

From: [Sai](#)
To: [RulesCommittee Secretary](#)
Cc: susan.steinman@justice.org
Subject: FRCP 4(c) proposal to abrogate service if actual notice (see 19-CV-W)
Date: Friday, April 16, 2021 10:52:32 AM

Dear FRCP Committee —

In 19-CV-W, AAJ, CC'd, proposed to address the problem of "snap removals" by adding a rule deeming all defendants to have constructively waived service if any defendant has actual notice, provided that all are timely served (and some other caveats).

I believe that AAJ's intent was good, and the problem that they pointed out is legitimate — but that their proposal was poorly written. It was too specific to the situation that they described, yet for a very broadly applicable rule. It would have unfairly caught many other situations in a rule that doesn't really apply well outside the situation envisioned by AAJ. Even apart from that, I don't believe it's fundamentally fair to have one defendant's knowledge impact another's rights.

I do, however, believe that the essence of the proposal was just, salvageable, and would apply very well to many situations besides the ones described by AAJ.

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I therefore propose the following addition, at FRCP 4(c)(4), modifying the general case in (c) (1):

- (4) Service under this rule is not required upon a party that has:
- i) actual knowledge of the suit, the name of the court in which the suit was filed, and their relation to the suit (e.g. that they are a defendant ¹); and
 - ii) actual possession of, or PACER access to, a copy of the complaint.

¹ Some service is required on non defendants, or even non parties — e.g. Rule 4(i)(1)(B & C).

I've not tried to determine all other non-defendant service provisions, but this is intended to capture all service requirements.

That's why I didn't just write "and that they are a defendant", but put it instead as the primary example clause. It could probably be reworded to improve clarity.

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This rule would address the situation AAJ raised, but limited to those with actual knowledge — not all other defendants.

And it would do away with purely pretend "service". It is deliberately framed not as a waiver, but as abrogating the need to serve at all.

The point of service is not an empty formalism; it's to ensure that a party actually knows that they're being sued and have a copy of the complaint.

If a party knows that, and has it, then it's a complete waste of time and resources to go through motions of "telling" them what they already know.

There is no legitimate purpose of justice served by such charades. This simply gives rise to gamesmanship like that identified by AAJ — not to mention the far more common shenanigans of people with actual knowledge trying to evade formal service.

While this might make for a great Marx Brothers episode, it's contrary to the fundamental principles of the Rules. See FRCP 1.

Naturally, the burden of proof would still be on the party that has to conduct service. Likewise, this doesn't toll service — though there may be "good cause" considerations under 4(m).

If a defendant takes an action like making a filing about the case, that should be obvious proof that they know about it perfectly well enough that they could have filed an appearance instead of, e.g., a removal motion. Burden fulfilled.

My proposal deliberately does not address what might prove actual knowledge. I'm certain that courts are quite capable of handling the inquiry, and that it will encompass a much wider range of situations than the rule could easily address if it tried to enumerate.

The question for the court is, at root, "does the defendant actually know you're suing them (in this court with this lawsuit etc), and have a copy of the complaint?".

An indirect way to address that is proving service.

The direct way is to prove actual knowledge.

It's simple, flexible, no-nonsense, and to the point.

I hope that the Committee will deem it just.

In the interests of disclosure, I note that I am a member of a civil rights coalition that also includes AAJ. I am not a member of AAJ (nor otherwise affiliated with them), and have not consulted with them on this proposal. Reading their proposal inspired this one; that is all.

However, I have CC'd them, and invite them to give their own views should they wish to do so.

Sincerely,

Sai

President, Fiat Fiendum, Inc., a 501(c)(3)

PS Non-gendered pronouns please. I'm a US citizen.

Sent from my mobile phone; please excuse the concision and autocorrect errors.