

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT SPR11-42

Title	Action Requested
Family Law: Proof of Service by Publication or Posting	Review and Submit Comments by June 20, 2011
Proposed Rules, Forms, Standards, or Statutes Adopt rule 5.72; and forms FL-980, FL-982, and FL-985	Proposed Effective Date January 1, 2012
Proposed by Family and Juvenile Law Advisory Committee Hon. Kimberly J. Nystrom-Geist, Cochair Hon. Dean Stout, Cochair	Contact Bonnie Hough, 415-865-7668 bonnie.hough@jud.ca.gov
Elkins Family Law Implementation Task Force Hon. Laurie D. Zelon, Chair	

Summary

The proposed rule and forms are intended to make the process easier for serving family law forms by publication or posting.

Discussion

The Judicial Council established the Elkins Family Law Task Force in response to the decision in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337. The task force was charged with studying and proposing measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for family law litigants, many of whom are self-represented.

The Elkins Family Law Task Force *Final Report and Recommendations* (Final Report) which was accepted by the Judicial Council on April 23, 2010, contained recommendations regarding providing basic information for litigants about the family law process.¹

¹ The Final Report of the Task Force may be found at <http://www.courts.ca.gov/xbcr/cc/elkins-finalreport.pdf>

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 These proposals are circulated for comment purposes only.

The task force recommended at page 36 of the Final Report:

When litigants are unable to locate the other party, there should be procedures to allow for service by publication after good cause is shown to the court. Indigent litigants who cannot afford the costs of newspaper publication should be able to ask the court to post the pleadings on a bulletin board at the courthouse. To increase the likelihood that the respondent will actually get notice of the pending case, the Administrative Office of the Courts (AOC) should investigate the possibility of establishing a Web site for documents that are to be served by posting.

In considering this recommendation for implementation, information systems analysts have advised that a standard form of application and order would greatly simplify automation. While some courts have developed forms for publication and posting, others have not. Statewide forms would assist attorneys and self-represented litigants.

Service by publication or posting is appropriate in cases where 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.

In *Boddie v. Connecticut* (1971) 401 U.S. 371, the U.S. Supreme Court held that due process of law prohibits a state from denying, solely because of inability to pay court fees and costs for service of process, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriages. The Supreme Court stated:

We think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. See *Mullane v. Central Hanover Tr. Co.*, *supra* [339 U.S. 306]. We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper. (401 U.S. at p. 382).

This decision was followed by *Cohen v. Board of Supervisors* (1971) 20 Cal. App.3d 236, 239 in which indigent litigants requested that the Board of Supervisors of Alameda County and the Controller of the State of California pay for the cost of publication of their summons in their dissolution and nullity actions. The Court of Appeals followed *Boddie's* holding that service by posting is equally as effective as publication in a newspaper and posed less of a burden on state funds and stated:

Section 415.50 of the Code of Civil Procedure provides, in relevant part, that summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served

cannot with reasonable diligence be served in other specified manner, and that a cause of action exists against the party or he is a necessary or proper party to the action. But this is not the only pertinent statute. Section 413.30 of the same code directs that where no provision is made “in this chapter or other law” for service of summons, the court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served. Obviously, such a "manner" is at hand, for the Supreme Court has described it in *Boddie* (401 U.S. 371, 382) as service at a defendant’s last known address and posting. The other prerequisite mentioned in section 413.30 is also present, in that there really is no other provision made by law for service, because although publication is theoretically possible, practically there is no way of efficient publication save by the doubtful expedient of ordering public officials to make expenditures which no statute authorizes them to make. This would be a measure justifiable, if at all, only if it were the sole available means of carrying into execution the service of summons which plaintiffs, as indigent litigants, rightfully demand as an incident of due process.

Proposed rule 5.72 *Court order for service of summons by publication or posting when respondent’s address is unknown* sets forth the procedures for service of both the petition and summons as well as subsequent documents in the case.

The *Application for Order for Publication or Posting of Summons* (form FL-980) identifies where the publication or posting should take place and sets out the efforts that the petitioner has made to locate the respondent for the purpose of service.

The *Order for Publication or Posting of Summons* (form FL-982) allows the judicial officer to quickly make the order regarding publication or posting. It also allows for the judicial officer to request a hearing regarding the petitioner’s financial ability to pay for publication.

The *Verification of Service by Posting Summons* (form FL-985) is to be completed by the person who posted the pleadings and mailed them to the respondent’s last known address. This verification is to be attached to the *Proof of Service of Summons* (form FL-115) and submitted to the court upon completion of service.

