

## Alabama Rules of Civil Procedure

### II. Commencement of action; service of process, pleadings, motions, and orders.

#### Rule 4.3.

##### Process: Service by publication.

(a) *Scope of rule.* This rule applies as follows:

(1) To a claim historically equitable involving property under the control of the court (e.g., administration of an estate, interpleader, partition) or marital status which claim has heretofore been deemed appropriate for service by publication where the identity or residence of a defendant is unknown or where a resident defendant has been absent from that defendant's residence for more than thirty (30) days since the filing of the complaint and the method of service by publication in such instances is not specifically provided by statute; and,

(2) To a claim, whether legal or equitable, against a defendant who avoids service of process as described in subdivision (c) of this rule. This rule does not supersede specific procedure for publication as set forth in certain statutes governing special proceedings (e.g., attachment, in rem action to quiet title) and, in such proceedings, the specific statutory procedure for publication and all other requirements appearing therein shall govern except to the extent that subdivision (b) of this rule may be applicable. In no event shall an in personam judgment be entered on service by publication except as provided in subdivision (c) of this rule.

(b) *Residence known; when publication appropriate.* When the residence of a defendant is known and the action is one in which service by publication is permitted, service of process must first be attempted by one of the methods of service other than publication as is provided by Rule 4 or Rule 4.4, if service on the defendant is to be effected in a foreign country.

(c) *Avoidance of service.* When a defendant avoids service and that defendant's present location or residence is unknown and the process server has endorsed the fact of failure of service and the reason therefor on the process and returned it to the clerk or where the return receipt shows a failure of service, the court may, on motion, order service to be made by publication. When a defendant is a corporation and the process server has endorsed the fact that the

process cannot be served because of the failure of the defendant to elect officers or appoint agents, or because of the absence of officers or agents from the state of incorporation and the state of the corporation's principal place of business for a period of thirty (30) days from the filing of the complaint or because the officers or agents are unknown, then such defendant shall be deemed to have avoided service and the court may, on motion, order service on such defendant to be made by publication. The mere fact of failure of service is not sufficient evidence of avoidance, and the affidavit required in subdivision (d)(1) of this rule must aver specific facts of avoidance.

(d) *Procedure for publication in actions governed by this rule.*

(1) AFFIDAVIT NECESSARY. Before service by publication can be made in an action where the identity or residence of a defendant is unknown, or when a defendant has been absent from that defendant's residence for more than thirty (30) days since the filing of the complaint or where the defendant avoids service, an affidavit of a party or the party's counsel must be filed with the court averring that service of summons or other process cannot be made because either the residence is unknown to the affiant and cannot with reasonable diligence be ascertained, or, the identity of the defendant is unknown, or, the resident defendant has been absent for more than thirty (30) days since the filing of the complaint, or, the defendant avoids service, averring facts showing such avoidance.

(2) HOW PUBLISHED. Upon the filing of the affidavit the clerk shall direct that service of notice be made by publication in a newspaper of general circulation in the county in which the complaint is filed; and, when publication is authorized under subdivision 4.3(c), also in the county of the defendant's last known location or residence within the United States. If no newspaper of general circulation is published in the county, then publication shall be in a newspaper of general circulation published in an adjoining county.

(3) CONTENTS OF PUBLICATION. The publication shall (A) contain a summary statement of the object of the complaint and demand for relief; (B) notify the person to be served that that person is required to answer within thirty (30) days after the last publication on or before a date certain specified in the notice which said date shall be thirty (30) days after the last publication; and (C) be published at least once a week for four successive weeks. In a divorce action, publication of a notice in substantial compliance with the following form shall be deemed sufficient:

"NOTICE OF DIVORCE ACTION

“John Doe, whose whereabouts is unknown, must answer Mary Doe’s petition for divorce and other relief by July 1, 1975, or, thereafter, a judgment by default may be rendered against him in Case No.\_\_\_\_\_, Circuit Court of \_\_\_\_\_County.

“Done the 30<sup>th</sup> day of April, 1975.

“RICHARD ROE, Clerk of the Circuit Court of \_\_\_\_\_ County.

“JOE DOAKS  
“123 Main Street  
“Anywhere, Alabama  
“Attorney for Mary Doe”

(4) WHEN COMPLETE. Service shall be complete at the date of the last publication.

(5) PROOF OF SERVICE. After the last publication, the publisher or the publisher’s agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service.

*(e) Alternative to publication in certain domestic proceedings.*

(1) WHEN PROPER. When service of process by publication in domestic proceedings is otherwise proper under this rule and the affidavit made necessary by subdivision (d)(1) of this rule has been filed, service of process may be made by first-class mail in lieu of publication when the party requesting such service has also filed an affidavit setting forth (A) substantial hardship in the payment of the cost of publication and (B) all of the known addresses of the defendant for the preceding two years or, if the defendant’s whereabouts have been unknown for said period, the last known address of the defendant and, if known, the address of defendant’s next-of-kin or some other person who may know the defendant’s whereabouts.

(2) HOW SERVED. The clerk shall place copies of the process and complaint or other document to be served in envelopes addressed to the defendant at all of defendant’s addresses as shown in plaintiff’s affidavit and, where appropriate, in an envelope addressed to the defendant in care of the next-of-kin or other person who may know the defendant’s whereabouts as shown in plaintiff’s affidavit. The process shall notify the defendant that the time within which the defendant is required to appear shall begin to run on the third day after the date shown on the

postmark on the envelope. The clerk shall enter the fact of mailing on the docket sheet of the action.

(3) WHEN EFFECTIVE. Service by mail pursuant to this subdivision shall be deemed complete on the third day after mailing and the time for answering shall run from said third day after mailing.

(dc) *District court rule.* Rule 4.3 applies in the district courts.

[Adopted 10-14-76, eff 1-16-77; Amended effective October 1, 1995; Amended eff. 8-1-2004.]

### **Committee Comments on 1977 Complete Revision**

#### **District Court Committee Comments**

While the district court lacks in rem jurisdiction, the likelihood of attachment and garnishment proceedings in the district courts makes it necessary for service of process by publication to be available. Of course, the reference in Rule 4.3 to service of process by publication in a domestic relations case has no bearing in view of the unavailability of that jurisdiction in the district courts.

### **Committee Comments on Complete Revision to Rules 4, 4.1, 4.2, 4.3, and 4.4, effective August 1, 2004**

#### **Committee Comments to Amendment to Rule 4.3 Effective August 1, 2004**

This Rule is mostly unchanged. Subdivision (c) was amended to delete the word "resident." Under the Rule as amended, any defendant who is avoiding service is amenable to service by publication, even nonresident defendants. Subdivision (d)(2) was amended to provide that publication shall be made both in the forum and at the defendant's last known county of residence, when avoidance is the basis for publication.

**Note from the reporter of decisions:** The order amending Rules 4, 4.1, 4.2, 4.3, 4.4, 6(a), 7(b)(2), 17(a), 22(c), and 26(b), Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.