

David P. Miranda
General Counsel
New York State Bar Association
One Elk Street, Albany, NY 12207

August 9, 2024

Re: Proposal for House of Delegates from CPLR Committee

Dear David:

We attach a Report by the Committee on Civil Practice Law and Rules aimed at simplifying the rules governing service of process and defendants' appearances in the New York State Courts. The amendments proposed in the attached Report are the result of a process that started with a discussion at the December 13, 2023, meeting of the Committee about how rules regarding these issues are not uniform and are sometimes confusing. A subcommittee was formed at that meeting to consider the issues in more depth. That subcommittee met and proposed an initial set of amendments at the March 13, 2024, Committee meeting, where Committee members expressed possible concerns and proposed improvements. The Subcommittee considered those comments and revised the proposed amendments, which were presented and approved unanimously by the Committee at its June 25, 2024, meeting.

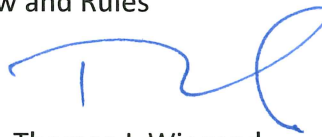
Please contact us for any additional information.

Sincerely,

Co-Chairs of Committee on Civil Practice Law and Rules



Hon. Lucy Billings
Immigration Judge
U.S. Department of Justice
Executive Office for Immigration Review
New York—Varick Immigration Court
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Simpler and Uniform Rules Governing
Filing Proof of Service and Timing for Appearances
in the New York State Courts

Report of the New York State Bar Association
Committee on Civil Practice Law and Rules

August 9, 2024

Co-Chairs of Committee on Civil Practice Law and Rules:

Judge Lucy Billings and Thomas Wiegand

Subcommittee responsible for drafting Report:

Paul Aloe (Chair), Margorie Berman,
Judge Lucy Billings, Helene Blank,
Michael Fernández, David Ferstendig,
Sharon Gerstman, and Thomas Wiegand
(Members)

I. Introduction and Executive Summary

This Report proposes important amendments to the CPLR concerning filing proof of service and the timeline for a defendant to appear, to make the process more uniform and easier to follow.

New York procedural rules currently provide different rules for:

- the number of days available to respond to a complaint and
- whether proof of service must be filed,

each depending on how the summons is served. When a defendant is served by personal delivery, the proof of service is not filed, and a response is due in 20 days. When substitute service is made on a person of suitable age and discretion at the defendant's home or place of business, a response is due in 40 days or more. This Report proposes amendments that require filing proof of service in all instances and 30 days to respond in all instances.

The Report also proposes a separate amendment relating to service of process. When a defendant has not been served, even after the 120 days for effecting service has expired, the current CPLR does not authorize the court to dismiss the claims against an unserved defendant on the court's own initiative. The Report proposes a simple amendment to give the court this power to control the court's docket.

II. Background

A. Filing Proof of Service and Time to Appear.

CPLR 308 governs service of a summons on a defendant who is a natural person. Subsections (1) and (3) provide for service by handing the summons to the defendant or to an agent for service. In both instances service is complete upon delivery. Subsections (2) and (4) provide for service by handing the summons to a person of suitable age and discretion at the defendant's home or place of business and mailing the summons to the defendant at that home or business address. Leaving the summons with "a person of suitable age and discretion" is presumed reasonable because such a person may be trusted to locate and give the summons to the defendant promptly, in which case the time when the defendant actually receives the summons is almost the same as when it is handed to the defendant.

Subsections (2) and (4) also require filing proof of service and provide that service is not "complete" until 10 days after that filing. Because the time to respond is measured from when service is "complete," a defendant served under subsections (2) and (4) has at least 10 extra days to respond. The CPLR allows for substitute service without filing proof of service in other instances, so nothing is unfair about not requiring proof of service to be filed when using substitute service. For example, under CPLR 2303, subpoenas may be served either by personal delivery or by substitute service, akin to the substitute service allowed under CPLR 308(2) or (4), but CPLR 2303 does not require proof of service to be filed for service to be complete and binding.

Next, the difference between 20 and 30 days in which to respond is increased under CPLR 320, which provides 20 days after service for a defendant to appear when served under CPLR 308(1) or (3), but 30 days to appear when served under CPLR 308(2) or (4). So, even if proof of service under subsections (2) or (4) is filed the same day service is effected, the defendant who receives service by that method has 40 days to respond.

The requirement to file proof of service only in specified circumstances creates confusion in determining the date by which a defendant must appear. How the process server intended to effect service is not always clear to a defendant or a defendant's attorney. For example, a sibling might be mistaken for the defendant, or a process server might hand the summons to the defendant without confirmation of the recipient's identity. In such situations a process server might have made a mistake or might also pursue substitute service on a person of suitable age and discretion in a desire to ensure service with a "belt and suspenders" approach. These situations may be especially confusing to defendants and their attorneys, who need to know how and when service was effected to determine the appearance deadline. Checking a court file to determine if, how, and when service was effected provides no assurance because filing proof of service is not required for all methods of service. The absence of proof of service could mean either that the process server believes personal delivery was effected or that service is not yet "complete."

