



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: TBD

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Title	Agenda Item Type
Judicial Council Forms - Proof of Service	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise Form POS-040	January 1, 2016
Recommended by	Date of Report
Civil and Small Claims Advisory Committee Hon. Patricia M. Lucas, chair	August 12, 2015
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### **Executive Summary**

The Civil and Small Claims Advisory Committee recommends revising Judicial Council form POS-040, *Proof of Service—Civil* to correct two legal errors in the current form. The recommended revisions to the form would conform it to statute.

### **Recommendation**

The Civil and Small Claims Advisory Committee recommends revising Form POS-040, *Proof of Service—Civil*, to:

1. Remove electronic service as one of the manners of service for which the form may be used;  
and

2. Modify the language regarding personal service on an attorney to accurately reflect the circumstances in which statute requires that personal service on an attorney by leaving a copy at an attorney's office must be accomplished between the hours of 9:00 am and 5:00 pm.

### **Previous Council Action**

Form POS-040 was last revised effective July 1, 2011.

### **Rationale for Recommendation**

Statute provides that 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.<sup>1</sup> Current Judicial Council form POS.040, *Proof of Service—Civil*, incorrectly 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. The Civil and Small Claims Advisory Committee therefore recommends that POS-040 be revised to remove electronic service as one of the manners of service for which the form may be used. This change 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.

There is also an error on POS-040 at Item 6(a) of the form and also in the Declaration of Messenger. The form currently states that personal service on an attorney by leaving a copy at an attorney's office must be accomplished between the hours of 9:00 am and 5:00 pm. However, the requirement that service on an attorney 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.<sup>2</sup> The recommended amendments to form POS-050 would correct this error by accurately stating when the 9:00 a.m. to 5:00 p.m. limitation applies.

### **Comments, Alternatives Considered, and Policy Implications**

#### **External comments**

The form as proposed to be revised was circulated for public comment from April 17 to June 17, 2015. Comments were received from nine different commentators. Of these, three, from the Superior Courts of Los Angeles, Riverside, and San Diego Counties, merely expressed agreement with the proposal.

The other commentators were mostly in favor of removing E-service from this form. One commentator did express a preference for a single proof of service form combining all manners of service, and another was concerned about the use of “multiple erroneous over-lapping forms

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

<sup>2</sup> See Code Civ. Proc., § 1011(a).

for proof of service.” However, the committee believes that multiple forms are preferable to one lengthy form. One form that covers all manners of service results in an overly complex form that is difficult to use. The fact that different manners of service have different requirements requires that each section of the form include the requirements for that manner of service.

With regard to revising the language concerning personal service on an attorney, all comments on this point pointed out that the current language is not legally correct and should be revised. There were several suggestions for wording changes for Item 6a. There are three ways presented to personally serve an attorney:(1) serve the attorney directly; (2) give the papers to a receptionist or other person in charge; or (3) leave them in a conspicuous place during business hours. Letters (a), (b), and (c) were added to emphasize that there are three options. Some other minor revisions to the wording were made in response to these comments.

Several commentators noted that the form requires that personal service be by a nonparty, and that no statute or rule of court contains this limitation. The reference in the comment noted above to “erroneous” forms almost certainly refers to this problem. For the reasons discussed under Alternatives, below, the committee declined to recommend any revisions to form POS-040 to address this issue at this time.

### **Alternatives**

The committee considered several alternative approaches to addressing the error with respect to who can effect electronic service.

- Adding the words “other than for electronic service” before “not a party to this action” in Item 1 and in the instructions. But the committee thought that removing electronic service from the form entirely was cleaner and simpler.
- Revoking POS-040 altogether. 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. To maintain a form for these modes of service, the committee concluded it was preferable to revise, rather than revoke POS-040.

The committee also considered whether to a related issue presented in POS-040. Currently, the form requires that one effecting personal service be a nonparty. However, 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.<sup>3</sup> 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.<sup>4</sup> But extension of this requirement to all personal service is not required by law. The committee

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<sup>3</sup> Electronic service is the only manner of service that expressly authorizes service by a party.

<sup>4</sup> 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.

therefore considered whether the nonparty requirement could be removed from form POS-040 for personal service also. The committee concluded, however, that removing this requirement would impact 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 a section of another form, to see if nonparty status is required. This would entail a significant amount of work and would change a long-standing practice. In addition, the committee felt that it should not make this decision unilaterally. Other subject areas have proofs of service raising the same issue.<sup>5</sup> The committee's view was that the decision to revise personal service forms should be a joint project by all groups involved with forms development. For all these reasons, the committee decided not to recommend this change to form POS-040 at this time, but will consider this further as time and resources permit.

