

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT SPR13-20

Title	Action Requested
Family Law: Clarification of Rules Regarding Service and Posting of a Summons and Forms of Pleading	Review and Submit Comments by June 19, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend rules 5.68, 5.72, and 5.74 of the California Rules of Court	January 1, 2014
Proposed by	Contact
Family and Juvenile Law Advisory Committee	Gabrielle D. Selden, 415-865-8085 gabrielle.selden@jud.ca.gov
Hon. Kimberly J. Nystrom-Geist, Cochair Hon. Dean T. Stout, Cochair	
Elkins Family Law Implementation Task Force	
Hon. Laurie D. Zelon, Chair	

Executive Summary and Origin

The restructuring of Title V of the California Rules of Court (known as the Family Rules) became effective January 1, 2013. Since the implementation of the new and revised rules, court personnel have suggested that changes to some rules are necessary to clarify their meaning. Specific amendments to rule 5.68 (Manner of service of summons and petition; response; jurisdiction), rule 5.72 (Court order for service by publication or posting when respondent's address is unknown), and rule 5.74 (Pleadings and amended pleadings) are included in this proposal.

The Proposal

Rule 5.68. Manner of service of summons and petition; response; jurisdiction

This proposal would amend rule 5.68(a)(5) to reflect procedures used by the court to help effect service of judicial documents on a person located in a foreign state.

As relates to service of process on a person outside the United States, rule 5.68(a)(5) provides that service must be done in compliance with service rules of the Convention on the Service

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).¹ However, the United States is also signatory to a pair of international treaties that regulate international service of process—the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Inter-American Convention on Letters Rogatory (IACAP).² The IACAP provides a mechanism to facilitate judicial assistance between countries by a central authority (the U.S. Department of Justice is the central authority for such requests originating from the United States). Reference to the IACAP is not included in the rule and is needed to reflect an additional authority by which service may be effected on a person subject to the jurisdiction of a court in such countries as Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, and Venezuela.

Rule 5.72. Court order for service by publication or posting when respondent’s address is unknown

Rule 5.72(b)(1) requires that to request permission for service by posting, a party has to have already received a fee waiver granted on form FW-003 (*Order on Court Fee Waiver*). However, the rule mentions no other types of fee waiver orders, such as form FW-005 (*Notice: Waiver of Court Fees*; the automatic fee waiver granted after five days) or form FW-008 (*Order on Court Fee Waiver After Hearing*), which may be a full or a partial waiver. Therefore, the rule appears to preclude a party from requesting an order for service by posting if he or she obtains an order waiving court fees on any form other than FW-003.

Under Code of Civil Procedure section 415.50, service by publication or posting is appropriate in cases in which a petitioner has made diligent efforts to locate the respondent but has been unable to do so. Case law allows for posting of documents if the petitioner is unable to afford the costs of publication. For example, in *Boddie v. Connecticut* (1971) 401 U.S. 371, the U.S. Supreme Court held that service by posting is equally as effective as publication in a newspaper and posed less of a burden on state funds. Further, the U.S. Supreme Court in *Boddie* held that the due process of law prohibits a state from denying access to its courts—solely because of inability to pay court fees and costs for service of process—to indigents who, in good faith, seek judicial dissolution of their marriages.

Because the particular form used to obtain a fee waiver order used does not determine a party’s eligibility to seek an order for publication or posting, the committee and task force propose amending rule 5.72 to remove the reference to any specific Judicial Council form number. Making this change would assure procedural fairness by helping a petitioner and the court

¹ Under the Hague Service Convention, service of judicial documents may be effected between one signatory state and another (largely between countries in Europe, Asia, and North America) without use of consular or diplomatic channels. The treaty may be found at www.hcch.net/index_en.php?act=conventions.text&cid=17.

² The United States became a party to the Inter-American Convention on Letters Rogatory on January 30, 1975, and the Additional Protocol to the Inter-American Convention on Letters Rogatory, on May 8, 1979. The treaties may be found at www.oas.org/juridico/english/treaties/b-36.html and www.oas.org/juridico/english/treaties/b-46.html.

understand that any order for waiver of court fees, not just an order made on form FW-003, qualifies a party to seek an order for posting of a summons.

Rule 5.74. Pleadings and amended pleadings

This rule provides, in pertinent part, that demurrers or summary judgment motions must not be used in family law actions. Court staff have reported that attorneys have been trying to file motions for summary adjudication in family law cases, noting that the rule addresses only summary judgment pleadings and is silent concerning motions for summary adjudications.

A motion for summary adjudication is a common pleading in civil court proceedings. It is a pretrial motion as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, wherein a party contends the cause of action has no merit or there is no affirmative defense thereto. A summary adjudication motion is granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.³ As provided in Code of Civil Procedure section 437c(f)(2) and in rule 3.1350 of the California Rules of Court,⁴ a motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.

