Cite as 2018 Ark. 239

SUPREME COURT OF ARKANSAS

IN RE RECOMMENDATIONS OF THE COMMITTEE ON CIVIL PRACTICE; ARK. RULES OF CIVIL PROCEDURE 4 & 12; ARKANSAS SUPREME COURT ADMIN. ORDER NO. 18	**Opinion Delivered** June 21, 2018

PER CURIAM

The Arkansas Supreme Court Committee on Civil Practice submitted its proposals and recommendations for changes in rules of procedure affecting civil practice. They were published for comment. *In re Recommendation of the Committee on Civil Practice*, 2016 Ark. 29 (per curiam). The proposals relate to summons and related rules: Ark. R. Civ. P. 4 and Form of Summons, Ark. R. Civ. P. 12, and Administrative Order No. 18.

Comments have been reviewed by the committee and the court. The court thanks everyone who took the time to review the rules and submit comments. Revisions were made, most notably: (1) in the deletion of service on a receptionist or employee apparently in charge [proposed (f)(1)(D)] and service on a secretary or assistant in (f)(12)–(16); (2) in not increasing the time period to post or the number of postings for warning orders (g)(3); (3) in not requiring clerks to post a list of approved commercial delivery companies (g)(2)(A); and (4) in revising the substantial compliance provision in paragraph (k).

We adopt the amendments and republish the rules as set out below. These amendments shall be effective January 1, 2019.

1. Ark. R. Civ. P. 4. Summons and Service of Process.

(a) *Issuance of Summons.* Immediately on the filing of the complaint, the clerk shall issue a summons to the plaintiff or the plaintiff's attorney, who shall deliver it for service to a person authorized by subdivision (c) of this rule to serve process.

(b) *Form of Summons.* The summons shall be styled in the name of the court and issued under its seal, dated and signed by the clerk or a deputy clerk, and directed from the State of Arkansas to the defendant to be served. It shall contain:

(1) in its caption, the names of the plaintiff and defendant or, if there are multiple parties, the names of the plaintiff and defendant listed first in the complaint;

(2) the address of the defendant to be served, if known;

(3) the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff;

(4) the time within which these rules require that the defendant to be served must appear, file a responsive pleading or motion, and defend; and

(5) notice that the defendant's failure to appear, respond, and defend within the time allowed may result in entry of judgment by default against the defendant for the relief demanded in the complaint.

(c) *Process: Defined; By Whom Served*. (1) For purposes of this rule, the term "process" means the summons and a copy of the complaint, which shall be served together. The plaintiff or the plaintiff's attorney shall furnish the person making service with as many copies as are necessary.

(2) The following persons are authorized to serve process:

(A) the sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action;

(B) any person appointed pursuant to Administrative Order No. 20 for the purpose of serving summons by either the court in which the action is filed or a court in the

county in which service is to be made;

(C) any person authorized to serve process under the law of the place outside this state where service is made; and

(D) in the event of service by mail or commercial delivery company pursuant to subdivision (g)(1) and (2) of this rule, the plaintiff or an attorney of record for the plaintiff.

(d) *Proof of Service*. The person effecting service shall make proof of service to the clerk within the time during which the person served must respond to the summons. Failure to make proof of service, however, shall not affect the validity of service.

(1) Proof of service may be made by executing a certificate of service contained in the same document as the summons. If service is made by a person other than a sheriff or his or her deputy, the certificate shall be sworn. If service has been by mail or commercial delivery company, the person making service shall attach a return receipt, envelope, affidavit, acknowledgment, or other writing required by subdivision (g)(1) and (2) of this rule.

(2) If service is made by warning order, proof of service shall be made as provided in subdivision (g)(3) of this rule.

(3) Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in subdivision (h)(4) of this rule, shall be made in accordance with the applicable treaty or convention.

(e) *Amendment*. At any time in its discretion and on terms as it deems just, the court may allow any summons or proof of service to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons is issued.

(f) *Personal Service Inside the State*. Service of process shall be made inside the state as follows:

(1) *Natural Persons*. If the defendant is a natural person at least 18 years of age or emancipated by court order, by:

(A) delivering a copy of the process to the defendant personally, or if he or she refuses to receive it after the process server makes his or her purpose clear, by leaving the papers in close proximity to the defendant;

(B) leaving the process with any member of the defendant's family at least 18 years of age at a place where the defendant resides; or

(C) delivering the process to an agent authorized by appointment or by law to receive service of summons on the defendant's behalf.

(2) *Minors.* If a defendant is less than 18 years of age and has not been emancipated by court order, by delivering the process to the defendant's father, mother, or guardian or, if there be none in the state, to any person at least 18 years of age in whose care or control the minor may be or with whom the minor resides.

(3) *Incapacitated Persons.* If a plenary, limited, or temporary guardian has been appointed for an incapacitated person, or if a conservator has been appointed for a person who by reason of advanced age or physical disability is unable to manage his or her property, service shall be on the person and the guardian or conservator.

(4) *Incarcerated Persons.* Service on a person incarcerated in any jail, penitentiary, or other correctional facility in this state shall be on the administrator of the institution, who shall promptly deliver the process to the incarcerated person. A copy of the process shall also be sent to the incarcerated person by first-class mail and marked as "legal mail" and, unless the court otherwise directs, to his or her spouse, if any.

