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12 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

13 PETITION TO AMEND
14 ARIZONA RULES OF CIVIL
15 PROCEDURE (ARCP) ARCP
16 RULE 4.1(d); ARCP RULE 5(C);
17 RULES OF FAMILY LAW
18 PROCEDURE (RFLP) RFLP
19 RULE 41(C); RFLP RULE 41(D)

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26 PROCEDURE (RFLP) RFLP
27 RULE 41(C); RFLP RULE 41(D)

28 **BACKGROUND AND AUTHORITY**

1. The undersigned is the elected Secretary of the Board of Directors of the Arizona Process Servers Association. Pursuant to authorization issued by the Board on January 4, 2012, on behalf of the Arizona Process Servers Association, the undersigned submits this Petition.

- 1 2. The Arizona Process Servers Association (APSA) is the most representative
2 industry trade association for Process Servers throughout Arizona. APSA
3 currently has over 100 Process Server members. Within that membership are
4 several attorney service owners, who collectively employ approximately 600
5 Arizonans, including Process Servers and a substantial number of additional
6 related support personnel. Accordingly, APSA collectively represents the
7 interests of a substantial number of active Process Servers in Arizona.
- 8 3. The Process Server is one of the most important and vital persons serving a
9 function within our justice system. The Process Server is tasked with giving
10 defendants, witnesses and other parties written notice of pending court
11 proceedings, or the results thereof. Without the Process Server's efforts, the
12 proper service of civil legal process would essentially stop. Our system of
13 justice is reliant on the professional services of the Process Server to give
14 notice and due process thereof. Constables and Sheriffs are overloaded with
15 not only their law enforcement functions as peace officers, but civil legal
16 process to serve, and consequently our collective remedy to expedite the
17 service of legal process is through the use of the Process Server.
- 18 4. Accordingly, consistent with the public good in mind, and pursuant to Rule 28
19 of the Arizona Rules of the Supreme Court, APSA submits proposed rule
20 changes to ARCP Rule 4.1, et seq. and related Rule(s), where noted.
- 21 5. APSA believes these rule changes are necessary for the public good, for the
22 expeditious service of legal process.
- 23 6. The qualifications for regular membership in APSA include the requirement
24 that each regular member be in current status as to his/her authority to serve
25 legal process, as per Arizona Rules of Civil Procedure (ARCP) Rule 4(e), and
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1 other applicable authority. Associate membership qualifications are irrelevant
2 for purposes of this discussion.

- 3 7. Accordingly, each regular member is qualified to serve legal process within the
4 state of Arizona. As the largest and most established statewide association of
5 Process Servers, APSA represents the interests of its members and of Process
6 Servers, in general within Arizona.
- 7 8. APSA believes the proposed rule changes are necessary for the public good,
8 the judiciary, the safety and security of the Process Server, and the expeditious
9 and proper service of process.
- 10 9. The proposed rule changes address several shortcomings in the current
11 language for the rules for service of process, including (1) substitute service,
12 (2) defining a person of suitable age and discretion, (3) service where the
13 Process Server, Constable or Deputy Sheriff is not allowed access to private,
14 gated communities, and (4) contempt of court and the issuance of civil arrest
15 warrants.
- 16 10. The proposed rule changes are consistent and explicit in further defining
17 methods of service of process in Arizona and where needed, to provide
18 additional means for actual notice to defending parties who are served with
19 legal process.
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21 **SUBSTITUTE SERVICE**

- 23 11. Currently, ARCP Rule 4.1(d) provides for service of a copy of the summons
24 other legal process to an individual, by personal service or by leaving copies
25 with "...some person of suitable age and discretion then residing therein or by
26 delivering a copy of the summons and of the pleading to an agent authorized
27 by appointment or by law to receive service of process". This method of
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1 service is solely applicable to the residential (abode) address of the person
2 being served.

3 12. While personal service of legal process is the preferred method of service,
4 there are instances where substitute service (i.e.: "... leaving copies thereof at
5 that individual's dwelling house or usual place of abode with some person of
6 suitable age and discretion then residing therein...") is necessary due to the
7 defendant's lack of presence at the time of service.

