

DUE DILIGENCE WHEN SERVING BY PUBLICATION

PRESENTED BY THE HON. ANDREW W. GOULD,
JUSTICE, ARIZONA SUPREME COURT

Ariz. R. Civ. P. 4.1(I)

Service by Publication on a Person Within Arizona

(1) *Generally.* A party may serve a person by publication *only if*:

(A) 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

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Service by Publication on a Person Within Arizona Continued

(ii) the person to be served has intentionally avoided services 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.

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(2) *Procedure.* [omitted]

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(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.

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(4) Return

(A) Required Affidavit

The party or person making service must prepare, sign, and file an *affidavit stating. . . the circumstances warranting service by publication.*

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Service by Publication on a Person Within Arizona Continued

(C) *Effect.* An affidavit that complies with these requirements constitutes prima facie evidence of compliance with the requirements for service by publication.

See also Ariz. R. Civ. P. 4.1(k)(3) (discussing alternative means of service, and stating that “[a] party may serve by publication only if the requirements of Rule 4.1(l), 4.1(m), 4.2(f), or 4.2(g) are met and the procedures provided in those rules are followed”).

Other Relevant Rules

Ariz. R. Civ. P. 4.2(f) (setting forth similar requirements as Rule 4.1(l) where the last-known address of the person to be served by publication is outside Arizona.

Rule 4.1(k) (Alternative Means of Service)

Under Rule 4.1(k), a party may use an alternative means of service, such as service by mail, by showing personal service is “impracticable.” Ariz. R. Civ. P. 4.1(k)(1) The serving party must file a motion and obtain an order from the court. *Id.* at (1) – (2). Additionally, “the serving party must” (1) “make a reasonable effort to provide the person being served with actual notice of the action’s commencement,” and (2) “mail the summons, the pleading being served, and any court order authorizing an alternative means of service to the last-known business or residential address of the person being served.” *Id.* at (2).

Requirements of Service by Publication

- (1) “the serving party, despite reasonably diligent efforts, has been unable to ascertain the person’s current address;” *or*
- (2) “the person to be served has intentionally avoided service of process;” *and*
- (3) “service by publication is the best means practicable in the circumstances for providing the person with notice.”

Ariz. R. Civ. P. 4.1(1); *Ruffino v. Lokosky*, 245 Ariz. 165, 169 ¶ 11 (App. 2018); *see Ritchie v. Salvatore Gatto Partners, L.P.*, 223 Ariz. 304, 307 ¶ 8 (App. 2010); *Master Financial, Inc. v. Woodburn*, 208 Ariz. 70 (App. 2004).

Requirements of Service by Publication continued

Further, if the serving party knows the person's address, the serving party must mail the summons and complaint to the person "on or before the date of first publication." Ariz. R. Civ. P. 4.1(1)(3); *Lokosky*, 245 Ariz. at 169 ¶ 11.

Note: Rule 4.1(1) does not require a prior order from the court authorizing service by publication. See *Lokosky*, Ariz. at 167 ¶ 5 n.1 (stating that Rule 4.1(1) does not "require a party to seek leave of the court before serving by publication," and that "[t]o serve by publication, a party must simply comply with the procedures set forth in the rule. . . ." (citation omitted))

Due Diligence

If a party is not avoiding service, a finding of due diligence is a jurisdictional prerequisite for service by publication and a valid judgment.

See Preston v. Denkins, 94 Ariz. 214, 222 (1963) (due diligence in determining the allegedly unknown residence of defendant as a fact is a prerequisite to the jurisdiction of a court to enter a default judgment upon service by publication); *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 262 (App. 1990) (“A finding of due diligence prior to service by publication is a jurisdictional prerequisite,” and if a party’s “affidavit fails to indicate that due diligence was exercised to locate the defendant, the default judgment is void on its face for lack of jurisdiction.”); *Omega II Inv. Co. v. McLeod*, 153 Ariz. 341, 342 (App. 1987) (same).

Due Diligence Continued

Service by publication upon a defendant whose residence address is *unknown* is proper only where the defendant's address cannot be ascertained after diligent efforts to do so.

In the Matter of Rights to Use of Gila River, 171 Ariz. 230 (1992); *Pioneer Fed. Sav. Bank v. Driver*, 166 Ariz. 585 (App. 1990); *Omega II*, 153 Ariz. at 341; *Brennan v. W. Sav. & Loan Ass'n*, 22 Ariz. App. 293 (1974).