(5) *Corporations.* Service on any corporation, including nonprofit corporations, professional corporations, and cooperatives, shall be on its registered agent for service of process, or the agent's secretary or assistant; any officer of the corporation, or the officer's secretary or assistant; a managing or general agent of the corporation, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(6) *Limited Liability Companies.* Service on a limited liability company shall be on its registered agent for service of process, or the agent's secretary or assistant; a manager of a limited liability company in which management is vested in managers rather than members, or the manager's secretary or assistant; a member of a limited liability company in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant; a managing or general agent of the limited liability company, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(7) *Partnerships*. Service on any type of partnership, including a general partnership, a limited liability partnership, a limited partnership, and a limited liability limited partnership, shall be on any general partner or his or her secretary or assistant; the partnership's registered agent for service of process, or the agent's secretary or assistant; a managing or general agent of the partnership, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(8) *Unincorporated Associations*. Service on an unincorporated association subject to suit under its own name, except a partnership, shall be on its registered agent for service of process, or the agent's secretary or assistant; any manager of the association, or the manager's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

(9) *Defendant Class Actions*. Service on a defendant class shall be on each of the parties named as class representatives in the same manner as if each representative were sued in a separate action.

(10) *Trusts*. Service on a trust shall be on a trustee of the trust, on the trustee's secretary or assistant, or as provided by statute.

(11) *The United States*. Service on the United States or any of its agencies, officers, or employees shall be as authorized by the Federal Rules of Civil Procedure or by other federal law.

(12) *States and State Agencies*. Service on a state or any of its agencies, departments, boards, or commissions subject to suit shall be on the chief executive officer, director, or chairman, any other person designated by appointment or by an applicable statute to receive service of process, or on the Attorney General of the state if service is accompanied by an affidavit of a party or the party's attorney that the officer or designated person is unknown or cannot be located.

(13) *Municipal Corporations*. Service on a municipal corporation shall be on the mayor, city manager, city administrator, or city clerk.

(14) *Counties*. Service on a county shall be on the county judge, county administrator, county clerk, or circuit clerk if no county clerk has been elected.

(15) *School Districts*. Service on a school district shall be on the president of the board of directors, or the superintendent of schools.

(16) *Other Political Subdivisions*. Service on any political subdivision, special district, or quasi-municipal agency not listed in this subdivision shall be on any officer, director, chairman, or manager.

(17) *Public Officers or Employee*s. Service on an officer or employee of a government entity listed in paragraphs (12)–(16) of this subdivision, acting in an official capacity, shall be on the officer or employee and by mailing a copy of the process as specified in subdivision (g)(1)(A)(i) of this rule to an official on whom service can be made pursuant to paragraphs (12)–(16), as applicable, and a copy to the Attorney General if a state officer or employee is sued.

(g) *Alternative Methods of Service*. In addition to the methods of service described in subdivision (f) of this rule, process may be served on any defendant except the United States and any of its agencies, officers, or employees by the methods enumerated in this subdivision.

(1) *Service by Mail*. The plaintiff or an attorney of record for the plaintiff shall serve process by mail only as provided in this paragraph.

(A)(i) Certified mail shall be addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. Notwithstanding the foregoing, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document, or affidavit by a postal employee reciting or showing refusal of the mailed process by the addressee. Failure to claim mail does not constitute refusal for purposes of this paragraph.

(iii) If delivery of mailed process is refused, the plaintiff or attorney making service, promptly on receipt of notice of the refusal, shall mail to the defendant by first-class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the

defendant appears to defend the suit.

(iv) A judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

(B)(i) First-class mail, postage prepaid, shall be addressed to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender.

(ii) If no acknowledgment of service is received by the sender within 20 days after the date of mailing, service of process shall be made in a manner other than by mail or by commercial delivery company.

(iii) Unless good cause is shown for not doing so, the court shall order the payment of the costs of service by the person served if that person does not complete and return, within 20 days after mailing, the notice and acknowledgment of receipt of summons. The notice and acknowledgment of receipt of process shall be executed under oath or affirmation.

(2) *Service by Commercial Delivery Company.* The plaintiff or an attorney of record for the plaintiff shall serve process by commercial delivery company only as provided in this paragraph.

(A) The documents must be addressed to the person to be served and delivered by a commercial delivery company that (1) obtains signatures of recipients, (2) maintains permanent records of actual delivery, and (3) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

(B) The process must be delivered to the defendant or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained.

(C)(i) Service pursuant to this paragraph (2) shall not be the basis for a judgment by default unless the record reflects actual delivery on, and the signature of, the defendant or agent, or an affidavit by an employee of an approved commercial delivery company reciting or showing refusal of the process by the defendant or agent.

(ii) If delivery of process is refused, the plaintiff or attorney making the service, promptly on receipt of notice of the refusal, shall mail to the defendant by first class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the defendant appears to defend the suit.

(iii) Any judgment by default may be set aside pursuant to Rule 55(c) if the court finds that someone other than the defendant or agent signed the receipt or refused the delivery or that the commercial delivery company had not been approved as required by this paragraph.

(3) *Service by Warning Order.* If the plaintiff seeks a judgment that affects or may affect the rights of persons who need not be subject personally to the jurisdiction of the court, service may be by warning order issued by the clerk. On the filing by the plaintiff or his or her attorney of an affidavit showing that, after diligent inquiry, the identity or whereabouts of the defendant remains unknown, the clerk shall issue a warning order to be published in a newspaper of general circulation as described in paragraph (B) or posted at the courthouse as provided in paragraph (C).

(A) The warning order shall state the caption of the pleadings; briefly describe the nature of the action and the relief sought; include, if applicable, a description of the property or other res to be affected by the judgment; and warn the defendant or interested person to appear within 30 days from the date of first publication of the warning order or face entry of judgment by default or be otherwise barred from asserting his or her interest.

(B)(i) The party seeking judgment shall cause the warning order to be published weekly for two consecutive weeks in a newspaper having general circulation in the county where the action is filed and to be sent, with a copy of the complaint, to the defendant or interested person at his or her last known address by certified mail as provided in paragraph (1)(A)(i) of this subdivision.

(ii) As used in this subdivision, the term "newspaper" means a printed publication in the English language of no less than four pages that has been disseminated without interruption at least once a week for the preceding 12 months in the county where the action has been filed, holds a second-class mailing permit, has at least 50-percent paid circulation, and devotes an average of 40 percent of its space to news and information of interest to the general public.

(iii) Proof of publication shall be by affidavit of the editor, proprietor, or business

manager of the newspaper, with a copy of the published notice attached, stating the dates on which the notice appeared.

(C) If the party seeking judgment has been granted leave to proceed as an indigent without prepayment of costs, the clerk shall conspicuously post the warning order for a continuous period of 30 days at the courthouse or courthouses of the county where the action is filed. The party seeking judgment shall cause the warning order and a copy of the complaint to be sent to the defendant or interested person at his or her last known address by certified mail as provided in paragraph (1)(A)(i) of this subdivision. Newspaper publication of the warning order is not required. Proof of posting shall be by a letter or other statement signed by the clerk stating the location and dates on which the warning order was posted.

(D) No judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published or posted. The affidavit shall be accompanied by the required proof of publication or posting of the warning order. If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person.

(4) *Service as Directed by Court Order.* On motion without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by this rule, the court may order service by any method or combination of methods reasonably calculated to apprise the defendant of the action, including service by warning order meeting the minimum requirements of paragraph (3)(A)-(D) of this subdivision.

(h) *Service Outside the State.* Whenever the law of this state authorizes service outside this state, service, when reasonably calculated to apprise the defendant of the action, may be made:

(1) By personal delivery in the same manner prescribed for service within this state;

(2) In any manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

(3) By mail or commercial delivery company as provided in subdivision (g)(1) and

(2) of this rule;

(4) As directed by a foreign authority in response to a letter rogatory or pursuant to the provisions of any treaty or convention pertaining to the service of a document in a foreign country;

(5) By any method or combination of methods as directed by order of the court on motion, without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by this rule.

(i) *Time Limit for Service.* (1) If service of process is not made on a defendant within 120 days after the filing of the complaint or within the time period established by an extension granted pursuant to paragraph (2), the action shall be dismissed as to that defendant without prejudice on motion or on the court's initiative. If service is by mail or by commercial delivery company pursuant to subdivision (g)(1) and (2) of this rule, service shall be deemed to have been made for purposes of this subdivision on the date that the process was accepted or refused.

(2) The court, on written motion and a showing of good cause, may extend the time for service if the motion is made within 120 days of the filing of the suit or within the time period established by a previous extension. To be effective, an order granting an extension must be entered within 30 days after the motion to extend is filed, by the end of the 120-day period, or by the end of the period established by the previous extension, whichever date is later.

(3) This subdivision shall not apply to service in a foreign country pursuant to subdivision (h) of this rule or to complaints filed against unknown tortfeasors.

(j) *Service of Other Writs and Papers*. Whenever any rule or an applicable statute requires service on any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, the notices, writs or papers may be served in the manner prescribed in this rule for service of process. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

(k) *Disregard of Error; Actual Notice*. Any error as to the sufficiency of process or the sufficiency of service of process shall be disregarded if the court determines that the serving

party substantially complied with the provisions of this rule and that the defendant received actual notice of the complaint and filed a timely answer.

(l) *Waiver.* A party seeking to affirmatively waive sufficiency of service and sufficiency of process shall do so in writing. A waiver pursuant to this subdivision: (1) is not effective unless filed with the clerk and served on all parties as provided in Rule 5; and (2) does not of itself waive any other defense.

Reporter's Notes (2019 Amendment). Rule 4 has undergone several modifications since it became effective in 1979. The 2019 amendment substantially revises and reorganizes the rule.

Subdivision (a). The amendment reflects more clearly the actual practice envisioned by the Reporter's Notes to the original version of the rule. As there stated: "Whereas FRCP 4 places the onus of delivering process to the server upon the Clerk, this Rule permits the Clerk to 'cause it to be delivered,' thus contemplating placing the summons with the plaintiff's attorney who then will see to it that it is served by an appropriate official."