8 13. Currently in Arizona there is no provision which defines a "...person of
9 suitable age and discretion...", which leaves a wide latitude and nebulous
10 meaning, resulting in an environment which creates an opportunity for errors
11 in judgment as to the actual suitable age and discretion of the person with
12 whom the legal process is left.

13 14. At the time of service, it may be the opinion of the Process Server, Constable
14 or Deputy Sheriff which substantially determines whether that person with
15 whom legal process is being left is a "...person of suitable age and
16 discretion...". However, the actual result may be substantially different. Often
17 times the person contacted who is apparently of such suitable age and
18 discretion is a minor child¹, who, while informed of the general nature of the
19 papers left with him or her, may not be sufficiently responsible to understand
20 the gravity of the legal process served, and consequently may fail to inform the
21 defendant/respondent of the service of process. Accordingly, Petitioner
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25 ¹ As opposed to an "adult", as defined by ARS §8-201.3. The author's use of
26 the term, "minor" would necessarily include those person(s) defined by ARS 8-
27 201.6, which includes, "Child", "youth" or "juvenile" ...who is under the age
28 of eighteen years."

1 believes that a substantive definition of the person of "...suitable age and
2 discretion..." be defined.

3 15. Under current Rule, while service of process may be deposited with a person
4 appearing of "...suitable age and discretion...", the party serving the papers
5 (Process Server, Constable or Deputy Sheriff), as well as the litigants, their
6 counsel, and the Court are depending upon such a person to perform acts
7 which may have substantial consequence to the recipient party served.

8 16. Current rule (ARCP Rule 4.1(e)) allows for service on a minor, and specifies
9 the age of the minor for both personal and substitute service.

10 17. The proposed rule changes seek to impose a common sense approach to
11 service of process upon a person by means of substituted service.

12 18. Petitioner believes that a concrete definition of a person of "suitable age and
13 discretion" should be defined as a person *who stated or appeared that he or*
14 *she was at least 15 years of age* at the time of service. This definition is
15 consistent with other states' requirements not only for service of process, but
16 for consent to marriage.

17 19. Other states have varying degrees of requirements for substituted service, not
18 only of the age of the person of "...suitable age and discretion...", but as to
19 other factors and procedures. In particular, California (ref. California Code of
20 Civil Procedure (CCP) §415.20, et seq.) requires that in any event where a
21 substituted service is made, it shall be to a person "...apparently in charge..."
22 of the residence or business, who is at least 18 years of age. CCP §415.20
23 further requires that legal process served in such a manner be accompanied by
24 a mailing of the legal process to the person served, and that such service is
25 deemed complete 10 days after mailing.
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1 20. While California statute (the CCP) addresses the manner and method of most
2 types of service of process, Arizona rules for service of process are primarily
3 addressed in ARCP Rule 4, et seq., ARCP Rule 5, et seq., RPEA Rule 5, et
4 seq., and ARS §33-1377(B). The proposed rule changes seek to rectify what
5 the Petitioner believes are the shortcomings of these Rules.

7 **ACCESS TO GATED COMMUNITIES**

8 21. The issue of access to HOA, privately patrolled, gate guarded, gated or other
9 "planned community"(ies) is one in which the needs of the community for
10 privacy and security are balanced against the need for access to serve legal
11 process. Process Servers, Constables and Deputy Sheriffs who are engaged in
12 the service of legal process have no special exemption for access such planned
13 communities. Access to the planned community is at times vital and necessary
14 to enable the service of legal process. Many planned communities prohibit
15 entry to the premises by Process Servers, Constables and Deputy Sheriffs who
16 approach the entry or gate the for the service of legal process.

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18 22. The purchase of a property within such a planned community is deeded to the
19 buyer in a "deed restricted"² manner. Such deed restrictions are generally
20 administered through a Home Owners Association (HOA), which is authorized
21 by such deed restrictions to develop policies and procedures to allow or
22 disallow access to the planned community by non-residents. The HOA would
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25 ² "Deed restricted" would necessarily include such property having a private
26 covenant as defined by ARS §38-440(C)(2), including "...any uniform or
27 nonuniform covenant, restriction or condition regarding real property that is
28 contained in any deed, contract, agreement or other recorded instrument
affecting real property."

