January 1979


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affords only compensatory awards and behavior that warrants punitive damages.

**PROCEDURE—SERVICE OF PROCESS—PROPOSED AMENDMENT TO RULE 4(c) CRITICIZED.** Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1979). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Advisory Committee) has proposed a major amendment to the federal rules governing who may serve process in federal courts. Rule 4(c) of the Federal Rules of Civil Procedure presently requires that a United States marshal, his deputy, or a special court appointee serve process. The proposed amendment would extend rule 4(c) by also permitting service at the plaintiff's election "by a person authorized to serve process by any statute or rule of the state in which the district court is held or in which service is made."

Through the amendment the Advisory Committee seeks to eliminate a "troublesome ambiguity" within rule 4. While the current rule 4(c) requires service of process by a United States marshal, rules 4(d)(7)

1. **COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REVISED PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1 (Feb. 1979) [hereinafter cited as DRAFT PROPOSAL].**

2. **FED. R. CIV. P. 4(c) provides:**

   By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

3. **DRAFT PROPOSAL, supra note 1, at 1. Amended rule 4(c) would read:**

   By Whom Served. Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. At the election of the plaintiff service of process may be made by a person authorized to serve process by any statute or rule of the state in which the district court is held or in which service is made.


5. **FED. R. CIV. P. 4(d)(7) provides:**

   (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like
and 4(e) permit service in the manner prescribed by the laws and rules of the state in which the district court is located. The 1963 Advisory Committee Note to rule 4(d)(7) expressed the intent that the rules governing the manner of service be unrestricted by rule 4(c)'s prescription of service by a federal official, but rule 4(c) has the force of statute; its clear language resists alteration by mere expressions of intent. Thus, the Advisory Committee's Note to rule 4(d)(7) only exacerbated the ambiguity within rule 4 and, as a consequence of this confusing statu-

process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

6. FED. R. CIV. P. 4(e) provides:
Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

8. Id. The Advisory Committee notes:
It has also been held that the clause of paragraph (7) which permits service “in the manner prescribed by the law of the state,” etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See Farr & Co. v. Clia. Intercontinental de Nav. de Cuba [243 F.2d 342 (2d Cir. 1957)]. But cf. Sappia v. Lauro Lines, 130 F. Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved.


tory guidance, courts have inconsistently applied the federal rules. 12

Some courts, in both early 13 and recent 14 interpretations of rule 4(c), have required that all process, regardless of the manner allowed by other subdivisions of rule 4, be served by persons designated in rule 4(c). 15 In one case the court held that only a rule 4(c) person could serve process even though state law permitted service by mail. 16

The court in Ospina v. Vanelli, 17 in contrast, did not confine service

12. See notes 13-22 infra and accompanying text.

Courts typically construe rule 4(d)(7) as a federal incorporation of state procedures in the manner of serving process. By not specifically including within their interpretation of the rule a license to adopt state rules on who may serve process, courts may be seen as sub silentio requiring that a rule 4(c) person continue to serve process regardless of the state procedures adopted. See, e.g., Deveny v. Rheem Mfg. Co., 319 F.2d 124, 126 (2d Cir. 1963); Heyman v. Kline, 344 F. Supp. 1081, 1085 (D. Conn. 1970), rev'd on other grounds, 456 F.2d 123 (2d Cir.), cert. denied, 409 U.S. 847 (1972); Olin Mathieson Chem. Corp. v. Molins Orgs., Ltd., 261 F. Supp. 436, 441 (E.D. Va. 1966).

15. The historical origins of service of process argue strongly for a rigid reading of rule 4(c). William W. Blume, writing of this history, noted that "[t]he giving of notice being a substitute for arrest on a capias, personal service cannot be accomplished unless the process server and the person served are so situated that the one could arrest the other." W. BLUME, AMERICAN CIVIL PROCEDURE 275-76 (1955). See also Life & Fire Ins. Co. v. Christopher Adams, 34 U.S. (9 Pet.) 571 (1835); United States v. Montgomery, 2 U.S. (2 Dall.) 335 (1795); O. BUMP, BUMP'S FEDERAL PROCEDURE § 914 (1881); C. MONTGOMERY, MONTGOMERY'S MANUAL OF FEDERAL PROCEDURE § 524 (2d ed. 1918); A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064, at 206 (1969 & Supp. 1978); Dodd, Jurisdiction in Personal Actions, 23 ILL. L. REV. 427 (1929).

Federal Equity Rule 15, the model for rule 4(c), also required personal service by select individuals. The rule reads:

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for the purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

B. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 271 (1925).
17. 34 F.R.D. 151 (D. Minn. 1964) (noted in 42 NOTRE DAME LAW. 284, 288 (1966)).
made pursuant to state law to rule 4(c) persons. In a garnishment proceeding the court found that state law controlled the manner of serving process and upheld personal service performed by any individuals authorized by state law.

The majority of cases, however, adopt a more moderate position. These cases hold that when state law prescribes personal service, rule 4(c) determines who must perform the service. But when state law allows service by posting, publishing, or mailing, these courts conclude that it is irrelevant whether the plaintiff or the marshal serves process; thus "a marshal or any other person authorized to make service under rule 4(c) need play no part in the process."

To avoid inconsistent court rulings, the Advisory Committee's proposed amendment chose the Ospina approach. Other alternatives, however, were available. The Committee could have chosen to require: (1) that only a rule 4(c) person make federal service of process regardless of the manner of service permitted by the operation of rules 4(d)(7), 4(e), or other federal rules; or (2) that personal service under rules 4(d)(7), 4(e), or other federal rules be performed by a person authorized by rule 4(c), but posted, published, or mailed service permitted under the rules may be made by any individual authorized by state law.

Of the three options, the Advisory Committee's proposal most radically changes the content of the service rules. The present rule 4(c)


19. Ospina v. Vanelli, 34 F.R.D. 151, 152 (D. Minn. 1964), in which the court reasoned that "[t]he rule specifically states that these remedies are available ' . . . under the circumstances and in the manner . . . ' provided by State law. This seems to fairly indicate that this Court is to adopt both the substantive and procedural law of Minnesota in regard to garnishment proceedings."


23. See notes 1-3 & 17-19 supra and accompanying text.
provides a balance between the need for effective and reliable service (U.S. marshals) and the judicial discretion necessary for flexibility and practical convenience (court appointments). Courts have used this discretion either to allow appointments or, when necessary, to insist that a U.S. marshal serve process. The Advisory Committee proposal would strip the courts of their discretion by forcing them to adhere to state laws and rules on the means of making service.

This change seems unwise and unnecessary. Under present rule 4(c), federal courts can rely on the validity of return of service made by U.S. marshals. Courts treat the return of service as either a conclusive presumption of service, or as a rebuttable presumption overcome only by


26. See note 25 supra.

27. Chemical Bank N.Y. Trust Co. v. Pug Sand & Gravel Corp., 51 F.R.D. 147 (D. Nev. 1970). In this case the court wrote:

While process which functions only as notice to a litigant or third party, the obligations of the process server being completed when service is made, may appropriately be accomplished by any qualified person under court authorization, this is not so with respect to process which invokes other duties and responsibilities subject to court supervision and governed by federal statutes. The statutory requirements for bonding a United States Marshal and his deputies (28 U.S.C. § 564), and statutory requirements regarding collection and accounting for fees (28 U.S.C. § 572), the charges for levying upon and keeping seized properties (28 U.S.C. § 1921), and the obligations with respect to judicial sales (28 U.S.C. § 2001, et. seq.), for examples, are inapplicable to a person whose sole official connection with court administration is a designation under Rule 4(c) as a person qualified and authorized to make service.

Id. at 148.

28. See notes 1-3 supra and accompanying text.

29. Affidavits must be submitted to verify service performed by special court appointees under rule 4(c). Fed. R. Civ. P. 4(g).

"strong and convincing evidence." State experience with the affidavit procedure does not warrant this high degree of trust. Abuses occur with such frequency that "sewer service," or the fraudulent nonservice of process, is often standard operating procedure.32 Faced with the greater possibility of unreliable service, federal courts can either: (1) give less evidential respect to affidavits, easing the burden of proof required to make a challenge and thus likely increasing litigation; or (2) ignore the possibilities for abuse of service and accept the attendant ill consequences.

The Advisory Committee's proposal does clarify rule 4—but at too great a cost. The amendment eliminates valuable judicial discretion and creates unreliability in service of process. The other possible proposals, which continue service by rule 4(c) persons (at least in situations involving personal service) not only eliminate the ambiguity of rule 4, but also preserve judicial discretion and reliable service of process.