Subdivision (b). This subdivision has been revised to accommodate electronic filing and to reflect current law. The introductory section to the official summons form has also been modified.

New language in subdivision (b) provides that, in multiple-party cases, only the first-listed party on each side of the case must be listed in the caption. This revision is necessary because of electronic filing software and is consistent with *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004), in which the Supreme Court refused to read the original version of the rule to require "a listing of every plaintiff and every defendant on every summons, no matter how many plaintiffs and defendants are parties to the case." *Id.* at 123, 186 S.W.3d at 729.

Similarly, the phrase "directed from the State of Arkansas to the defendant to be served" has been added to reflect the holding of *Gatson v. Billings*, 2011 Ark. 125. There the Supreme Court held that Rule 4(b) must be read in conjunction with Ark. Const. art. 7, § 49, which provides that "[a]ll writs and other judicial process, shall run in the name of the State of Arkansas." The new provision also makes plain that the defendant "to be served" is identified here; in a case with multiple defendants, this defendant's name will not necessarily appear in the caption.

Another change requires the summons to contain "the address of the defendant to be served, if known." This provision makes the rule's text consistent with the official summons form, which contains a space for the address of the defendant being served. The amended rule recognizes, however, that the defendant's address may not be known at the time the complaint is filed and the summons issued.

The introductory section of the official summons form has been divided into three paragraphs. The second paragraph lists examples of additional notices that may be included: those required by statute in unlawful-detainer actions and in replevin actions, plus the notice of consent jurisdiction of state district courts required by Administrative Order No. 18.

Subdivision (c). This subdivision has been amended by adding a new paragraph (1) and designating the previous text as paragraph (2). The latter is unchanged except for a revised cross-reference. The new first paragraph defines "process" for purposes of the rule to include the summons and complaint and requires, as did a sentence in subdivision (d) in the previous version of the rule, that they be served together.

Subdivision (d). This subdivision addresses proof of service; for the most part it is the same as former subdivision (g) but has been divided into three paragraphs. The introductory material consists of the first and second sentences of former subdivision (g) with one stylistic change. Paragraph (1) is based on the third and fourth sentences of the previous version, rewritten to conform to the official summons form. Paragraph (2), which cross-references the proof-of-service provision for warning orders, is new. Paragraph (3) is identical to the last sentence of former subdivision (g) with the exception of the cross-reference.

Subdivision (e). This subdivision, which governs amendment of the summons and proof of service, tracks former subdivision (h).

Subdivision (f). A substantially revised version of former subdivision (d), this provision addresses personal service inside the state. It clarifies the prior rule as to service on individuals, entities, and organizations and in some instances expands the opportunities for service. Alternative methods for serving these defendants (except the United States and its agencies, officers, and employees) are set out in subdivision (g).

Paragraph (1)(A) spells out so-called "refusal service" in more detail, drawing on such cases as *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000), and *Riggin v. Dierdorff*,

302 Ark. 517, 790 S.W.2d 897 (1990). The process server must, after "mak[ing] his or her purpose clear," leave the summons and complaint "in close proximity" to a defendant who refuses to accept the documents.

In paragraph (1)(B), the phrase "a place where the defendant resides" replaces its counterpart in former paragraph (d)(1), "dwelling house or usual place of abode." The effect of this change is to overturn *State Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997), which defined the latter phrase in terms of domicile: a person's "fixed permanent home, the place to which he has—whenever absent—the intention of returning." *Id.* at 344, 954 S.W.2d at 910. Residence and domicile are not synonymous; a person can have multiple residences but only one domicile. *See Leathers v. Warmack*, 341 Ark. 609, 19 S.W.3d 27 (2000); *Lawrence v. Sullivan*, 90 Ark. App. 206, 205 S.W.3d 168 (2005). This change makes Arkansas practice consistent with that in other jurisdictions whose courts have rejected the narrow approach taken in *Mitchell*. *See, e.g.*, *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253 (2d Cir. 1991); *United States v. Tobin*, 483 F. Supp.2d 68 (D. Mass. 2007); *Blittersdorf v. Eikenberry*, 964 P.2d 413 (Wyo. 1998); *Sheldon v. Fettig*, 919 P.2d 1209 (Wash. 1996); *Van Buren v. Glasco*, 217 S.E.2d 579 (N.C. 1975), *overruled on other grounds by Love v. Moore*, 291 S.E.2d 141 (N.C. 1982).

Paragraph (1)(B) also provides that the person receiving the process (summons and complaint) must be a family member who is at least 18 years old. Under former paragraph (d)(1), the recipient could be anyone 14 years of age or older residing in the defendant's place of abode. *See Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1997) (cook); *Nowell v. Nowell*, 384 F.2d 951 (5th Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (resident manager of apartment complex who lived in separate building); *Nat'l Dev. Co.*, *supra* (housekeeper); *Barclays Bank v. Goldman*, 517 F. Supp. 403 (S.D.N.Y. 1981) (maid). The changes are intended to make actual notice to the defendant more likely.