B. Dismissal of Claims Against Unserved Defendants

Another concern about the current procedures for service is that, when a defendant has not been served within the 120 days allowed to effect service, the defendant might remain in the case throughout. Unserved defendants might never ask for dismissal because, for example, they indeed may be unaware of the litigation, or they may choose to avoid the litigation when the court has no jurisdiction over them, out of concern that any filing might result in becoming a bound party. A plaintiff also might not want to dismiss claims against unserved defendants, in the hope of later serving them and being excused for the late service. At least one appellate court has held that, under the current rules, the court has no independent power to dismiss claims against an unserved defendant. In *Rotering v. Satz*, 71 A.D.3d 861, 862 (2d Dep't 2010), the trial court dismissed the claims against a defendant *sua sponte* because service had not been completed, but the appellate court reversed and reinstated the complaint because a court may only dismiss a complaint "'upon motion,' not on its own initiative." See *Daniels v. King Chicken & Stuff, Inc.*, 35 A.D.3d 345, 345 (2d Dep't 2006) (same); V. Alexander, Practice Commentaries CPLR 306-b, C306-b:1 (citing *Rotering*).

This rule may prove especially problematic in advancing a multi-defendant case toward trial or other resolution. Even in a single-defendant case, the current rule results in that unserved defendant remaining a defendant, even after the statute of limitations has run and even though the defendant never received notice of the suit.

III. Analysis and Recommendations

A. Uniform Filing of Proof of Service and Uniform Response Period in All Cases

Proof of Service. The proposed amendments create a more uniform and easily understood procedure. First, rather than filing proof of service only where substitute service is effected under CPLR 308(2) or (4), filing proof of service would be required in all cases. Then if defendants are unsure how they were served or the date they were served, they may check the court file to understand what the process server alleges. The proposed amendments accomplish this objective without changing how process servers are accustomed to effecting service in New York. The amendments regarding filing proof of service also make the response period more uniform by eliminating the current provision that, depending on the method, service is incomplete until 10 days after proof of service is filed.

These changes are accomplished by adding a new subsection (f) to CPLR 306 and by deleting the provisions for filing proof of service from CPLR 308(2) and (4) and 310(b) and (c). The proposed deletions from CPLR 308 regarding filing proof of service when natural persons are served are due to the addition of CPLR 306(f), which requires proof of filing in all contexts. Because CPLR 310 includes the same provision deleted from CPLR 308 concerning filing proof of service, the same logic for changing CLR 308 applies to CPLR 310. If that provision is not deleted from CPLR 310, then its 20 days for filing would conflict with the 14 business days in the new CPLR 306(f). The current 20 days to file proof of service under CPLR 308(2) and (4) are shortened slightly to 10 business days, so that it is filed farther in advance of when an appearance is due, enabling defendants to confirm the appearance date earlier. A new subsection CPLR 3125(j) makes clear that filing proof of service is no longer an element of completing service, but continues to be required at least 10 days before seeking a default judgment against a defendant who has failed to appear.

Time to Appear. Second, CPLR 320 is revised to make clear that an appearance (by a motion to dismiss the complaint, an answer, or a demand for a complaint) is required in all cases 30 days after receipt of the summons, rather than either 20 days or 40 days depending on the method of service. This revision sets a simpler and more understandable deadline that also is fairer to defendants by not penalizing them based on how they were served. A corresponding change is made to CPLR 3012, regarding a demand for a complaint when it is not served with the summons.

The changes to CPLR 320 and 3012 also clarify that a defendant against whom service has not been effected still may appear voluntarily (i.e., move to dismiss the complaint, answer, or demand a complaint). This change is consistent with *Wimbledon Fin. Master Fund, Ltd., v. Weston Capital Mgt., LLC*, 150 A.D.3d 427, 428 (1st Dep't 2017), which raised an issue whether a defendant who received service under CPLR 308(2) was permitted to demand a complaint before service was completed through filing proof of service. By eliminating the requirement that service is not complete until the filing of proof of service, the proposed amendments eliminate this issue consistent with *Wimbledon Fin. Master Fund*. The amendments also replace the word "within" with "not later than" to accord with the view of the First Department of the Appellate Division that those provisions create a deadline rather than a window.

The specific additions and deletions to the current CPLR that accomplish these changes are as follows:

CPLR 306. PROOF OF SERVICE AND FILING.

(a) Generally. Proof of service shall specify the papers served, the person who was served and the date, time, address, or, in the event there is no address, place and manner of service, and set forth facts showing that the service was made by an authorized person and in an authorized manner.

(b) Personal service. Whenever service is made pursuant to this article by delivery of the summons to an individual, proof of service shall also include, in addition to any other requirement, a description of the person to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features.

(c) Other service. Where service is made pursuant to subdivision four of section three hundred eight of this chapter, proof of service shall also specify the dates, addresses and the times of attempted service pursuant to subdivisions one, two or three of such section.

(d) Form. Proof of service shall be in the form of a certificate if the service is made by a sheriff or other authorized public officer, in the form of an affidavit if made by any other person, or in the form of a signed acknowledgement of receipt of a summons and complaint, or summons and notice or notice of petition as provided for in section 312-a of this article.

(e) Admission of service. A writing admitting service by the person to be served is adequate proof of service.

(f) Filing. Proof of service shall be filed with the clerk of the court designated in the summons not later than ten business days after service is complete. The filing of proof of service shall not be deemed an element of service or required for the exercise of the court's jurisdiction.

CPLR 308. PERSONAL SERVICE UPON A NATURAL PERSON.

Personal service upon a natural person shall be complete when made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; ~~proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service,~~ except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or
3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;
4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by

first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; ~~proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing,~~ except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, “actual place of business” shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

CPLR 310. PERSONAL SERVICE UPON A PARTNERSHIP.

(a) Personal service upon persons conducting a business as a partnership may be made by personally serving the summons upon any one of them.

(b) Personal service upon said partnership may also be made within the state by delivering the summons to the managing or general agent of the partnership or the person in charge of the office of the partnership within the state at such office and by either mailing the summons to the partner thereof intended to be served by first class mail to his last known residence or to the place of business of the partnership. ~~Proof of such service shall be filed within twenty days with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify the person to whom the summons was so delivered and state the date, time of day and place of service.~~

(c) Where service under subdivisions (a) and (b) of this section cannot be made with due diligence, it may be made by affixing a copy of the summons to the door of the actual place of business of the partnership within the state and by either mailing the summons by first class mail to the partner intended to be so served to such person to his last known residence or to said person at the office of said partnership within the state. ~~Proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after filing.~~

(d) Personal service on such partnership may also be made by delivering the summons to any other agent or employee of the partnership authorized by appointment to receive service; or to any other person designated by the partnership to receive process in writing, filed in the office of the clerk of the county wherein such partnership is located.

(e) If service is impracticable under subdivisions (a), (b) and (c) of this section, it may be made in such manner as the court, upon motion without notice directs.

CPLR 320. DEFENDANT'S APPEARANCE.

(a) Requirement of appearance. The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made ~~within twenty~~ not later than thirty days after service of the summons is complete, ~~except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf or if it was served pursuant to section 303, subdivision two, three, four or five of section 308, or sections 313, 314 or 315, the appearance shall be made within thirty days after service is complete.~~ If the complaint is not served with the summons, the time to appear may be extended as provided in subdivision (b) of section 3012.

CPLR 3012. SERVICE OF PLEADINGS AND DEMAND FOR COMPLAINT.

(a) Service of pleadings. The complaint may be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made ~~within twenty~~ not later than thirty days after service of the pleading to which it responds.

(b) Service of complaint where summons served without complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made ~~within~~ not later than twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served ~~within~~ not later than twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

(c) Additional time to serve answer where summons and complaint not personally delivered to person to be served within the state. If the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to section 303, paragraphs two, three, four or five of section 308, or sections 313, 314 or 315, service of an answer shall be made ~~within~~ not later than thirty days after service is complete.

(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

CPLR 3215. DEFAULT JUDGMENT.

[subdivisions (a) through (j) remain unchanged]

(k) The filing of proof of service shall not be deemed an element of service or required for the exercise of the court's jurisdiction, except that no defendant shall be deemed to be in default in appearing, and no default motion may be made nor default entered based on a defendant's failure to appear, before ten days have expired from the filing of proof of service with respect to such defendant.

B. Enabling Courts to Dismiss Claims Against Unserved Defendants

To avoid the problem when a named defendant has not been served, yet no party moves to dismiss the claims against that defendant, this Report recommends changing CPLR 306-b to provide the court the option itself to dismiss the claims against the unserved defendant. The proposed amendment give state court judges the same control as the federal rules, on which CPLR 306-b was based, to dismiss claims against an unserved defendant or extend the time to effect service.¹ As in the federal system, such a dismissal would require notice to the plaintiff and an opportunity to be heard, and the court would have the option, as in federal court, to extend the time to effect service for an appropriate period.

The specific amendment proposed is as follows:

CPLR 306-b. SERVICE OF THE SUMMONS AND COMPLAINT, SUMMONS WITH NOTICE, THIRD-PARTY SUMMONS AND COMPLAINT, OR PETITION WITH A NOTICE OF PETITION OR ORDER TO SHOW CAUSE.

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon its own notice or upon a motion by any party, which notice or motion shall be served upon all parties who have appeared, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

¹ Federal judges have this authority under Rule 4(m) of the Federal Rules of Civil Procedure, which currently provides:

“Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).”

FRCP 4(m) previously provided 120 days for service, but that period was shortened to 90 days in 2015.

IV. Conclusion

The Committee on Civil Practice Law and Rules requests that the House of Delegates adopt the proposed amendments set forth above. The specific amendments for all of the CPLR sections set forth above are isolated from the analysis and collected into a single document, attached as Appendix 2.