



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 21, 2018

Title	Agenda Item Type
Rules and Forms: <i>Confidential Information Form Under Civil Code Section 1708.85</i> (form MC-125)	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise form MC-125	January 1, 2019
Recommended by	Date of Report
Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair	August 3, 2018
Judicial Council Staff Sarah Abbott, Attorney Legal Services	Contact Sarah Abbott, 415-865-7687 sarah.abbott@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends revisions to the *Confidential Information Form Under Civil Code Section 1708.85* (form MC-125). This form is used by parties in cases filed under Civil Code section 1708.85, which provides a private cause of action for wrongful distribution of sexually explicit material, to file any material or information that the statute mandates be kept confidential and not included in the public files. The recommended revisions are intended to reflect amendments to Civil Code section 1708.5 that took effect January 1, 2018.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2019, revise form MC-125 to:

1. Expand the list of document types with which the form is being filed, by adding “other pleading” and “discovery document” to the checklist in Instructions item 2.
2. Make more explicit that the form may be used by any party when necessary, by adding a sentence to this effect in Instructions item 2.
3. Reflect the mandatory nature of filing the form, by highlighting the word “must” where it currently appears in Instructions items 1, 3, and 4, and replacing the phrase “may be” with “plaintiff may, and all other parties **must**” in Instructions item 4.
4. Include the full amended definition of the term “identifying characteristics,” along with a reference to the new definition of “online identifiers,” in Instructions item 4.
5. Modify the form heading to require additional identifying information about the party filing the form.

The text of the revised form is attached at pages 7–8.

Relevant Previous Council Action

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 other “identifying characteristics” of the plaintiff from all pleadings and documents filed in the action. The Judicial Council initially adopted form MC-125 as of July 1, 2015, 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 when confidential identifying characteristics were excluded or redacted from the pleadings.

Analysis/Rationale

As of January 1, 2018, Civil Code section 1708.85 was amended to expand the privacy protections for the plaintiff. The amended statute provides that “[t]he Judicial Council shall, on or before January 1, 2019, adopt or revise as appropriate rules and forms in order to implement subdivision (f).”¹

Amended Civil Code section 1708.85 expands the privacy protections for the plaintiff by requiring 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 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”

¹ Civ. Code, § 1708.85(j).

² Civ. Code, § 1708.85(f)(2)(A).

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 have also added “discovery documents” to the list of documents that are to be worded 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 new definition for the term “online identifiers” contained therein.⁶

To reflect the fact that form MC-125 must be used with a broad variety of documents—specifically including pleadings and discovery documents—when the plaintiff elects to proceed using a pseudonym, the committee proposes revising item 2 to add “other pleading” and “discovery document” to the list of document types with which the form is being filed.

Further, because the amended statute makes exclusion or redaction of a plaintiff’s identifying characteristics and the filing of form MC-125 mandatory for all parties when a plaintiff proceeds under a pseudonym, the committee proposes that Instructions items 1, 3, and 4 be revised to reflect the mandatory nature of the filing. The committee proposes highlighting the word “must” where it currently appears in the instructions, and replacing the phrase “may be” with “plaintiff may, and all other parties **must**” in Instructions item 4.

Likewise, to make clear that the form is to be used by all parties when a plaintiff elects to proceed using a pseudonym, the committee proposes adding a party identifier to the form heading and adding a sentence to Instructions item 2 to specifically state that any party must use form MC-125 when necessary.

The amended statute also includes a more expansive definition of the term “identifying characteristics” than the prior version and creates a new definition for the term “online identifiers” contained therein. In its current form, Instructions item 4 states that the “identifying characteristics” to be redacted “include, but are not limited to” the list of characteristics contained in the original version of Civil Code section 1708.85. To avoid confusion and comport with the current statutory definition of “identifying characteristics,” the committee proposes revising Instructions item 4 to include the full amended definition of “identifying characteristics,” along with a reference to the new definition of “online identifiers.”

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).

Policy implications

As the proposed revisions are intended only to provide clarity to parties and counsel and conform the form to amended statutory language, no policy implications relating to this proposal were raised during the comment period or during committee discussions.

Comments

Proposed revisions to form MC-125 were circulated for public comment from April 9 through June 8, 2018, as part of the regular spring comment cycle. No individuals submitted comments on this proposal. One organization, the Orange County Bar Association, submitted a comment agreeing with this proposal. Two courts—the Superior Courts of San Bernardino and San Diego Counties—submitted comments agreeing with the proposal if modified, and suggested additional revisions to form MC-125. A chart with the full text of the comments received and the committee’s responses is attached at pages 9–12. Based on the comments received, and for the reasons discussed below, the committee recommends that the Judicial Council adopt the proposal with three additional revisions.