1 necessarily engage the services of an employee or agent thereof (security guard)
2 who may execute the entry policy of such HOA.

3 23. Unfortunately, as experience has shown, in several instances, where service of
4 process is intended to be made, access to the planned community by the Process
5 Server, Constable or Deputy Sheriff is disallowed by such security guard.
6 Under these circumstances, under the current applicable Rules, the proper
7 service of process is not executed, and barring other means of service, the
8 administration of justice is rendered moot.

9 24. While ARCP Rule 4.1(m) provides for an Alternate Means of Service, the cost
10 and time factors involved in securing such Alternate Means are many times out
11 of the means of the litigant. This is especially true when dealing with the issues
12 of serving legal process which are time sensitive.

13 25. Accordingly, there is a need to address the concerns of access to planned
14 communities by Process Servers, Constables and Deputy Sheriffs for the
15 service of legal process to combat the perceived "service free zone" created
16 within such planned communities.

17 26. Our neighboring states, California and Nevada, have both enacted statutes
18 addressing such issues. Further, California has case law which addresses the
19 issues, as well.

20 27. California Code of Civil Procedure (CCP) §415.21 states:

21 "(a) Notwithstanding any other provision of law, any person shall be granted
22 access to a gated community for a reasonable period of time for the purpose of
23 performing lawful service of process or service of a subpoena, upon identifying
24 to the guard the person or persons to be served, and upon displaying a current
25 driver's license or other identification, and one of the following:
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1 (1) A badge or other confirmation that the individual is acting in his or her
2 capacity as a representative of a county sheriff or marshal.

3 (2) Evidence of current registration as a Process Server pursuant to Chapter
4 16 (commencing with Section 22350) of Division 8 of the Business and
5 Professions Code.

6 (b) This section shall only apply to a gated community that is staffed at the
7 time service of process is attempted by a guard or other security personnel
8 assigned to control access to the community."

9 28.Nevada Revised Statute (NRS) §14.090 states:

10 "1. A person who resides at a location to which access is not reasonably
11 available except through a gate may be lawfully served with any legal process
12 in the manner provided in this section. If there is:

13 (a) A guard posted at the gate and the guard denies access to the residence for
14 service of process, service of process is effective upon leaving a copy thereof
15 with the guard.

16 (b) No guard posted at the gate and entry through the gate is not reasonably
17 available, the court may, if it is satisfied by affidavit that those facts are true,
18 allow service of process by mailing a copy thereof to the residence by certified
19 or registered mail.

20 2. The manner of service authorized by this section is supplemental to and does
21 not affect the validity of any other manner of service authorized by law."

22 29.Further, *Bein v. Brechtel-Jochim Group, Inc.* [(1992) 6 Cal.App.4th 1387, 8

23 Cal.Rptr.2d 351] addresses the issue (in California) with regard to service of
24 process where the person controlling access to the private community does not
25 permit entry for the service of process. In its decision, the Court said,
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27 "Litigants have the right to choose their abodes; they do not have the right to
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1 control who may sue or serve them by denying them physical access." We
2 believe the same is true for litigants in Arizona, as well.

3 30. Further, the Bein Court stated,

4 "In *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal.App.3d 1009 [269
5 Cal.Rptr. 687], where a corporation attempted to avoid service by refusing to
6 unlock its door, the court determined a "defendant will not be permitted to
7 defeat service by rendering physical service impossible." ... "The evident
8 purpose of Code of Civil Procedure section 415.20 is to permit service to be
9 completed upon a good faith attempt at physical service on a responsible
10 person. ..." ... Service must be made upon a person whose "relationship with the
11 person to be served makes it more likely than not that they will deliver process
12 to the named party." (*50 Court St. Assoc. v. Mendelson et al.* (1991) 151
13 Misc.2d 87 [572 N.Y.S.2d 997, 999].) Here, the gate guard's relationship with
14 appellants [6 Cal.App.4th 1394] made it more likely than not that he would
15 deliver process to appellants. We note they do not claim they failed to receive
16 notice of service."