### **Implementation Requirements, Costs, and Operational Impacts**

There should be no implementation requirements, costs, or impact on the courts from this proposal. The form is already in use by attorneys, and the revisions proposed will not have any significant impact on this use.

### **Attachments and Links**

1. Judicial Council form POS-040 at pp. 5–7
2. Chart of comments on proposal SPR15-11 at pp. 8–13

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<sup>5</sup> See, e.g., FL-330, Proof of Personal Service (Family Law).



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 (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in 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](http://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.**

**SPR15-11****Civil Forms: Proof of Service (revise POS-040)**

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Samuel Beuderwell, Attorney at Law Salinas, CA	A	While I agree with the substance of the proposed changes, the exclusion of electronic service from POS-040, which may be used for all other methods of service, may lead inexperienced litigants to believe electronic service is not permitted. This is perhaps particularly confusing where proof of personal service and proof of service by mail may be filed either using POS-040 or forms specifically tailored to those methods of service.	The committee notes the commentator's support for the proposal. The comment does not request or suggest any proposed changes to the form. The commentator's concerns are perhaps valid, but as he himself appears to recognize by agreeing in substance with the proposed changes, do not compel any different course of action with regard to PS-040.
2.	California Judges Association by Joan P. Weber, President	A	The proposal to modify POS-040 to conform to law and clarify the ambiguity as to POS-050 (POS as to electronic service) makes sense as the least intrusive method of fixing the issue. The same holds true with regard to amending Item 6a of the POS-040 as to service at an attorney's office.	The committee notes the commentator's support for the proposal; no response is necessary.
3.	Azar Elihu, Attorney at Law Los Angeles	N	Proof of Service forms should be consolidated in a single form that includes electronic service. Digging through multiple forms to find the right one is time consuming and confusing.	The committee believes that multiple forms are preferable to one lengthy form. One form that covers all manners of service results in an overly complex form that is difficult to use. The fact that different manners of service have different requirements requires that each section of the form include the requirements for that manner of service. That E-service can be made by a party is an example.
4.	Julie Goren, Author Sherman Oaks	AM	I agree with deleting eService from this form and fixing the language of 6a.	The committee notes the commentator's support for the proposal; no response is necessary.
			1. Suggested change: At 6a, by leaving "between the hours of ..." at the end of the	The committee agreed that the text would be smoother if "by leaving them" is repeated after

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**Civil Forms: Proof of Service** (revise POS-040)

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	Commentator	Position	Comment	Committee Response
			<p>sentence, it still could be construed as modifying all manner of service. I suggest changing the order of the last part so it reads like CCP Sec. 1011 -- after "could be left," add "by leaving them between the hours of 9:00 a.m. and 5:00 p.m. in a conspicuous place in the office." I also suggest stating the times as I have done - the time requirement stands out more clearly.</p>	<p>“could be left” and has made this change.</p> <p>The committee does not see any improvement by putting the time frame before “in a conspicuous place.”</p> <p>Nor does the committee see any improvement in replacing “in the morning and “in the evening” with “a.m.” and “p.m.”</p>
			<p>2. Suggested change: On the information sheet, I don't see how someone could try to use this form for eService when there is no provision for it. Instead of the new proposed third paragraph, I would add at the end of the first paragraph: "For electronic service, use Proof of Electronic Service (form POS-050)."</p>	<p>The committee does not see any difference between the proposed change and the current approach of a separate paragraph that includes “do not use this form ....”</p>
5.	Orange County Bar Association By Ashleigh Aitken, President	N	<p>The OCBA does not believe the proposal appropriately addresses its stated purposes because it ignores and continues the misstatement of law in the continuing forms by requiring personal service only by a “non-party”</p>	<p>The committee recognizes that statutes do not require that personal service be made by a nonparty. Nevertheless, it concluded that addressing that issue is beyond the scope of this proposal, which is only to address E-service.</p> <p>The committee may address personal service by a party in the future.</p>
6.			<p>The OCBA does not believe the proposal appropriately addresses its stated purposes because it continues in the “Declaration of Messenger” section the old incorrect statements about service between 9am and 5pm.</p>	<p>The committee agrees with the comment had has revised the Declaration of Messenger section accordingly.</p>
7.			<p>[T]he Judicial Council is using too many multiple erroneous over-lapping forms for</p>	<p>Other than the question of personal service by a party (addressed above), the committee knows of</p>

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**Civil Forms: Proof of Service** (revise POS-040)

