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Christian A.M. Curry on

The California Unlawful Detainer Process and its Required Notices

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Introduction. Unlawful detainer is a summary proceeding to recover possession of real property by a landlord from a tenant. In an unlawful detainer proceeding, the issues are limited to possession (the primary issue), and rent or holdover damages (a secondary issue) contingent on the existence of a valid claim for possession. Unlawful detainer is a creation of statute, unknown at common law, and demands strict adherence to the statutory procedural requirements.

With the exception of the termination of a fixed-term lease (where all parties are aware of the tenancy termination date), one of the several types of noticed set forth in Cal. Code Civ. Proc. § 1161 must be served on the tenant and run as a prerequisite to the filing of a viable case in unlawful detainer. It is the service and running of the notice that terminates the tenancy such that the landlord-plaintiff may file and maintain a case in unlawful detainer, and allows the court to award possession.

Statutory Duty Requires Serving Notice and Allowing Notice to Run Before Filing Unlawful Detainer. The statutes that govern service of notices as prerequisites to an unlawful detainer action are Cal. Civ. Code § 1946 and Code Civ. Proc. § 1162.

30-day notices to quit under Civ. Code § 1946 (and 60-day notices to quit under Civ. Code §1946.1) may "be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party" [Civ. Code § 1946]. All other notices as a prerequisite to an unlawful detainer action per Code Civ. Proc. § 1161 must be served in accordance with Code Civ. Proc. § 1162 to be valid [*see* Judicial Council of California Civil Jury Instructions ("CACI") Nos. 4303, 4305, 4307 (LexisNexis Matthew Bender, official publisher)].

Unlawful Detainer Is Unique Body of Law; Requirements That Deviate From Common or Statutory Law Must be Followed. Chapter 4 of Title 3 of Part 3 of the Code of Civil Procedure (§§ 1159–, 1179a) is known as the Unlawful Detainer Act. The Unlawful Detainer Act is broad in scope, available to both landlords and tenants who have suffered wrongs committed by the other [*Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal. App. 2d 340, 344, 63 P.2d 1184]. Procedures and proceedings in unlaw-

ful detainer were unknown at common law and are creatures of statute [*Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal. App. 2d 340, 344, 63 P.2d 1184]. As such, they are governed solely by the statutes that created them [*Kwok v. Bergren* (1982) 130 Cal. App. 3d 596, 599, 181 Cal. Rptr. 785]. Thus, where the Unlawful Detainer Act "deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code" [*Schubert v. Lowe* (1924) 193 Cal. 291, 295, 223 P. 550; *Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799].

Landlord Must Strictly Comply With Notice Statute to Effect Valid Service to Support Unlawful Detainer Claim. *Requirements for Service Are Set Forth in Plain Language of Code Civ. Proc. § 1162*. The requirements for service are unequivocal, set forth in Code Civ. Proc. § 1162:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,

3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

Only Strict Compliance With Statutory Requirements Will Afford Remedy of Unlawful Detainer. The landlord must follow the procedures outlined in Code Civ. Proc. § 1162, or the action will fail. Thus, in an unlawful detainer action, a landlord must strictly comply with statutorily mandated requirements for service of the notice to pay rent or quit; compliance with one of these methods must be shown or judgment declaring the landlord's right to possession must be denied. The landlord *must* prove compliance with Code Civ. Proc. § 1162 [*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th

511, 513-514, 65 Cal. Rptr. 2d 457]. Thus, if there is not complete compliance with Code. Civ. Proc. § 1162, judgment for unlawful detainer cannot be had.

Three cases are commonly cited to refute the plain language of Code Civ. Proc. § 1162: *Hozz v. Lewis* (1989) 215 Cal. App. 3d 314, 263 Cal. Rptr. 577; *Highland Plastics v. Enders* (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353; and *Nourafchan v. Miner* (1985) 169 Cal. App. 3d 746, 215 Cal. Rptr. 450. However, neither these cases, not any other, stands for that premise.

In *Hozz v. Lewis*, the tenant had multiple residence addresses, and the court found that the landlord had no duty to demonstrate reasonable diligence in determining at which address the tenant was staying [*Hozz v. Lewis* (1989) 215 Cal. App. 3d 314, 317, 263 Cal. Rptr. 577]. The more important distinction in the *Hoss* case was that the landlord had a legitimate belief that the tenant had *no* business address, and could thus not attempt service there.

The *Hozz* case also addresses *Highland Plastics v. Enders* [(1980) Cal. App. 3d Supp.1, 7, 167 Cal. Rptr. 353]. *Highland Plastics* case also found that posting and mailing pursuant to Code Civ. Proc. § 1162(3) was appropriate. But, in *Highland Plastics,* the defendant used the property as both his residence and business addresses. The attempt of service on the home was itself also an attempt of service at the business because the business was in the home. In this case, two trips to the same address were not necessary.

