Committee Comments on 1977 Complete Revision

Overview

The Supreme Court of Alabama, in its Order of January 3, 1973 adopting the Alabama Rules of Civil Procedure, asked the Committee to give particular study to ARCP 4. Accordingly, the Committee has conducted an exhaustive study of this matter and had consulted other interested individuals, groups and organizations including the Alabama Law Institute. The Committee now recommends the adoption of the revised rule, now arranged as ARCP 4 through ARCP 4.4.

The threshold problem facing the Committee was the validity of a redefinition of the bases for permissible "long-arm" service of process under the exercise of rule-making power. The Rules Enabling Act (Acts of Alabama, No. 1311, Regular Session, 1971) do not authorize the abridgement, enlargement or modification of the substantive right of any party. After much discussion, a majority of the Committee has concluded that an overhaul of the rule governing service of process can properly include a redefinition of the bases for permissible "long-arm" service of process without further legislative or constitutional authority than that which presently exists under the Rules Enabling Act and Sec. 150 of the Constitution of Alabama of 1901, as amended 1973. Such activity is in the area of procedure, not substance. *McGee v. International Life Ins. Co.,* 355 U.S. 220; *State v. District Court*, 417 P.2d 109 (Mont.1966); *Hardy v. Pioneer Parachute Co.*, 531 F.2d 193 (4th Cir.1976); Annot. 19 A.L.R.3d 138. Under similar statutory limitations, the United States Supreme Court, in *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 90 L.Ed. 185 (1946) has held that rules relating to service of process affect only the manner and means by which a right to recover is enforced. Likewise, this proposed revision of ARCP 4, in the opinion of the Committee, does not alter or abridge any right to recover but relates only to the manner and means of its enforcement.

Although similar in subject matter to Federal Rule 4, revised ARCP 4 is necessarily different in many respects because Federal Rule 4 relies in large part upon an incorporation of the methods of service available under state law.

The rules are drawn to cover summons "or other process" and complaint "or other document to be served" so as to make it clear that the procedure here is applicable not only to summons and original complaint but also to any document required to be served in the manner of a summons and complaint.

ARCP 4

Proposed ARCP 4 is an amalgam of general and miscellaneous provisions. The summons, the limits of effective service, the proper person upon whom to execute process, the standards governing amendment of process, the effect of refusal of service, multiple defendants, incomplete service and the effect of availability of alternative or dual modes of service of process and acceptance or waiver of service are covered in ARCP 4.

ARCP 4(a) requires issuance of the summons without unnecessary delay. The summons can be issued for service in any county, or for service outside the state if otherwise provided for by these rules. For a form of summons complying with this rule, see Form 1 in the Appendix of Forms. Also, a form of summons which substantially complies with Title 7, Sec. 184, *Code of Ala.* is sufficient. While Federal Rule 4(b) requires the summons to be under the seal of the court, there has been no similar requirement in the state courts of Alabama and, consequently, the requirement of the seal is not found in ARCP 4. In order to eliminate any undue burden on the clerk's office, it is expressly provided that the plaintiff supply the clerk with sufficient copies of the complaint to allow the clerk to attach one copy of the complaint to each summons to be issued in the action. ARCP 4(a)(4) makes it clear that any party seeking issuance of a summons is entitled to the issuance thereof regardless of whether he is, for example, a third-party plaintiff and original defendant seeking to bring in a third party defendant under ARCP 14 or a counterclaim-plaintiff and original defendant seeking to join an additional defendant to a counterclaim under ARCP 13.

ARCP 4(b) permits process to be served anywhere in this state and, when service is to be had in a county other than a county in which the action is filed and service is to be made by delivery by a process server, the clerk can transmit the summons and a copy of the complaint directly to the process server. See ARCP 4.1(b). This eliminates the cumbersome branch summons where, under former practice, the clerk caused the issuance of a summons to the sheriff of the county in which the action had been filed for subsequent delivery to the sheriff of the county in which the defendant was to be found.

ARCP 4(c) delineates who may be served in all actions where service is other than by publication. The categories contained herein should be considered as subject to the methods of service set out in Rules 4.1 and 4.2. For example, these categories would determine the proper person to whom one should look for determination of residence in the event residence service under Rule 4.1(d) was to be employed. Thus, the thrust of this subdivision is only to delineate the proper person to whom the service of process should be directed.

ARCP 4(c)(1) provides for service upon an individual who is not an infant or incompetent by service in his own name. The definition of infancy must be read in light of the change of the age of majority to persons over the age of 19 years.

ARCP 4(c)(2) carries forward the philosophy that persons of tender years should be served in a "dual manner" by having service directed to that person individually as well as to a more mature person connected with the individual of tender years. The rule also eliminates the unnecessary formality of "cradle service," that is, service directly on the infant when the infant is not over the age of twelve years. The legislative definition of infancy is found in Act No. 77 (Regular Session 1975) and that statute is to be applied in making a determination of the applicability of ARCP 4(c)(2).

ARCP 4(c)(3) carries forward a similar philosophy of dual service on incompetent persons not confined in an institution. Of course, under ARCP 17(c) the court is required to appoint a guardian ad litem for an infant defendant or for an incompetent person not otherwise represented in an action, and to make any other orders it deems proper for the protection of the infant or incompetent person.

ARCP 4(c)(4) provides the means for service on an incompetent person who is confined in a mental institution and does not have a guardian, and is designed to notify some responsible person of the pending action.

ARCP 4(c)(5) modifies the original rule insofar as it relates to service on incarcerated persons by requiring service to be in the same manner as service on any other individual. This approach, of course, should not result in rendering service more difficult but should make it easier due to the service by certified mail provision contained in Rule 4.1(c). Also, this will alleviate any confusion that existed under the prior rule as to service on persons incarcerated in county or city jails instead of in the state penal system. Moreover, it eliminates the necessity of involving the Director of the Department of Corrections in the chain of service of process.

ARCP 4(c)(6) is designed to allow service upon a corporation or its agents directly, without the necessity of utilizing the Secretary of State to effect service. As noted earlier, this provision is not intended to state the method of service nor to specify the bases of valid service which, in the case of foreign corporations, are covered in Rule 4.2, but merely to delineate who may be served in situations where service is otherwise authorized by these rules or by law. This provision should considerably simplify the former practice.

ARCP 4(c)(7) restates, and to some extent expands, the person to be served in a partnership.

ARCP 4(c)(8) provides who should be served in an unincorporated organization or association.

ARCP 4(c)(9) is a new provision which recognizes that professional associations and professional corporations are entities which would not be prejudiced by allowing service upon individual shareholders. In many respects, these associations or corporations are similar to partnerships, and the stockholders are in effect, “partners” doing business in corporate form.

ARCP 4(c)(10) through ARCP 4(c)(13) specify the person to be served when the defendant is the State of Alabama or any public body.

ARCP 4(d) affords a liberal policy with reference to the amendment of process or proof of service or the approval of any amendment of process or proof of service that may have been made by the sheriff or other person authorized to serve process.

ARCP 4(e) governs refusal of service while ARCP 4(f) permits trial when efforts to serve some of multiple defendants have been unsuccessful.

ARCP 4(g) states a general philosophy which pervades the proposed revision. It is the intent of the Committee and the purpose of the rule not to eliminate any presently available method of service with the possible exception of any instance under present practice which would allow service by publication when the defendant’s residence is known. Under this revision service must first be attempted by other than publication whenever defendant’s residence is known. With this exception service that can be justified either under this revision or by a statute through ARCP 4(g), or both, should be deemed adequate.

ARCP 4(h) permits waiver or acceptance of service by a defendant or his attorney.

This rule represents the first of several conceptual departures from the previous rule and its approach to service of process. ARCP 4.1 deals only with service within the state, as opposed to service outside the state. The breaking down of service to service within the state and service outside the state enables the practitioner to have a frame of reference based on the location of the defendant to be served. Further, instead of describing the various types of service as either "personal" or "substituted" service, the revised rules functionally classify service into "service by certified mail," "residence service," "delivery by a process server" and "service by publication."

ARCP 4.1(a) provides that the usual method of service within the state is delivery by a process server such as the sheriff. ARCP 4.1(b)(2) authorizes the court to allow an appropriate person other than the sheriff to serve process. It is anticipated that such leave will be freely given when requested. ARCP 4.1(b)(4) provides that when process is returned unserved, the clerk will notify the attorney or party requesting the service of the failure of service. It was felt by the Committee that any additional burden on the clerk caused by this provision could be minimized by a pre-printed postcard system. This inconvenience would be, in all events, outweighed by the salutary effect of stimulating the movement of litigation by encouraging prompt additional information as to service from the attorney or party requesting service.

