

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR18-10

Title	Action Requested
Forms: Confidential Information Form Under Civil Code Section 1708.85	Review and submit comments by June 8, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise form MC-125	January 1, 2019
Proposed by	Contact
Civil and Small Claims Advisory Committee	Sarah Abbott, Legal Services
Hon. Ann I. Jones, Chair	415-865-7687 phone sarah.abbott@jud.ca.gov

Executive Summary and Origin

The committee proposes revising *Confidential Information Form Under Civil Code Section 1708.85* (form MC-125) to reflect recent amendments to California Civil Code section 1708.85. The amendments provide that the Judicial Council adopt or revise rules or forms to reflect the new law as appropriate by January 1, 2019.

Background

Civil Code section 1708.85 was enacted in 2015 to create a private right of action for the wrongful distribution of sexually explicit materials, and provided that a plaintiff may file the action using a pseudonym and exclude or redact from all pleadings and documents filed in the action other “identifying characteristics” of the plaintiff.¹ Form MC-125 was originally adopted to comport with the statutory language of Assembly Bill 2643, which mandated that the council adopt a confidential information form for the parties to file in cases brought under Civil Code section 1708.85 when confidential identifying characteristics were excluded or redacted from the pleadings and the plaintiff proceeded using a pseudonym. The statute and form became operative July 1, 2015.

On January 1, 2018, Civil Code section 1708.75 was amended to require that, in cases where a plaintiff proceeds using a pseudonym, “[a]ll other parties and their agents and attorneys shall use this pseudonym in all pleadings, discovery documents, and other documents filed or served in the action, and at hearings, trial, and other court proceedings that are open to the public.”² The

¹ Civ. Code, § 1708.85(f)(1).

² Civ. Code, § 1708.85(f)(2)(A).

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 These proposals are circulated for comment purposes only.

amended statute also requires that, in cases where a plaintiff proceeds using a pseudonym, “[a]ny party filing a pleading, discovery document, or other document in the action shall exclude or redact any identifying characteristics of the plaintiff” from those documents, except for a confidential information form filed pursuant to the statute.³ The amended statute further requires that “[a] party excluding or redacting identifying characteristics as provided in this section shall file with the court and serve upon all other parties a confidential information form that includes the plaintiff’s name and other identifying characteristics excluded or redacted. The court shall keep the plaintiff’s name and excluded or redacted characteristics confidential.”⁴ The amendments also added “discovery documents” to the list of documents that are to be worded so as to protect the name and identifying information of the plaintiff.⁵ Finally, the amended statute includes a more expansive definition of the term “identifying characteristics” than the prior version and creates a definition for the term “online identifiers” contained therein.⁶

The amended statute mandates that the Judicial Council, by January 1, 2019, adopt or revise as appropriate rules and forms in order to implement the amendments described above.⁷

The Proposal

The Civil and Small Claims Advisory Committee is proposing revisions to *Confidential Information Form Under Civil Code Section 1708.85* (form MC-125) to comply with the expanded mandate of California Civil Code section 1708.85(j).

Existing form MC-125 is broadly worded such that it can be filed with either a complaint or “other” document.⁸ However, the instructions on the form are being expanded in light of the recent statutory amendments. For example, Instruction item 4 of form MC-125 provides that: “‘Identifying characteristics’ that may be redacted include, but are not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to defendant, and race or ethnic background. See Civil Code section 1708.85(f)(3).” This instruction on the current form appears to make the redaction or exclusion of identifying characteristics permissive rather than mandatory. The statute as amended makes redaction or exclusion of identifying characteristics mandatory by all parties if the plaintiff is

³ Civ. Code, § 1708.85(f)(2)(B)(i).

⁴ Civ. Code, § 1708.85(f)(2)(B)(ii).

⁵ Civ. Code, § 1708.85(f)(2)(C).

⁶ Civ. Code, § 1708.85(f)(3).

⁷ Civ. Code, § 1708.85(j).

⁸ When it was created in 2015, form MC-125 was deliberately worded for use by all parties, even though the statute as originally enacted only expressly mandated that a plaintiff proceeding using a pseudonym and excluding or redacting identifying characteristics file with the court and serve upon the defendant a confidential information form. The Judicial Council concluded that, because the statute required the defendant or other parties also to ensure that confidential identifying characteristics not be included in documents filed with the court, and placed the responsibility for redacting such information with the parties, the form should be available for use by defendants and other parties as well as by the plaintiff.

proceeding under a pseudonym.⁹ Therefore, in the proposed form, the phrase “may be” has been replaced with “plaintiff may, and all other parties must” in Instruction item 4. Similar revisions have been made to Instruction items 1 and 3.