This was also the case in *Nourafchan v. Miner,* where the evidence supported the property manager's belief that the tenant used his home as his workplace. This included evidence that the tenant had converted one room into an office, and that the residence was frequented by his employees [*Nourafchan v. Miner* (1985) 169 Cal. App. 3d 746, 750, 215 Cal. Rptr. 450. In the *Nourafchan* and *Highland Plastics* cases, posting and mailing was appropriate because the landlord, believing the tenant was away from home, had attempted service at the home and business before resorting to posting and mailing.

None of these cases supports the frequently misstated presumption that a landlord need not comply with the plain language of Code Civ. Proc. § 1162. All modern (post-*Hozz* [1998]) cases specifically say the landlord must strictly comply with all of Code Civ. Proc. § 1162. In *Losornio v. Motta,* the court stated in pertinent part [*Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799]:

> Section 1162 provides three methods of serving these notices: (1) by personal delivery to the tenant (personal service); or (2) if the tenant is absent

> from his residence and usual place of business, by leaving a copy with a person of suitable age and discretion at either place, and sending a copy through the mail to the tenant's residence (substituted service); or (3) if a place of residence and usual place of business cannot be ascertained or a person of suitable age or discretion cannot be found there, then by affixing a copy in a conspicuous place on the property and delivering a copy to a person residing there, if such a person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated (post and mail service). (§ 1162, subds. 1–3; Civ. Code, § 1946.) A 30-day or 3-day notice is valid and enforceable only if the lessor has strictly complied with these statutorily mandated requirements for service. (*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th 511, 513, 65 Cal. Rptr. 2d 457.)

It is thus well established that *strict* compliance with statutory mandate as to contents and service of the subject notice is required, including attempting personal service and substituted service at both the home and place of business, if know, pursuant to Code Civ. Proc. § 1162(1), (2) before resorting to posting and mailing at the property pursuant to Code Civ. Proc. § 1162(3) [*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th 511, 513-514, 65 Cal. Rptr. 2d 457; *Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799; *Underwood v. Corsino* (2005) 133 Cal. App. 4th 132, 135, 34 Cal. Rptr. 2d 542].

Legally Required Service Vs. Actual Receipt of Service. Lack of actual receipt of a notice is not a defense to an unlawful detainer based on it when proper service is alleged and proven.

Landlords sometimes argue that actual receipt of a notice cures any defects in service, often citing *Lehr v. Crosby* [(1982) 123 Cal. App. 3d Supp. 1, 177 Cal. Rptr. 96] and *Valov v. Tank* [(1985) 168 Cal. App. 3d 867, 214 Cal. Rtpr. 546]. Neither case actually supports that position.

In *Lehr,* the landlord served the tenant by substituted service under Civ. Code § 1962(2) by delivering a copy to the tenants' 16-year-old daughter and mailing a copy to the tenant [*Lehr v. Crosby* (1982) 123 Cal. App. 3d Supp. 1, 4, 177 Cal. Rptr. 96]. The landlord's efforts to serve ended there and did not proceed to the third step of posting and mailing. The court in *Lehr* stated [*Lehr v. Crosby* (1982) 123 Cal. App. 3d Supp. 1, 4, 177 Cal. Rptr. 96]:

> [T]here is no evidence in the record that Hazlett [tenant] had a place of business, nor, in fact, does she so allege on appeal. Lacking such evidence, we believe the trial judge correctly concluded that an attempt to serve her at the one location where she might be found satisfies the requirements of the statute.

If anything, *Lehr* confirms that if the landlord knows of the tenant's place of business, the landlord must attempt personal service there before serving the tenant by substituted service at the subject property.

In oft-cited footnote 3, the court merely states that "we infer that plaintiff received actual notice" [*Lehr v. Crosby* (1982) 123 Cal. App. Supp. 1, 6 n.3, 177 Cal. Rptr. 96]. Not only is this dicta because the service under Civ. Code § 1962(2) means the court never directly addressed service under § 1962(3), but also the court never said what, if any, was the effect of actual receipt.

