



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on October 25, 2013

Title

Family Law: Clarification of Rules on Service and Posting of a Summons and Forms of Pleading

Agenda Item Type

Action Required

Effective Date

January 1, 2014

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 5.68, 5.72, and 5.74

Date of Report

October 9, 2013

Recommended by

Family and Juvenile Law Advisory Committee

Hon. Jerilyn L. Borack, Cochair

Hon. Kimberly J. Nystrom-Geist, Cochair

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Elkins Family Law Implementation Task Force

Hon. Laurie D. Zelon, Chair

Executive Summary

In response to the suggestions of court personnel following the implementation of the restructured title V family rules, the Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend amending rules 5.68 (Manner of service of summons and petition; response; jurisdiction), 5.72 (Court order for service by publication or posting when respondent's address is unknown), and 5.74 (Pleadings and amended pleadings) to clarify their meaning so as to better educate parties and their attorneys and increase court efficiencies in the subject areas of these rules.

The Family and Juvenile Law Advisory Committee and the Elkins Family Law Implementation Task Force recommend that the Judicial Council, effective January 1, 2014:

1. Amend rule 5.68 (Manner of service of summons and petition; response; jurisdiction) to reflect procedures used by the court to help effect service of judicial documents on a person located in a foreign state;
2. Amend rule 5.72 (Court order for service by publication or posting when respondent's address is unknown) to clarify that any order waiving court fees and costs (not only an order granted on form FW-003) qualifies a party to request a court order for service of a summons by posting; and
3. Amend rule 5.74 (Pleadings and amended pleadings) to state that summary adjudication motions may not be filed in family law matters.

Previous Council Action

The Judicial Council adopted the restructuring of title V of the California Rules of Court (known as the Family and Juvenile Rules) on February 28, 2012. The restructured family rules, including rules 5.68, 5.72, and 5.74 became effective on January 1, 2013.

Rationale for Recommendation

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

Amendments to rule 5.68(a)(5) are needed to reflect procedures used by the court that help parties effect service of judicial documents on a person located in a foreign state.

Rule 5.68(a)(5) provides that service must be done in compliance with service rules of the Convention on the Service 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 should be added to the rule 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.

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.

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

Amendments to rule 5.72(b)(1) are needed to delete the reference to a specific fee waiver order form (FW-003) that is required before a party may request a court order for service of a summons by posting.

Currently, the rule states that a party must have already received a fee waiver granted on form FW-003 (*Order on Court Fee Waiver*) to be able to request a court order for service by posting. 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.

Because the particular form used to obtain a fee waiver order 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. Making this change would ensure procedural fairness by helping a petitioner and the court 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

Changes to rule 5.74(b) are needed to clarify that motions for summary judgment and summary adjudication are prohibited in family court. 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.

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 for 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 no affirmative defense thereto exists. 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

³ See Code Civ. Proc., § 437c(f)(1), at www.leginfo.legislature.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.

adjudication may be made by itself or as an alternative to a motion for summary judgment and shall move forward 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(b) 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.” Prior to January 1, 2013, subdivision (b) then went on to specify 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.

Comments, Alternatives Considered, and Policy Implications

The invitation to comment was circulated from April 19, 2013, through June 19, 2013, to the standard mailing list for family and juvenile law proposals. Included on the lists were appellate presiding justices, appellate court clerk/administrators, trial court presiding judges, court executive officers, judges, court clerk/administrators, attorneys, social workers, probation officers, and other family law professionals such as family law facilitators and family court services directors, managers, supervisors, and staff.

Among a total of five commentators, four agreed with the amendments as proposed and one agreed if modifications were made. Comments included the following:⁶

- The State Bar of California agreed with the proposed amendments without providing specific comment;
- A comment received from a court provided that the amendments to rules 5.68, 5.72, and 5.74 reasonably achieve the stated purpose and added that the amendments will require time to educate court staff;

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.”

⁶ A chart containing all comments and the committee and task force responses is attached at pages 9–12.

- Another court commented that the changes to rule 5.68 will not impact their review of a proof of service, as their list already includes the Inter-American Convention on Letters Rogatory. With regard to rule 5.72, the court noted that removing reference to form FW-003 would require staff to be informed that any order for waiver of court fees, not just an order made on this form, qualifies a party to seek an order for posting of a summons; and
- A court’s family law unit manager agreed with the need for the proposed changes to rules 5.68 and 5.74. The commentator also stated that the proposal reasonably achieves the stated purpose, would provide clarification to litigants, increase court efficiencies, require minimal training of court staff, and would not be too cumbersome to implement;

In addition, a family law facilitator suggested alternatives for making technical, formatting, and grammatical changes to the rules in the proposal. For example, she suggested:

- Adding the word “following” to the end of rule 5.68(a)(5) to create this complete sentence: “Service on person residing outside of the United States, which must be done in compliance with service rules of the following:”
- Changing rule 5.72(b)(1) by placing the article “the” in front of “petitioner’s” so that it reads, “If the petitioner’s financial situation has improved . . .”; and
- Replacing the word “or” with “and” in rule 5.74(b)(2) to more accurately provide that none of the types of filings listed are permitted in family law actions. Therefore, the rule would provide that “[d]emurrers, ~~or~~ motions for summary adjudication, and motions for summary judgment ~~motions~~ must not be used in family law actions.