Further, Instruction item 4 on the proposed form has been revised to incorporate the amended definition of “identifying characteristics” and to include a reference to the newly enacted definition of “online identifiers” contained therein.¹⁰

Alternatives Considered

In reviewing form MC-125, the committee concluded that no changes to the existing form were *required* to implement the amendments to Civil Code section 1708.85 and therefore considered making no changes to the form. However, the committee concluded that the proposed changes to Instruction items 1, 3, and 4 would make the form clearer for litigants.

Alternate revisions to the form were also considered. In light of the statutory amendments clarifying that form MC-125 is to be used by all parties excluding or redacting information in cases where a plaintiff is proceeding under a pseudonym—and that form MC-125 may accompany many different types of documents filed by various parties within a single case—the committee also considered revising item 2 of the form to require more detail about the identity of the filing party and the name of the document with which the form is being filed. While the committee concluded that such a revision is not necessary to implement the statute, it is asking for specific comments as to whether such a revision would be helpful to the courts.

Because the amendments added “discovery documents” to the list of documents that are to be worded so as to protect the name and identifying information of the plaintiff, the committee also considered the alternative of either developing another form or revising form MC-125 in some way for use with discovery documents. The committee concluded that existing form MC-125 is suitable for use with discovery documents.

Implementation Requirements, Costs, and Operational Impacts

Because Civil Code section 1708.85 and form MC-125 have been operative for several years, there is unlikely to be significant training required for court clerks and judicial officers regarding the revised form. Moreover, because “[t]he responsibility for excluding or redacting the name or identifying characteristics of the plaintiff from all documents filed with the court rests solely with the parties and their attorneys,”¹¹ it is up to the parties and not the court to familiarize themselves with the amended definition of “identifying characteristics” and comply with the use of the revised form.

⁹ See Civ. Code, § 1708.85((f)(2)(B)(i) (“Any party filing a pleading, discovery document or other document in the action shall exclude or redact any identifying characteristics . . .”); Civ. Code, § 1708.85((f)(2)(B)(ii) (“A party excluding or redacting identifying characteristics as provided in this section shall file with the court and serve on all other parties a confidential information form . . .”).

¹⁰ Civ. Code, § 1708.85((f)(3).

¹¹ Civ. Code, § 1708.85(f)(4).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Do the proposed revisions to form MC-125 appropriately implement the amendments to Civil Code section 1708.85?
- Should an item be added to form MC-125 that requires a party filing the document to include more detail about the identity of the filing party and more specific information about the document with which the form is being filed?

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

- 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 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Form MC-125, at pages 5–6

2. Link A: Civ. Code, § 1708.85, as amended, is available at

http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1708.85&lawCode=CIV

SHORT TITLE:	CASE NUMBER:
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	LOCATION OF REDACTION <i>(page and line where the redaction occurs)</i>	INFORMATION REDACTED <i>(text that has been redacted)</i>
4.		
5.		
6.		
7.		

Additional pages are attached. Number of pages attached: _____

Date:

_____ (TYPE OR PRINT NAME) ▶ _____ (SIGNATURE)

INSTRUCTIONS

(Note: This form may be used only in cases brought under Civil Code section 1708.85.)

1. To protect personal privacy issues, parties who bring an action under Civil Code section 1708.85 for distribution of sexually explicit material may use a pseudonym in place of the true name of the plaintiff and may exclude or redact from all pleadings and documents other identifying characteristics. See Civil Code, section 1708.85(f)(1). **In such cases**, papers filed by other parties **must** be worded so as to protect the name or other identifying characteristics of the plaintiff from public revelation. See Civil Code, section 1708.85(f)(2).
2. A plaintiff who uses a pseudonym must file this confidential information form with the court at the time of filing the complaint, with items 2 and 3 completed, in order to provide his or her true name to the court. Plaintiff must also serve the form on defendant along with the complaint and summons. Counsel for a party filing under a pseudonym may provide the pseudonym for the name of the represented party in the attorney/party information box at the top of the form.
3. Any party **required to redact** identifying characteristics from any pleading or document filed with the court other than a complaint **must** file with the court and serve on all parties this confidential information form, with items 2 and 4 completed, providing any identifying characteristics that have been redacted from the pleading or document and stating where the information was redacted.
4. **"Identifying characteristics" that the plaintiff may and all other parties must redact include, but are not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to defendant, and race or ethnic background, telephone number, Email address, social media profiles, online identifiers, contact information, or any other information, including images of the plaintiff, from which the plaintiff's identity can be discerned. See Civil Code section 1708.85(f)(3). (See Civ. Code, §1708.85(f)(3)(B) for a list of "online identifiers.")**
5. If more space is needed to describe all the redactions in a pleading or document, form MC-025 may be attached, with information provided in the same format as in item 4.
6. A copy of this form should be completed each time a pleading or document redacted under Civil Code section 1708.85 is filed and should be served and filed along with the redacted document.