

Judicial Council of California

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INVITATION TO COMMENT SPR15-11

Title	Action Requested
Civil Forms: Proof of Service	Review and submit comments by June 17, 2015
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Revise form POS-040	January 1, 2016
Proposed by	Contact
Civil and Small Claims Advisory Committee	Bruce Greenlee, Legal Services
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Executive Summary and Origin

The proposed revised form POS-040, *Proof of Service—Civil*, corrects two legal errors in the current form. First, the current form instructs that electronic service cannot be done by a party. Second, the current form states that service by leaving a copy with an individual at an attorney’s office must be accomplished between the hours of 9:00 am and 5:00 pm. Neither of these provisions is legally correct.

Background

Electronic service may be performed directly by a party, by an agent of a party, including the party's attorney, or through an electronic filing service provider.¹ Current Judicial Council form POS.040, *Proof of Service—Civil*, requires that the person serving electronically state that he or she is “not a party to this action” (see Item 1 and General Instructions on Page 3: “A party to the action cannot serve the documents.”).

There is a separate form POS-050 for Proof of Electronic Service. Therefore, it is not necessary that POS-040 provide for proof of electronic service as one of its options.

¹ Cal. Code Civ. Proc., § 1010.6(a)(1)(A), Cal. Rules of Ct., Rule 2.251(e)(1).

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 These proposals are circulated for comment purposes only.

There is also an error at Item 6a of the form. The requirement that service on an attorney by leaving a copy at the attorney's office be accomplished between the hours of 9:00 am to 5:00 pm applies only if there is no receptionist or person in charge present.² This error should also be fixed.

The Proposal

The Civil and Small Claims Advisory Committee proposes that POS-040 be revised to remove electronic service as one of the manners of service for which the form may be used. This will resolve the error in requiring that electronic service be effected by a nonparty in a very simple way without any loss of functionality to form users.

The committee also proposes that Item 6a of the form be revised to correctly state when the 9:00 a.m. to 5:00 p.m. limitation applies.

Alternatives Considered

The committee considered several alternatives. First: the words "other than for electronic service" could have been added before "not a party to this action" in Item 1 and in the instructions. But the committee decided that removing electronic service from the form entirely was cleaner and simpler.

Second, POS-040 could be revoked. There are separate POS forms for personal service (POS-020), service by mail (POS-030), and electronic service (POS-050). However, revocation would mean that there would not be a Judicial Council form for proof of service by fax, overnight delivery, or messenger service.

A related issue raised by POS-040 is that there is no express authority in the law, either statute or rule of court, that generally requires that the person effecting personal service be a nonparty.³ The form requires that one effecting personal service be a nonparty. The origin of this requirement would seem to be Code of Civil Procedure section 414.10, which requires that a summons be served by a nonparty,⁴ but there is no statute extending this requirement to service of other documents after the court has gained jurisdiction over a party.

Therefore, the nonparty requirement could be removed for personal service also. This decision would be far-reaching, though, changing a long standing practice and impacting many other forms, not just POS-040. It would be necessary to check all other proof-of-service forms, including proofs of service included as an integral section of other forms, to see if nonparty status is required for service of those forms.

² Code Civ. Proc., § 1011(a).

³ Electronic service is the only manner of service that expressly authorizes service by a party.

⁴ Statutes governing particular proceedings may expressly require that the personal service be by a nonparty. See, e.g., Pen. Code § 18755(b)(1), gun violence restraining orders.

The advisory committee rejected this option. In addition to being concerned about the large number of civil forms that might be affected, the committee felt that it should not make this decision unilaterally, because it would impact more than just civil forms. Other subject areas have proofs of service raising the same issue. See, e.g., FL-330, *Proof of Personal Service (Family Law)*. The decision to revise personal service forms across the various should not come solely from a single advisory committee, or address only a single set of forms. If the change is made, it would have to apply to all groups involved with forms development.

A possible course of action would be to ask the Judicial Council to either adopt a rule of court or sponsor legislation to address the lack of authority requiring personal service to be by a nonparty. From a policy perspective, the requirement that the person serving not be a party makes sense, in that attempting to serve an opposing party personally could lead to a volatile confrontation. The committee notes this as a possible project for the future, but is making no recommendation at this time.

Implementation Requirements, Costs, and Operational Impacts

A very minimal amount of training may be required to alert court personnel that form POS-040 may no longer be used for electronic service. Because the current form is legally incorrect, this small cost and impact is unavoidable.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

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

- Would the proposal provide cost savings? If so please quantify.
- 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 2 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

Revised Form POS-040 at pages 4-6.

CASE NAME:	CASE NUMBER:
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6. b. **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (*specify one*):
- (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (2) placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):
- c. **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.*)
- e. **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)	▶	(SIGNATURE OF DECLARANT)
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(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (*date*):

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

Date:

(NAME OF DECLARANT)	▶	(SIGNATURE OF DECLARANT)
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INFORMATION SHEET FOR PROOF OF SERVICE—CIVIL

(This information sheet is not part of the official proof of service form and does not need to be copied, served, or filed.)

USE OF THIS FORM

This form is designed to be used to show proof of service of documents by (1) personal service, (2) mail, (3) overnight delivery, (4) messenger service, or (5) fax.

This proof of service form should **not** be used to show proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Also, this proof of service form should **not** be used to show proof of electronic service. For that purpose, use *Proof of Electronic Service* (form POS-050).

Certain documents must be personally served. For example, an order to show cause and temporary restraining order generally must be served by personal delivery. You must determine whether a document must be personally delivered or can be served by mail or another method.

GENERAL INSTRUCTIONS

A person must be over 18 years of age to serve the documents. The person who served the documents must complete the Proof of Service. **A party to the action cannot serve the documents.**

The Proof of Service should be typed or printed. If you have Internet access, a fillable version of this proof of service form is available at www.courts.ca.gov/forms.htm.

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person *for* whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as the address on the documents that you served.

Third box, left side: Print the names of the plaintiff/petitioner and defendant/respondent in this box. Use the same names as are on the documents that you served.

Fourth box, left side: Check the method of service that was used. You should check only one method of service and should show proof of only one method on the form. If you served a party by several methods, use a separate form to show each method of service.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Third box, right side: State the judge and department assigned to the case, if known.

Complete items 1–6:

1. You are stating that you are over the age of 18.
2. Print your home or business address.
3. If service was by fax service, print the fax number from which service was made.
4. List each document that you served. If you need more space, check the box in item 4, complete the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)), and attach it to form POS-040.
5. Provide the names, addresses, and other applicable information about the persons served. If more than one person was served, check the box on item 5, complete the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)), and attach it to form POS-040.
6. Check the box before the method of service that was used, and provide any additional information that is required. The law may require that documents be served in a particular manner (such as by personal delivery) for certain purposes. Service by fax generally requires the prior agreement of the parties.

You must sign and date the proof of service form. By signing, you are stating under penalty of perjury that the information that you have provided on form POS-040 is true and correct.