

This outline was created for the July 2006 Oregon bar exam. The law changes over time, so use with caution. If you would like an editable version of this outline, go to [www.barexammind.com/outlines](http://www.barexammind.com/outlines).

## Civil Procedure Outline: Federal First, then Oregon Distinctions

### I. Personal Jurisdiction

#### a. Basic Idea

- i. In which state(s) can P sue D?
- ii. Use two-step analysis:
  1. satisfy the statute? (ie, long-arm statute)
  2. satisfy the const (ie, due Process)
- iii. Same test in state and Fed Court

#### b. Statutory Analysis

##### i. Look to words of long-arm statute

##### 1. OREGON ORCP 4

- a. Local act or omission by D
- b. Local injury; foreign act
  - i. D or his agent solicits or acts inside state; or
  - ii. D's products are used/distributed inside the state in ordinary course of trade
- c. Local services, goods or contracts
  - i. Promise made anywhere to P to perform within state; or
  - ii. Services actually performed within state
- d. Local property
  - i. Action arises out of ownership, use or possession of real property in Oregon
- e. Misc
  - i. Insure risks in state
  - ii. Sell securities in state
  - iii. Divorce: lived here 6 months or moved within 1 year

##### 2. Also need NOTICE. See Service of Process

- ii. If says "reaches to limits of const," then do const analysis

#### c. Constitutional analysis (*International shoe*)<sup>1</sup>

<sup>1</sup> Mnemoic: My Parents Frequently Forgot to Read Children's Stories.

Minimum Contacts

-purposeful availment

-foreseeability

Fair Play and Substantial Justice

-relatedness of the contact

-convenience

-state's interest

- i. **WORDS:** “does D have such minimum contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice?”
- ii. Easy cases:
  1. D is domiciled in forum
  2. D is served personally in forum
- iii. Hard cases; look at two main factors: contact and fairness
  1. **contact:** must be some tie between D and forum
    - a. must result from D’s **purposeful availment** (ie, an affirmative act)
    - b. must be **foreseeable** that D would be sued in the forum
  2. **fairness** (ie, fair play and substantial justice)
    - a. **relatedness** between contact and the claim
      - i. NB: if small contact, was it of such quality as to make up for the smallness?
      - ii. NB: relatedness NOT needed if D has *substantial ties* with the forum
    - b. **Convenience**
      - i. D must show a *severe disadvantage* in litigation in the forum state
    - c. Look to **state’s interest**
      - i. Ie, provide forum for citizens

## II. Subject Matter Jurisdiction (SMJ)

- a. Basic Idea: we know what state we are in, but now we need to figure out what court (state or federal) we will be in
- b. **DO SMJ ANALYSIS FOR EACH AND EVERY CLAIM IN AN ESSAY QUESTIONS!!!!**
  - i. Two types of SMJ:
    1. diversity
    2. federal question
- c. **Diversity of Citizenship**
  - i. Requirements
    1. citizens of different states (or foreign citizen)
    2. amount in controversy *exceeds* \$75,000
  - ii. **citizenship**
    1. complete diversity required *at time action is filed*
    2. citizenship determined by:
      - a. humans: state of domicile
        - i. domicile is:
          1. presence in the state; and
          2. subjective intent to make permanent home
      - b. corporations: located in two states:
        - i. state of incorporation; and
        - ii. state where principal place of business (PPB)
          1. PPB Test:
            - a. Location of HQ; or

- b. More production or service activity than anywhere else
    - c. Unincorporated association (partnerships, unions, LLC)
      - i. Determine citizenship of ALL members
    - d. Decedents, minors, and incompetents
      - i. Look to *their* citizenship, NOT citizenship of their *representative*
      - ii. EXCEPT in class action (below)
  - iii. **Amount in controversy**
    - 1. must exceed \$75,000
    - 2. whatever P pleads is fine, UNLESS it is *clear to a legal certainty* that P can't recover that much
    - 3. aggregation
      - a. yes, if claims of 1 P vs. 1 D
      - b. no, if claims of 2 Ps vs. 1 D
      - c. joint tortfeasors if sued by 1 P
    - 4. *Equitable Relief* (rare)
      - a. Test whether injunction is either
        - i. Worth \$75k+ to P or
        - ii. Will cost D \$75k+
  - iv. Can't get diversity via *collusion*
- d. **Federal Question Jurisdiction**
  - i. Claim "arises under" federal law
    - 1. look to *well-pleaded complaint* rule to determine
    - 2. ASK: is P enforcing a federal right?
      - a. Yes = FQ
      - b. NO = No FQ
- e. **Supplemental Jurisdiction**
  - i. Issue: fed court has SMJ over at least one claim; how can we get the non-SMJ claims in?
  - ii. TEST:
    - 1. is there a common nucleus of operative fact?
    - 2. ie, do the claims arise from the same transaction or occurrence (T/O)?
  - iii. Limitation
    - 1. P cannot use supplemental jurisdiction to overcome a lack of diversity in a *diversity of citizenship* case for a claim made by P (see hypos p.8 in OICW)
    - 2. BUT, P can overcome lack of diversity in a FQ claim
    - 3. AND, P can overcome failure to meet amount in controversy req in a diversity case against a second D
    - 4. AND, will overcome lack of diversity OR amount in cont. by anyone other than initial P
- f. **Removal**
  - i. Only Ds may remove from state to federal court if
    - 1. the case *could have been brought* in federal court

- 2. if multiple Ds, ALL must agree to remove
  - ii. removed to federal district embracing the state court
  - iii. Remove 30 days after **service** of the *first removable document*
    - 1. and always removed within 1 year of initial filing
  - iv. EXCEPTION
    - 1. if D sued in D's home state under *diversity of citizenship case* ONLY, D can't remove
    - 2. if that D drops out, then remaining D could then remove
- g. **Erie doctrine**
  - i. In diversity cases, federal court must apply substantive law of state in which it sits
    - 1. Easy issues:
      - a. elements of claim or defense
      - b. sol
      - c. rules for tolling of sol
      - d. choice of law
    - 2. Difficult issue analysis:
      - a. Is there a preempting federal law to be applied? If yes, apply it b/c of Supremacy Clause
      - b. If no, judge balances interests, outcome determinativity, and need to prevent forum shopping to determine applicable law

### III. Venue

- a. Basic Idea: SMJ says to go to fed court, but which fed court in the state?
- b. Local actions (on land)
  - i. Filed in place where land located
- c. If not local action then, file in **any district where...**
  - i. **All defendants reside\* or (Oregon:** where any D resides)
    - 1. \*special rule: if Ds reside in same state but different districts, then can sue in either of the districts
  - ii. **A substantial part of the claim arose**
- d. Where do Ds *reside* for venue purposes?
  - i. Humans: at place of domicile
  - ii. Corporation: in all districts where it is subject to personal jurisdictions (eg, Ford Motor resides everywhere)
- e. **Transfer** of venue
  - i. Can only transfer to district where could have filed
    - 1. ie, place of proper venue; and
    - 2. personal juris over D
      - a. NB: these must be true *without waiver* by D
  - ii. If original venue was proper, court has discretion to transfer if:
    - 1. convenience of parties and interest of justice
- f. Forum Non Conveniens
  - i. Case should be in a foreign country; dismissed

### IV. Service of Process

- a. Basic idea: P needs to deliver within 120 days of filing to D a

- i. Summons (notice of suit and time to respond); and
  - ii. Complaint
- b. Mechanics of Service
  - i. Personal service: valid anywhere in forum state
  - ii. Substituted service:
    - 1. left at D's usual abode
    - 2. with someone of suitable age & discretion *who resides there*
  - iii. Service on D's agent
  - iv. Method provided by state law
  - v. Waiver by mail
    - 1. D must return within 30 days; otherwise must
    - 2. serve by personal or substituted service
- c. Immunity
  - i. If in forum state only to testify in *civil matter*, then D is immune
- d. **OREGON ORCP 7**
  - i. Notice must be "reasonably calculated, under all the circumstances, to inform D" of the suit and provide reasonable chance to defend
  - ii. ORCP 7D: 4 types of service
    - 1. personal service: deliver S&C directly to D
    - 2. substituted service: deliver S&C to D's usual place of abode and leave with someone 14 or older. Must also *mail* copy to D with statement on details of service
    - 3. Office service: leave S&C at business office of D during normal hours with a *person in charge*, and mail copies to usual abode or place of business
    - 4. Mail service: by first class mail AND certified, registered, or express mail, return receipt requested
  - iii. When methods used:
    - 1. individual D: personal, substituted, office
    - 2. corporate D: officer or clerk for registered agent, in person or by mail
    - 3. partnership D: serve a partner or authorized agent
  - iv. *Actual Notice*
    - 1. if P is responsible for giving D actual notice of suit, then defects in service may be overlooked (use TOC test)