Due Diligence Continued

The exercise of “due diligence” requires such measures as the examination of any, and/or, all of the following: (1) telephone company records, (2) utility company records, (3) postal service records, and (4) records maintained by the county treasurer, county recorder, county assessor, or similar agency.

See Sprang, 165 Ariz. at 261.

Due Diligence Continued

If serving party, through diligence, has notice that a defendant has moved to another county, the records for that county should be examined as well.

See Sprang, 165 Ariz. at 261-262.

Due Diligence Continued

Additionally, due diligence may require examination of email and social media accounts.

See Lokosky, 245 Ariz. at 167 ¶ 1 (holding that “[b]ecause Ruffino had access to Lokosky’s email address, phone number, and social media accounts, we hold under Arizona Rule of Civil Procedure 4.1(1)(1) that service by publication without first attempting to communicate with Lokosky by any of those channels did not constitute ‘reasonably diligent efforts’ to obtain her address; therefore, publication was not the ‘best means practicable; to provide notice of the lawsuit”).

Defendant Evading Service

Under the Rule, service by publication upon a defendant whose residence address *is known* is proper only where it can be shown that that defendant is avoiding service of process.

See 2B Daniel J. McAuliffe & Shirley J. McAuliffe, *Arizona Practice, Civil Rules Handbook* R. 4.1, cmt. 9 (July 2017 update).

Defendant Evading Service Continued

In addition to publication, the summons and a copy of the complaint must be mailed to the defendant at that address.

See 2B Daniel J. McAuliffe & Shirley J. McAuliffe, *Arizona Practice, Civil Rules Handbook* R. 4.1, cmt. 9 (July 2017 update).

Compare *Lokosky*, 245 Ariz. at 169-70 ¶ 15 (holding that plaintiff “failed to prove [defendant] was evading service,” where plaintiff’s “process server only attempted service twice at the” defendant’s address and “[t]he first time, the process server left no documentation with [plaintiff’s] mother and did not identify herself as a process server. The second time, no one answer the door.”), and *Barlage v. Valentine*, 210 Ariz. 270, 273-74 ¶¶ 9-11 (App. 2005) (holding that two unsuccessful attempts at service by certified mail were not enough to constitute evasion of service), with *Walker v. Dallas*, 146 Ariz. 440, 444 (1985) (“[S]ervice by publication is constitutionally sufficient where the defendant willfully leaves the state to evade service of process.”)

Best Means Practicable – Due Process

State Bar Committee Note, 1991 Amendments to Rule 4.1(l) and 4.1(m)

“Even where the conditions specified in the Rule are present, service by publication must also satisfy due process standards of being the best means of notice practicable under the circumstances and reasonably calculated to apprise interested parties of the institution and/or pendency of the proceedings. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).”

Thus, even where a plaintiff has “proven that he has made reasonably diligent efforts to obtain [a party’s] address or that [he] intentionally avoided service, Rule 4.1(l)(1)(B) and due process impose a requirement that service by publication be the best means practicable to provide notice to the interested party.” *Lokosky*, 245 Ariz. at 170 ¶ 16; *Woodburn*, 208 Ariz. at 73-74 ¶ 15 (same).

Affidavit

The efforts made to ascertain the defendant's address or location must be set forth in an affidavit filed before service by publication is accomplished. *Sprang*, 165 Ariz. at 262.

An affidavit which merely asserts, in conclusory fashion, that a duly diligent effort to locate the defendant has been made is insufficient. *See Barlage*, 210 Ariz. at 273 ¶¶ 6, 8 (stating that plaintiff's affidavit was insufficient to support service by publication where he stated that the defendant had been "[a]voiding service," his "residence was unknown, despite 'a diligent search to find out,' and that his search had 'failed to reveal any information that might lead to knowledge'" of his residence).

Relief From a Judgment

“When service of process was by publication, party against whom a default judgment has been entered may seek relief” pursuant to Rule 60(b)(2) “under Rule 59[(g)] within one year of the judgment. After one year has lapsed, the party may still seek relief under Rule 60[b](4).” *Woodburn*, 208 Ariz. 74-75 ¶ 20; *Lokosky*, 245 Ariz. at 168-69 ¶ 10 (to same effect).

Questions?