ARCP 4.1(c) introduces a new concept with its provision for, upon the request of the plaintiff, service within the state by certified mail. Such a request should be in writing, and could be easily endorsed upon the complaint. It is anticipated that this provision will provide the vehicle for expediting out-of-county but within-the-state service of process by eliminating the necessity for using the sheriff for service in the foreign county. Of course, certified mail service is also available for within-the-county service. There appears to be no constitutional infirmity in this manner of service since the federal due process clause requires, in an in personam action, a valid basis for a state to exercise jurisdiction, such as physical presence or residence within the state at the time service is effected, and a mode of service reasonably calculated to give the defendant actual notice of proceedings against him and an opportunity to be heard. In connection with physical presence, see *Smith v. Gibson*, 83 Ala. 284, 3 So. 321 (1887) and with reference to service reasonably calculated to give a defendant actual notice, see *Milliken v. Meyer*, 311 U.S. 457 (1940). The reliability and convenience of service by mail requiring a signed receipt has long been recognized. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (registered mail); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 650-51 (1950) (registered mail); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (registered mail and service on agents); and Louis, *Modern Statutory Approaches To Service of Process Outside the State-Comparing the North Carolina Rules of Civil Procedure With The Uniform Interstate and International Procedure Act*, 49

N.C.L.Rev. 235, 237-38 (1971). This provision requiring certified mail and a return receipt should meet and exceed present constitutional standards.

When the person to be served is a natural person, the clerk must require "restricted delivery" since this method of delivery has superseded the earlier provision for "deliver to addressee only." See Postal Bulletin 21023, February 13, 1975. Under the Regulation, this type of delivery is defined as follows:

"Restricted Delivery provides a means by which a mailer may direct that delivery be made only to the addressee or to an agent of the addressee who has been specifically authorized in writing by the addressee to receive his mail. This service is available only for articles addressed to natural persons specified by name…." Postal Service Manual, Sec. 165.31, February 7, 1975.

Other states have adopted similar "certified mail" service of process provisions. See, e.g., Ohio Rules of Civil Procedure 4.1(1) which provides service by certified mail as a matter of course on resident defendants, while delivery by a process server is available on request only.

ARCP 4.2

This rule represents a significant departure from prior Alabama practice with regard to "long-arm" service of process on out-of-state defendants. Instead of engaging in the fiction that an out-of-state person in certain situations "appoints" the Secretary of State as his agent for service of process, this rule, in accordance with current constitutional concepts, by-passes the cumbersome and expensive procedure whereby the clerk of the circuit court is required to obtain service by the sheriff of Montgomery County on the Secretary of State, and thereafter the Secretary of State is required to mail the process to the person to be served. There is no constitutional requirement of this nature. Under this rule as revised, service of process in an out-of-state situation is effected by the clerk, unless delivery by a process server is ordered by the court under ARCP 4.2(b)(2). This revised procedure should result in significant savings in time and expense for litigants.

ARCP 4.2(a)(2) defines the bases or grounds of in personam jurisdiction over non-residents or absent residents that will be recognized in Alabama. As a general proposition of federal constitutional law, two requirements must be met before a foreign nonqualifying corporation or a nonresident individual may be subjected to suit within a designated forum state: (1) there must be a basis or ground of in personam jurisdiction that comports with the current interpretation of

the federal due process clause; and (2) there must be compliance with a state statute or rule of court authorizing service of process which is reasonably calculated to give the defendant actual notice. See 2 J. Moore, *Federal Practice*, para. 4.25 at 1145-97 (2d Ed.1953); *Elkhart Engineering Corp. v. Dornier Werke*, 343 F.2d 861, 863 (5th Cir.1965); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 548 (5th Cir.1959). This rule attempts to authorize service of process under all situations where the exercise of in personam jurisdiction by Alabama courts will not violate federal due process requirements and, in so doing, to set out the general bases or grounds of in personam jurisdiction recognized under federal law.