As circulated for public comment, the proposal would have (1) revised Instructions items 1, 3, and 4 of form MC-125 to reflect that redaction or exclusion of identifying characteristics is mandatory by all parties if the plaintiff is proceeding under a pseudonym, and (2) revised Instructions item 4 to incorporate the amended definition of “identifying characteristics” including reference to the newly enacted definition of “online identifiers.” No commenter expressed opposition to these proposed revisions, and the committee recommends that they be adopted as circulated for public comment.

The Invitation to Comment also specifically asked whether an item should be added to require parties filing the form 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 with the court. While no commenter recommended adding an additional item to the form, both commenting courts suggested additional revisions to the form relating to different aspects of this question.

First, to assist the clerk in identifying the filing party, the Superior Court of San Diego County suggested adding a “party identifier” below the party/attorney’s signature line, and changing the phrase “ATTORNEY FOR (*name or pseudonym*)” in the form heading to “ATTORNEY FOR (*party*).” The committee discussed whether one, both, or neither of the San Diego court’s proposed additional revisions would be advisable, and determined that one or the other would likely be helpful in determining what party is filing form MC-125, but both are unnecessary. The committee believes that the best approach would be to implement only the commenter’s second suggestion as modified to include the phrase “ATTORNEY FOR (*party name or pseudonym*)” in the heading. The committee recommends that this additional revision be made to form MC-125.

The Superior Court of San Bernardino County suggested that form MC-125 be revised to clearly indicate that the form is not limited to complaints by modifying the checklist in item 2 to specifically include “other pleading” and “discovery document” among the list of document types with which the form should be used. Prior to circulation of the proposal, the committee had

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 but included a question on the issue in the Invitation to Comment to solicit further comment on the issue. Based on this comment, the committee now believes that it would be helpful for the form to include more information as to which document it accompanies, including a specific reference to discovery documents. The committee therefore recommends that this additional revision be made to form MC-125.

There was also a suggestion to further revise Instructions item 6 to specifically state that the form should be used when discovery documents redacted under Civil Code section 1708.85 are filed. The committee discussed this suggestion but decided that it is unnecessary, especially if item 2 is further revised to specifically include “discovery document” among the list of documents with which the form may or must be filed, as is recommended above.

Finally, the Superior Court of San Bernardino County also suggested adding a sentence to the end of Instructions item 2 to specify that: “Any other party may use this form when necessary.” The committee believes that a revision would make it clearer that the form must also be used by parties other than plaintiffs when necessary and should be made to form MC-125.

Alternatives considered

Alternate revisions to the form were 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 initially 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. The committee concluded that such a revision was not necessary to implement the statute, but asked for specific comments as to whether such a revision would be helpful to the courts and/or litigants. As discussed above, based on the comments received in response to this question, the committee now recommends additional revisions to the form heading, item 2, and Instructions item 2.

In addition to the alternatives on which the committee received public comment, the committee also considered whether it would be preferable not to propose any revisions to form MC-125 at this time. The committee concluded, however, that while no changes to the existing form were *required* to implement the amendments to Civil Code section 1708.85, the proposed changes would more closely align the form with the amended statutory language and make the form clearer for litigants and court staff. The committee therefore determined that it would be beneficial to propose these revisions.

Fiscal and Operational Impacts

Because Civil Code section 1708.85 and form MC-125 have been operative for several years, the training required for court clerks and judicial officers regarding the revised form will not be overly burdensome. 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,”⁷ 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. The Superior Court of San Diego County noted that increased processing time might result because of more parties having to file the form, but that requirement arises from the statute and not from revisions to the form.

Attachments and Links

1. Form MC-125, at pages 7–8
2. Chart of comments, at pages 9–12

⁷ Civ. Code, § 1708.85(f)(4).

MC-125

DRAFT
07/26/18

1. This action includes a claim under Civil Code section 1708.85.
2. The document with which this form is being filed is a
 - a. ☐ complaint or other pleading.
 - b. ☐ discovery document.
 - c. ☐ other (describe):
3. **Name of Plaintiff** (complete if being filed with complaint)
 - a. ☐ Plaintiff did not use a pseudonym in the complaint.
 - b. ☐ Plaintiff used a pseudonym in the complaint (complete the following for each plaintiff for whom a pseudonym was used).

True name of plaintiff

	LOCATION OF REDACTION <i>(page and line where the redaction occurs)</i>	INFORMATION REDACTED <i>(text that has been redacted)</i>
1.		
2.		
3.		

Page 1 of 2

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. **Any other party must also use this form when necessary.**
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, **race or ethnic background, telephone number, e-mail 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.

