

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

10 **PETITION TO AMEND RULES 4.1**
11 **AND 4.2 OF THE ARIZONA**
12 **RULES OF CIVIL PROCEDURE**

Supreme Court No. R-21-

STATE BAR OF ARIZONA
PETITION

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby petitions the Court to amend Arizona Rules of
15 Civil Procedure (the “Ariz. R. Civ. P.”) 4.1(l) and 4.2(f). Ariz. R. Civ. P. 4.1 and 4.2
16 govern service of process within and outside of Arizona, respectively. The proposed
17 amendments to Ariz. R. Civ. P. 4.1(l) and 4.2(f) adopt changes to address due
18 process concerns raised in *Ruffino v. Lokosky*, 245 Ariz. 165 (App. 2018), *review*
19 *denied* (Dec. 13, 2018), with respect to service by publication and to align with
20 recent amendments to the Arizona Rules of Family Procedure.
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1 The State Bar’s proposed amendments require the serving party to seek court
2 approval by motion, and support the motion with an affidavit, outlining the steps
3 taken prior to seeking approval to serve by publication.
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5 The attached Appendix A contains a blackline showing all of the proposed
6 changes to Ariz. R. Civ. P.4.1(l) and 4.2(f). A clean version of the proposed changes
7 is attached at Appendix B.
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9 **I. BACKGROUND**

10 On July 12, 2018, the Court of Appeals of Arizona, Division 1, issued its
11 decision in *Ruffino v. Lokosky*, 245 Ariz. 165 (App. 2018), *review denied* (Dec.
12 13, 2018). In *Ruffino*, the Court of Appeals affirmed the trial court’s decision to
13 vacate a default judgment obtained after the plaintiff served defendant by
14 publication under Ariz. R. Civ. P. Rule 4.1(l)(1)(A). *Id.* at 170, ¶ 18. Under Ariz.
15 R. Civ. P. 4.1(l), service by publication may be made “only if” the following
16 conditions are met:
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19 (1) “the serving party, despite reasonably diligent efforts,
20 has been unable to ascertain the person’s current address,”
21 **or**

22 (2) “the person to be served has intentionally avoided
23 service of process,” **and**

24 (3) “service by publication is the best means practicable in
25 the circumstances for providing the person with notice.”

1 The Court of Appeals held that the plaintiff failed to show that “reasonably diligent
2 efforts” were made to ascertain the defendant’s address. *Ruffino*, 245 Ariz. at 169,
3 ¶¶ 12–15. The court acknowledged that the plaintiff performed a “skip trace,” but
4 despite having narrowed the defendant’s location to one likely address, the court
5 held that the plaintiff did not make any effort—much less “reasonably diligent
6 efforts”—to communicate with the defendant to confirm she was residing at that
7 address. The Court of Appeals further held that the plaintiff could have used many
8 conventional ways to determine which of the addresses the skip trace revealed were
9 actually the defendant’s residence.¹ *Ruffino*, therefore, created ambiguity over what
10 efforts constitute “reasonably diligent efforts” that satisfy the requirements for
11 service by publication.
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15 Additionally, effective January 1, 2019, Arizona Rule of Family Law
16 Procedure (the “Ariz. R. Fam. Law P.”) 41(m) was revised to require court approval
17 before service by publication. Similar to *Ruffino*’s concerns that “reasonably diligent
18 efforts” are made to communicate with, and ultimately give notice to, an opposing
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22 ¹ The court also held that direct service was not the best means practicable
23 under the circumstances. *Id.* at 170, ¶¶ 16–17. The court instructed that “when more
24 practicable channels of communication are available, . . . a serving party should first
25 use those channels to attempt to confirm the other party’s address, or move for
alternative service, before service by publication can be considered the best means
practicable under the rule.”

1 party that an action has been filed, the Comment to Ariz. R. Fam. Law P. 41 provides
2 that:

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4 [S]ervice by publication is subject to subsequent challenge if it does not
5 satisfy due process standards of being reasonably calculated to give
6 notice to the party being served and providing the best practicable
7 notice under the circumstances.

8 *See* Ariz. R. Fam. Law P. 41, at Cmt. to 2019 Amdt. Thus, the recent revision to
9 Ariz. R. Fam. Law P. 41(m) emphasizes additional due process standards before
10 resorting to service by publication.