## V. Pleadings

- a. Federal court requires **notice pleading**
- b. Rule 11
  - i. All pleadings must be signed by atty or pro se
  - ii. Signature *certifies that*, after reasonable inquiry,
    - 1. the paper is not for improper purpose,
    - 2. legal contentions are warranted by law, and
    - 3. factual contentions or denial of factual contentions have or are likely to have evidentiary support
      - a. NB: certification is continuing throughout action
  - iii. Sanctions possible if violation

1. sanction are for deterrence
2. serve opposing party first; 21 day safe harbor
3. NB: court can raise sanctions sua sponte

c. **Complaint**

- i. Commences the action
- ii. Requirements:
  1. statement of SMJ
  2. Notice pleading: short and plain statement of claim, showing entitled to relief
    - a. **Oregon**: Fact pleading of *ultimate* facts; state all joined claims separately
  3. demand for judgment
  4. *Special matters* requiring more specificity:
    - a. Fraud
    - b. Mistake
    - c. Special damages

d. **D's Response:** Rule 12 motion OR Answer

i. **Rule 12 Motion**

1. issues of form:
  - a. make more definite
  - b. mtn to strike immaterial pleadings
2. 12(b) defenses
  - a. lack of SMJ
  - b. lack of PJ (waivable)
  - c. improper venue (waivable)
  - d. insufficiency of process (waivable)
  - e. insufficient service of process (waivable)
  - f. failure to state a claim
  - g. failure to join indispensable party
3. If waivable, MUST be placed in first responsive pleading or they are lost
4. **Oregon**
  - a. Only failure to raise PJ in first filing is waiver of that defense

ii. **Answer**

1. serve within 20 days of receiving process (**Oregon**: 30 days) OR
  - a. 10 days after court ruling on motion
  - b. 60 days if D waves formal service
2. Contents:
  - a. Admit
  - b. Deny
    - i. NB: failure to deny can constitute an admission
  - c. State you lack sufficient information to admit or deny
  - d. Raise all *affirmative defenses* or probably waived

e. **Counterclaim**

- i. Compulsory

1. arises from same T/O as P's claim
2. MUST be filed in pending case or is waived
- ii. Permissive (all **Oregon** counterclaims are permissive)
  1. does NOT arise from same T/O as P's claim
  2. may assert in separate action
- iii. Analytical steps:
  1. is counterclaim procedurally correct?
  2. does fed court have SMJ over counterclaim?
  3. if not, does supplemental jurisdiction save it?
- f. **Cross-claim**
  - i. Never compulsory
  - ii. Against a co-party and arises out of same T/O
  - iii. Analytical steps:
    1. procedurally correct?
    2. SMJ or supplemental juris?
- g. **Amending pleadings**
  - i. Plaintiff
    1. right to amend ONCE before D serves answer
  - ii. Defendant
    1. right to amend ONCE within 20 days of serving answer
  - iii. Leave of court
    1. discretion to amend if not right available
  - iv. Variance [bar testers love]
    1. amend to bring pleadings in line with evidence offered at trial
  - v. Relation back; amend after sol has run
    1. amendment will relate back if it concerns the same conduct, T/O as the original pleading