Historically, only physical presence within the forum state or consent was a sufficient basis of in personam jurisdiction. See *Pennoyer v. Neff*, 95 U.S. 714 (1877). However, in recent years, there has been an explosive expansion of the due process clause in this area. This saga of development, which is one of the most fascinating found in the annals of jurisprudence, has been told many times by courts and commentators. See, e.g. 4 C. Wright & A. Miller, *Federal Practice and Procedure*, Sec. 1065-1969, at 211-66 (1969); Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction Of State Courts-From Pennoyer To Denckla: A Review*, 25 U.Chi.L.Rev. 569 (1958); Annot., *Construction And Application of State Statutes or Rules of Court Predicating In Personam Jurisdiction Over Non-Residents or Foreign Corporations on the Commission of a Tort Within the State*, 24 A.L.R.3d (1960); Annot., *Validity As A Matter of Due Process, of State Statutes or Rules of Court Conferring In Personam Jurisdiction Over Non-Residents or Foreign Corporations on the Basis of Isolated Business Transactions Within the State*, 20 A.L.R.3d 1201 (1968). As a result of this expansion, which has come about primarily because of the recognition of the increasing mobility and industrialization of American society which makes travel less of a hardship, service which a few years ago would have been considered obviously insufficient, is now considered valid. It is now generally recognized that if a defendant has certain “minimum contacts” with a forum state, and it is fair and reasonable to exercise jurisdiction under the circumstances, that due process is not violated by subjecting the defendant to jurisdiction in the forum state. Professor Moore has summarized the current constitutional requirements in this area as follows:

> “The first requirement is that there must be some minimum contact with the state which results from an affirmative act of the defendant. But it is not necessary that the defendant have been in the state or that it have had agents there.
>
> “In addition to some minimum contact with the state, it must be fair and reasonable to require the defendant to come into the state and defend the action. In determining what is fair and reasonable, the court may

consider factors associated with the doctrine of forum non conveniens, but need not give them over-riding importance.…

"Based as they are on notions of fairness and reasonableness the Supreme Court decisions do not permit a simple generalization of the rule pertaining to in personam jurisdiction over foreign corporations. If there are substantial contacts with the state, for example a substantial and continuing business, and if the cause of action arises out of the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of these contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction. If there is a minimum of contacts and the cause of action does not arise out of the contacts, there will normally be no basis of jurisdiction, since it is difficult to establish the factors necessary to meet the fair and reasonable test."

2 J. Moore, *Federal Practice*, Para. 4.25, at 1171-73 (2d Ed.1953).

Alabama at present has six separate "long-arm" statutes. See Tit. 7, Sections 192, 193, 199, 199($^1/_2$), 199(1), 199(2), Code of Alabama, ARCP 4 as originally adopted, among other things, brought together these statutes in one rule. There has been great debate in Alabama legal literature relating to the scope of Alabama's "longest" long-arm statute, Tit. 7, Sec. 199(1), Code of Alabama, and whether or not it extends as far as the due process clause allows. See, e.g., Note, *Alabama's Nonresident Jurisdiction Statutes; The Reach of the Long-Arm*, 24 Ala.L.Rev. 777 (1972); Note, *Conflict of Laws-The Limits of Alabama's "Long-Arm" Statute Falls Short of Those Allowed By Due Process*, 20 Ala.L.Rev. 326 (1968); Harrison, *Recent Trends In the Field of Conflict of Laws*, 15 Ala.L.Rev. 1 (1962).

A large part of the confusion has resulted from the "doing business" language in the Sec. 199(1), coupled with judicial pronouncements that Sec. 199(1) was as broad as the due process clause allowed. When considering this revised rule, some members of the Committee felt that the adoption of ARCP 4.2(a) would constitute an expansion of in personam jurisdiction of Alabama courts, and therefore was without the authority of the enabling act. However, other members of the Committee and the final consensus of the Committee was that since the Alabama Supreme Court had twice stated, and the Fifth Circuit has at least four times recognized, that Sec. 199(1) is as broad as the permissible limits of due process, justification for revamping this important area of Alabama law by rule existed and revision would be undertaken. See *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So.2d 25 (1962), rev'd on other grounds, 376 U.S.

254 (1964) ("The scope of substituted service is as broad as the permissible limits of due process"); *Ex Parte Martin*, 281 Ala. 135, 199 So.2d 836 (1967); *Elkhart Engineering Corp. v. Dornier Werke*, 343 F.2d 861, 865 (5th Cir.1965); *New York Times v. Conner*, 310 F.2d 133 (5th Cir.1962). *Sells v. International Harvester Co.,* 513 F.2d 762 (5th Cir.1975) invokes the standard *Sullivan*, supra, doctrine as to the extension of Alabama's long-arm jurisdiction to the outer limits of due process in a context where legislative definition of a transactional basis for the assertion of jurisdiction may have been absent. This revision affords adequate definition of transactional bases for assertion of jurisdiction, thus filling any void that may have existed at the time of the decision in *Sells*, supra.