Paragraph (2) clarifies service on minors and recognizes that, under Arkansas law, the age of majority is 18. Until that age is attained, all persons "shall be considered minors." Ark. Code Ann. § 9-25-101(a). The former rule permitted service on an individual at least 14 years of age and required service on parents or guardians of younger defendants. Paragraph (2) also takes into account minors emancipated by court order. *See* Ark. Code Ann. §§ 9-26-104, 9-27-362.

In paragraph (3), the term "incapacitated person" refers to a person who is "impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient

understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate." Ark. Code Ann. § 28-65-101(5)(A). The appointment of a conservator requires the consent of the person who, because of advanced age or physical infirmity, can no longer manage his or her own financial affairs. *Id.* §§ 28-67-103, 28-67-105. A conservator has the same powers and duties as a guardian, except as to the custody of the person. *Id.* § 28-67-108.

Paragraph (4), which provides for service on incarcerated persons, largely tracks former subdivision (d)(4).

With respect to corporate entities, paragraph (5) expressly applies to "any corporation," including nonprofit corporations, professional corporations, and cooperatives. *See* Ark. Code Ann. §§ 4-28-201 et seq. (nonprofit corporations); §§ 4-29-201 et seq. (professional corporations); §§ 4-29-301 et seq. (medical corporations); §§ 4-29-401 et seq. (dental corporations); §§ 4-30-101 et seq. (cooperatives). In light of the word "any," this list is obviously not exclusive; for example, the provision reaches foreign corporations as well as those formed under Arkansas law.

Paragraph (5) retains the provisions of former subdivision (d)(5) authorizing service on a corporation's officer, managing or general agent, or any agent authorized by appointment or by law to receive service. It also permits, as did the opening clause of former subdivision (d), service as provided by statute. But paragraph (5) adds other options, including the corporation's registered agent and an officer's secretary or assistant. Although the holdover term "managing or general agent" is not defined, the Supreme Court has offered the following guidance:

> [T]he person . . . must have some measure of discretion in operating some phase of the defendant's business or in the management of a given office [and] such status that common sense would trust him to see that the summons gets promptly into the hands of the right corporate people.

Lyons v. Forrest City Mach. Works, Inc., 301 Ark. 559, 561, 785 S.W.2d 220, 221 (1990) (plant manager, who had worked for corporate defendant for 32 years, was a managing or general agent). *See also May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990) (bookkeeper who was "more or less in charge" of office at time of service held to be a managing or general agent).

Paragraph (6) addresses service on limited liability companies. It is based on paragraph (5) but contains language specific to the structure of limited liability companies.

In particular, it provides for service on (1) a manager of the LLC if management is vested in managers rather than the members, or on the manager's secretary or assistant; or (2) a member of the LLC if management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant. This language is based on that in Colo. R. Civ. P. 4(e)(4)(C) & (D). *See also* N.Y. Civ. P. L. § 311-a.

Service on any type of partnership, including a general partnership, a limited liability partnership, a limited partnership, and a limited liability limited partnership, is governed by paragraph (7). It provides for service on any general partner or his or her secretary or assistant; the partnership's registered agent for service of process, or the agent's secretary or assistant; a managing or general agent of the partnership, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by statute.

Under the Revised Uniform Partnership Act, Ark. Code Ann. §§ 4-46-101 et seq., a general partnership can be sued in its own name, but a judgment against the partnership cannot be satisfied from a partner's individual assets unless there is also a judgment against that partner. *Id.* § 4-46-307(a) & (c). Generally, partners are jointly and severally liable for all obligations of the partnership. *Id.* § 4-46-306. They are also agents of the partnership for purposes of its business. *Id.* § 4-46-301(1).

A limited liability partnership must designate a registered agent if it has no office in this state, as must a foreign limited liability partnership. *Id.* §§ 4-46-1001(c), 4-46-1102(a). Service of process is made on the registered agent or the agent's secretary or assistant. A partnership becomes a limited liability partnership by a vote of the partners and by filing a "statement of qualification" with the Secretary of State. *Id.* § 4-46-1001. A foreign LLP must file a "statement of foreign qualification" before transacting business in the state. *Id.* § 4-46-1102. An obligation of a limited liability partnership is solely the obligation of the partnership. *Id.* § 4-46-306(c).

Domestic limited partnerships and foreign limited partnerships doing business in Arkansas must have a registered agent in the state. *Id.* § 4-47-114. Each general partner is an agent of the limited partnership for the purposes of its activities. *Id.* § 4-47-402. The certificate filed with the Secretary of State must state "whether the limited partnership is a limited liability limited partnership." *Id.* § 4-47-201(a)(4). Although a limited partnership is an entity distinct from its partners, *id.* § 4-47-104, each general partner is for the most part jointly and severally liable for all obligations of the limited partnership. *Id.* § 4-47-404. If the partnership elects LLLP status, however, each general partner enjoys a complete

shield from liability. *Id.* § 4-47-404(c). A judgment against a limited partnership alone is not a judgment against a general partner and cannot be satisfied from a general partner's assets. To reach those assets, the plaintiff must join a general partner as a party in the action against the limited partnership or proceed against that partner in a separate action. *Id.* § 4-47-405.

