Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

June 15, 2017

Via Electronic Mail to Laura.Wait@dcsc.gov

Ms. Laura M.L. Wait
Assistant General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

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

Dear Ms. Wait,

The Legal Aid Society of the District of Columbia[1] ("Legal Aid") submits these comments on the proposed amendments to Superior Court Rules of Civil Procedure 5, 54-II, and 69-I, and the proposed addition of Rule 5.2.

A. Rule 5 and Proposed Rule 5.2 (Privacy Protection for Filings Made With the Court)

On November 28, 2016, Legal Aid submitted comments on the prior set of proposed amendments to the civil rules. Those proposals included the deletion of privacy protection provisions from Rule 5(e) and the addition of a new Rule 5.2 on privacy protection. (The placement of privacy protection provisions in a separate Rule 5.2 is consistent with the 2007 amendments to the Federal Rules of Civil Procedure.)

In our prior comments, we read the then-proposed rule as generally requiring full redaction of a financial account number and allowing substitution of the last four digits of the number only if the content of the redaction would not be self-evident. Similarly, with regard to the names of minors, we read the then-proposed rule as requiring full redaction of a minor's name and allowing substitution of a minor's initials only if the content of the redaction would not be self-evident. In both cases, those proposed changes were inconsistent with the approach taken in Federal Rule 5.2 and with current Superior Court Rule 5(e), both of which allow the filer to make those substitutions (which are routinely made in actual practice under the current rule). We also explained why, as opposed to full redaction, the substitution of the last four digits of a

[1] Legal Aid is the District's oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. We have a special interest in promoting access to justice for District residents, including persons who engage the Court as self-represented litigants.

financial account number is important in debt collection actions and why substitution of a minor's initials promotes clarity in cases involving minors.

The Committee's proposed addition of Rule 5.2 (as a substitute for current Rule 5(e)) was not included in the comprehensive set of amendments to the Superior Court Rules of Civil Procedure that the Court adopted in Rules Promulgation Order 17-02 (April 5, 2017). Instead, the Rules Committee has now proposed and issued for comment a revised version of Rule 5.2. The new version, like the federal rule and current Superior Court rule, would allow a filer to substitute the last four digits of a financial account number and a minor's initials. The language chosen to make clear that the filer is authorized to make these substitutions – "except that a party or nonparty making the filing may include the following" – is similar to the language used in the federal rule. It fully addresses our prior concern.

For clarity, we suggest that the list of items subject to redaction in proposed Rule 5.2(a) be punctuated with semi-colons instead of commas after "birth date" and "known to be a minor" so that the list of items to be redacted would read as follows: "[A]n individual's social-security number, taxpayer-identification number, driver's license or non-driver's license identification card number, and birth date; the name of an individual known to be a minor; and a financial-account number. . . ." This sets off the first four items as a list within a list and avoids a possible misreading of "and birth date" as related only to the driver's license or non-driver's license identification card items.

We appreciate the Committee's consideration of our prior comment on proposed Rule 5.2.

B. Rule 54-II (Waiver of Costs, Fees, or Security)

Superior Court Rule 54-II addresses waivers of payments of costs, fees, and security for litigants seeking to proceed *in forma pauperis* ("IFP"). The proposed amendments to the rule include stylistic revisions to subsections (a) through (h) (which address the process for obtaining an IFP order) and a substantive revision to subsection (i). That subsection is currently titled "Service of Process and Witness Fees." Consistent with the proposed revision, the title of subsection (i) would change to "SERVICE OF COMPLAINT; SERVICE ON MINOR OR INCOMPETENT PERSON; SERVICE OF WITNESS SUBPOENA; WITNESS FEES."

The revised rule would require the Court to make service on behalf of IFP litigants *only* with respect to service of most complaints (but not those involving a minor or incompetent person). In order to obtain the Court's assistance in making other types of service, including witness subpoenas, the IFP litigant would have to file a motion. Currently, the rule requires the Court's assistance with all types of service. It states that when an application to proceed without prepayment of costs is granted, "the officers of the court will issue and serve all process and perform all duties in such cases." Rule 54-II(a)(i).

Legal Aid understands that the current rule's broader requirement for service assistance could create a burden on the Clerk's Office, be subject to abuse in isolated cases, and, in theory, create potential liability for the assessment of costs against an *in forma pauperis* party. For those reasons, we do not oppose the revision. In taking that position, however, we emphasize that

many parties who proceed without prepayment of costs are unrepresented. In order to mitigate any adverse impact on access to justice, Clerk's Office personnel will need to be aware of this change and ready to provide information to unrepresented litigants on the process for filing a motion and the availability of other information and legal resources. In addition, especially on the calendars where cases move rapidly to trial (as in the Landlord & Tenant Branch and the Small Claims Branch), the Court will need to be sensitive to the need for these motions to be brought on for hearing and decided in sufficient time to have a subpoena served before trial.

C. Rule 69-I (Attachment After Judgment)

Superior Court Rule 69-I currently addresses post-judgment attachments generally. It covers both attachments of wages, salaries, and commissions ("wage attachments") and non-wage attachments. Most commonly, a non-wage attachment involves a judgment creditor seeking funds in an account maintained by the judgment debtor in a depository institution like a bank or credit union. Rule 69-II, in contrast, addresses only wage attachments (commonly referred to as wage garnishments).

The principal substantive change proposed for Rule 69-I is the addition of three new subsections that would address non-wage attachments. Proposed subsection (g) would specify the content of a non-wage writ of attachment, including directions to the garnishee not to "hold," *i.e.*, to continue to make available to the defendant, certain types of funds exempt from attachment under federal or D.C. law. Proposed subsection (h) would require the judgment creditor to serve the judgment debtor with a copy of the writ of attachment and a Notice to Debtor of Non-Wage Garnishment and Exemptions by certified and first-class mail within 3 days of service of the writ on the garnishee. Proposed subsection (i) would specify the process by which a judgment debtor may raise a claim that funds sought by the writ are exempt and provide for an expedited hearing on a motion asserting such a claim. The rules do not currently address these matters. Nor do the forms currently in use in the Civil Actions Branch address exemptions or the process by which a judgment debtor may claim exemptions.[2]

Legal Aid strongly supports the addition of subsections (g), (h), and (i) to Rule 69.[3] We recommend, however, that the approach taken in subsection (g) be revised to be consistent with

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[2] The Small Claims Branch several years ago adopted a writ of attachment form for non-wage attachments that contains much of the information that proposed subsection (g) would require, including instructions to garnishees regarding exempt funds. The non-wage writ of attachment form used in the Civil Actions Branch does not address exemptions. Proposed subsection (h) would require the judgment creditor to provide the judgment debtor with a Notice to Debtor of Non-Wage Garnishment and Exemptions on a form available in the Clerk's Office. The Small Claims Branch currently has a form notice with that title. It provides detailed information regarding available exemptions and how to raise a claim of exemption. We do not know whether small claims judgment creditors actually provide that notice to judgment debtors or whether the Clerk's Office otherwise makes it available to judgment debtors. To our knowledge, there is no comparable notice form used in other Civil Division branches.

[3] We suggest that the Rules Committee consider maintaining Rule 69-I as a rule addressing post-judgment attachments generally, i.e., as a rule that applies to both wage and non-wage attachments. In that event, proposed new subsections (g), (h), and (i) could be moved into a new Rule 69-III titled "Non-Wage Attachments." This organization – a rule 69-I applying to all post-judgment attachments, a rule 69-

the federal regulations applicable to attachments of federal benefit payments that are direct deposited into financial institution accounts and to provide more precise directions to garnishees. Those regulations, which are set forth in 31 CFR Part 212, were finalized in 2013 and became effective on June 28, 2013. We also recommend deleting certain language from subsection (i) that appears to be a drafting error. We present our proposed redline changes to subsections (g) and (i) below, following an explanation of the reasons for our recommendations.

Judgment debtors, especially low-income judgment debtors, frequently receive public benefits or other payments that are exempt from attachment under federal or District of Columbia law or both. These include items such as Social Security disability benefits, Social Security retirement, veterans' benefits, Office of Personnel Management benefit payments, workers compensation, and unemployment compensation. Persons receiving such benefits often count on them to provide the basic necessities of life. In many cases, they are required to be direct deposited into bank accounts. When a bank garnishee freezes the funds in such accounts in response to a writ of attachment, every day that the funds remain frozen and unavailable can be devastating to the debtor.

For that reason and others, courts around the country have recognized that post-judgment attachments trigger basic due process protections, including prompt and meaningful notice to the judgment debtor and a prompt opportunity to be heard. The Court's current system for post-judgment attachments does not provide these basic protections. The proposed rule would go a long way towards remedying that problem.

In addition, the 2013 federal regulations have now established a well-understood system for automatically protecting exempt federal benefits from non-wage garnishment, without the need for action by the debtor. When a financial institution receives a writ of attachment or other form of garnishment order, the regulations require it to conduct an account review to determine the total amount of federal benefit payments direct deposited into the account in the two months preceding service of the writ. That amount is protected from the attachment and cannot be held or frozen. The rule is designed to facilitate compliance by the financial institution by avoiding any need for inquiry into the commingling of exempt and non-exempt funds. It applies only to direct deposited funds (whose source is easily traceable) and only to the particular federal benefits specified in the regulations. In other circumstances (including exempt payments that have not been direct deposited and are commingled with non-exempt funds), it may be considerably more difficult for the financial institution to identify exempt funds in an account without the assistance of the account holder. [4]

II applying only to wage attachments, and a rule 69-III applying only to non-wage attachments – would provide a more easily understood format for those who do not deal with post-judgment attachments on a regular basis.

[4] In instances not covered by the federal regulations, the fact that exempt and non-exempt funds have been commingled in the same account should not provide a basis for denying a claim of exemption, provided that the financial institution or debtor can trace the amount of exempt funds in the account. For that reason, we have proposed an addition to subsection (i) stating that a claim of exemption must not be denied solely due to commingling of funds.

Against this background, Legal Aid believes that Rule 69-I should place the burden of protecting exempt funds on garnishees in most circumstances, while placing the burden of claiming an exemption on the debtor in others. For direct deposited federal benefits, all financial institutions already have (or should have) systems and procedures to comply with the federal regulations. For other payments that are exempt under D.C. law, direct deposited, and susceptible to precise identification, financial institution garnishees can and should be required to apply the same approach as they currently apply to federal benefits. In our experience, this will cover the exempt benefits most commonly received by defendants in cases on the Superior Court debt collection calendars, including the low income population served by Legal Aid. Our recommended revision is designed to protect these benefits from being frozen without the need for action by the judgment debtor in the typical case.

With regard to all other potentially exempt payments (including those that are not direct deposited and those that we have not attempted to specify in the rule because certain limitations or conditions apply), we believe the initial burden of claiming an exemption can be placed on the judgment debtor. That approach will not pass due process muster, however, unless judgment creditors are required to give the debtor prompt and meaningful notice of the writ (including information regarding the availability of exemptions and the process for claiming them) and the Court provides an expedited opportunity for the judgment debtor to be heard. Proposed subsection (h) would provide for that notice and proposed subsection (i) would provide a process for an expedited hearing on the debtor's motion presenting a claim of exemption. We emphasize, however, that in addition to the rule language, it is critical that the Court also develop appropriate forms for the writ of attachment and for the Notice to Debtor of Non-Wage Garnishment and Exemptions. Legal Aid would appreciate the opportunity to work with the Court in developing those forms.

For the forgoing reasons, we recommend the following revisions to the proposed rule (shown in redline):

(g) CONTENT OF WRIT OF ATTACHMENT ON OTHER <u>THAN</u> WAGES, SALARY, OR

COMMISSION. The writ must:

(1) contain:

(A) the caption of the action;

(B) the name and last known address of the judgment debtor;

(C) the name and address of the judgment creditor; and

(D) the date of issuance;

(2) list the amount of the total balance due under the judgment;

<u>(3) state that the garnishee must not hold federal benefit payments direct deposited into an account, to the extent required by 31 CFR Part 212;</u>

<u>(4) direct the garnishee not to hold the following payments exempt from garnishment under District of Columbia law, if direct deposited into an account, in the same manner and to the same extent required for direct deposited federal benefit payments under 31 CFR Part 212:</u>

<u>(A) disability, illness, or unemployment benefits (exempt under D.C. Code § 15-501(a)(7)); and</u>

<u>(B) workers compensation benefits (exempt under D.C. Code § 32-1517);</u>

~~(3)~~ (5) direct the garnishee to hold, subject to further proceedings under subsection (i) of this section, all other property of the judgment debtor subject to attachment by law ~~the non-exempt property of the judgment debtor~~ up to the amount of the total balance due at the time of the issuance of the writ and which is in the possession or charge of the garnishee at the time of service of the writ; and

~~(4) direct the garnishee not to hold, and to make available to the account holder, all funds from an account that consists solely of direct deposited benefits that are exempt:~~

~~(A) under federal law including:~~

~~(i) Social Security;~~

~~(ii) Supplemental Security Income;~~

~~(iii) Social Security benefits;~~

~~(iv) Veterans' benefits;~~

~~(v) Civil Service Retirement;~~

~~(vi) Federal Employee Retirement System benefits;~~

~~(vii) Black Lung, Railroad Retirement, Disability or unemployment; or~~

~~(B) under District of Columbia law including:~~

~~(i) unemployment;~~

~~(ii) Public Assistance/Temporary Assistance for Needy Families benefits; or~~

~~(iii) Worker's Compensation;~~

~~(5) direct the garnishee, in any account that consists in part of benefits that are exempt under federal law, not to hold, and to make available to the account holder, an amount equal to the total amount of exempt funds deposited into the account in the two months prior to the service of a writ of attachment; and~~

(6) contain interrogatories to be answered by the garnishee regarding the nature of the property in possession of the garnishee and indebtedness of the garnishee to the judgment debtor, and instructing the garnishee to specify~~ing~~ the amounts and sources of any direct deposited exempt funds in the account.

(h) NOTICE TO THE JUDGMENT DEBTOR. The judgment creditor must mail to the judgment debtor at his or her last known address, by certified and first-class mail, a copy of the writ and the Notice to Debtor of Non-Wage Garnishment and Exemptions on the form available in the clerk's office, no more than 3 days after service of the writ on the garnishee.

(i) FUNDS EXEMPT FROM ATTACHMENT.

(1) Motion Claiming Exemption. A party may raise a claim that funds or property are exempt from a writ of attachment by filing a motion with the Presiding Judge, or his or her designee, claiming an exemption and requesting a hearing.

(2) Commingled funds. A claim that funds are exempt from attachment must not be denied solely because exempt and non-exempt funds have been commingled in the same account.

(3~~2~~) Hearing on Motion. ~~On filing a motion,~~ U~~u~~nless otherwise requested, th~~eat matter~~ motion

must be set for a hearing before the Presiding Judge of the Civil Division, or his or her designee, as soon as practicable, but no later than 7 days after the motion is filed. ~~If the motion is contested, the matter must be set for a hearing on the day the motion is filed or as soon as possible thereafter, provided that both sides have:~~
~~(A) received actual notice of the hearing date;~~
~~(B) been provided a copy of the motion, unless the party contesting the motion waives its right to receive a copy; and~~
~~(C) been afforded an adequate opportunity to be heard.~~[5]
(4~~3~~) Requesting Later Date. No hearing may occur later than the 7th day after the motion is filed unless the filing party requests a later date.
(5~~4~~) Effect of Filing Motion. On the filing of a motion, any further action on the writ of attachment, including any condemnation of funds, must be stayed until a decision is made by the Presiding Judge, or his or her designee, on the merits of the motion.

* * *

Legal Aid appreciates the Committee's consideration of these comments and recommendations.

Sincerely,

Chinh Q. Le
Legal Director

Jennifer Lavallee
Supervising Attorney, Consumer Law Unit

Thomas Papson
Volunteer Staff Attorney, Consumer Law Unit

Enclosure

[5] The second sentence of the Hearing on Motion subsection appears to have been included in error. Several years ago, legal services advocates suggested amendments to Rule 69-I similar to those now proposed. Originally, those suggestions included a process for a same-day hearing on a debtor's motion before Judge in Chambers. The language we now propose for deletion appears to be a remnant of that long-ago suggestion. Legal Aid believes that the first sentence of the Hearing on Motion subsection, providing for a hearing as soon as practicable but no later than 7 days after the motion is filed, will provide adequate protection for debtors, some of whom may seek or obtain legal services or pro bono counsel only after filing their motion.

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Proposed Subsections (g), (h), and (i) of Rule 69-I
Incorporating Revisions Recommended by Legal Aid

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(1) contain:

(A) the caption of the action;

(B) the name and last known address of the judgment debtor;

(C) the name and address of the judgment creditor; and

(D) the date of issuance;

(2) list the amount of the total balance due under the judgment;

(3) state that the garnishee must not hold federal benefit payments direct deposited into an account, to the extent required by 31 CFR Part 212;

(4) direct the garnishee not to hold the following payments exempt from garnishment under District of Columbia law, if direct deposited into an account, in the same manner and to the same extent required for direct deposited federal benefit payments under 31 CFR Part 212:

(A) disability, illness, or unemployment benefits (exempt under D.C. Code § 15-501(a)(7)); and

(B) workers compensation benefits (exempt under D.C. Code § 32-1517);

(5) direct the garnishee to hold, subject to further proceedings under subsection (i) of this section, all other property of the judgment debtor subject to attachment by law up to the amount of the total balance due at the time of the issuance of the writ and which is in the possession or charge of the garnishee at the time of service of the writ; and

(6) contain interrogatories to be answered by the garnishee regarding the nature of the property in possession of the garnishee and indebtedness of the garnishee to the judgment debtor, and instructing the garnishee to specify the amounts and sources of any direct deposited exempt funds in the account.

(h) NOTICE TO THE JUDGMENT DEBTOR. The judgment creditor must mail to the judgment debtor at his or her last known address, by certified and first-class mail, a copy of the writ and the Notice to Debtor of Non-Wage Garnishment and Exemptions on the form available in the clerk's office, no more than 3 days after service of the writ on the garnishee.

(i) FUNDS EXEMPT FROM ATTACHMENT.

(1) Motion Claiming Exemption. A party may raise a claim that funds or property are exempt from a writ of attachment by filing a motion with the Presiding Judge, or his or her designee, claiming an exemption and requesting a hearing.

(2) Commingled funds. A claim that funds are exempt from attachment must not be denied solely because exempt and non-exempt funds have been commingled in the same account.

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(3) Hearing on Motion. Unless otherwise requested, the motion must be set for a hearing before the Presiding Judge of the Civil Division, or his or her designee, as soon as practicable, but no later than 7 days after the motion is filed.

(4) Requesting Later Date. No hearing may occur later than the 7th day after the motion is filed unless the filing party requests a later date.

(5) Effect of Filing Motion. On the filing of a motion, any further action on the writ of attachment, including any condemnation of funds, must be stayed until a decision is made by the Presiding Judge, or his or her designee, on the merits of the motion.