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	Commentator	Position	Comment	Committee Response
			<p>proofs of service: POS-010 (Proof of Service of Summons); POS-020 (Proof of Personal Service); POS-030 (Proof of Service by Mail – Civil); POS-040 (Proof of Service – Civil); and POS-050 (Proof of Electronic Service). ... [N]o specific legislation is recommended to solve policy concerns about personal service by parties or to correct all of the mistaken forms here and in other areas.</p>	<p>no other erroneous forms, and the comment provides no specific alleged errors in any other forms. Therefore, no response is possible to the “erroneous” aspect of this comment.</p> <p>This proposal addresses the issue of overlapping forms to some extent by removing E-service from Form POS-040 and requiring Form POS-050 for E-service.</p> <p>The committee has given some consideration to recommending that the Judicial Council sponsor legislation to require that personal service by made by a nonparty. No final decision has yet been made whether to pursue a legislative solution.</p>
8.	State Bar of California’s Committee On Administration of Justice	AM	<p>CAJ supports this proposal subject to the following comments.</p> <p><u>Proposed revision to accurately reflect law regarding service on attorneys where receptionist is not present</u></p> <p>The revised form POS-040 would separately describe the two alternatives available for personal service on an attorney: (1) service on a receptionist or an individual in charge of the office (without any restriction as to time of day); or (2) when no receptionist or other person is available, by leaving a copy in a conspicuous place between 9 am and 5 pm. This proposed revision to form POS-040 would</p>	No response is necessary.

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**Civil Forms: Proof of Service** (revise POS-040)

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	Commentator	Position	Comment	Committee Response
			correct the form so that it accurately reflects California law, and the CAJ supports the proposed revision.	
9.			<p><u>Proposed revision to eliminate electronic service from the form</u></p> <p>POS-040 specifically provides that the party signing the form cannot be a party to the action, but California law authorizes parties to serve documents electronically and to sign a proof of that service. The proposed revision eliminates the conflict by removing electronic service from the form. CAJ supports this proposal as it solves the immediate conflict.</p>	No response is necessary.
10.			<p>[T]he proposed revision does not address the larger problem with form POS-040 and possibly other proof of service forms.</p> <p>CAJ suggests... that the Judicial Council also take up and address the issues arising from the fact that POS-040 does not accurately reflect California law. As noted in the Invitation to Comment, while electronic service is the only manner of service that expressly authorizes service by a party, California does not appear to prohibit a party from personally serving documents in a civil case (other than the summons and complaint).* Thus, form POS-040 is not accurate, to the extent it indicates that</p>	See response above to comment of Orange County Bar Association.

\* CAJ has not researched this issue extensively, but notes that Code of Civil Procedure sections 1013a(1) and (2) provide that proof of service by mail “may be made” by methods that include a showing that the person making the service is not a party to the action.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			service by a party is prohibited for all manner of service covered by form POS-040.	
11.			<p>It seems clear that Form POS-040 is intended to serve as the “master” or “comprehensive” form for use in connection with service of documents in a civil case (other than for the summons and complaint), and CAJ believes that having a single proof of service form is preferable to having multiple forms. Rather than simplify and correct the larger problem in the master form, the proposed revision would solve it for electronic service only, requiring use of an additional form for that form of service only.</p> <p>While CAJ supports the proposal as a stopgap measure, CAJ suggests that form POS-040 should be revised to apply to all forms of service (including electronic service), with revisions as necessary to adhere to California law governing whether a party may or may not effect a particular method of service.</p>	See response above to comment of attorney Azar Elihu.
12.			Alternatively, consideration could be given to clarifying California law to consistently allow (or disallow) service of documents by parties, with revisions to the proof of service form as necessary.	See response above to comment of Orange County Bar Association.
13.			CAJ suggests that the language used in the revision should be semantically consistent. The revision at page 1 of POS-040 (in the language beneath the caption) prohibits use of the form for electronic service (using the words “do	The committee sees no significant difference between “do not use” and “should not be used.” The language on page 3 is consistent with the preceding paragraph advising that the form “should not be used to show proof of service of a

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
			not”), but the “Use of This Form” section on page 3 merely dissuades the use (“should not”).	summons and complaint.”
14.	Superior Court of Los Angeles County	A	Agree with proposed changes.	The committee notes the commentator’s support for the proposal; no response is necessary.
15.	Superior Court of Riverside County, by Marita Ford (position not given)	A	On behalf of the Riverside Superior Court, we agree with the proposed changes.	The committee notes the commentator’s support for the proposal; no response is necessary.
16.			Does the proposal appropriately address the stated purpose? Yes.	
			Would the proposal provide cost savings? If so, please quantify. No.	
			What would the implementation requirements be for courts? Informational training for Court Operation Clerks who add these filings.	
			Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	
			How well would this proposal work in courts of different sizes? No impact.	