11 Finally, stakeholders in both Arizona's creditor and debtor bars have
12 expressed support for aligning Ariz. R. Civ. P. 4.1(l) and 4.2(f) with Ariz. R. Fam.
13 Law P. 41(m). The majority of state jurisdictions within the United States that permit
14 service by publication have moved toward either a motion and affidavit requirement
15 or affidavit alone requirement. Twenty states have rules requiring a motion and
16 affidavit before service by publication. Another fourteen states have rules requiring
17 the filing of an affidavit before service by publication. Only four states, including,
18 Arizona do not have either a motion or an affidavit requirement in their rules
19 governing service by publication.
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22 Accordingly, the State Bar believes that Ariz. R. Civ. P. 4.1 and 4.2 should be
23 amended to align with Ariz. R. Fam. Law P. 41(m), and to require an additional
24 affidavit requirement to outline the steps taken to try to locate and serve a person.
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1 Such a process will help address the due process concerns raised in *Ruffino v.*
2 *Lokosky*.

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4 **II. THE PROPOSED AMENDMENTS TO RULE 4.1 AND RULE 4.2**

5 The State Bar's proposed amendments require the serving party to seek court
6 approval by motion, supported by an affidavit, which outlines the steps taken prior
7 to seeking approval to serve by publication. These amendments alter the current
8 practice of a serving party being able to solely make the determination to serve by
9 publication.
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12 **A. *The Motion and Affidavit Requirements Address Due Process***
13 ***Concerns***

14 In *Ruffino v. Lokosky*, the court concluded the plaintiff had not made
15 reasonably diligent efforts to ascertain the defendant's address and, therefore, held
16 that service by publication was not the best means practicable under the
17 circumstances. *Ruffino*, 245 Ariz. at 169, ¶¶ 12-15. There, the plaintiff knew the
18 defendant's email address, phone number, and how to reach the defendant through
19 social media. Nevertheless, the plaintiff made no attempt through those channels to
20 verify which of the defendant's suspected addresses was correct prior to serving the
21 defendant by publication. *Id.*
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1 The court concluded that a “reasonably diligent effort” by the plaintiff would
2 have included reaching out to the defendant via telephone, email, or even social
3 media to verify the defendant’s correct address. *Id.* Thus, the court held that
4 alternative service through Ariz. R. Civ. P. 4.1(k)(1), and not service by publication
5 under ARCP 4.1(l), was “the best means practicable to alert [the defendant] of the
6 suit and comply with due process.” *Id.* at 170, ¶ 16. Ultimately, the court summarized
7 its holding as requiring, “when more practicable channels of communication are
8 available, . . . a serving party should first use those channels to attempt to confirm
9 the other party’s address, or move for alternative service, before service by
10 publication can be considered the best means practicable under the rule.” *Id.*, ¶ 18.

11 The proposed amendments to Ariz. R. Civ. P. 4.1(l) and 4.2(f), including the
12 affidavit requirement to support the motion for court approval, squarely address the
13 due process concerns raised in *Ruffino v. Lokosky*.

14 **B. *Efforts to Serve Should Be Set Forth in an Affidavit***

15 To determine what information should be included in an affidavit outlining
16 the serving party’s “reasonably diligent efforts,” the State Bar has looked to the
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1 Superior Court of Maricopa County, Arizona’s Library Resource Center², for an
2 example of guidance with respect to forms offered under the Ariz. R. Fam. Law P.
3 41(m). The State Bar believes that the following examples of “reasonably diligent
4 efforts” would satisfy *Ruffino v. Lokosky*:
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- 6 • **searching** internet databases or other networking sites for the person;
- 7 • **requesting** an address by which the person may be served through the
8 person’s known email and remitting the service documents through that
9 known email;
- 10 • **requesting** an address by which the person may be served through a
11 directed question to the person’s known social media accounts;
- 12 • **inquiring** with the person’s known acquaintances, friends, relatives, or
13 employers as to the party’s whereabouts;
- 14 • **investigating** the real and personal property index in the applicable
15 county assessor’s office;
- 16 • **checking** the websites of and telephoning the county jail, state prisons,
17 and other detention facilities; or
- 18 • **hiring** a private detective or company that charged a fee to conduct a
19 thorough search.

20 The list is not intended to be exhaustive, nor should a serving party be required
21 to complete every task listed above. Indeed, each instance of serving a party is
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24 ² <https://superiorcourt.maricopa.gov/llrc/>, with a detailed information paper
25 explaining “reasonably diligent efforts” at
<https://superiorcourt.maricopa.gov/media/4797/dr28hz.pdf>