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18 31. Georgia has addressed access to service of process within such planned
19 communities through Official Code of Georgia, Annotated (OCGA) §9-11-
20 4(f)(4), which states:

21 (4) *Service upon persons residing in gated and secured communities.*

22 (A) As used in this paragraph, the term "gated and secured communities"
23 means multiple residential or commercial properties, such as houses,
24 condominiums, offices, or apartments, where access to the multiple residential
25 or commercial properties is restricted by a gate, security device, or security
26 attendant that restricts public entrance onto the property; provided, however,
27 that a single residence, farm, or commercial property with its own fence or gate
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1 shall not be included in this definition.

2 (B) Any person authorized to serve process shall be granted access to gated
3 and secured communities for a reasonable period of time during reasonable
4 hours for the purpose of performing lawful service of process upon:

5 (i) Identifying to the guard or managing agent the person, persons, entity,
6 or entities to be served;

7 (ii) Displaying a current driver's license or other government issued
8 identification which contains a photograph; and

9 (iii) Displaying evidence of current appointment as a Process Server
10 pursuant to this Code section.

11 (C) Any person authorized to serve process shall promptly leave gated and
12 secured communities upon perfecting service of process or upon a
13 determination that process cannot be effected at that time."

14 32. Florida goes further in its address the issue of service of process at a planned
15 community through Florida Statutes §48.031(7), which states:

16 "A gated residential community, including a condominium association or a
17 cooperative, shall grant unannounced entry into the community, including its
18 common areas and common elements, to a person who is attempting to serve
19 process on a defendant or witness who resides within or is known to be within
20 the community."
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22 33. While the issue is addressed and resolved in at least two neighboring states, and
23 at least two other states, the opportunity exists for Arizona to resolve issue and
24 remove what amounts to a "special exemption" allowing homeowners or
25 occupants within such planned communities to avoid service of process.
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DISCUSSION OF THE IMPACT OF PROPOSED CHANGE(S)

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2 34. While the proposed rule changes are written to clarify and explicitly state the
3 manner and methods for certain types of service of process, such do not inhibit
4 or otherwise alter the existing rules pertaining to Alternate Means of Service.
5 The proposed rule changes do not diminish the necessity for, nor effectiveness
6 of ARCP Rule 4.1(m), nor RFLP Rule 41(L), but seek to clarify and further
7 state the need for a uniform set of circumstances under which service of process
8 may be made under the proposed rules. The impact and language of these rules
9 remain intact and are unaffected.

10 35. Rules of Procedure for Eviction Actions (RPEA) Service of Special Detainer &
11 Forcible Detainer Action, Rule 5(f) remains intact and is unaffected.

12 36. The effect of statutes enacted by the legislature are recognized, and are beyond
13 the scope of the proposed rule changes.
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CONTEMPT OF COURT & CIVIL ARREST WARRANTS

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16 37. Contempt of court and civil arrest warrants are issues which the Petitioner
17 believes should be attended to in proposed changes to Rule 4.1(d). The impact
18 on the individual served with an order punishable by contempt of court is
19 substantial, and service requirements should be clearly spelled out in
20 appropriate Rule(s). The proposed rule changes include language that, "*Any*
21 *order of the court in such pleading which may result in the issuance of a civil*
22 *arrest warrant, as defined in ARCP Rule 64.1(a) or a finding of contempt must*
23 *be personally served upon the individual, or, in the alternative, served by an*
24 *order of the court in accordance with ARCP Rule 4.1(m)*". Where there is
25 vagueness in the existing language, the proposed change in language is meant to
26 explicitly state the procedure for serving an individual to give actual knowledge
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1 of the legal process punishable by contempt of court, which may result in a civil
2 arrest warrant issued by the court.

