

Article of Interest

Potential Pitfalls With Certified Mail Service In The Coronavirus Era

By



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COVID-19, the illness caused by the novel coronavirus, has affected nearly all aspects of life. For the legal community, service of process is no exception. All too often, attorneys seeking certified mail service of the Complaint and Summons receive return of service forms signed COVID-19, COVID, or CV-19. This stems from the United States Postal Service's temporary modification of the procedure for mail requiring signature deliveries which was done in an effort to minimize the spread of COVID-19. As of spring 2020, letter carriers no longer obtain the signature of the person receiving the certified mail. Instead, letter carriers are to maintain distance and verbally ascertain the first initial and last name of the person receiving the certified mail. The letter carrier then transcribes the information onto the return of service form.

Some return of service forms appear to follow...

this procedure. Others, however, have the first initial and last name of the letter carrier instead of the mail recipient. Others yet, are coming back simply marked "Covid" with no name printed. The consistency among such inconsistencies is that the dockets are reflecting completed service. This can be a fatal flaw for the practitioner who simply relies on docket entries.

While the USPS has relaxed its signature requirement for certified mail deliveries, the Ohio Civil Rules have not. Some judges in the Summit County Court of Common Pleas do not accept a "COVID" signature as valid service despite what the docket may reflect. In Mahoning County, dockets are marked "Questionable Service" when the return of service forms show a COVID signature.

By contrast, the United States District Court for the Southern District of Ohio issued a General Order stating that a COVID signature creates a rebuttable presumption of service. Gen. Order no. 20-39, S.D. Ohio (Dec. 29, 2020). Practically, should the defendant thereafter attest that he was not served with the initial papers, a plaintiff would have no return of service signed by the defendant as evidence to the contrary.

One way to avoid service of process pitfalls is to request a waiver of service from the defendant. Under Ohio Civil Rule 4.7, adopted by the Ohio Supreme Court in July 2020,

[t]he plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

- (1) be in writing and be addressed as required by Civ.R. 4.2;
- (2) name the court where the complaint was filed;
- (3) be accompanied by a copy of the complaint, two copies of the waiver form appended to this Rule 4.7, and a prepaid means for returning the form;
- (4) inform the defendant, using the form appended to this Rule 4.7, of the consequences of waiving and not waiving service;
- (5) state the date when the request is sent;
- (6) give the defendant a reasonable time of at least twenty-eight days after the request was sent - or at least sixty days if sent to the defendant outside of the United States - to return the waiver;
- (7) and be sent by first-class mail or other reliable means.

Civ. R. 4.7(A).

Form documents required to be sent under Civ. R. 4.7(A) are provided in the rule. In addition to first-class mail, the request for waiver can be sent via “reliable means”, which includes facsimile transmission, electronic mail, and private messenger service. Encouragement to seek a waiver of service can be found in section (C) of the rule, which allows the court to levy the costs and expenses of obtaining service, including reasonable attorney fees, on the defendant who failed to return the waiver of service without good cause.

Civ. R. 4.7(C).

The new rule is not without foreseeable issues. First, a plaintiff seeking a waiver of service must be cognizant of the time-limitations imposed under the rule. In general, the defendant has twenty-eight days to return the request for waiver to the plaintiff, and sixty days from the date the request for waiver was sent to file his answer. Civ. R. 4.7(A)(6), (D). In cases where time is of the essence, such as those approaching the one-year limit to obtain service, or those where additional time may result in further harm to the plaintiff, alternative means of service should be considered.

Another foreseeable issue is the situation where the defendant is represented by counsel. Under Civ. R. 4.7(A), the request for waiver must be addressed and sent to the defendant. This communication may prompt ethical concerns given that the defendant has counsel. In this situation, best practice may be to send the request for waiver to counsel for the defendant, asking that the defendant execute the waiver.

Just because a return of service was marked “COVID” doesn’t necessarily mean a request to waive service under Civ. R. 4.7 is the next step. If the defendant is participating in litigation, service defenses may be waived in the Answer. Requests for Admissions or a Stipulation Withdrawing and Waiving Service may be used to clarify service issues. If all else fails, there are numerous process servers across the state to assist with service during these unprecedented times.