Paragraph (8) covers service on unincorporated associations, other than partnerships, subject to suit in their own names. This category at present appears limited to unincorporated nonprofit associations governed by the Revised Uniform Unincorporated Nonprofit Association Act, Ark. Code Ann. §§ 4-28-601 et seq. Under the Act, an unincorporated association of this type "may sue or be sued in its own name." *Id.* § 4-28-609(a). The term "registered agent" in paragraph (8) is intended to include an agent that an unincorporated nonprofit association authorizes to receive service of process by filing a statement with the Secretary of State. *See id.* § 4-28-611. Paragraph (8) also provides for service on "any manager of the association," as does § 4-28-612.

Apart from the Revised Uniform Unincorporated Nonprofit Association Act, Arkansas follows the common-law rule that an unincorporated association cannot be sued in its own name. *See, e.g.*, *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960). However, members of the association can be sued as a class by naming representative parties as defendants. This practice is reflected in Rule 23.2. *See Ark. Cnty. Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998). Service of process is on the named representatives of the class.

Paragraph (9) addresses service in defendant class actions, whether against unincorporated associations under Rule 23.2 or in other cases under Rule 23. Service on a defendant class shall be on each of the parties named as class representatives in the same manner as if each representative were sued in a separate action. The intent is to incorporate the various methods of service depending on the type of class representative—natural person, corporation, etc.—as provided for in subdivision (f) of this rule. The plaintiff selects the representative defendants and has the burden to convince the court that they will adequately protect the interests of the defendant class. 7A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1770 (3d ed.).

Paragraph (10), providing for service on trusts, had no counterpart in the previous version of the rule. It is based on Colo. R. Civ. P. 7(e)(4)(E).

Paragraph (11), which addresses service on the United States, is essentially the same as former subdivision (d)(6). Similarly, paragraph (12), which applies to service on states

and state agencies, is based on former subdivision (d)(7) but is limited to the state government. Paragraphs (13) through (15) are specific provisions for government entities that are not individually addressed in the present rule: cities, counties, and school districts. All other political subdivisions are to be served in accordance with paragraph (16). Finally, paragraph (17) provides for service on public officers and employees, a matter not covered by the current rule. These paragraphs are based in part on Colo. R. Civ. P. 7(e)(6)–(8) & (10)–(11).

Subdivision (g). This subdivision lists four alternative methods of services that may be used on defendants except the United States and its agencies, officers, and employees: mail, commercial delivery company, warning order, and as the court directs. Only the fourth method is new, but some clarifying changes have been made in the provisions governing the other methods.

Paragraphs (1) and (2) essentially maintain the status quo with respect to service by mail and commercial delivery company. In an important change, however, paragraph (1)(A)(i) now requires service by certified mail, rather than "any form of mail addressed to the person to be served with a return receipt requested and delivery restricted." Certified mail meets these requirements and is most often used, while other forms of mail that qualify are not well-suited for service of process. Also, paragraph (1)(A)(ii) has been amended to provide expressly that although the refusal of mail will support a default judgment, failure to claim mail does not constitute a refusal. The Supreme Court so held in *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990).

Paragraph (3), which deals with warning orders, departs significantly from former subdivision (f). First, paragraph (3) limits warning orders issued by the clerk to cases in which the plaintiff "seeks a judgment that affects or may affect the rights of persons who need not be subject personally to the jurisdiction of the court"—that is, when jurisdiction is *in rem*. However, if *in personam* jurisdiction over the defendant is necessary, the plaintiff cannot obtain a warning order from the clerk but must seek a court order under paragraph (4).

Second, paragraph (3) requires the plaintiff to submit to the clerk "an affidavit showing that, after diligent inquiry, the identity or whereabouts of the defendant remains unknown." Under the previous versions of the rule, this requirement applied only when *in personam* jurisdiction over the defendant was necessary. *See* Newbern, Watkins & Marshall, *Arkansas Civil Practice & Procedure* § 12:14, n.14. As a matter of due process, however, service by publication of a warning order is a matter of last resort to be employed only if a defendant's whereabouts cannot be ascertained through the exercise of reasonable diligence. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Third, paragraph (3)(B) establishes the minimum requirements for newspapers in which warning orders may be published and specifies the manner in which proof of publication of the warning order is to be made. The rule was previously silent on these matters. The requirements are drawn from two statutes, *see* Ark. Code Ann. §§ 16-3-104 & 16-3-105, which appear in a section of the code inapplicable to warning orders. *Id.* § 16-3-101(e).

Finally, paragraph (3) continues the time period in which the warning order must be published (two consecutive weeks) or posted at the courthouse (30 days). A judgment by default cannot be taken until after 30 days of the date that the warning order was first published or posted.

Under paragraph (4), which is new to Arkansas practice, the court may order any method of service "reasonably calculated to apprise the defendant of the action." To obtain an order, the plaintiff must show by affidavit that, "despite diligent effort," service cannot be obtained using one of the other methods of service. The "diligent effort" standard is analogous to the "diligent inquiry" requirement for warning-order cases requiring *in personam* jurisdiction, and it should be interpreted in the same manner. *See, e.g.*, *Horne v. Savers Federal Sav. & Loan Ass'n*, 295 Ark. 182, 747 S.W.2d 580 (1988); *Scott v. Wolfe*, 2011 Ark. App. 438, 384 S.W.3d 609.