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4 **HOUSEKEEPING MATTERS**

5 38. The changes proposed in ARCP Rule 5(c) and RFLP Rule 41(C) and 43(C) are
6 consistent with the proposed ARCP Rule 4.1(d), defining "someone of suitable
7 age and discretion". Further, the changes sought in ARCP Rule 5(c) look to
8 correct the typographical error in the spelling of "judgement" to "*judgment*".
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10 **THE PROPOSED RULE CHANGES**

11 39. Accordingly, the issues presented here in this Petition allow for clarity and
12 explicitly specify the circumstances and requirements for (1) substitute service,
13 (2) defining a person of suitable age and discretion, (3) service where the
14 Process Server, Constable or Deputy Sheriff is not allowed access to private,
15 gated communities, and (4) contempt of court and the issuance of civil arrest
16 warrants. These issues are addressed for both relevancy and appropriateness in
17 expediting the service of legal process in Arizona.
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19 40. Accordingly, for good cause, the Petitioner prays that the Court will adopt the
20 proposed rule changes.

21 41. I declare under penalty of perjury that the foregoing is true and correct.
22 (ARCP R. 80(i)).
23

24 Date: _____

Signed: _____

25 Patty Chlebanowski, Secretary

26 For the Board of Directors of the Arizona Process Servers Association, Inc.
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1 **APPENDIX A:**

2 **DRAFT TEXT OF PROPOSED CHANGES TO ARCP RULE 4.1(d)**

- 3 1. The proposed rule under ARCP Rule 4.1(d), would state as follows (proposed
4 changes in italics):

5 **Service of Summons Upon Individuals.** Service upon an individual from
6 whom a waiver has not been obtained and filed, other than those specified in
7 paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by one of the
8 following methods:

9 (1) (Personal Service): Delivering a copy of the summons, pleading and other
10 documents being served to that individual personally. Any order of the court in
11 such pleading which may result in the issuance of a civil arrest warrant, as
12 defined in ARCP Rule 64.1(a) or a finding of contempt must be personally
13 served upon the individual, or, in the alternative, served by an order of the court
14 in accordance with ARCP Rule 4.1(m).

15 (2) (Substitute Service at a Residence): Leaving a copy of the summons,
16 pleading and other documents being served at that individual's dwelling house
17 or usual place of abode in the presence of a member of the household or a
18 person apparently in charge therein, who stated or appeared that he or she was
19 at least 15 years of age at the time of service, who shall be informed of the
20 general nature of the legal process.

21 (3) (Substitute Service at a Planned Community): If the dwelling house or usual
22 place of abode lies within a planned community or other such location where
23 access or entry to such planned community or other such location must be
24 granted or is controlled by a guard this section shall apply. If after having
25 identified himself or herself to the guard as a Process Server, Constable or
26 Deputy Sheriff having lawful business in serving legal process upon a person
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1 reasonably believed to be residing or located in such planned community or
2 other such location, and entry to such planned community or other such location
3 is denied, service of a copy of the summons, pleading and other documents
4 being served may be performed by leaving a copy of the legal process with the
5 guard, who shall be informed of the general nature of the legal process, and
6 thereafter mailing a copy of the legal process by first-class mail, postage
7 prepaid thereon to the person served at the individual's dwelling house or usual
8 place of abode. Service of legal process in this manner is deemed complete on
9 the 3rd day after the mailing.

10 (2) (Substitute Service at a Business): Leaving a copy of the summons, pleading
11 and other documents being served at that individual's usual place of business, or
12 usual mailing address other than a United States Postal Service post office box,
13 in the presence of a person apparently in charge therein, who shall be informed
14 of the general nature of the legal process and thereafter mailing a copy of the
15 legal process by first-class mail, postage prepaid thereon to the person served at
16 the location where service was made. Service of legal process in this manner is
17 deemed complete on the 3rd day after the mailing.

18 (4) This Rule shall not affect any alternate means of service which may be
19 ordered by the court under Rule 4.1(m).
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1 **TEXT OF PROPOSED CHANGES TO ARCP RULE 5(c)**

2 42. The proposed rule under ARCP Rule 5(c) would state as follows:

3 Rule 5(c). Service After Appearance; Service After Judgment; How Made

4 (1) Serving an Attorney. If a party is represented by an attorney, service under
5 this rule must be made on the attorney unless the court orders service on the
6 party.