The proposed rule and forms are attached at pages 4–10.

Rule 5.72 of the California Rules of Court would be adopted, effective January 1, 2012, to read:

1
2 **Title 5. Family and Juvenile Rules**

3
4 **Division 1. Family Rules**

5
6 **Chapter 4. Starting and Responding to a Family Law Case: Service of Papers**

7
8 **Article 4. Manner of service**

9
10 **Rule 5.72. Court order for service of summons by publication or posting**
11 **when respondent's address is unknown**

12
13 If respondent cannot be found to be served a petition by any method described in
14 California Code of Civil Procedure sections 415.10 through 415.40, petitioner may
15 request an order for service by publication or posting of notice under CCP sections
16 415.50 and 413.20, respectively.

17
18 **(a) Forms**

19
20 To request service by publication or posting, the petitioner must complete
21 and submit to the court *Application for Order for Publication or Posting of*
22 *Summons* (form FL-980) and *Order for Publication or Posting of Summons*
23 (form FL-982). Petitioner must list all the reasonable diligent efforts that
24 have been made to find and serve respondent by other means.

25
26 **(b) Order**

27
28 Service by posting may be ordered only if the court finds that petitioner is
29 eligible for a waiver of court fees and costs.

30
31 (1) To request service by posting, petitioner must complete and file a
32 *Request to Waive Court Fees*, (form FW-001), unless one has been
33 approved in the last 4 months. If the court finds that the petitioner does
34 not qualify for a fee waiver, then the court may order service by
35 publication of the summons.

36
37 (2) *Verification of Service by Posting of Summons* (form FL-985) is
38 completed by the clerk and filed with the court once posting is
39 completed.

1 **(c) Non-appearance by respondent**

2
3 If petitioner serves the respondent with the petition and summons by
4 publication or posting and the respondent has not appeared:

5
6 (1) The petitioner may serve all subsequent forms and notices by mailing
7 them to the respondent, in care of the clerk's office, at the address of
8 the superior court where the family case is proceeding or as required by
9 the clerk of the court.

10
11 (2) On any proof of service, petitioner must indicate that respondent was
12 served by mail in care of the clerk's office.

13
14 (3) The back of the envelope delivered under (1) must include the
15 following information: "Service is being made under Code of Civil
16 Procedure section 1011(b) on a party whose residence address is
17 unknown."
18
19
20

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p> <p style="text-align: center; font-size: 24pt; font-weight: bold;">DRAFT</p> <p style="text-align: center; font-size: 18pt; font-weight: bold;">Not Approved by the Judicial Council</p>
<p style="text-align: center;">SUPERIOR COURT OF CALIFORNIA, COUNTY OF</p> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
<p>APPLICATION FOR ORDER FOR PUBLICATION OR POSTING OF SUMMONS</p>	CASE NUMBER:

1. **Publication Request:** The petitioner requests that the court issue an order directing service of the *Summons* and *Petition* in the following newspaper of general circulation.

Newspaper for publication (*Write in name of proposed newspaper of general circulation where respondent is most likely to receive actual notice*):

2. **Posting Request:** The petitioner requests that the court issue an order directing service of the *Summons* and *Petition* at the location listed below. The petitioner has submitted a *Request to Waive Court Fees* (FW-001). This request is based on Code of Civil Procedure section 413.30, *Boddie v. Connecticut* (1971)(401 U.S. 371), and *Cohen v. Board of Supervisors* (1971) (20 Cal App.3d 236).

Courthouse, government building, or law enforcement office posting location (*Write in name, city, and state of proposed location to post where respondent is most likely to receive actual notice*):

3. **The Summons and Petition, which is for (mark one):**
- Petition—Marriage* (form FL-100) and *Summons* (Family Law) (form FL-110)
 - Petition—Domestic Partnership* (form FL-103) and *Summons* (Family Law) (form FL-110)
 - Petition to Establish Parental Relationship* (form FL-200) and *Summons* (Uniform Parentage—Petition for Custody and Support) (form FL-210)
 - Petition for Custody and Support of Minor Children* (form FL-260) and *Summons* (Uniform Parentage—Petition for Custody and Support) (form FL-210)
 - Other (*specify*): _____

was filed on (*Write in date forms were file-stamped*):

PETITIONER: RESPONDENT:	CASE NUMBER:
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- 4 The respondent cannot with reasonable diligence be served in another manner specified in Code of Civil Procedure sections 415.10 through 415.40 based on the declaration below.
- 5. **Declaration** *(List what you did to find the respondent, and include dates and results of search. This search should generally include checking with respondent's friends and family; respondent's current and past employers and any unions; internet research; and the tax assessor records in the county of respondent's last known address or any county in which you think the respondent may live.)*

Continue on the attached declaration

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:



(Signature of Petitioner)

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY DRAFT Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
ORDER FOR PUBLICATION OR POSTING OF SUMMONS	CASE NUMBER:

1. **Publication Request:** The court finds that the respondent cannot be served in any other manner specified in the California Code of Civil Procedure. The court orders that the *Summons* and *Petition* be served by publication at least once per week for four successive weeks in the newspaper listed below.