## VI. Joinder of Parties

- a. Permissive joinder of co-Ps or co-Ds
  - i. Claims arise from same T/O; and
  - ii. Raise at least one common question
- b. Necessary/Indispensable Parties
  - i. Three step analysis:
    1. Who is necessary? An absentee who meets one of these:
      - a. Without A, court cannot accord complete relief;
      - b. A's interest may be harmed if not joined; or
      - c. A claims interest which subjects a party to multiple obligations
    2. Can A be joined?
      - a. Only if *feasible*, ie
        - i. There is personal jurisdiction over A; and
        - ii. Joining won't destroy diversity
    3. If A can't be joined, either
      - a. Proceed without him; or
      - b. Dismiss the case
- c. **Impleader** (aka 3<sup>rd</sup> party practice)

- i. Within 10 days of serving answer OR with court permission
- ii. SMJ issue
  - 1. a non-diverse 3<sup>rd</sup> party D can be implead by D, but P cannot assert a claim against TPD or else P destroys the diversity

d. **Intervention**

- i. Rare on bar

e. **Interpleader**

- i. Rare on bar

f. **The Class Action**

- i. Initial requirements
  - 1. *Numerosity*: to many for practicable joinder
  - 2. *Commonality*: same questions of law or fact in common to the class
  - 3. *Typicality*: rep's claims/defenses typical of the class; and
  - 4. *Adequate representation*: class rep fairly reps class
- ii. Which of three class actions is it?
  - 1. Prejudice: deciding for one claimant could prejudice others (eg, fighting over a pot of money)
  - 2. Injunction/Declaratory relief: class members treated alike (eg, employment discrimination)
  - 3. Damages: (most common)
    - a. Common questions predominate over individual questions; and
    - b. Class action superior method to handle dispute
- iii. Court certification
  - 1. determined at "an early practicable time"
  - 2. cert defines the class, the claims, issues, or defenses
  - 3. counsel must *fairly and adequately* represent interests of class
- iv. Notice to class
  - 1. only in Type 3 class action
  - 2. class rep bears expense
  - 3. **contents** of notice:
    - a. can opt out
    - b. bound by case if don't opt out
    - c. can have separate counsel
- v. Who is bound?
  - 1. all members of any class action, except those who opt out of Type 3 action
- vi. Settlement/Dismissal of Claims
  - 1. court approval required in all Types
  - 2. if Type 3, class members must have 2<sup>nd</sup> chance to opt out
- vii. SMJ
  - 1. FQ possible
  - 2. diversity based on representative's citizenship

VII. Discovery

a. **Discovery Tools**



- i. Depositions
  - 1. written or oral
  - 2. for *non-parties*, need subpoena or no need to attend
  - 3. max 10 deps and only depose each person once, UNLESS court approval
- ii. Interrogatories
  - 1. only used against a party, NOT non-party
  - 2. must respond/object within 30 days
  - 3. **Oregon**: NO Written Interrogatories!
- iii. Request for Production
  - 1. against a party
  - 2. *non-party* with subpoena
  - 3. respond/object within 30 days
- iv. Physical or Mental Exam
  - 1. only against party
  - 2. only with court order
- v. Request for admission
  - 1. only against party
- b. **Scope of discovery**
  - i. Anything *relevant* to a claim or defense (ie, in the pleadings)
  - ii. Relevant: reasonably calculated to lead to the discovery of admissible evidence (ie, discovered info need not be admissible)
- c. **Work Product**
  - i. Material prepared *in anticipation of litigation*
  - ii. Generally protected from discovery
  - iii. Analysis:
    - 1. start with assumption that NOT discoverable, BUT
    - 2. can be discovered if:
      - a. substantial need; and
      - b. not otherwise available
- d. **Enforcement of Discovery Rules**
  - i. Protective order
  - ii. Partial violation/light sanction
    - 1. party objects improperly to some discovery requests
    - 2. made good faith effort to resolve issue
    - 3. seek motion to compel and atty fees
      - a. if violation of compel order, then heavy sanctions
  - iii. Total violation/heavy sanction
    - 1. party improperly fails to fulfill any discovery requests
    - 2. heavy sanctions:
      - a. establishment order
      - b. strike pleadings
      - c. disallow evidence
      - d. dismiss case (if bad faith shown)
      - e. enter default judgment (if bad faith shown)