Subparagraphs (A) through (H) in ARCP 4.2(a)(2), are designed to demonstrate or state certain activities which constitute "minimum contacts" with Alabama sufficient to subject a foreign corporation or a non-resident individual to suit and to in personam jurisdiction within Alabama. These bases or grounds are similar to those adopted in many other states. See, e.g., Ohio Rules of Civil Procedure 4.3(a). However, their presentation differs from the Uniform Interstate and International Procedure Act where much of the same language appears. The Advisory Committee chose to add an additional subparagraph (I) not found in the model act but similar to Section 9-5-33 of the General Laws of Rhode Island, a statute dealing with jurisdiction over foreign corporations. This subparagraph (I) is but a restatement of the current definition of the federal constitutional standard. Accordingly, service of process which does not fit comfortably within any of the transactional bases enumerated in subparagraphs (A)-(H) of ARCP 4.2(a)(2) can nonetheless be sustained if the allowance of the service does not offend the standard of subparagraph (I) under all the circumstances of the particular case. Subparagraph (I) was included by the Committee to insure that a basis of jurisdiction was included in Alabama procedure that was coextensive with the scope of the federal due process clause, as *New York Times v. Sullivan*, supra, indicated is allowable in Alabama.

Upon an invitation from the Supreme Court of Alabama to comment upon the proposed revisions to Rule 4, Professor M. Leigh Harrison, Warner Professor of Law, University of Alabama School of Law, observed that if it was the objective of the Advisory Committee to recommend a basis of jurisdiction co-extensive with the scope of federal due process, there was some language in the draft then before the Court which did not clearly achieve that end. Upon study of Professor Harrison's recommendations, the explanatory statement appearing in ARCP 4.2(a)(2)(I) was included so as to prevent the specific descriptions of contacts as set forth in ARCP 4.2(a)(2)(A)-(H) from having a limiting effect on the "catch-all" reference to minimum contacts in ARCP 4.2(a)(2)(I). Without such an explanatory statement as appears in ARCP 4.2(a)(2)(I) there is a danger of judicial construction which narrowly focuses upon the specific descriptions of contacts and finds that jurisdiction does not exist because none of the specific descriptions are satisfied by the facts of the particular case and, in so doing,

overlooks the possibility that sufficient contacts may nonetheless exist which would sustain jurisdiction under the catch-all provision. For an example of such construction under a statute which contained the catch-all provision but did not contain an explanatory statement as to its effect, see *Timberlake v. Summers*, 413 F.Supp. 708 (D.C.Okla.1976). Thus, and by way of example, under the Alabama rule jurisdiction could be properly exercised to the limit of due process upon an evaluation of all of the relevant facts in a products liability case although, at the same time, the facts of the case might not sustain jurisdiction under the more specific requirements of ARCP 4.2(a)(2)(D) and 4.2(a)(2)(E), provisions which ordinarily would apply to many products liability cases.

Although Alabama courts should not be limited to prior decisions interpreting the previously applicable long-arm statutes in Alabama, the existing case law certainly may be considered in defining certain terms contained in these subsections. For example, prior Alabama and federal cases show that transacting business in Alabama would include such various factors as the presence of agents in the state, the solicitation of orders in Alabama (*Tetco Metal Products, Inc. v. Langham*, 387 F.2d 721, 723 (5th Cir.1968)), a continuous flow of products into the state (*Thompson-Hayward Chemical Co. v. Childress*, 277 Ala. 285, 169 So.2d 305, 308 (1964)), correspondence with persons in Alabama (*Calagaz v. Calhoon*, 309 F.2d 248, 256 (5th Cir.1962)), or the ownership of real property in the state (*Armi v. Huckabee*, 266 Ala. 91, 94 So.2d 380, 383-84 (1957)).

ARCP 4.2(a)(1)(B) provides for service upon a personal representative in circumstances where service on the decedent or ward would have been upheld if the action could have been maintained against him. This result has been obtained under the Uniform Interstate and International Procedure Act although the language of the act may not be so readily adaptable to such construction as the statement found at ARCP 4.2(a)(1)(B). See *Hayden v. Wheeler*, 33 Ill.2d 110, 210 N.E.2d 495 (1965) and Annot., *State Statutes or Rules of Court Conferring In Personam Jurisdiction Over Non-Residents on the Basis of Isolated Acts or Transactions Within State As Applicable to Personal Representative of Deceased Non-Resident*, 19 A.L.R.3d 171 (1968).

ARCP 4.2(b) relates to the methods of long-arm service and its self-explanatory provisions are consistent with the methods of service allowed within the state by ARCP 4.1.

ARCP 4.3

Service by publication in Alabama can be generally divided into two categories of cases. First, there are certain claims which are historically of an equitable nature and which involve property or marital status which is under the control of the court. In most instances, a specific statute exists which confers jurisdiction upon the court to proceed in such matters but fails to provide a detailed method of obtaining service by publication other than to remit the practitioner to court rules or "practice in equity" or words of similar effect. For example, see Tit. 13, Sec. 139, dealing with the administration of an estate in equity, Tit. 34, Sec. 23, dealing with divorce and Tit. 47, Sec. 186, dealing with partition of property. In connection with partition proceedings, at Tit. 47, Sec. 186, there is a directive to proceed according to its own practices in equity cases coupled with a specific statutory reference at Tit. 47, Sec. 191(1) as to the method of obtaining service by publication in the case of an individual as to whom there is uncertainty as to whether or not he is living or dead. The silence as to the availability of service by publication in the context of a defendant whose identity or residence is unknown in partition proceedings makes it necessary for court rules to be supplied to provide for service by publication in these other contexts. Finally, interpleader stands on a little different footing from all of the others in that the remedy was originally a part of the equity rules and service by publication was available in an interpleader proceeding through the application of now superseded Equity Rule 6. In all such proceedings, publication procedure shall be governed by ARCP 4.3.

The second category of proceedings in which publication has heretofore been permitted are those proceedings wherein specific statutory procedure for publication is spelled out as a part of the statute dealing with the proceeding. In this connection, e.g., see attachment, Tit. 7, Sec. 852, and in rem actions quieting title to land, Tit. 7, Sec. 1119. In those instances, the procedure set forth by this Rule 4.3 does not apply and the requirements of the statute creating such remedy must be scrupulously observed with one exception. That exception relates to the requirement of ARCP 4.3(b) wherein it is stated that in all events no effort to obtain service by publication can be made as to a defendant whose residence is known unless any available method of service other than publication has first been exhausted. Most publication procedures already preclude service by publication as the exclusive method of service when the residence of the defendant is known. Rule 4.3(b) has been included so as to eliminate for all time any such abuse of the power to obtain service by publication. Finally, there is a blanket provision against obtaining an in personam judgment upon service by publication except when a proper showing has been made that a defendant avoids service as is set forth at ARCP 4.3(d).

ARCP 4.3(c) authorizes service by publication upon a resident defendant who avoids service and upon a domestic corporation or foreign corporation having a principal place of business in Alabama which fails to elect officers or appoint agents or whose officers or agents have been absent from the state for a

period of thirty days from the filing of the complaint or whose officers or agents are unknown. As is provided at ARCP 4.3(a) this is the one instance wherein an in personam judgment (including a money judgment) is permissible when service is obtained by publication. Note that more than mere inability to find the defendant is required because of the use of the term “avoidance” of service. Without this element of culpability on the part of the defendant when plaintiff has failed to obtain service other than by publication, substantial constitutional questions may be posed by the obtaining of an in personam judgment by publication. Further, note that publication is only available on motion at which time the plaintiff should bring to the attention of the court those circumstances which, in the opinion of the plaintiff, substantiates plaintiff’s contention that the defendant is avoiding service and that plaintiff is entitled to service by publication.

ARCP 4.3(e) provides an economical alternative to publication in domestic proceedings when the plaintiff is unable to pay the cost of publication. The requirement of payment of costs of publication in domestic proceedings has been held unconstitutional when applied to an indigent. See *Land v. Cockrell*, No. CA 75-P-0234-S (U.S.Dist.Ct., N.D.Ala., Feb. 3, 1976).

ARCP 4.4

This rule provides a method of service of process in foreign countries and it is new in Alabama procedure. The increasing and ever-expanding commercial nature of the Alabama economy required the inclusion of such a procedural rule. It incorporates by reference the bases for assertion of jurisdiction beyond state lines found in ARCP 4.2(a) where provision is made for assertion of jurisdiction over persons beyond state lines but, nonetheless, within the United States of America. The methods of service in a foreign country are, in many respects, equivalent to the methods available for service under ARCP 4.2(a) as to persons beyond state lines but within the United States. See, for example, ARCP 4.4(b)(1) and ARCP 4.4(b)(2), providing for service by certified mail or its equivalent service by delivery by a process server, respectively. In addition thereto, provision is made for service by letters rogatory (ARCP 4.4(b)(3)), service pursuant to the law of the foreign country (ARCP 4.4(b)(4)) and service by some other method as may be directed by order of the court in which the action is pending (ARCP 4.4(b)(5)).