SPR18-10**Forms: Confidential Information Form Under Civil Code Section 1708.85** (Revise form MC-125)

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

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Nikki P. Miliband, President	A	No specific comment.	The committee notes the commenter's support for the proposal.
2.	Superior Court of San Bernardino County	AM	<p>Q: Do the proposed revisions to form MC-125 appropriately implement the amendments to Civil Code section 1708.85?</p> <p>o Yes</p> <p>Q: 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?</p> <p>o No</p> <p>Q: 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.</p> <p>o This would require training of Legal Processing Assistants, Judicial Assistants, and Operation Supervisor I's not to exceed 4 hours overall, revising procedures manuals and developing case categories for limited, mid, and unlimited matters.</p> <p>Q: Would 3 months from judicial council approval of this proposal until its effective date provide sufficient time for implementation?</p> <p>o Yes</p>	<p>The committee notes the commenter's support for the proposal.</p> <p>The committee appreciates this input; no further response required.</p> <p>The committee appreciates the comment responding to this question, but notes that part of the comment appears to be directed to a different proposal relating to civil tiers.</p> <p>The committee appreciates this input; no further response required.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR18-10

Forms: Confidential Information Form Under Civil Code Section 1708.85 (Revise form MC-125)

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	Commenter	Position	Comment	Committee Response
			<p>Suggestions for Form M-125: Paragraph 2 on page one: We suggest that paragraph 2 read as follows to clearly indicate that the form is not limited to complaints and includes discovery as well as other pleading/documents: “2. “The document with which this form is being filed is a a. complaint or other pleading. b. discovery document. c. other (describe):”</p> <p>Page 2, Instructions: Revise as follows: 2. Add the following sentence to paragraph 2 as follows: “Any other party may use this form when necessary.”</p> <p>6. Revise paragraph 6 as follows: “A copy of this form should be completed each time a pleading, or document, or discovery document, redacted under Civil Code section 1708.85, is filed and should be served and filed along with the redacted document.”</p>	<p>The committee appreciates this input; no further response required.</p> <p>The committee believes that it would be advisable to implement this suggestion, and the form has been modified as suggested.</p> <p>The form has been modified in light of this comment.</p> <p>The committee considered this suggestion to add “discovery document” to instruction item 6. However, the committee does not believe this revision is needed given that the instruction as currently stated is broad enough to encompass discovery documents among the documents with which the form is to be filed and item 2 is being revised to specifically include discovery documents.</p>
3.	Superior Court of San Diego County by Mike Roddy, CEO	AM	<p>Q: Do the proposed revisions to form MC-125 appropriately implement the amendments to Civil Code section 1708.85? Yes.</p> <p>Q: Should an item be added to form MC-125 that requires a party filing the document to</p>	<p>The committee notes the commenter’s support for the proposal.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR18-10

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	Commenter	Position	Comment	Committee Response
			<p>include more detail about the identity of the filing party and more specific information about the document with which the form is being filed?</p> <p>Yes. The Committee may wish to include a party identifier (e.g., plaintiff, defendant, etc.) following the party/attorney's signature on page 2. This is similar to the approach used on Judicial Council form CIV-110 Request for Dismissal, which also may be filed by various parties to an action.</p> <p>Q: 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.</p> <p>Local procedures were updated in January to reflect new law and since the name of the form remains unchanged, no changes to the case management system are necessary. The change will result in increased processing time, as all parties will be required to redact the information and file the MC-125 form.</p> <p>Q: Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</p>	<p>The committee has considered this suggestion, as well as the suggestion below to revise the heading to place the phrase "name or pseudonym" with the term "party." The committee believes that some variation of these revisions to clarify the filer's identity may be advisable, but both are unnecessary. The committee has modified the proposal to include the phrase "ATTORNEY FOR (party name or pseudonym)" in the header.</p> <p>The committee appreciates the comment responding to this question.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR18-10

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	Commenter	Position	Comment	Committee Response
			<p>Yes.</p> <p>Q: How well would this proposal work in courts of different sizes?</p> <p>It appears that the proposal would work for courts of various sizes.</p> <p>General Comments: MC-125:</p> <p>Our Court proposes the following changes:</p> <ul style="list-style-type: none">• “ATTORNEY FOR (<i>name or pseudonym</i>)” listed in the header be changed to “ATTORNEY FOR (<i>party</i>)”.• Include the party role under the signature on page 2. See Request for Dismissal (JC Form #CIV-110). <p>These changes will assist the clerk in identifying the filing party. See response to question 2.</p>	<p>The committee appreciates this input; no further response required.</p> <p>The committee appreciates this input; no further response required.</p> <p>The committee has considered this suggestion, as well as the suggestion above to include a party identifier (e.g., plaintiff, defendant, etc.) following the party/attorney’s signature on page 2. The committee believes that some variation of these revisions to clarify the filer’s identity may be advisable, but both are unnecessary. The committee has modified the proposal to include the phrase “ATTORNEY FOR (party name or pseudonym)” in the header.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated