December 7, 2020

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VIA ELECTRONIC MAIL: laura.wait@dcsc.gov

Re: Comments on Proposed Amendments to the Superior Court Rules of Civil Procedure

Dear Ms. Wait:

Our organizations – Bread for the City, the Children's Law Center, the D.C. Bar Pro Bono Center, the Legal Aid Society of the District of Columbia, Legal Counsel for the Elderly, Rising for Justice, and Tzedek D.C. – submit these comments on the D.C. Superior Court's Proposed Amendments to Superior Court Rules of Civil Procedure. Our comments are directed to the proposed amendments to Rules 4, 10-I, 12-I, and 40-III. We appreciate the opportunity to provide stakeholder input on this important matter.

We are particularly concerned about the adverse consequences that the proposed amendments to Rule 4 will likely have for our low-income client community. We recognize that alternative methods of service may be appropriate in some limited circumstances. But it is critical that the alternate methods be reasonably calculated to result in actual, confirmed notice of the court case and not unreasonably intrude on personal privacy. The current proposal includes methods of service that, among other issues, are not likely to result in actual notice to defendants in many cases, particularly in the absence of specific requirements for proof of service tailored to the alternative methods and other safeguards. We also are concerned that the proposal on alternative methods of service will result in adverse consequences, including increased default judgments, that will disproportionately harm low-income litigants and people of color. The Court should not relax service of process requirements at a time when efforts should be focused on ensuring integrity in the existing, traditional methods of service permitted in the Civil Division.

To address these issues, we are proposing substantial revisions to the proposed alternative methods of service amendments to Rule 4. In addition, we recommend minor clarifications to the proposed amendments to Rule 10-I (requiring litigants to provide email addresses) and Rule 12-I (designating matters heard by judge in chambers). Finally, we support the proposed amendments to Rule 40-III governing the civil actions debt collection calendar. Those amendments will

promote access to justice for unrepresented litigants and bring the civil action debt collection rule in line with its counterpart already promulgated in the Small Claims Branch.

Our suggested revisions to these proposed amendments are illustrated in Attachment 1.

Rule 4 – Alternative Methods of Service

As a preliminary matter, D.C. Code § 11-946 establishes a presumption that the Superior Court will follow the Federal Rules of Civil Procedure. The statute allows the Court to "modify" the federal rules, but only after such modifications are approved by the D.C. Court of Appeals.[1] In the time since the reorganization of the D.C. courts under Home Rule, this Court has frequently adopted rules modifying the federal rules. In most instances, however, such modifications have related to provisions of the federal rules that are inconsistent with D.C. law or established practice or otherwise address circumstances unique to our local courts.[2] The proposed alternative service methods amendment is not of that character. It represents a substantial departure from longstanding, core provisions of Federal Rule 4 to address perceived service issues that are not unique to local practice. In our view, such departures should be adopted sparingly and only for compelling reasons. We do not believe there are compelling reasons to adopt the proposed expansion of service methods in the Civil Division.

The proposed amendments would permit service on an individual's employer, through electronic means, by posting on the court's website, and by any other method that the court finds to be just and reasonable as an alternative method of service. The proposal to allow alternative methods of service presents two primary concerns. First, permitting alternative methods of service, without adequate safeguards, presents the potential for abuse (just as the current system is regularly abused by some bad actors). Second, service by electronic means and service by posting on the court's website are not likely to result in actual notice in far too many cases. In addition, while serving a person's employer may be more likely to result in actual notice, it presents serious privacy issues.

Recent news reports and scholarly articles document the prevalence of fraudulent service of process, particularly in debt collection and eviction matters.[3] Although some of those matters would be subject to branch-specific service of process rules, the reports and articles highlight broader concerns about the dire impacts of faulty service of process. In far too many cases, defendants learn about litigation on the eve of an eviction, in late stages of a foreclosure proceeding, when wages are garnished, or as their assets are seized. Any amendments to Rule 4 to authorize alternative methods that are inherently more suspect than the traditional methods should

[1] D.C. Code § 11-946.

[2] *See, e.g.*, Official Comments to 2017 Amendments to Rule 4 (identifying differences between Federal Rule 4 as amended in 2007 and 2015 and Super. Ct. R. 4).

[3] Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 Ark. L. Rev. 813 (2018); Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?* DCist, Oct. 5, 2020, https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court/.

ensure rigorous standards for ensuring actual notice and proof of service that are currently absent from the proposed amendments.

I. Service should be permitted only by methods that are reasonably calculated to result in actual notice and do not unreasonably intrude on personal privacy.

A. The proposed addition of Rule 4(e)(3)(A), permitting service on an individual's employer, should be eliminated.

Service on a person's employer represents a substantial intrusion on a person's privacy and may have adverse employment consequences. Under Rule 4(c)(1), the summons must be served with a copy of the complaint, which likely will contain allegations about an individual's personal or financial affairs. The amendment contemplates that the service packet could be delivered to an employer's clerk or person in charge but does not, and cannot, dictate what happens *after* this information is delivered. Service on an employer also may result in adverse employment consequences. An employer may make negative assumptions about an employee who is the defendant in a lawsuit.

Federal law recognizes the potential for these adverse outcomes in other contexts. For example, the Fair Debt Collection Practices Act prohibits a debt collector from communicating with a person other than the consumer in most contexts.[4] This includes communications between a debt collector and the debtor's employer.[5] Serving a summons and complaint on a person's employer has the potential for many of these same adverse consequences and should not be permitted.

B. The proposed addition of Rule 4(e)(3)(C), permitting service by posting on the Court's website, should be eliminated.

It is unreasonable to expect that an individual who has no knowledge of a pending lawsuit will receive such notice by searching for it on the Court's website. The Court's website is not commonly used by individuals who do not have pending court cases and no commercial reason to monitor the website. As a result, the Court should not expect that a person without knowledge of a pending court case would learn of the case by going, unprompted, to the Court's website. Because this method of service would rarely if ever achieve actual notice, we suggest removing it from the proposed amendment as an alternative method of service. In those extraordinary cases where

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[4] 15 U.S.C. § 1692c(b).

[5] *See, e.g.*, *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1024 (9th Cir. 2012) ("Under the plain language of this statute, a violation occurs when a debt collector sends a letter to the debtor's place of employment absent consent."). Congress also recognized the abuse that can arise when a debt collector contacts a person's employer when it passed the Act, noting in a report: "Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs." S. Rep. No. 95-382, at 4.

posting on the website would be just and reasonable, the Court could authorize it under the proposed "any other manner" provision.

C. Service of process by electronic means should be limited to electronic mail and should be disfavored.

The proposed amendments would permit service by "electronic means" as an alternative method of service. The amendment does not define "electronic means." As a threshold matter, electronic means of service other than email – for example, social media or text message – raise serious issues with privacy similar to those noted above with respect to service on an employer (as to social media), as well as technological issues relating to available devices, data limits, and attachments (as to text messaging). Further, allowing either social media or text messages as alternative methods of service would present difficult problems of proof of service. Service by social media poses particular challenges because it is more public than other forms of electronic service and may be seen by a recipient's acquaintances or larger social circle. Posts on social media can spread quickly, and it can be damaging if a person's social or professional network learns through social media that a person is being sued. As a result, we recommend changing the clause that permits service "by electronic means" to permit such service only "by electronic mail."

Even if the amendment is limited to electronic mail service, it should be disfavored and authorized only for compelling reasons. As applied to cases in the Civil Division, email service will not be reasonably calculated to give a defendant actual notice of the lawsuit in most cases. We identify other specific problems with use of electronic mail service below. We also highlight why the considerations for whether to allow electronic means of service in the Civil Actions Branch differ substantially from those in the domestic relations and domestic violence contexts, where the Court has already adopted rules providing for service by electronic means.

1. A defendant may not see a summons effected through electronic mail.

Many individuals who have email accounts do not regularly use those accounts or check their email. This is especially true for older adults and lower-income individuals, who are less likely to have consistent access to technology (for example, they may rely on being able to go to the library to access a computer) and who may establish an email account for a limited purpose and without the intent of regularly communicating by email.[6] The recipient may not see the email until it is too late, or not at all. Even if a defendant regularly checks their email, an email (especially with attached court papers) could be filtered out as spam. For example, the D.C. Office of Administrative Hearings recently found that a claimant did not receive an email from the Department of Employment Services because the email was redirected to his spam folder.[7] If an

[6] The digital divide between low- and high- income households is a persistent problem. *See* Monica Anderson and Madhumitha Kumar, *Digital Divide Persists Even As Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center, May 7, 2019, https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

[7] *See* Attachment 2, at 2.

email containing a summons is automatically filtered out as spam, the recipient is unlikely to ever see it.

2. Even if a defendant does see an email transmitting a summons and other court papers, they may reasonably disregard it.

Scammers often impersonate courts, governmental agencies, and large corporations.[8] D.C. courts are not immune from these scams. In 2014, scammers sent fake emails purporting to advise recipients of hearings in D.C. courts. [9] The emails in fact contained an attachment that caused a virus to spread to the recipient's computer. Similar scams have happened in other courts as well.[10]

Electronic service is even more likely to be mistaken as spam if it comes from a person or is associated with a party with whom the defendant has had limited or no previous contact or who the defendant recognizes, but with whom the defendant has not previously communicated by email. Rule 4 provides that, with limited exceptions not relevant here, process must be served by a "person who is at least 18 years of age ***and not a party***."[11] With regard to alternative service by email, that would mean that the email would come from a complete stranger and from an unfamiliar email address in most cases. That in turn means that many or most service emails will be filtered into spam folders, seen and regarded as fraudulent, or otherwise ignored.

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[8] In 2019, the FBI's Internet Crime Complaint Center received 23,774 complaints that involved email account compromise, including "scams typically involve[ing] a criminal spoofing or mimicking a legitimate email address." Federal Bureau of Investigations, *2019 Internet Crime Report Released*, Feb. 11, 2020, https://www.fbi.gov/news/stories/2019-internet-crime-report-released-021120. The Federal Trade Commission reports that it received nearly 1.3 million reports about government imposters between 2014 and 2019, a number that is "far more than any other type of fraud reported in the same timeframe." Emma Fletcher, *Government Imposter Scams Top the List of Reported Frauds*, FTC, July 1, 2019, https://www.ftc.gov/news-events/blogs/data-spotlight/2019/07/government-imposter-scams-top-list-reported-frauds.

[9] *See* Debra Cassens Weiss, Beware of Email Attachments Purporting to Carry Case Information, Courts Warn, ABA Journal, Jan. 16, 2014, https://www.abajournal.com/news/article/beware_of_email_attachments_purporting_to_carry_case_information_courts_war; Zoe Tillman, Federal, State Court Officials Warn of Email Scam, The Blog of Legal Times, Jan. 15, 2014, https://legaltimes.typepad.com/blt/2014/01/federal-state-court-officials-warn-of-email-scam.html.

[10] *See, e.g.*, Public Alert: Scam Emails About Phony Court Cases Carry Computer Virus, United States Courts, Jan. 13, 2014, https://www.uscourts.gov/news/2014/01/13/public-alert-scam-emails-about-phony-court-cases-carry-computer-virus (email scam involving emails "purporting to come from federal and state courts" informing recipients of fake hearing dates and infecting recipients' devices with computer viruses); Judicial Council of Georgia, Administrative Office of the Courts, Press Release: Judicial Agency Warns of False "Court Case" Email Scam, May 28, 2014, https://www.atlantaga.gov/Home/ShowDocument?id=14424 (email scam involving false notice to appear); Minnesota Judicial Branch, Chief Justice Gildea Urges Awareness of Jury Duty Scams, Sept. 5, 2019, https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=1641.

[11] Super. Ct. R. 4(c)(2) (emphasis added).

The odds will not improve much even if the email transmitting the court papers itself clearly identifies the party suing the defendant. Persons are often sued by parties with whom they have had no preexisting relationship (like a debt collector or debt buyer or a mortgage or auto loan assignee) or only limited prior contact. In those common instances, the defendant may reasonably believe that the email with an attached summons and complaint is a fraudulent communication sent by a scammer. That an email message attempting to serve process in a civil action would likely come from a professional process server, a law office, or other non-party stranger adds yet another layer of unfamiliarity that would reasonably lead a recipient to distrust its contents. Because of the prevalence of scam emails, recipients of electronic service may ignore the messages that they receive or decline to open links or attachments (as we are all repeatedly reminded we should do only with great caution). For all these reasons, emails will not provide actual notice of a lawsuit or at least not a form of notice that is likely to be viewed as authentic in most cases.

3. Even if a defendant does not disregard or distrust electronic service, they may not be able to access attached documents.

A summons must be "served with a copy of the complaint, the Initial Order setting the case for an initial scheduling and settlement conference, any addendum to that order, and any other order directed by the court to the parties at the time of filing," as well as a copy of the order permitting an alternative method of service to be used.[12] Under the proposed amendments, each of these documents will have to be attached to the electronic message. It can be far more difficult (or even impossible) to open and read an attachment on a mobile phone as compared to other devices. Downloading documents from a website or the cloud would be equally challenging. Low-income individuals and seniors are disproportionately likely to *only* have a mobile phone.[13] As a result, they may be unable to view the attached documents (including the substantive content of the complaint and potentially voluminous exhibits, critical information about their initial court date, and requirements for filing a responsive pleading) effectively, or at all.

4. There are meaningful differences between the Civil Division and other areas of the Court in which electronic service is already allowed.

There are important differences between typical party relationships in the Civil Division and those in other areas of the Court that currently allow service by electronic means, including the Domestic Relations Branch and Domestic Violence Division.[14] Most significantly, the parties to a domestic relations or domestic violence case typically have or recently had an ongoing and

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[12] Super. Ct. Civ. R. 4(c)(1) (as proposed for amendment).

[13] Monica Anderson and Madhumitha Kumar, *Digital Divide Persists Even As Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center, May 7, 2019, https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/; Monica Anderson and Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, Pew Research Center, May 17, 2017, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2017/05/PI_2017.05.17_Older-Americans-Tech_FINAL.pdf.

[14] D.C. Super. Ct. Dom. Rel. R. 4(c)(3)(B); D.C. Super. Ct. Dom. Violence R. 5(a)(3)(D).

personal relationship. As a result, the parties likely have accurate and up-to-date contact information for each other, know what channels of communication are most effective, and have a history of communicating through those channels. In contrast, disputes in cases filed in the Civil Actions Branch of the Civil Division often arise between parties who do not have an ongoing relationship, may not previously have communicated by electronic means, and may not know whether an email address is still current.

In the Civil Division, the proposed amendments would apply across-the-board, including on calendars like the foreclosure and commercial debt collection calendars. On both of those calendars, virtually all plaintiffs are commercial entities represented by lawyers who have the means and the sophistication to employ traditional methods of service successfully. Likewise in these cases, the parties may not have had any prior course of dealing by electronic means (or where any electronic communication has been passive, such as the defendant receiving automated notifications of statement availability, privacy policy changes, or similar non-personal communications). Many other case types in the Civil Division involve similar circumstances. Unlike the Domestic Relations Branch and the Domestic Violence Division, there is a substantial segment of cases in the Civil Division in which authorizing service by electronic means would never be appropriate.

II. Safeguards should be added to ensure that any alternative method of service is permitted only in exceptional circumstances and, when used, is likely to result in actual notice.

A. Permit service through electronic mail only when the parties have recently used this method of communication successfully.

If alternative service by electronic mail is permitted in the Civil Division, the substantial likelihood that such service will not result in actual notice to the defendant can be mitigated somewhat by allowing service by electronic mail only when the parties have previously and recently used electronic mail to communicate. We recommend adding language to the proposed amendment that would permit service by electronic means "only when the serving party shows that the parties' custom and practice has been to use such electronic means for prior successful communications within the past six months." The six-month timeframe adds basic protection by making it more likely that the email address is still in use by the recipient. While beneficial for trying to ensure the accuracy of the defendant's email address itself, this safeguard remains limited by the fact that the email transmitting the service papers would still be sent by an unknown process server or other stranger and therefore may still get caught in spam or be disregarded as illegitimate.

B. Require a verified statement specifying the diligent effort used to accomplish service by standard methods.

As the proposed amendment recognizes, alternative methods of service should be permitted only when the plaintiff has already made a "diligent effort" to accomplish service by the methods prescribed in Rule 4(c) or (e)(1)-(2), i.e., by registered or certified mail, first-class mail with notice and acknowledgment, delivery to the defendant (or to a person residing with the defendant or an authorized agent). To verify these efforts, the serving party should be required to submit an affidavit (or a declaration as permitted by Rule 9-I) and appropriate documentation identifying the

diligent efforts. We suggest adding the following language to ensure that the Court has enough information to determine whether the party has made a diligent effort to accomplish service:

> The party seeking to use an alternative method of service must file a motion with a supporting affidavit identifying the diligent efforts used to accomplish service by methods prescribed in Rule 4(c) or (e)(1)-(2) and providing any documents reflecting such efforts. The supporting affidavit must:
>
> (i) Identify each method used in an attempt to accomplish service on the person to be served and the specific efforts that were used for each attempted method, and explain why the attempts were not successful (including any evidence that the person is evading service);
> (ii) If the physical location or mailing address of the person could not be ascertained, identify the efforts made to obtain the location or mailing address; and
> (iii) Provide the last-known contact information for the party to be served, including the party's residential and business addresses, phone numbers, and email addresses.

This addition will also bring the proposed amendments in line with corresponding rules in other jurisdictions, which frequently require the serving party to provide this type of information under oath or by declaration.[15]

We further recommend that the official comments to the rule include examples of the kind of "diligent efforts" to obtain current contact information that would suffice as a guide to litigants and judges. We recommend adding the following comment to Rule 4:

[15] *See, e.g.*, Me. R. Civ. P. 4(g)(1) ("Any such motion shall be supported by . . . an affidavit showing that: (A) The moving party has demonstrated due diligence in attempting to obtain personal service of process in a manner otherwise prescribed by Rule 4 or by applicable statute; (B) The identity and/or physical location of the person to be served cannot reasonably be ascertained, or is ascertainable but it appears the person is evading process."); Nev. R. Civ. P. 4.4(b)(2) ("A motion seeking an order for alternative service must . . . provide affidavits, declarations, or other evidence setting forth specific facts demonstrating: (i) the due diligence that was undertaken to locate and serve the defendant; and (ii) the defendant's known, or last-known, contact information, including the defendant's address, phone numbers, email addresses, social media accounts, or any other information used to communicate with the defendant."); Or. R. Civ. P. 7D(6)(b) ("The affidavit or declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to accomplish service."); 231 Pa. Code R. 430(a) ("The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.").

> Examples of diligent efforts to obtain the physical location or mailing address for the party to be served include efforts to obtain the current residence or business address of the person to be served, such as (1) inquiries of postal authorities, (2) inquiries of relatives, neighbors, and friends of the defendant, (3) examinations of local telephone directories, courthouse records, voter registration records, local tax records, and motor vehicle records, (4) a reasonable internet search, and (5) skip tracing reports from commercial services.[16]

C. Add language to ensure that proof of service by alternative methods is meaningful.

Rule 4(*l*) requires that proof of any method of service "must be made to the court . . . by the server's affidavit." We assume that this requirement also would apply to any alternative method of service. But Rule 4(*l*) also specifies the particular *type or manner* of proof to be provided by affidavit for the two most common methods of service: delivery under Rule 4(c)(2)-(3) and registered or certified mail under Rule 4(c)(4). And a third common method, first class mail with notice and acknowledgement under Rule 4(c)(5), contains its own reliable proof of service element in the form of the return acknowledgement. By specifying how actual service for all common methods of service is to be proved, the current rule is designed to ensure that service is not merely attempted or transmitted, but actually accomplished, i.e., received by the person to be served.

In contrast, the proposed amendment to the rule does not specify any particular type of proof for any of the alternative methods. In fact, it says only that the "court may specify how the party must prove that service was accomplished by the alternative method," presumably leaving it up to the judgment of the serving party when the court does not specify. We believe that the proposed amendments should be revised to require that the Court identify the proof required to show that service was accomplished in every case and to include safeguards designed to ensure actual receipt of the service papers. We identify four revisions to accomplish these ends below.

1. Require that the Court "must" specify proof of service.

Currently, the proposal states: "The court *may* specify how the party must prove that service was accomplished by the alternative method." *May* should be replaced with *must* so that in every case, the court will specify the type and manner of proof of service to be provided under Rule 4*(l*).

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[16] This addition would closely parallel the Official Note to the rule in the Pennsylvania Code pertaining to alternative service. 231 Pa. Code R. 430, cmt. ("An illustration of a good faith effort to locate the defendant includes (1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, 39 C.F.R. Part 265, (2) inquiries of relatives, neighbors, friends, and employers of the defendant, (3) examinations of local telephone directories, courthouse records, voter registration records, local tax records, and motor vehicle records, and (4) a reasonable internet search.").