Valov was a commercial tenancy for sharecrop revenue, easily distinguishable from a residential tenancy. In *Valov*, the court found that the tenant had avoided service. The process server had observed the defendant sitting in the living room, but after the tenant saw the process server, he left the room and did not answer the door [*Valov v. Tank* (1985) 168 Cal. App. 3d 867, 870, 214 Cal. Rtpr. 546]. There was also evidence that the tenant's business was at the same address as his residence and that this address, which was different from the address of the subject property, was where service was made. The *Valov* court found waiver "under the circumstances of this case" only [*Valov v. Tank* (1985) 168 Cal. App. 3d 867, 870, 214 Cal. Rtpr. 546]. In *Valov* service was not made by posting and mailing under Civ. Code § 1962(3) because the notice was not posted "on the [subject] property" or sent "through the mail addressed to the tenant at the place where the property is situated" as required by § 1962(3). As such, the service in *Valov* bore no resemblance to posting and mailing, relying more on the position that mail service can be de facto "personal service" when the tenant admits receiving notice.

Courts have made this type of finding on a case-by-case basis in several instances:

- *Colyear v. Tobriner* (1936) 7 Cal. 2d 735, 741-742, 62 P.2d 641 (commercial case predating Civ. Code § 827 requirement that notice served pursuant to Civ. Code § 1162).

- *University of So. Calif. v. Weiss* (1962) 208 Cal. App. 2d 759, 769, 25 Cal. Rptr. 475 (commercial case).

- *Wilcox v. Anderson* (1978) 84 Cal. App. 3d 593, 597, 148 Cal. Rptr. 773 (service of 30-day notice of termination of tenancy).

None of these cases addresses when a notice would start to run, but arguably they could not start to run earlier than the admitted date of receipt.

Although one reported case states that service by posting and mailing is effective only if it creates actual notice and that opportunity to cure is a possibility [*see Davidson v. Quinn* (1982) 138 Cal. App. 3d Supp. 9, 188 Cal. Rptr. 421], later cases do not follow this line of thinking [*Walters v. Meyers* (1990) 226 Cal. App. 3d Supp. 15, 19, 277 Cal. Rptr. 316].

Service on One Tenant Is Service on All Tenants. When two or more tenants hold the property either jointly or in common, service of notice on one of them is service on all of them [*University of Southern Cal. v. Weiss* (1962) 208 Cal. App. 2d 759, 769, 25 Cal. Rptr. 475; *Gentry v. Citron* (1918) 36 Cal. App. 288, 171 P. 1079].

Parties to Commercial Lease May Alter Statutory Requirements for Service. Parties to a commercial lease may waive or modify the right to statutory notice, substituting a mutually agreed-on form of notice instead [*Folberg v. Clara G.R. Kinney Co., Inc.* (1980) 104 Cal. App. 3d 136, 140, 163 Cal. Rptr. 426; *Hignell v. Gebala* (1949) 90 Cal. App. 2d 61, 202 P.2d 378 (15-day notice to quit served only by registered mail)]. Unless the lease directs that the agreed-on notice is a replacement for (rather than an alternative to) the statutory notice requirements, the agreed-on notice period may be deemed an option to the statutory provisions, and not the exclusive remedy [*Fifth & Broadway Partnership v. Kimny, Inc*. (1980) 102 Cal. App. 3d 195, 200-201, 162 Cal. Rptr. 271].

Proving Defense of Defective Service of Subject Notice in Unlawful Detainer Action. A specific allegation in the tenant's answer that service is defective is not necessary. Service is part of the landlord's case in chief. Thus, a general denial is sufficient to cover this defense, which puts all facts of the landlord's case in issue including sufficiency of notice to quit [*Bevill v Zoura* (1994) 27 Cal. App. 4th 694, 698, 32 Cal. Rptr. 2d 635; *see* Code Civ. Proc. §§ 431.10(a), 431.30].

Proof that the landlord knows the tenant's business or primary residence address may come from various sources, including:

- Cross examination of the landlord or property manager.
- Direct examination of the tenant.
- Examination of the tenant's co-workers or co-habitators regarding contact at the alternative property by the landlord.
- Normal discovery channels.
- Information in the rental application.

Because proof of service is an element of the plaintiff's case in chief, the best starting point is to ask the person who served the notice to state the steps taken before resorting to posting and mailing.

For further discussion, *see* Matthew Bender Practice Guide: Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, §§ 4.07 et seq., 4.21 et seq.

About the Author. Christian A.M. Curry is an attorney with the Tenants Legal Center in San Diego, California. He is a graduate of the University of California, San Diego, and Thomas Jefferson School of Law in San Diego. He has been in private practice for 15 years.

Mr. Curry's practice is dedicated to the representation of tenants and consumers. He has acted as an advisor to all four branches of the military and numerous public organizations on the issues of housing and tenancies. He has served as a judge pro tempore of the Superior Court and has been involved directly and as a consultant on several groundbreaking tenant law cases, including the *Losornio* case cited above.