1 unique and presents varying situations. And, modes of searching for an individual,
2 including what social media is and how it might be described in the future, may
3 change. So, rather than include the foregoing examples in the amended rule, the State
4 Bar believes a serving party may look to case law such as *Ruffino v. Lokosky* or
5 forms available at library resource centers to guide the serving party in what
6 “reasonably diligent efforts” include.
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9 The required affidavit will also allow the court to more quickly ascertain and
10 decide whether to approve service by publication. While some may argue that
11 requiring permission to serve by publication will open the floodgates to meaningless
12 paperwork, the State Bar believes that ensuring due process is of paramount
13 importance. Service by publication has been described as service by “last resort.”
14 The proposed amended rule will require parties to truly use service by publication
15 as a “last resort,” thus, ameliorating concerns that the floodgates may open.
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18 Aligning Ariz. R. Civ. P. 4.1(l) and 4.2(f) with Ariz. R. Fam. Law P. 41(m)
19 will allow for consistency in what serving parties must do, primarily seeking court
20 permission, before resorting to service by publication. The additional step of
21 supporting the motion with an affidavit that outlines the efforts taken will ensure all
22 “reasonably diligent efforts” are exhausted to provide a party with due process prior
23 to serving by publication.
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ATTACHMENT A

Text added is marked with underline. Text removed is marked with ~~strikethrough~~.

Rule 4.1. Service of Process Within Arizona

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(1) Service by Publication.

(1) Generally. ~~A party may serve a person by publication only if: If a party shows that the service provided by Rule 4.1(c) through 4.1(k)—including an alternative means of service—is impracticable, the court may, on motion and without notice to the person to be served, order that service be accomplished by publication. The court may permit service by publication, in such manner and form as the court may direct, if:~~

(A) the serving party, despite reasonably diligent efforts, has been unable to determine the person's current address; or the person to be served has intentionally avoided service of process; ~~the last known address of the person to be served is within Arizona but:~~

(i) ~~the serving party, despite reasonably diligent efforts, has been unable to ascertain the person's current address; or~~

(ii) ~~the person to be served has intentionally avoided service of process; and~~

(B) service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement; and

(C) the motion is supported by affidavit that sets forth the serving party's reasonably diligent efforts to serve the person.

(2) Procedure.

(A) Generally. Service by publication is accomplished by publishing the summons and a statement describing how a copy of the pleading being served may be obtained at least once a week for 4 successive weeks:

(i) in a newspaper published in the county where the action is pending; and

(ii) if the last-known address of the person to be served is in a different county, in a newspaper in that county.

(B) Who May Serve. Service by publication may be made by the serving party, its counsel, or anyone authorized under Rule 4(d).

- (C) Alternative Newspapers. If no newspaper is published in a county where publication is required, the serving party must publish the summons and statement in a newspaper in an adjoining county.
 - (D) Effective Date of Service. Service is complete 30 days after the summons and statement is first published in all newspapers where publication is required.
- (3) Mailing. If the serving party knows the address of the person being served, it must, on or before the date of first publication, mail to the person the summons and a copy of the pleading being served, postage prepaid.
- (4) Return.
- (A) Required Affidavit. The party or person making service must prepare, sign and file an affidavit stating the manner and dates of the publication and mailing, and the circumstances warranting service by publication. If no mailing was made because the serving party did not know the current address of the person being served, the affidavit must state that fact.
 - (B) Accompanying Publication. A printed copy of the publication must accompany the affidavit.
 - (C) Effect. An affidavit that complies with these requirements constitutes prima facie evidence of compliance with the requirements for service by publication.

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Rule 4.2. Service of Process Outside Arizona

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(f) Service by Publication.

(1) Generally. ~~A party may serve a person by publication only if:~~ If a party shows that the service provided by Rule 4.2(b) through 4.2(e) is impracticable, the court may, on motion and without notice to the person to be served, order that service be accomplished by publication. The court may permit service by publication, in such manner and form as the court may direct, if:

(A) the serving party, despite reasonably diligent efforts has been unable to determine the person's current address; or the person to be served has intentionally avoided service of process; ~~the last known address of the person to be served is outside Arizona but:~~

(i) ~~the serving party, despite reasonably diligent efforts, has not been able to ascertain the person's current address; or~~

(ii) ~~the person has intentionally avoided service of process; and~~

(B) service by publication is the best means practicable in the circumstances for providing notice to the person of the action's commencement; and

(C) the motion is supported by affidavit that sets forth the serving party's reasonably diligent efforts to serve the person.

(2) Procedure.

(A) Generally. Service by publication is accomplished by publishing the summons and a statement describing how a copy of the pleading being served may be obtained at least once a week for 4 successive weeks in a newspaper published in the county where the action is pending.

(B) Who May Serve. Service by publication may be made by the serving party, its counsel, or anyone else authorized to serve process under Rule 4(d).

(C) Alternative Newspapers. If no newspaper is published in a county where publication is required, the serving party must publish the summons and statement in a newspaper in an adjoining county.

(D) Effective Date of Service. Service is complete 30 days after the summons and statement is first published in all newspapers where publication is required.

- (3) Mailing. If the serving party knows the address of the person being served, it must, on or before the date of first publication, mail to the person the summons and a copy of the pleading being served, postage prepaid.
- (4) Return.
 - (A) Required Affidavit. The party or person making service must prepare, sign and file an affidavit describing the manner and dates of the publication and mailing, and the circumstances warranting service by publication. If no mailing was made because the serving party did not know the current address of the person being served, the affidavit must state that fact.
 - (B) Accompanying Publication. A printed copy of the publication must accompany the affidavit.
 - (C) Effect. An affidavit that complies with these requirements constitutes prima facie evidence of compliance with the requirements for service by publication.

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ATTACHMENT B

Rule 4.1. Service of Process Within Arizona

...

(1) Service by Publication.

- (1) Generally. If a party shows that the service provided by Rule 4.1(c) through 4.1(k)—including an alternative means of service—is impracticable, the court may, on motion and without notice to the person to be served, order that service be accomplished by publication. The court may permit service by publication, in such manner and form as the court may direct, if:
 - (A) the serving party, despite reasonably diligent efforts, has been unable to determine the person's current address; or the person to be served has intentionally avoided service of process;
 - (B) service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement; and
 - (C) the motion is supported by affidavit that sets forth the serving party's reasonably diligent efforts to serve the person.

(2) Procedure.

- (A) Generally. Service by publication is accomplished by publishing the summons and a statement describing how a copy of the pleading being served may be obtained at least once a week for 4 successive weeks:
 - (i) in a newspaper published in the county where the action is pending; and
 - (ii) if the last-known address of the person to be served is in a different county, in a newspaper in that county.
- (B) Who May Serve. Service by publication may be made by the serving party, its counsel, or anyone authorized under Rule 4(d).
- (C) Alternative Newspapers. If no newspaper is published in a county where publication is required, the serving party must publish the summons and statement in a newspaper in an adjoining county.
- (D) Effective Date of Service. Service is complete 30 days after the summons and statement is first published in all newspapers where publication is required.

- (3) Mailing. If the serving party knows the address of the person being served, it must, on or before the date of first publication, mail to the person the summons and a copy of the pleading being served, postage prepaid.
- (4) Return.
 - (A) Required Affidavit. The party or person making service must prepare, sign and file an affidavit stating the manner and dates of the publication and mailing, and the circumstances warranting service by publication. If no mailing was made because the serving party did not know the current address of the person being served, the affidavit must state that fact.
 - (B) Accompanying Publication. A printed copy of the publication must accompany the affidavit.
 - (C) Effect. An affidavit that complies with these requirements constitutes prima facie evidence of compliance with the requirements for service by publication.

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Rule 4.2. Service of Process Outside Arizona

...

(f) Service by Publication.

- (1) Generally. If a party shows that the service provided by Rule 4.2(b) through 4.2(e) is impracticable, the court may, on motion and without notice to the person to be served, order that service be accomplished by publication. The court may permit service by publication, in such manner and form as the court may direct, if:
 - (A) the serving party, despite reasonably diligent efforts has been unable to determine the person's current address; or the person to be served has intentionally avoided service of process;
 - (B) service by publication is the best means practicable in the circumstances for providing notice to the person of the action's commencement; and
 - (C) the motion is supported by affidavit that sets forth the serving party's reasonably diligent efforts to serve the person.
- (2) Procedure.
 - (A) Generally. Service by publication is accomplished by publishing the summons and a statement describing how a copy of the pleading being served may be obtained at least once a week for 4 successive weeks in a newspaper published in the county where the action is pending.
 - (B) Who May Serve. Service by publication may be made by the serving party, its counsel, or anyone else authorized to serve process under Rule 4(d).
 - (C) Alternative Newspapers. If no newspaper is published in a county where publication is required, the serving party must publish the summons and statement in a newspaper in an adjoining county.
 - (D) Effective Date of Service. Service is complete 30 days after the summons and statement is first published in all newspapers where publication is required.
- (3) Mailing. If the serving party knows the address of the person being served, it must, on or before the date of first publication, mail to the person the summons and a copy of the pleading being served, postage prepaid.
- (4) Return.
 - (A) Required Affidavit. The party or person making service must prepare, sign and file an affidavit describing the manner and dates of the publication and mailing, and the circumstances warranting service by publication. If no

mailing was made because the serving party did not know the current address of the person being served, the affidavit must state that fact.

- (B) Accompanying Publication. A printed copy of the publication must accompany the affidavit.
- (C) Effect. An affidavit that complies with these requirements constitutes prima facie evidence of compliance with the requirements for service by publication.

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