2. Include the requirements for proof of service by electronic means in the rule itself.

With regard to service by electronic mail, we believe that it is especially critical that the type of required proof be set forth in the rule itself (just as current Rule 4 details how personal service must be proved). We propose the following language (designed to show actual receipt of the email and not merely proof of its transmission):

> Service by Electronic Mail. If service is made by electronic mail under Rule 4(e)(3)(C)(i), the serving party must file a copy of the email, a read receipt or reply email from the party demonstrating service, and an affidavit which must specifically state:
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> (i) the process server's name, residential or business address, and the fact that he or she is 18 years of age or older;
> (ii) the email address of the process server;
> (iii) the time at which the email was transmitted;
> (iv) an identification of each attachment to the email; and
> (v) if there is no read receipt or reply email, specific information such as the date, time, and content of an oral or written communication from the party to be served indicating that the email transmitting the required documents for service of process was received.

3. Require contemporaneous mailing by first class mail.

Any serving party using an alternative method of service should be required to mail the summons, complaint, Initial Order, any addendum to that order, and the order authorizing the alternative method of service to the last known address of the person to be served. Such a requirement is important for two reasons. First, requiring a contemporaneous mailing makes it more likely that the defendant will receive actual notice of the court case. Second, with regard to service by electronic mail, mailing of hard copies of the court papers makes it substantially more likely that the party to be served will not only receive the email itself, but will actually be able to review the papers. Low-income defendants and seniors may not be able to open attachments on their phone, may have difficulty reading the attachments on a phone, or may wish to have a hard copy of the court documents but not have access to a printer. This requirement would also bring the proposed rule amendment in line with rules in other jurisdictions that allow electronic service, many of which require a contemporaneous mailing in addition to the electronic method of service.[17]

[17] *See, e.g.*, Ariz. R. Civ. P. 4.1(k)(2) ("If the court allows an alternative means of service, the serving party must make a reasonable effort to provide the person being served with actual notice of the action's commencement. In any event, the serving party must 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."); Me. R. Civ. P. 4(g)(2) ("An order for service by alternate means . . . shall also direct the mailing to the defendant, if the

4. Require that the transmittal message for service by electronic means include case identifiers and other information.

For alternative service by electronic means, the rule also should require that the email itself include the following transmittal message:

> You have been named as a defendant [or party] in a case filed in the D.C. Superior Court. This message is an attempt to notify you of the court case and to serve you with the summons, complaint, and other court papers, which are attached. The case name and number is [ ]. We also have mailed a copy of the court papers to your last known address. You can view a copy of the papers on the Court's website at dccourts.gov by using the "search cases" feature to find your case. Please reply to this message to acknowledge its receipt.

Rule 10-I – Pleadings

The proposed amendment to Rule 10-I(b) would require pleadings to set forth the party's email address. The proposed amendment reads:

> The first pleading filed by or on behalf of a party must set forth in the caption the party's name, full residence address, and unless the party is represented by counsel, the party's telephone number and email address if any. All subsequent pleadings and other papers filed by or on behalf of a party must set forth the name, full residence address, email address, and telephone number of the party, unless that party is represented by counsel.

Although the first of these two sentences makes it clear the email addresses are only required if they exist, the second sentence does not. We recommend repeating "if any" in the second sentence so that it is clear that pleadings do not need to include an email address if the party does not have one.

In addition, because many persons, particularly low-income individuals, have email addresses for limited purposes but do not regularly use or check their email, the proposal should be further revised to refer to the email address to be provided as an "active and regularly used email address" preceding each of the two references to an "email address." These revisions would read as follows:

> The first pleading filed by or on behalf of a party must set forth in the caption the party's name, full residence address, and unless the party is represented by counsel,

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defendant's address is known, a copy of the order as published."); Nev. R. Civ. P. 4.4(b)(3) ("If the court orders alternative service, the plaintiff must also: (A) make reasonable efforts to provide additional notice under [the rule regarding alternative methods of notice]; and (B) mail a copy of the summons and complaint, as well as any order of the court authorizing the alternative service method, to the defendant's last-known address.").

> the party's telephone number and ***an active and regularly used*** email address if any. All subsequent pleadings and other papers filed by or on behalf of a party must set forth the name, full residence address, ***an active and regularly used*** email address ***if any***, and telephone number of the party, unless that party is represented by counsel.

Rule 12-I – Judge in Chambers

The proposed changes to Rule 12-I would eliminate any reference to the judge in chambers from the rules. We recognize the Court's need for greater flexibility in judicial assignments. However, we believe that preserving the role of the judge in chambers is vital for low-income and self-represented litigants whose first, and sometimes only interaction with the Court may be with the judge in chambers to address an emergency matter. It is likewise beneficial to preserve a reference to the judge in chambers in the rules to assist individuals looking to the rules for guidance understand how to proceed. In order to maintain the basic public informational purpose of this rule while allowing the Court flexibility in judicial assignments, we recommend the following language:

> (b) JUDGE IN CHAMBERS. (1) ~~The following~~ ~~m~~ Matters designated by the Chief Judge that require summary or emergency disposition may ~~at any time~~ be presented for disposition to a judge in chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate. The Chief Judge will from time-to-time publish by administrative order a list of the matters designated to be heard by Judge in Chambers.

Rule 40-III – Collection and Subrogation Cases

We support the proposed changes to Rule 40-III (governing civil debt collection and insurance subrogation matters), including those that would bring the civil rule in conformity with the recently-promulgated Small Claims Rule 19 governing the same types of actions in small claims. While more can and should still be done to enhance fairness and access to justice for defendants in these types of matters in both branches of the Court, the proposed rule change is a positive step and necessary to create consistency with the provisions of Small Claims Rule 19.