As noted above, paragraph (4) requires a warning order issued by the court when *in personam* jurisdiction over the defendant is necessary. This change from prior practice, under which all warning orders were issued by the clerk, is a safeguard prompted by due process considerations. As one court has observed: "Notice by publication, constitutionally suspect in 1950, is even more vulnerable today, given the precipitous decline in newspaper readership." *In re E.R.*, 385 S.W.3d 552, 560–61 (Tex. 2012).

Subdivisions (h)–(j). With minor exceptions, subdivision (h) tracks former subdivision (e). Its subheading has been revised to better reflect the content of the rule ("Service Outside the State"), and paragraph (3) has been updated to include service by commercial delivery company. In addition, paragraph (5) has been rewritten to make plain that service "as directed by the court" is permissible only upon a showing that the other methods listed in subdivision (f) have, despite diligent effort, proved unsuccessful. Stylistic changes have been made in subdivisions (i) and (j), and the cross-references in the former have been changed. Subdivision (i) provides that a motion to extend the time for service is proper if filed within 120 days of the filing of the complaint or within the time period provided by a previous extension of time. The rule was amended in 2014 to expressly address subsequent extensions and to overrule *Powell v. Fernandez*, 2013 Ark. App. 595.

Historically, motions to extend the time for service were considered proper if filed within the time period provided by a previous extension. *See Dougherty v. Sullivan*, 318 Ark. 608, 887 S.W.2d 305 (1994); *see also Henyan v. Peek*, 359 Ark. 486, 199 S.W.3d 51 (2004); *Wilkins v. Food Plus, Inc.*, 99 Ark. ftlineApp. 64, 257 S.W.3d 107 (2007). The Court of Appeals, however, held in *Powell* that a subsequent extension had to be sought within 120 days of the filing of the complaint.

Subdivision (k). This new provision reestablishes a substantial-compliance standard for process and service of process under Rule 4 when the defendant has actual notice of the complaint and has filed a timely answer. Other states have adopted similar rules. *E.g.*, Ore. R. Civ. P. 7(G).

Subdivision (k) is in accord with older Arkansas authority holding the plaintiff to a substantial-compliance standard, both as to the summons and service of process, in nondefault cases. *E.g.*, *Ford Life Ins. Co. v. Parker*, 277 Ark. 516, 644 S.W.2d 239 (1982). More recent cases, however, have held that a defendant's actual notice of a lawsuit does not validate defective process or defective service. *E.g.*, *Trusclair v. McGowan Working Partners*, 2009 Ark. 203, 203 S.W.3d 428; *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996).

The strict-compliance standard reflected in these decisions grows out of default situations. *E.g.*, *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978). Despite the amendment of Ark. R. Civ. P. 55 to echo its federal counterpart, getting a default judgment set aside in Arkansas remains notoriously difficult. *E.g.*, *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006). Insistence on strict compliance is a helpful shield in the default situation. But the same standard should not be a sword when the defect in process or service of process was minor and the defendant had actual notice of the complaint and filed a timely response.

It is often stated that service requirements, being in derogation of common-law rights, must be strictly construed and complied with exactly. *E.g.*, *Trusclair*, 2009 Ark. 203, at 3, 203 S.W.3d at 430. This rule arose in the context of service on out-of-state defendants where "personal jurisdiction over a defendant may be founded on something less than actual notice." *Halliman v. Stiles*, 250 Ark. 249, 254, 464 S.W.2d 573, 577 (1971); *see generally Kerr v. Greenstein*, 213 Ark. 447, 212 S.W.2d 1 (1948) (construing nonresident motorist statute). When a defendant has actual notice of the complaint and does not default, however, due-process concerns are not present and the strict-compliance rule should not apply.

Application of the rule in nondefault situations is also at odds with the guiding principal of Rule 4—ensuring due process by giving the defendant adequate notice of the suit and an opportunity to respond before a judgment is entered. Subdivision (k) retains the strict-compliance rule in default situations, while reviving the substantial-compliance

standard when the defendant has actual notice of a complaint and files a timely response. In the latter instance, due process is satisfied even if marginal defects in the summons or the service exist.

Subdivision (l). This new provision addresses a problem that has arisen primarily in divorce cases. It requires that a party who wishes to affirmatively waive sufficiency of process and sufficiency of service of process do so in writing, file the document with the clerk, and serve it on all parties. Otherwise, the waiver is not effective. This waiver goes only to these matters and does not, of itself, waive any other defense, such as lack of personal jurisdiction or improper venue.

2. Ark. R. Civ. P. 12(a)(1).

Rule 12. Defenses and Objections; When and How Presented; By Pleading or Motion; Motion for Judgment on the Pleadings.

(a) *When Presented.* (1) A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her. A defendant served by warning order under Rule 4(g)(3) or (4) shall file an answer within 30 days from the date of first publication or posting of the warning order. A defendant incarcerated in any jail, penitentiary, or other correctional facility in this state shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him or her shall file an answer or reply thereto within 30 days after service upon the party. The court may, upon motion of a party, extend the time for filing any responsive pleading.