Although Family Code section 210 specifies that the rules of practice and procedure applicable to civil actions generally apply to family law proceedings, the same statute also makes clear that such practices and procedures apply, “(e)xcept to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules.”⁵ Further, Family Code section 211 provides that “(n)otwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under this code.”

Rule 5.74 specifically provides that “[t]he forms of pleading and the rules by which the sufficiency of pleadings is to be determined are solely those prescribed in these rules.” The rule then specifies that “[d]emurrers must not be used.” Effective January 1, 2013, the rule was amended to provide that summary judgment motions must also not be used. The amendment reflects the nature and culture of family law proceedings: they are factually driven, there is almost always a question of fact, a party may seek pretrial orders on issues, and adjudication is not done summarily.

³ See Code Civ. Proc., § 437c(f)(1), at www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=437c-438.

⁴ Rule 3.1350 may be found at www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_1350.

⁵ Family Code section 210, in its entirety, provides: “Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally, including the provisions of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice and procedure in, proceedings under this code.”

This proposal would clarify in rule 5.74(b) that the intent of the recent amendment was to prohibit a motion for either summary judgment or summary adjudication. The amendment would help educate parties and their attorneys and thereby avoid the filing of these motions. Further, it would avoid the time required for court staff to handle the paperwork and to research family rules of court and statutes, and possibly the time of a judicial officer to review or rule on a summary adjudication motion when he or she is not required to do so.

Alternatives Considered

The committee and task force considered deferring the action but recommend proposing the suggested changes to the rules to help increase court efficiencies as previously described.

Implementation Requirements, Costs, and Operational Impacts

The committee and task force believe that minimal costs will be incurred to implement the proposed amendments to the rules. Such costs might include revising local rules to reflect the proposed amendments to rules 5.68, 5.72, and 5.74.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee and task force are interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?
- Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?
- Other specific comments.

The advisory committee and task force also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Attachments

1. Cal. Rules of Court, rules 5.68, 5.72, and 5.74, at pages 5–6

Rules 5.68, 5.72, and 5.74 of the California Rules of Court would be amended, effective January 1, 2014, to read:

1
2 **Rule 5.68. Manner of service of summons and petition; response; jurisdiction**

3
4 **(a) Service of summons and petition**

5
6 The petitioner must arrange to serve the other party with a summons, petition, and
7 other papers as required by one of the following methods:

8
9 (1)–(4) ***

10
11 (5) Service on person residing outside of the United States which must be done in
12 compliance with service rules of the: ~~Hague Convention on the Service~~
13 ~~Abroad of Judicial and Extrajudicial Documents in Civil or Commercial~~
14 ~~Matters; or~~

15
16 (A) Hague Convention on the Service Abroad of Judicial and Extrajudicial
17 Documents in Civil or Commercial Matters; or

18
19 (B) Inter-American Convention on Letters Rogatory and Additional Protocol
20 to the Inter-American Convention on Letters Rogatory.

21
22 (6) ***

23
24 **(b)–(c) *****

25
26 **Rule 5.72. Court order for service by publication or posting when respondent’s**
27 **address is unknown**

28
29 If the respondent cannot be found to be served a summons by any method described in
30 Code of Civil Procedure sections 415.10 through 415.40, the petitioner may request an
31 order for service of the summons by publication or posting under Code of Civil
32 Procedure sections 415.50 and 413.30, respectively.

33
34 **(a) *****

35
36 **(b) Service of summons by posting; additional requirements**

37
38 Service of summons by posting may be ordered only if the court finds that the
39 petitioner is eligible for a waiver of court fees and costs.

40
41 (1) To request service by posting, the petitioner must have obtained an order on
42 court fee waiver (~~Superior Court~~) (~~form FW-003~~). If petitioner’s financial
43 situation has improved since obtaining the approved order on court fee waiver,

1 the petitioner must file a *Notice to Court of Improved Financial Situation or*
2 *Settlement* (form FW-010). If the court finds that the petitioner no longer
3 qualifies for a fee waiver, the court may order service by publication of the
4 documents.

5
6 (2) ***

7
8 **Rule 5.74. Pleadings and amended pleadings**

9
10 **(a) Definitions**

11
12 (1)–(4) ***

13
14 **(b) Forms of pleading**

15
16 (1) The forms of pleading and the rules by which the sufficiency of pleadings is to
17 be determined are solely those prescribed in these rules.

18
19 (2) Demurrers, ~~or motions for summary adjudication, or motions for summary~~
20 judgment ~~motions~~ must not be used in family law actions.

21
22 **(c) *****

23