In addition, we strongly support the changes that will allow the Court to schedule an initial hearing in civil debt collection and insurance subrogation matters after a case is filed, rather than only after a defendant has filed a response to the complaint. As we have highlighted in previous comments submitted to the Court, setting an initial scheduling conference at the outset of the case—and allowing defendants the opportunity to appear in court even if they have not yet filed an answer—has significant access to justice implications for unrepresented litigants. For defendants who lack the resources to effectively participate in the court process and who may face various barriers to filing a responsive pleading (including not understanding that they need to, or how to do so), being able to appear at a court hearing is an important opportunity to obtain basic information about the case and connect with legal resources.

Implementing this proposed change would also enable the Court to send improved default notices similar to those used in other areas of the Civil Actions Branch that not only notify

defendants of the issuance of a default, but also include information about legal resources and state the date and time of an initial scheduling conference. These improved procedures would bring civil collection and subrogation cases in line with those already in place for other types of civil matters and support efforts to increase actual notice and decrease default judgments.

Conclusion

We appreciate the Committee's consideration of these comments and recommendations. We have attached our suggested revisions to the proposed amendments for the Committee's consideration.

Sincerely,

BREAD FOR THE CITY
Rebecca Lindhurst, Managing Attorney

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Attachment 1

Proposed Alternative Language

Rule 4. Summons

(e) SERVING AN INDIVIDUAL WITHIN THE UNITED STATES. Unless applicable law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose acknowledgment has been filed—may be served anywhere in the United States by:

(1) following District of Columbia law, or the state law for serving a summons in an action brought in courts of general jurisdiction in the state where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons, complaint, Initial Order, any addendum to that order, and any other order directed by the court to the parties at the time of filing to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(3) Alternative Methods of Service. If the court determines that, after diligent effort, a party has been unable to accomplish service by a method prescribed in Rule 4(c) or (e)(1)-(2), the court may permit an alternative method of service on an express finding that the proposed method is reasonably calculated to give actual notice of the action to the party to be served The court ~~may~~ must specify how the party must prove that service was accomplished by the alternative method.

(A) The party seeking to use an alternative method of service must file a motion with a supporting affidavit identifying the diligent efforts used to accomplish service by methods prescribed in Rule 4(c) or (e)(1)-(2) and providing any documents reflecting such efforts. The supporting affidavit must:

(i) Identify each method used in an attempt to accomplish service on the person to be served and the specific efforts that were used for each attempted method, and explain why the attempts were not successful (including any evidence that the person is evading service);

(ii) If the physical location or mailing address of the person could not be ascertained, identify the efforts made to obtain the location or mailing address; and

(iii) Provide the last-known contact information for the party to be served, including the party's residential and business addresses, phone numbers, and email addresses.

(B) If the court allows an alternative means of service, the serving party must also send, by first class mail, to the last-known business or residential address of the person being served the summons with a copy of the complaint, the Initial Order setting the case for an initial scheduling and settlement conference, any addendum to that order, and any other order directed by the court to the parties at the time of filing.

(C) Alternative methods of service include, but are not limited to:

~~(A) delivering a copy to the individual's employer by leaving it at the individual's place of employment with a clerk or other person in charge;~~

~~(B)~~(i) transmitting a copy to the individual by electronic ~~means~~ mail, but only when the serving party shows that the parties' custom and practice has been to use such electronic means for prior successful communications within the past six months; or

~~(C) posting on the court's website; or~~

~~(D)~~(ii) any other manner that the court deems just and reasonable.

(D) If service is made by electronic mail under Rule 4(e)(3)(C)(i), the serving party must include the following language in the body of the email:

> You have been named as a defendant [or party] in a case filed in the D.C. Superior Court. This message is an attempt to notify you of the court case and to serve you with the summons, complaint, and other court papers, which are attached. The case name and number is [ ]. We also have mailed a copy of the court papers to your last known address. You can view a copy of the papers on the Court's website at dccourts.gov by using the "search cases" feature to find your case. Please reply to this message to acknowledge its receipt.

(4) Posting Order of Publication on the Court's Website. In a case where the court has authorized service by publication, and on a finding that the plaintiff is unable to pay the cost of publishing without substantial financial hardship, the court may permit publication to be made by posting the order of publication on the court's website

. . .

(i) PROVING SERVICE.

(1) Affidavit or Unsworn Declaration Required. Proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit or unsworn declaration.

(A) Service by Delivery. If service is made by delivery pursuant to Rule 4(b)(1) or (3), then the return of service must be made under oath or by unsworn declaration (unless service was made by the United States marshal or deputy United States marshal) and must specifically state:

(i) the caption and number of the case;

(ii) the process server's name, residential or business address, and the fact that he or she is 18 years of age or older;

(iii) the time and place when service was made;

(iv) the fact that the materials required by Rule 4(a) were delivered to the person served; and

(v) if service was effected by delivery to a person other than the party named in the summons, then specific facts from which the court can determine that the person to whom process was delivered meets the appropriate qualifications for receipt of process set out in Rule 4(e)–(h).