. . .

Reporter's Notes (2019 Amendment). Subdivision (a)(1) has been amended to insert the correct cross-reference to Ark. R. Civ. P. 4(g)(3) or (4).

3. Administrative Order No. 18. Administration of District Courts.

. . .

6. *Jurisdiction of State District Court Judgeships*. In addition to the powers and duties of a district court under this administrative order, a state district court shall exercise additional power and authority as set out in this section.

. . .

(d) *Consent Process*.

(1) *Notice.* The circuit clerk shall give the plaintiff notice of the consent jurisdiction of a state district court judge when a suit is filed in the civil, domestic relations, or probate

division of circuit court. The circuit clerk shall also include the same notice with the summons for service on the defendant. Any party may obtain a "Consent to Proceed before a State District Court Judge" form from the Circuit Clerk's Office.

Reporter's Notes (2019 Amendment): Administrative Order No. 18(6)(d)(1) directs that the circuit clerk shall "give the plaintiff notice of the consent jurisdiction of a state district court judge when a suit is filed in the civil, domestic relations, or probate division of circuit court." Rather than "attach" that notice to the summons, as under the current version of this provision, the clerk must now "include" it with the summons for service on the defendant. This language accommodates electronic as well as paper filing.

4. Form of Summons

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is pursuant to Rule 4(c), (f), and (h) of the Arkansas Rules of Civil Procedure. The form incorporates a proof of service to be made by a sheriff, deputy sheriff, or other person, as appropriate, in accordance with Rule 4(g).

The form may be modified as needed in special circumstances, and additional notices, if required, should be inserted as appropriate. Examples include the notices required by statute in unlawful-detainer and replevin actions, *see* Ark. Code Ann. §§ 18-60-307(a) and 18-60-808(a), and the notice of the consent jurisdiction of a state district court that must be included pursuant to Ark. Sup. Ct. Admin. Order No. 18(6)(d)(1).

This form is not for use in cases of constructive service pursuant to Rule 4(g)(3). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

Effective July 1, 2012
Corrected August 14, 2012
Revised January 1, 2019

Reporter's Notes (2019 Amendment). In the introduction to the summons form, the second paragraph now provides that the form "may be modified as needed in special circumstances." It also states that "[a]dditional notices, if required, should be inserted as appropriate." The revised form combines these sentences and adds a sentence listing examples of the notices that may be "inserted as appropriate," including the notice of consent jurisdiction that is required by Administrative Order No. 18(6)(d)(1).

THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

_____ DIVISION [Civil, Probate, etc.]

_____
Plaintiff

v. No. _____

_____
Defendant

SUMMONS

THE STATE OF ARKANSAS TO DEFENDANT:

_____ [Defendant's name and address.]

_____

A lawsuit has been filed against you. The relief demanded is stated in the attached complaint. Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you are incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure.

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are:_____

If you fail to respond within the applicable time period, judgment by default may be entered against you for the relief demanded in the complaint.

Additional Notices Included: _____

CLERK OF COURT

Address of Clerk's Office

_____

_____ _____
[Signature of Clerk or Deputy Clerk]

Date:_____

[SEAL]

No. _____ This summons is for _____ (*name of Defendant).*

PROOF OF SERVICE

☐ On _____ [date] I personally delivered the summons and complaint to the defendant at _____ [place]; or

☐ After making my purpose to deliver the summons and complaint clear, on _____ [date] I left the summons and complaint in the close proximity of the defendant by _____ [describe how the summons and complaint was left] after he/she refused to receive it when I offered it to him/her; or

☐ On _____ [date] I left the summons and complaint with _____, a member of the defendant's family at least 18 years of age, at _____ [address], a place where the defendant resides; or

☐ On _____[date] I delivered the summons and complaint to _____ [name of individual], an agent authorized by appointment or by law to receive service of summons on behalf of _____ [name of defendant]; or

☐ On_____ [date] at _____ [address], where the defendant maintains an office or other fixed location for the conduct of business, during normal working hours I left the summons and complaint with _____ _ [name and job description]; or

☐ I am the plaintiff or an attorney of record for the plaintiff in a lawsuit, and I served the summons and complaint on the defendant by certified mail, return receipt requested, restricted delivery, as shown by the attached signed return receipt.

☐ I am the plaintiff or attorney of record for the plaintiff in this lawsuit, and I mailed a

copy of the summons and complaint by first-class mail to the defendant together with two copies of a notice and acknowledgment and received the attached notice and acknowledgment form within twenty days after the date of mailing.

☐ Other [specify]:

☐ I was unable to execute service because:

My fee is $ _____.

To be completed if service is by a sheriff or deputy sheriff:

Date: _____

SHERIFF OF _____ COUNTY, ARKANSAS

By: _____
[signature of server]

_____
[printed name, title, and badge number]

To be completed if service is by a person other than a sheriff or deputy sheriff:

Date: _____

By: _____
[signature of server]

_____
[printed name]

Address: _____

Phone: _____

Subscribed and sworn to before me this date: _____

Notary Public _____

My Commission Expires: _____
Additional information regarding service or attempted service:

_____
_

_____
_