7 (2) Service in General. A paper is served under this rule by:

8 (A) handing it to the person;

9 (B) leaving it:

10 (i) at the person's office with a clerk or other person in charge or, if no one is in
11 charge, in a conspicuous place in the office; or

12 (ii) if the person has no office or the office is closed, at the person's dwelling or
13 usual place of abode in the presence of a member of the household or a person
14 apparently in charge therein, who stated or appeared that he or she was at least
15 15 years of age at the time of service, who shall be informed of the general
16 nature of the legal process;

17 (C) Mailing it via U.S. mail to the person's last known address--in which event
18 service is complete upon mailing; or

19 (D) delivering the paper by any other means, including electronic means, if the
20 recipient consents in writing to that method of service or if the court orders
21 service in that manner--in which event service is complete upon transmission.

22 (3) Certificate of Service. The date and manner of service shall be noted on the
23 original of the paper served or in a separate certificate. If the precise manner in
24 which service has actually been made is not so noted, it will be conclusively
25 presumed that the paper was served by mail. This conclusive presumption shall
26 only apply if service in some form has actually been made.
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1 (4) Service After Judgment. After the time for appeal from a judgment has
2 expired or a judgment has become final after appeal, the service of a motion,
3 petition, complaint or other pleading required to be served and requesting
4 modification, vacation or enforcement of that judgment, shall be served
5 pursuant to Rules 4, 4.1 or 4.2, as applicable, of these rules as if serving a
6 summons and complaint.

1 **TEXT OF PROPOSED CHANGES TO RFLP RULE 41(C)**

2 43. The proposed rule under RFLP Rule 41(C) would state as follows:

3 C. Service of Summons upon Individuals.

4 Service upon an individual from whom a waiver has not been obtained and
5 filed, other than those specified in paragraphs D, E, and F, shall be effected by
6 delivering a copy of the summons, pleading and other documents being served
7 to that individual by one of the following methods:

8 1. (Personal Service): Delivering a copy of the summons and of the pleading
9 summons, pleading and other documents being served to that individual
10 personally.

11 2. (Substitute Service at a Residence): Leaving copies thereof a copy of the
12 summons, pleading and other documents being served at that individual's
13 dwelling house or usual place of abode in the in the presence of a member of
14 the household or a person apparently in charge therein, who stated or appeared
15 that he or she was at least 15 years of age at the time of service, who shall be
16 informed of the general nature of the legal process.

17 3. Service by Mail or National Courier Service; Return. When the location of a
18 party is within the state, service may be made by depositing, with delivery
19 charges prepaid, the summons and a copy of the pleading and other documents
20 being served with the United States Postal Service or any other national courier
21 service that provides delivery and signature confirmation or certified mail,
22 signed return receipt, to be sent to the person to be served. Service under this
23 rule and the return or confirmation of service may be made by the party
24 procuring service or by that party's attorney. Service in this manner is only
25 effective if the return receipt or signature confirmation is signed by the party to
26 be served. Upon receiving from the U.S. Postal Service or other national courier
27 be served. Upon receiving from the U.S. Postal Service or other national courier
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1 service the signed return receipt, or a copy of the signature confirmation and
2 cash register receipt or package label of the person being served, the serving
3 party shall file an affidavit with the court stating:

4 a. that the summons and a copy of the pleading and other document being
5 served were dispatched to the party being served;

6 b. that such papers were in fact received by the party as evidenced by the
7 receipt, or copy of the signature confirmation containing the signature of the
8 party served and cash register receipt or package label, a copy of which shall be
9 attached to the affidavit; and

10 c. the date of receipt by the party being served and the date of the return of the
11 receipt or signature confirmation to the sender.

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13 This affidavit shall be prima facie evidence of personal service of the summons,
14 the pleading and other documents to be served. Service shall be deemed
15 complete and time shall begin to run for the purposes of Rule 32(A) from the
16 date of receipt by the party being served, provided that no default may be had
17 on such service until the required affidavit has been filed.
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1 4. Service After Judgment. After the time for appeal from a judgment has
2 expired or a judgment has become final after appeal, the service of a motion,
3 petition, or other pleading required to be served and requests for modification,
4 vacation, or enforcement of that judgment, shall be served pursuant to Rule 40,
5 41 or 42, as applicable, as if serving a summons and petition.
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