(B) Service by Registered or Certified Mail. If service is made by registered or certified mail under Rule 4(b)(2), then the clerk must promptly attach the return receipt to the original statement of claim and note the return receipt on the docket, indicating whether the receipt shows delivery to or refusal by the defendant. If the signature on the return receipt is not legible, or if the return receipt does not purport to be signed by a party named in the statement of claim, then service has not been properly effected unless the court determines from specific facts presented that the person who signed the receipt is either the defendant or a person who meets the appropriate qualifications for receipt of process set out in Rule 4(e)–(h).

(C) Service by Electronic Mail. If service is made by electronic mail under Rule 4(e)(3)(C)(i), the serving party must file a copy of the email, a read receipt or reply email from the party demonstrating service, and an affidavit which must specifically state:

(i) the process server's name, residential or business address, and the fact that he or she is 18 years of age or older;

(ii) the email address of the process server;

(iii) the time at which the email was transmitted;

(iv) an identification of each attachment to the email; and

(v) if there is no read receipt or reply email, specific information such as the date, time, and content of an oral or written communication from the party to be served indicating that the email transmitting the required documents for service of process was received.

*****

COMMENT TO 2020 AMENDMENTS New subsection (e)(3) permits the court to authorize an alternative means of service if the serving party is unable to accomplish service using a traditional method and if the alternative method is reasonably calculated to give actual notice to the party being served. Subsection (e)(4) permits the court to authorize posting on the court's website when a plaintiff is unable to pay the cost of publication.

Examples of diligent efforts to obtain the physical location or mailing address for the party to be served include efforts to obtain the current residence or business address of the person to be served, such as (1) inquiries of postal authorities, (2) inquiries of relatives, neighbors, and friends of the defendant, (3) examinations of local telephone directories, courthouse records, voter registration records, local tax records, and motor vehicle records, (4) a reasonable internet search, and (5) skip tracing reports from commercial services.

Rule 10-I. Pleadings: Stationery and Locational Information

(b) LOCATIONAL INFORMATION: PLEADINGS AND OTHER PAPERS. The first pleading filed by or on behalf of a party must set forth in the caption the party's name, full residence address, and unless the party is represented by counsel, the party's telephone number and an active and regularly used email address if any. All subsequent pleadings and other papers filed by or on behalf of a party must set forth the name, full residence address, an active and regularly used email address if any, and telephone number of the party, unless that party is represented by counsel. If a party is represented by counsel, all pleadings or other papers must set forth the name, office address, telephone number, email address, and Bar number of the attorney. The names, addresses, email addresses, and telephone numbers so shown will be conclusively deemed to be correct and current. It is the obligation of the attorney or unrepresented party whose address, email address, or telephone number has been changed to give immediate notice to the appropriate branch or office within the Civil Division and all other attorneys and unrepresented parties named in the case of this change. Attorneys must include their Bar number in all such notices. Should a party incur expenses, including reasonable attorney's fees, due to the failure of any other party, or that party's attorney, to give prompt notice of a change of address, email address, or telephone number, the court, upon motion or upon its own initiative, may order the party failing to give notice to reimburse the other party for expenses incurred. (c) NONCONFORMANCE WITH ABOVE. A pleading or other paper not conforming to the requirements of this rule will not be accepted for filing.

Rule 12-I . Judge in Chambers

(b) JUDGE IN CHAMBERS. (1) ~~The following~~ ~~m~~ Matters designated by the Chief Judge that require summary or emergency disposition may ~~at any time~~ be presented for disposition to a judge in chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate. The Chief Judge will from time-to-time publish by administrative order a list of the matters designated to be heard by Judge in Chambers.

Attachment 2

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
One Judiciary Square
441 Fourth Street, NW, Suite 450 North
Washington, DC 20001-2714
TEL: (202) 442-9094 · FAX: (202) 442-4789 · E-MAIL: oah.filing@dc.gov

[REDACTED], Appellant/Claimant, v. D.C. DEPARTMENT OF EMPLOYMENT SERVICES, Appellee/Agency.	Case No.: [redacted]

FINAL ORDER

I. INTRODUCTION

Claimant [REDACTED] appealed a Department of Employment Services (DOES) Determination finding him ineligible for unemployment benefits because he failed to timely report identity verification documents in response to a claim-related information request. Exhibit 300, *citing* D.C. Official Code § 51-109(1). The Determination found Claimant ineligible for benefits from March 15th through May 2, 2020. *Id.* After May 2nd Claimant submitted the required documents and has received benefits, starting with the week ending May 9, 2020. For the reasons set forth below, I will reverse the Determination. Claimant is thus eligible for back benefits for the seven weeks ending March 21, 28, April 4, 11, 18, 25, and May 2, 2020.

I heard the case on June 1, 2020.[1] Appeals Examiner Sheila Meyers represented DOES and testified. Daniel Cantor, Esquire, represented Claimant, who testified. I considered Exhibits 300 and 301 to evaluate the appeal's timeliness for jurisdictional purposes.[2]

[1] On March 14, 2020, Mayor Muriel Bowser declared a Public Health State of Emergency for the District of Columbia due to the COVID-19 pandemic. That State of Emergency requires all hearings at OAH, scheduled between March 16 and the end of the Public Health Emergency, to be conducted telephonically. The Scheduling Order included instructions on how to participate by telephone.

[2] The appeal was timely, based on its filing date (May 18, 2020) and the mailing date of the Determination (May 18, 2020). Jurisdiction is established. D.C. Official Code § 51-111(b).

II. FINDINGS OF FACT

Claimant worked for the H Street Country Club until it shut down on or about March 14, 2020, due to COVID pandemic restrictions. He applied for benefits on March 18, 2020, with an effective claim date of Sunday, March 15, 2020.[3] To help prevent fraud, DOES cross-checks personal information on benefit applications against a Homeland Security database. If the cross-checked data does not match, DOES sends a request for at least two types of identity-verifying documents, such as a government photo ID, social security card, or comparable documents. DOES transmits the requests to the electronic accounts provided by benefit applicants.

Here, DOES sent an identity verification request to Claimant's correct Yahoo account on March 26, 2020, which instructed him to provide, no later than April 2, 2020, clear copies of a photo ID and social security card. Claimant did not answer immediately because the request got diverted to his spam folder. Because his initial weekly claims were rejected, he contacted DOES in late March or early April, learned about the identity verification request, and reported that he could not find his social security card. A DOES official said could submit a copy of his birth certificate instead. Claimant could not do so immediately because he was sick with COVID-19.

On or about April 7, 2020, Claimant transmitted copies of his driver's license and birth certificate to DOES at doesidverification@dc.gov and fact.finding@does.gov. After receiving no response, Claimant sent requests about the status of his claim to covid19.ui@dc.gov, on April 15, 2020, and to does.onestop@dc.gov on April 27, 2020. On May 15, 2020, he got through to a DOES supervisor, who accepted his identity verification documents and approved benefits starting the week ending May 9, 2020. Claimant has since received benefits. But for the seven preceding weeks, he received no benefits despite submitting weekly claims.

III. CONCLUSIONS OF LAW

Here, with Claimant's eligibility for benefits favorably resolved after the week ending May 2, 2020, this case turns solely on whether Claimant is ineligible for back benefits for the preceding seven weeks because he failed to submit identity verification documents "in a timely manner" pursuant to D.C. Code, Title 51-109(1). The controlling statute does not set a specific

[3] Unemployment benefit weeks run from Sundays to Saturdays. Mid-week benefit applications receive an effective claim date starting the preceding Sunday.

time limit for answering claim-related information requests. It simply makes eligibility for benefits contingent on filing compliant weekly claims, without setting rigid filing deadlines:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the Director:
>
> (1) That he has made a claim for benefits with respect to such week in accordance with such regulations as the Board may prescribe;

D.C. Official Code § 51-109(1).

The lack of rigid deadlines makes sense because high-volume claim processing systems are fallible, especially now, when they are taxed beyond their limits by a sudden onslaught of claims occasioned by a global pandemic. Despite the good faith and reasonable diligence of all interested parties, unemployment benefit reports will, from time to time, go missing or become misdirected. That is inevitable. And that is what happened here. Given the crush of pandemic-related claims, DOES and Claimant miscommunicated about resolving the identity verification issue until the benefit week ending May 9, 2020. This "no fault" chain of events should not reflect poorly on either party. Nor should it divest Claimant of the back benefits he reasonably pursued amid the claim processing challenges presented by the pandemic.

IV. ORDER

Based on the entire record in the case, it is this 9th day of July 2020,

ORDERED, that the Determination is **REVERSED**; and it is further

ORDERED, that Claimant Justin Hill is **ELIGIBLE** for back benefits for the weeks ending **March 21 and 28, April 4, 11, 18 and 25, and May 2, 2020** ; and it is further

ORDERED that the parties' reconsideration and appeal rights are attached.

This Final Order is effective when it is served, as certified on the Certificate of Service found at the end of this document.

_____/s/_____
Scott A. Harvey
Administrative Law Judge

After an administrative law judge has issued a Final Order, a party may ask the judge to change the Final Order and ask the District of Columbia Court of Appeals to change the Final Order. There are important time limitations described below for doing so.

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER

Under certain limited circumstances and within certain time limits, a party may file a written request asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at www.oah.dc.gov.

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH within 10 calendar days of the date the Final Order was filed (15 calendar days if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days of the date the Final Order was filed (125 calendar days if OAH mailed the Final Order to you).

PLEASE NOTE: By the June 8, 2020 Order of the Chief Administrative Law Judge, all filing deadlines that would otherwise expire during the public health emergency, as declared by the Mayor, are suspended/tolled/extended. Upon the expiration of the public health emergency, the Chief Administrative Law Judge will issue an order ending the suspension/tolling/extension period and parties will have thirty calendar days to timely submit any outstanding filings.

APPEAL RIGHTS ARE ON THE FOLLOWING PAGE

HOW TO APPEAL THE FINAL ORDER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a Petition for Review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the Court of Appeals, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a $100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at www.dcappeals.gov.

If you are a member of the United States Armed Forces on active duty, you may have certain rights under the Servicemembers Civil Relief Act, 50 U.S.C.S. Appx. § 501 *et seq*. If you qualify for these rights and you have **LOST** this case because you were not present, you **MAY** be able to have this case reopened. If you think you may qualify under this law, you must notify this court promptly to ensure that your rights are protected.

Certificate of Service:

By Email:

Daniel Cantor, Esquire
Arnold & Porter

Daniel.Cantor@arnoldporter.com

By Email:

Department of Employment Services
Attn: Arif Sheikh, Esquire
Interim Claims Officer - OUIC
does.oah@dc.gov

By Email:

[REDACTED]
[redacted]

I hereby certify that on July 10, 2020, I caused this Final Order to be served on the above-named parties and DOES at the addresses and by the means stated.

/s/ Tyrone Williams

Clerk/Deputy Clerk