The committee and task force agreed with the above suggestions and incorporated them into the recommendations being made to the council.

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 training court staff and revising local rules to reflect the proposed amendments to rules 5.68, 5.72, and 5.74.

Attachments

1. Cal. Rules of Court, rules 5.68, 5.72, and 5.74, at pages 6–7
2. Chart of comments, at pages 8–11

Rules 5.68, 5.72, and 5.74 of the California Rules of Court are 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 a person residing outside of the United States, which must be done
12 in 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 following:~~

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 the Additional
20 Protocol 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 waiving court fees waiver and costs ~~(Superior Court) (form FW-003)~~. If the
43 petitioner’s financial situation has improved since obtaining the approved

1 order on court fee waiver, the petitioner must file a *Notice to Court of*
2 *Improved Financial Situation or Settlement* (form FW-010). If the court finds
3 that the petitioner no longer qualifies for a fee waiver, the court may order
4 service by publication of the 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, and motions for summary~~
20 judgment ~~motions~~ must not be used in family law actions.

21
22 **(c) *****
23

SPR13-20**Family Law: Clarification of Rules on Service and Posting of a Summons and Forms of Pleading (Amend rules 5.68, 5.72, and 5.74 of the California Rules of Court)**

All comments are verbatim unless indicated by an asterisk (*)

	Commentator	Position	Comment	Committee Response
1.	Debbie Kruse, Deputy Manager; Family Law Superior Court Orange County	A	<p>Agree with the need for update to reflect an additional authority by which service may be effected on a person subject to the jurisdictions out of country.</p> <p>Agree with proposal to remove the specific reference to the form number (FW-003).</p> <ul style="list-style-type: none"> • Does the proposal reasonably achieve the stated purpose? Yes • Would this proposal have an impact on public’s access to the courts? Clarification to litigant . • Would the proposal provide cost savings? Yes If so, please quantify. Increased efficiencies; better resource allocations of work time for judicial officers, Legal Research attorneys, etc; reduced need to unnecessarily review SJ motions. • What are the implementation requirements for courts? Advisement to staff; no cost. Minimal training required. 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. 	No response required.

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	Commentator	Position	Comment	Committee Response
			<ul style="list-style-type: none"> • Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes • 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? Proposal is not too cumbersome. 	<p>No response required.</p> <p>No response required.</p>
2.	State Bar of California Office of Legal Services Standing Committee on the Delivery of Legal Services S. Lynn Martinez, Chair Los Angeles	A	No specific comment received	No response required.
3.	Superior Court of Los Angeles County	A	<p>In regards to adding the Inter-American Convention on Letters Rogatory, our list includes both Hague signatory countries as well as Inter-American Convention countries; therefore, this will not impact our review of POS.</p> <p>In regards to posting and publication and the removal of the specific Form, FW-003, this is a training issue. Staff will need to be informed that any order for waiver of court fees, not just an order made on this form, qualifies a party to seek an order for posting of a summons.</p>	No response required.

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	Commentator	Position	Comment	Committee Response
4.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A	Agree that the amendments to rules 5.68, 5.72, and 5.74 reasonably achieve the stated purpose. The amendments will require time to educate court staff.	No response required.
5.	Superior Court of Shasta County Stacy Larson Family Law Facilitator	AM	<p>CRC 5.68(5): I suggest that we create a complete sentence before the colon, e. g., “Service on person residing outside of the United States, which must be done in compliance with service rules of the following:” In the alternative, we should eliminate (A) and (B) and simply integrate the two subsections into the sentence, e. g. “. . . compliance with service rules of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; OR Inter-American Convention on Letters Rogatory and additional Protocol to the Inter-American Convention on Letters Rogatory.”</p> <p>CRC 5.72(b)(1): In the second sentence, “Petitioner” is being used as a proper noun and should be capitalized, e. g. “If Petitioner’s financial situation has improved . . .” In the alternative, we could place the article “the” in front of “petitioner’s” so that it reads, “If the petitioner’s financial situation has improved . . .”</p> <p>CRC 5.74(b)(2): I suggest we change “or” to “and” as none of these should be filed in family-law actions, e. g., “Demurrers, motions for</p>	<p>The committee and task force prefer the commentator’s primary suggestion over the alternative. Retaining the formatting that includes subdivisions (A) and (B) would ensure that this rule is easy to read. Therefore, the committee and task force agree to change to rule 5.68(a)(5) so that it states “Service on a person residing outside of the United States, which must be done in compliance with service rules of the <u>following</u>.”</p> <p>The committee and task force agree with the commentator’s suggested alternative change to rule 5.72 and will include it with the recommendations made to the Judicial Council.</p> <p>The committee and task force agree to include the commentator’s suggested revisions in rule 5.74.</p>

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	Commentator	Position	Comment	Committee Response
			summary adjudication, and motions for summary judgment must not be used in family law actions.”	