

## Service of process in a federal action: Understanding state, federal rules

By: Stacey A. Trien | October 19, 2016 | 0



Stacey E. Trien

You are filing a new lawsuit in federal court, having carefully crafted your client's complaint, making sure that you have subject matter jurisdiction, and finally locating your CM/ECF login and password. There is one last step to consider – how and when are you going to serve the summons and complaint on the defendants?

### Decreasing time of service

Effective Dec. 1, 2015, the presumptive time to serve the defendant under Federal Rule of Civil Procedure 4(m) was reduced from 120 to 90 days after the complaint is filed. Note that the court must extend the time for service if the plaintiff shows good cause for failing to serve the complaint, and the Advisory Committee Notes to the 2015 amendment anticipate that "[s]hortening the presumptive time for service will increase the frequency of occasions to extend

the time. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action."

### Waiver of service of process

FRCP 4(d) allows plaintiff the option to seek a waiver of service of process to avoid the expenses of accomplishing service by other means. The plaintiff may seek a waiver of service where the defendant is an individual (other than a minor or incompetent person), or a corporation, partnership, or other entity subject to suit under a common name. Conveniently, the language that must be included in the notice and request for waiver is contained in the forms appended to FRCP 4. The forms must be sent by "first-class mail or other reliable means" to the individual defendant, or if the defendant is a corporation or other entity, to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. Note that the plaintiff must include two copies of the waiver form (affixed to Rule 4), one copy of the complaint, and a pre-paid return envelope.

Seeking a waiver of service will significantly extend defendant's time to respond to the complaint. The defendant has 30 days (or 60 days if the defendant is outside the United States) to return the waiver, and if the defendant signs and returns the waiver it will have 60 days from the date the notice was sent to respond to the complaint (or 90 days if the defendant is outside the United States). If the defendant is located in the United States and fails, without good cause, to sign and return the waiver, the court "must impose" on the defendant the expenses incurred in making service and the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

### Individuals in the state

If a waiver is not sought, plaintiff must serve each defendant with the summons and a copy of the complaint, by any person who is at least 18 years old and not a party. Under FRCP 4, if the defendant is in the United States, the plaintiff may either comply with the Federal Rules for service, or follow the state law that applies to an action

brought in courts of general jurisdiction in the state where the U.S. District Court is located or where service is made.

Under FRCP 4, an individual within the U.S. may be served by delivering a copy of the summons and complaint to the individual personally; leaving a copy at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or delivering a copy to an agent authorized or appointed by law to receive service of process.

New York CPLR 308 provides several additional methods for service of the summons and complaint in an action filed in federal court in the state. As an alternative to service on an individual either personally or at his or her residence, the summons may be delivered to a person of suitable age and discretion at the defendant's actual place of business and mailed to the defendant either at his or her last residence or actual place of business in an envelope

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bearing the legend "personal and confidential" and not indicating that the communication is from an attorney or concerns an action against the person to be served.

If the person has designated an agent for service under CPLR 318, CPLR 308 also allows service on the person so designated. If service cannot be accomplished by the above methods "with due diligence," CPLR 308(4) permits service by nail and mail, which requires affixing the summons to the door of the defendant's actual place of business, dwelling place or usual place of abode and, within 20 days thereafter, mailing the summons to the defendant's last known residence or actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside that the communication is from an attorney or concerns an action against the person to be served.

#### **Minors or incompetents in the state**

If the defendant is a minor or incompetent person, FRCP 4(g) provides that the plaintiff must follow state law for service a summons or like process. CPLR 309 generally provides that service on an infant in New York shall be made by personally serving the summons on a parent, guardian, or person having legal custody. If the infant is married, service may be made on an adult spouse; or, if none of the above are in the state, on any other person with whom the infant resides or on the infant's employer. If a person is judicially declared incompetent, CPLR 309(b) requires service on the committee appointed and on the incompetent (although the court may dispense with service on the incompetent).

#### **Organizations in the state**

Under FRCP 4(h), a domestic entity may be served by delivering a copy of the summons and complaint to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process. New York law also allows for service of process on an entity's registered agent, or with respect to corporations and LLCs, on the Secretary of State as agent. See CPLR 310, 311, 311-a; NY Business Corporation Law §§ 306-307; NY Limited Liability Company Law §§ 303-304. Additionally, a partnership may be served by delivering the summons to any partner; by delivering the summons to the managing or general agent or person in charge of the office of the partnership and mailing to the partner's last known residence or place of business; or if the above service cannot be made by due diligence, by nail and mail of the summons (i.e. affixing a copy to the place of business and mailing to the partner's last known residence or office). See CPLR 310.

#### **Alternative methods of service under the CPLR**

In addition to the above methods of service, the CPLR provides for alternative service by mail (by mailing a copy of the summons and complaint with two copies of a statement of service by mail and acknowledgement of receipt with stamped return envelope); as well as for service by publication when authorized by court order in certain circumstances. See CPLR 312-a, 315.

#### **Time to respond to the complaint is determined by federal law**

Note that, while the Federal Rules allow for service of process pursuant to state law, only the method of service is prescribed by state law – not the time in which the defendant is required to respond to the complaint. This means that in a federal action, irrespective of the method of service, under FRCP 12(a) the plaintiff has 21 days from the date service is complete to file an answer or appropriate motion (or 60 days if service is waived). Additionally, the time to answer runs immediately and is not postponed until after proof of service is filed, as it is under certain sections of the CPLR. See e.g. *Kondaur Capital Corp. v. Cajuste*, 849 F. Supp. 2d 363 (E.D.N.Y. 2012).

#### **Local rules to consider**

The Local Rules of Civil Procedure for the Western, Southern, and Eastern Districts of New York do not address or alter the FRCP with respect to service of process. The Local Rules of the Northern District provide that, upon filing of the complaint, the clerk shall issue an order requiring service of process on all defendants within sixty days of filing the complaint and that "[i]n no event shall service of process be completed after the time specified" in FRCP 4; and further set forth additional forms and notices that must be served with the complaint. (Northern District Local Rule 4.1.)

It is good practice for a practitioner representing either the plaintiff or defendant in a federal action to be aware of the myriad of permissible methods of service, the proper time for service, and the applicable deadlines to respond. This involves a careful review of the interplay between the Federal Rules and the CPLR.

Stacey E. Trien is an associate in the Rochester law firm of Leclair Korona Vahey Cole LLP, where she concentrates her practice in civil litigation with an emphasis on business/commercial, employment, and personal injury matters. She can be reached at [strien@leclairkorona.com](mailto:strien@leclairkorona.com) or through the firm's website at [www.leclairkorona.com](http://www.leclairkorona.com).