2. **Posting Granted:** The court finds that the respondent cannot be served in any other manner specified in the California Code of Civil Procedure and that the petitioner cannot afford to serve by publication. The court orders that the *Summons* and *Petition* be served by posting for at least 30 days at the location listed below:

3. **Publishing Denied:** The court denies the request to publish.
 - a. Other methods of service are possible.
 - b. Insufficient attempts have been made to locate the respondent.

4. **Posting Denied:** The court denies the request to post.
 - a. Other methods of service are possible.
 - b. Insufficient attempts have been made to locate the respondent.

5. **Hearing Required:** The court orders that a hearing be set to determine the petitioner's financial circumstances. If at this hearing the court decides that the petitioner does not qualify for posting, based on financial circumstances, then the court may order that the *Summons* and *Petition* be served by publication.

Date: _____ Time: _____ Dept: _____

6. If during the time of publication or posting you locate the respondent's address, you must have someone 18 years of age or older mail the *Summons*, *Petition* and this *Order for Publication* to the respondent. The server must complete and file with the court a *Proof of Service by Mail* (form FL-335).

Date: _____

_____ JUDICIAL OFFICER

PETITIONER: RESPONDENT:	CASE NUMBER:
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INSTRUCTIONS

7. **Publication Request:** After publication is complete, the newspaper will send you a receipt and copy of the publication notice that appeared in the newspaper. You must take this receipt and publication notice and attach it to a *Proof of Service of Summons* (Form FL-115). The *Proof of Service of Summons* must be filed with the clerk's office. If the newspaper sends the receipt and publication notice directly to the court, you do not have to complete the *Proof of Service of Summons*. Service by publication is complete, and the 30-day response period begins, on the 28th day following the first day of publication in the newspaper.

8. **Posting:** You must have someone 18 years of age or older post a copy of the *Summons* and *Petition* in the place that is designated for posting in the above approved location. This same person must mail a copy to the respondent at his or her last known address. The person who posts and mails must complete *Verification of Service by Posting Summons* (form FL-985), stating the date, time, and location of the posting and mail service. This form must be attached to the *Proof of Service of Summons*, which in turn must be filed with the clerk's office. Service by posting is complete, and the 30-day response period begins, on the 31st day after posting. If no response has been filed, you may apply to finish your case, through the default process, on the 61st day after posting.

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i> TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY DRAFT Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
VERIFICATION OF SERVICE BY POSTING SUMMONS	CASE NUMBER:

1. I am 18 or older and not a party to this case. My name is:
 My address is *(write in street address, city and state where you live or work):*

2. On *(date):* _____ from *(city and state):* _____ I mailed a filed
 copy of the documents listed below to respondent's last known address at:

3. I posted a filed copy of the documents listed below on the designated bulletin board at *(name and address of location posted):*

 for 28 days, from *(date of first day of posting):* _____ to *(date of last day of posting):* _____

4. The papers that I served were:
- Petition-Marriage* (form FL-100) and *Summons* (Family Law) (form FL-110)
 - Petition-Domestic Partnership* (FL-103) and *Summons* (Family Law)(FL-110)
 - Petition to Establish Parental Relationship* (FL-200) and *Summons* (Uniform Parentage—Petition for Custody and Support) (form FL-210)
 - Petition for Custody and Support of Minor Children* (FL-260) and *Summons* (Uniform Parentage—Petition for Custody and Support) (form FL-210)
 - Other *(specify):* _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(PRINT YOUR NAME HERE)

(SIGN YOUR NAME HERE)

Notice to Petitioner:
This verification must be attached to *Proof of Service of Summons* (Form FL-115) before filing.

Item SPR11-42 Response Form

Title: Family Law- Proof of Service by Publication or Posting (adopt rule 5.72; approve forms FL-980, FL-982, and FL-985)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

Internet: www.courts.ca.gov/policyadmin-invitationstocomment.htm

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.