July 13, 1984

To the Board of Governors and Division Chairpersons:

SUMMARY OF THE REPORT OF THE
DIVISION 4 COMMITTEE ON COURT RULES
ON PROPOSED AMENDMENTS TO
SUPERIOR COURT CIVIL RULE 4

The Division 4 Committee on Court Rules in this Report analyzes and comments favorably upon a proposed amendment to Superior Court Civil Rule 4 (Process). The amendment allows for service of process by certified, registered or first class mail, to minimize the role of the U.S. Marshall's Office in service of process in routine cases. The revised rule provides a form for the acknowledgement of service by first class mail and specifies the matters to be covered by affidavits of service.

The amendment is similar to that made in the equivalent federal rule in 1982, with some significant differences; the Rules Committee compares the two rules and concludes that the Superior Court approach is preferable.

The Committee makes several suggestions for drafting changes in the proposed amendment to Superior Court Rule 4, to minimize confusion.

Finally, the Committee suggests that, in light of confusion concerning the amended federal rule, the revised Superior Court rule should be clarified to indicate that a plaintiff may use any form of service authorized by the rule if the defendant fails to acknowledge service by first class mail.

REPORT OF THE COMMITTEE ON COURT RULES ON PROPOSED AMENDMENTS TO SUPERIOR COURT CIVIL RULE 4

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INTRODUCTION

The Superior Court Rules Committee has proposed the amendment to Superior Court Civil Rule 4 (Process). A copy of the proposed revision and comment is attached hereto. The proposal substantially revises Superior Court Civil Rule 4 to clarify and expand the procedures governing service of process. Paragraph (c) of the proposed revision is designed to utilize to some extent the revision to Rule 4 of the Federal Rules of Civil Procedure which became effective February 26, 1983. Except for a few recommendations set forth below and the belief by some members that the revisions did not simplify the Rule, our Committee endorses and supports these amendments. Furthermore, our Committee commends the drafters of the proposed revision for a thoughtful and complete revision in a highly technical yet basic area of litigation.

Because of the close relationship between the revised Federal Rule 4 and the proposed revisions to Superior Court Civil Rule 4, it is appropriate to discuss the Federal Rule first.

BACKGROUND OF THE REVISED FEDERAL RULE

On April 28, 1982, the Supreme Court transmitted to Congress certain amendments to the Federal Rules. Among these amendments was a proposed amendment to Rule 4. The primary purpose of the revision was to relieve the U.S. Marshal's Office from the burden of serving process in civil cases. To that end, proposed Rule 4 would have permitted service by registered or certified mail with a return receipt requested and delivery restricted to the addressee. If the defendant failed to answer, this service by mail would have been adequate for a default

judgment if the record contained a return receipt showing acceptance by defendant or if the record showed that the certified mail envelope was refused, and the process server then mailed the summons and complaint to the defendant by first class mail together with a notice that the case would proceed despite refusal. Any such default, however, could be set aside if the defendant demonstrated that the certified mail receipt was signed, or refused, by an unauthorized person.

Furthermore, the proposed Rule would have made this method of service by mail exclusive, so that wherever the Federal courts had utilized state procedures for service of process under Rule 4(d)(7) (as the D.C. District Court had) those state procedures were no longer to be used. Finally, proposed Rule 4 would have provided, for the first time, that service of process had to be made within 120 days of the filing of the complaint. Service by mail was deemed made on the date on which service was accepted, refused or returned as unclaimed.

Congress received substantial criticism of these amendments to Rule 4 from many sources, including the Judicial Conference. For example, many lawyers felt the procedure for service by mail was unnecessarily complicated and not designed to effect service in the maximum number of cases. Others strongly protested elimination of local practice of mail service. For these reasons, Congress passed Public Law 97-227 (H.R. 6663) which postponed the effective date of the proposed amendments to Rule 4 until October 1, 1983. In the interim, the House Judiciary

Committee agreed to consider expeditiously a bill to allow mail service but eliminate the criticized elements.

H.R. 7154

The Judiciary Committee's response to the criticism is found in H.R. 7154, which passed the House without substantive amendment on December 15, 1982 (Cong. Rec. 9848-9856, December 15, 1982), passed by the Senate and signed by the President on December 12, 1982. The new law, Public Law 97-427 (96 Stat. 2527) became effective February 26, 1983.

New Federal Rule 4

New Federal Rule 4, as contained in Pub. L. 97-427, provides for changes in the areas discussed below.

1. Service by Mail. New Rule 4(c) provides that service can be made by first class mail together with an acknowledgement of service form which should be completed by the party receiving service. No registered or certified mail is necessary.

2. Local Option. New Rule 4 continues the local option in Rule 4(d)(7) and allows service on most individuals and organizations in accordance with the law of the state in which the Federal District Court sits.

3. Time Limits. New Rule 4 provides that service of the summons and complaint must be made within 120 days of the filing of the complaint. Unlike the original proposal, there is

no statement of when service by mail is deemed made. If service of process is not completed within 120 days, the complaint may be dismissed but only after notice to the plaintiff. If the dismissal is upon the court's own initiative, the court must provide that the plaintiff receives notice before dismissal. If another party moves to dismiss, such motion must be served under Rule 5(a). The plaintiff is free to oppose dismissal based on a showing of good cause. Such a dismissal would be without prejudice.

4. Service on an Officer of the United States. One other change to Rule 4 affects service of process to officers of the United States. Under Rule 4(d)(4), where the United States is named as a defendant, service must be made by personal service upon the U.S. Attorney or his delegate; by registered or certified mail upon the Attorney General; and, when the suit challenges the order of an agency or officer, by registered or certified mail to the officer or agency whose order is challenged. Under old Rule 4(d)(5) when an officer or agency is a defendant, service of process required personal service. New Rule 4(d)(5) allows that service of process can be made by mail on that officer or agency which is a defendant by sending the summons and complaint by registered or certified mail. Thus, service of an officer or agency is the same under Subparagraph (d)(4) and (d)(5).

* * *

Superior Court Rule 4 already incorporated many of the principles of the new Federal Rule 4, but the details differed significantly. Thus, S.C.R. 4(c)(3) currently provides for service by mail, but only if registered or certified mail is used. No "Acknowledgement of Service" form is utilized. Furthermore, S.C.R. 4(g) provides a time limit for service, but provides that service must be made in 20 days or the summons must be returned to the Clerk's Office and a new summons must be issued.*/ In theory, the Superior Court still allows service by the U.S. Marshal. See, Rule 4(c)(1).

THE PROPOSED REVISIONS TO SUPERIOR COURT RULE 4

The primary purpose of the revisions to S.C.R. 4, like that of Federal Rule 4, is to reflect the diminished role of the U.S. Marshal's office in service of process in routine cases. To that end, service of process may be made by a non-party adult:

(1) by personal delivery, or

(2) by mail if such mail is

(i) certified,

(ii) registered, or

(iii) first class.

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*/ Under Snyder v. Labor, 291 A.2d 194 (D.C. App. 1972), a summons which is not served within 20 days loses its vitality, and service of such a summons has no legal effect.

In addition, Paragraph (d) of the rule is modified to provide for service on the District of Columbia and the United States governments. Finally, the proposed revision contains a new form, Civil Form 1-A, to be used like the similar form under the Federal Rule, in conjunction with service by first class mail.

Subparagraph (a)

The proposed revisions to Subparagraph (a) of S.C.R. 4 are relatively minor except to make clear in a new final sentence that "prompt" service of process is necessary. Although there is inherent ambiguity in the use of the word "prompt," we support this revision because the revision incorporates the practice in the jurisdiction to require expeditious service, yet the revision does not unduly restrict the time for such service.

Subparagraph (c) (Other than Service by Mail)

Proposed Subparagraph (c) of S.C.R. 4 is a total revision of the Federal Rule. Essentially, service of process may be made by any adult (i.e., person over eighteen years of age) who is not a party or, under very limited circumstances, by the U.S. Marshal or his deputy. (Subparagraph (c)(1) and (2)). The U.S. Marshal's office may make service only on behalf of the United States or by special order of the Court. (Subparagraph (c)(2)(B)(i) and (ii)).

Our Committee recognizes the practical considerations which limit the use of the U.S. Marshal's office and require this revision. However, there is one phrase in Subparagraph (c)(2)(B)

which recurs throughout this section and which no longer appears useful. In this Subparagraph (c)(2)(B), the revision continues the language of the current S.C.R. 4 by including reference to "a person specially appointed by the Court for that purpose. . . ." Indeed, in Subparagraph (c)(3), the Court is urged to "freely make special appointments to serve summonses and complaints under subparagraph (c)(2)(B) of this rule."

Our Committee sees no further purpose in special appointments under S.C.R. 4 in light of the liberal arrangements for service of process by any non-party adult. We believe the inclusion of the "special appointments" procedure unduly complicates the revised rule and is merely a point of confusion to those not intimately familiar with Superior Court procedures. We therefore recommend complete elimination of Subparagraph (c)(2)(C)(3) and elimination of the language "or by a person specially appointed by the Court for that purpose, . . ." in Subparagraph (c)(2)(B) and similar language in Subparagraph (c)(2)(B)(ii).

Subparagraph (c)(2)(C) (Service By Mail)

The proposed revisions commendably do not adopt in whole the revisions to Federal Rule 4 with respect to service by mail. The Federal Rule revision was the result of Congressional action which failed to appreciate the complexities the Federal revision created. The result is a Federal Rule 4 which is confusing and replete with technical loopholes. See cases cited in fn. *, p. 8, infra.

The proposed revision to S.C.R. 4 eliminates most of these difficulties. First, unlike the Federal Rule, proposed S.C.R. 4(c)(2)(C)(ii) allows service by registered or certified mail. This is a very useful addition. Second, proposed S.C.R. 4(c)(2)(C)(i) allows service by first class mail, along with the Notice and Acknowledgement provided for in Civil Form 1-A. In an improvement on the Federal Rule, the proposed Subparagraph (c)(2)(C)(ii) clarifies that service is effective as long as the defendant has returned to the plaintiff a completed copy of the Acknowledgement at any time, even if signed and returned more than twenty days after mailing.

Third, proposed S.C.R. 4(c)(2)(C) adds the provision that service by mail is deemed to be made as of the date the Acknowledgement (if service made by first class mail) or the return receipt (if service made by registered or certified mail) is signed. The Federal Rule's lack of such a provision has caused substantial confusion on the part of parties and courts of the time within which the answer is due.

One other area of confusion in the Federal Rule is resolved to some extent in the proposed revision to S.C.R. 4. Recent Federal Court cases have held that under the specific language of Federal Rule 4(c)(2)(C)(ii), if the Acknowledgement is not returned, the plaintiff must use personal service.*/ The

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*/ See, Billy v. Ashland Oil, Inc., U.S.D.C. W.D.Pa., No. 84-30 (June 4, 1984); F.D.I.C. v. Sims, 100 F.R.D. 792, 794 (N.D. Ala. 1984).

language used in S.C.R. 4(c)(2)(C)(i) does not require this result, and we believe the language in S.C.R. 4(c) that these methods may be used "concurrently or successively" indicates a clear intent that a plaintiff may use registered or certified mail if first class mail fails to effect service. Nonetheless, in light of the Federal court decisions, we believe that the S.C.R. 4 should be amended to clarify that if a party does not complete and return the Acknowledgement under Subparagraph (c)(2)(C)(i), the plaintiff may use any form of service under the Rule and need not be limited to personal service. Furthermore, the revision should specifically provide that costs of any form of substituted service is recoverable under Subparagraph (c)(2)(D). To this end, we recommend proposed S.C.R. 4(c)(2)(D) be amended to add the underlined phrase:

> (D) Unless good cause is shown for not doing so, the Court shall order the payment of the costs of personal service, of <u>service by registered or certified mail, of service by the U.S. Marshal or the deputy U.S. Marshal, or of service by other authorized means</u> if such person does not complete and return within twenty (20) days after mailing. . . .

<u>Subparagraph (d)(1) and (3)</u>

Our Committee has no substantive comment on the minor revisions to Subparagraphs (d)(1), (2) and (3). We do recommend, however, that an additional phrase be added to subparagraphs (d)(1) and (d)(3) to clarify the manner in which individuals or corporations may be served. Under subparagraph (d)(1), individuals and corporations are served "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his

dwelling house . . . or by delivering a copy of the summons and complaint to the agent authorized . . . to receive service of process." Subparagraph (d)(3) likewise states that service is made "by delivering a copy of the summons and complaint to an officer. . . ." We believe these subparagraphs are misleading because both of these subparagraphs use only the words "by delivering" which clearly connotes personal service. In addition, these subparagraphs do not mention service by mail, even though subparagraph (c)(2)(C) clearly foresees that individuals and corporations are subject to service by mail.

To clarify this apparent inconsistency, we recommend that the following underlined words be added to your proposed Rule 4(d)(1) and (d)(3).

> (d) SUMMONS AND COMPLAINT: PERSON TO BE SERVED. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
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> (1) Upon an individual other than an infant or incompetent person, by mailing pursuant to this Rule or by delivering a copy of the summons and ~~of the~~ complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing pursuant to this Rule or by delivering a copy of the summons and ~~of the~~ complaint to an agent authorized by appointment or by law to receive service of process.
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> * * *
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> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by mailing pursuant to this Rule or by delivering a copy of the summons and ~~of the~~ complaint to an officer, a managing agent, or to any other

> agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive process and the statute so requires, by also mailing a copy to the defendant.*/

Subparagraph (d)(4)

Subparagraph (d)(4), which provides for service on the District of Columbia or its officers or agents, is generally revised to clarify numerous matters. Generally the proposed revision sets forth explicitly the manner in which the District Government is to be served. Our Committee recommends a slight revision in the language of this Subparagraph to eliminate the numerous parenthetical phrases which contain the "pursuant to" language. These parenthetical phrases are duplicative and unnecessarily confusing. We believe one phrase would suffice. Thus, we recommend the beginning of proposed S.C.R. 4(d)(4) should read:

> (4) Upon the District of Columbia by delivering ~~(pursuant to subparagraph (c)(2)(A))~~ or mailing ~~(pursuant to subparagraph (c)(2)(C))~~ pursuant to this Rule a copy of the summons. . . .

Similar changes should be made to the last sentence of proposed S.C.R. 4(d)(4).

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*/ Subparagraph (d)(3) thus provides for two types of service by mail. The first is service by first class, certified or registered mail under Rule 4(c). The second is service by any form of regular mail in those cases in which substituted service is made on an agent authorized by statute to accept service.

Subparagraph (d)(5)

Subparagraph (d)(5) deals with service on the United States Government, or its officers and agents. Our Committee recommends the same grammatical revisions discussed above in subparagraph (d)(4) to remove the numerous parenthetical phrases.

More importantly, we support these revisions even though this conflicts with Federal Rule 4(d)(4). Under the Federal Rule, service is made on the United States by delivery only to the United States Attorney and by registered or certified mail only to the Attorney General. Proposed S.C.R. 4(d)(5) allows service on these officials by mail or delivery. We recognize that there should not be different forms of service in the Superior Court and the Federal Court, but we support service on the United States by either method. We believe the proposed revision is preferable to the more restrictive methods in Federal Rule 4(d)(4).

Subparagraphs (e) and (f)

There are no changes made in these Subparagraphs. The references in the Comments reflect on the differences between the new Federal Rule and the existing provisions of Rule 4.

Subparagraph (g)

Subparagraph (g) provides explicit instructions for the return of service, either by hand-delivery or by mail. The proposed revision properly sets forth in some detail the facts which are to be set forth in the affidavit of service. We note,

however, that the use of the term "process server" connotes the historical "special process server" and could be confusing. This confusion would be eliminated by use of the term "person who serves process" to indicate the broader class of persons who serve process.

In addition, Subparagraph (g)(3) properly eliminates the requirement that a summons is only effective for twenty (20) days and needs to be returned if not served in that time period. This is a very commendable result in light of inherent delays in the procedures for service. It also eliminates useless repetition in issuing new summonses. We believe the requirement of "prompt service" in proposed S.C.R. 4(a) is adequate to protect a defendant from unwarranted and prejudicial delays.

The proposed Rule does not adopt Federal Rule 4(j) which requires that an action be dismissed without prejudice if no service is made within 120 days after filing the complaint unless good cause is shown. Our Committee supports this position since this is a matter best left to the discretion of the trial court.

Proposed Civil Form 1-A follows the Federal Form to the extent allowed by law in the District of Columbia. The only changes are to make certain that the date for serving an answer runs from the date the Acknowledgement is signed, dated and returned. The other change is to eliminate reference to penalties of perjury because there is no counterpart to 28 U.S.C. §1746 in D.C. law. Both of these changes are proper.