## VIII. Pretrial Adjudication

- a. **Failure to State a Claim:** 12(b)(6)
  - i. Standard
    - 1. court assumes truth of all well-pleaded facts
    - 2. asks: if everything is true, would the person win?
      - a. If No, then case dismissed
- b. **Summary judgment**
  - i. Moving party must show:
    - 1. no genuine issue of material facts; AND
    - 2. entitled to judgment as a matter of law
  - ii. Standard
    - 1. court views facts in light most favorable to non-moving party
    - 2. non-moving party cannot rest on pleadings and cannot use inadmissible evidence to counteract the MSJ
      - a. non-moving party must present new evidence (typically an affidavit)

#### IX. Conferences and Meetings

- a. **Pretrial conference**
  - i. Final one determines what will be said/presented at trial
  - ii. Can be no surprises at trial

#### X. Trial, Judgment, and Post-Trial Motions

- a. **Right to Jury Trial in FEDERAL court**
  - i. 7<sup>th</sup> Amendment
  - ii. only get jury in civil actions at law, not equity
    - 1. if both law and equity, have legal trial with jury first, then move to equitable issues in bench trial
  - iii. Demand for jury trial must be within 10 days of service of last pleading raising a triable
  - iv. Selection
    - 1. unlimited strikes for cause
    - 2. 3 peremptory challenges
      - a. b/c jury selection is state action, can't discriminate on race or gender
- b. **Motion for Judgment as a Matter of Law (JMOL)**
  - i. When brought?
    - 1. after other side is heard
      - a. D can move twice
      - b. P can only move once
  - ii. Standard
    - 1. Reasonable people could not disagree on the result
    - 2. View evidence in light most favorable to non-moving party
  - iii. **Oregon**
    - 1. called "directed verdict"
- c. **Renewed JMOL**
  - i. When brought?
    - 1. within 10 days of judgment
  - ii. Standard

1. Reasonable people could not disagree on the result
- iii. MUST HAVE moved for JMOL at close of ALL EVIDENCE. If not, then *cannot bring RJMOL!!!*
- iv. **Oregon**
  1. called JNOV
- d. **Motion for a new trial**
  - i. When brought?
    1. within 10 days of judgment
  - ii. Standard
    1. claim that errors at trial require a new trial
      - a. prejudicial error
      - b. new evidence arises that could not have been obtained with due diligence
      - c. prejudicial misconduct of a party, atty, 3<sup>rd</sup> party, or juror
      - d. judgment against weight of evidence
    2. NB: less radical than RJMOL since merely grants new trial, not opposite verdict

## XI. Appeal

- a. **Final judgment rule**
  - i. Must be final decision on the merits before appeal
    1. eg, grant of full MSJ
    2. after evidence at trial
  - ii. Filed notice within 30 days with trial court
- b. **Interlocutory review**
  - i. Rare

## XII. Claim and Issue Preclusion

- a. Issue: does a judgment entered in Case #1 preclude litigation of any matters in Case #2?
- b. **Claim preclusion (aka res judicata)**
  - i. Same claimant vs. same defendant
  - ii. Case #1 ended with valid judgment on the merits
    1. ie, any judgment EXCEPT based on
      - a. jurisdiction
      - b. venue
      - c. indispensable parties
  - iii. Both cases based on the same claim
    1. two theories for defining same claim:
      - a. same T/O; or
      - b. primary rights (ie, property damage claim vs. a personal injury claim)
- c. **Issue preclusion (aka collateral estoppel)**
  - i. Precludes relitigation of a particular *issue*
  - ii. Requirements:
    1. judgment on the merits in first case
    2. same issue was actually litigated (eg, default judgment cannot create issue preclusion)

3. issue was essential to case #1
4. asserted against party to case #1
5. asserted by:
  - a. traditional view: mutuality; party to case #1
  - b. modern view: permits nonmutual assertion
    - i. defensive: most courts allow
    - ii. offensive: most courts won't allow, but trend to allow if it would not be *unfair*
      1. foreseeability of multiple suits
      2. P couldn't easily be joined to case #1
      3. no inconsistent judgments

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