve the complaint within the two-year statute of limitations.

For an action to be timely commenced against a public body, the plaintiff must also give the proper tort claim notice under ORS 30.275. The notice of claim must be given within one year for wrongful death claims and within 180 days of an injury for all other claims.

The OTCA is **NOT** tolled for minors. If you are representing a minor on a claim against a public body, you must file the claim within the statute of limitations through a *guardian ad litem*.

### **REFILING DISMISSED CASES IF DEFENDANT HAS ACTUAL NOTICE**

ORS 12.220 was enacted in 2003 to help correct procedural deficiencies with service. Under ORS 12.220, if a new action is commenced not later than 180 days after the judgment dismissing the original action is entered, and the original action was involuntarily dismissed without prejudice on procedural grounds not adjudicating the merits of the action, the plaintiff can then refile the case, provided that the defendant in the original action had “actual notice” of the filing of the original action not later than 60 days after that action was filed. What constitutes “actual notice” is a question of fact. This statute provides an opportunity to try to revive the dismissed case.

### **IF YOU MADE A MISTAKE**

If you think you made a mistake or if the opposing side is challenging your filing or service, call the PLF at 503-639-6911 or 800-452-1639 and ask to speak to a claims attorney.

### **OTHER RESOURCES**

For more tips on avoiding common mistakes when filing and serving a defendant, order your free copy of the CLE program, *Avoiding Malpractice When Filing and Serving a Defendant*, from the PLF Web site. Go to [www.osbplf.org](http://www.osbplf.org), select CLE Audio Programs or CLE Video Programs under Loss Prevention. The PLF also has an extensive library of practice aids and forms, including a Service of Process Checklist. From the home page, select Practice Aids and Forms under Loss Prevention and look for the Litigation category.

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