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January 15, 1982

To: Judge Edward T. Gignoux, Chairman, and
Members of the Committee on Rules
of Practice and Procedure

From: Walter R. Mansfield, Chairman, Advisory
Committee on Civil Rules

I have the honor of submitting herewith our Committee's final draft of proposed amendments to Rule 4 of the Federal Rules of Civil Procedure and its Advisory Note, which recommend changes designed to relieve United States marshals of the duty of serving summonses and complaints in most federal civil litigation in which the government is not a party. Under the amendments the marshals would be obligated to serve such process only to the extent required by federal statute, local district court rule or court order, or where an enforcement presence is advisable, e.g., service of restraining orders, attachments, arrests and notices of judicial sales.

The draft amendments authorize service of a summons or complaint to be made by any non-party over 18 years of age, a procedure that has worked satisfactorily in a substantial number of other jurisdictions. Service must be made within 120 days after the filing of the complaint unless an enlargement of time is obtained by order of the court pursuant to Rule 6(b). Under the amendments special provisions authorizing service by certain facilities, such as sheriffs, state court officers or private process servers, would no longer be required, as long as the person making service is a non-party and over 18 years of age. A uniform and exclusive method of serving a summons and complaint by registered mail is also authorized by subdivision (d)(8).

A preliminary draft sent out by our Committee to the public in September 1981 provided that service of a summons and complaint, except where required to be made by a marshal or special appointee, must be made by a private process server registered with the clerk of the district court. The proposal met substantial opposition and was found inadvisable for the reason that, although it might assist in reducing some risks of fraud or inefficiency, the courts' assumption of responsibilities hitherto borne by the marshals' service posed numerous difficult administrative problems, including investigation into the qualifications and integrity of those seeking to act as professional process servers, regulation of their fees, and burdensome maintenance of records, which federal courts should not be required to assume. Accordingly our Committee recommends the simple procedure of authorizing service by any non-party adult.

We believe that the amended rule, if adopted, will relieve the marshals of a very large share of service duties which they are finding it difficult if not impossible to perform within present statutory budget and fee restrictions and that it is consistent with legislation on the subject now pending before the Congress.

Respectfully submitted,

The Advisory Committee on
Federal Civil Rules

by

Walter F. Mansfield
Chairman

FINAL DRAFT OF PROPOSED AMENDMENTS TO RULE 4
OF THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Process

(a) SUMMONS: ISSUANCE. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to ~~the marshal or to any other person authorized by Rule 1(e) to serve it~~ the plaintiff or his attorney. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

* * *

(c) BY WHOM SERVED.

(1) Service of ~~process~~ complaints and summonses shall be made by any person who is not a party and is not less than 18 years of age, except that service of such process shall at the request of any party seeking service be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose --

(A) on behalf of any party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. §1915 and any seaman authorized to proceed under Title 28, U.S.C. §1916,

* New matter is underscored; matter to be omitted is lined through.

(B) pursuant to any statutory provision expressly providing for service by a United States marshal or his deputy,

(C) pursuant to any local rule stating that service of process in that district or portion thereof by persons other than the United States marshal or his deputy is impracticable due to the unavailability of such persons or the geographic characteristics of the district, and

(D) pursuant to any order issued by the court stating that service in that particular action is required to be made by a United States marshal, deputy, or special appointee in order to guarantee that service is properly effected. ~~except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely.~~

(2) Service of all other process may also shall be made by a ~~person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made~~ United States marshal, by his deputy, or by some person specially appointed by the court for that purpose.

(3) The plaintiff or his attorney shall be responsible for making arrangements for prompt service. Special appointments to serve process shall be made freely.

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(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 process upon any such defendant in an action brought in the courts of general jurisdiction of that state; except that a summons and complaint served by mail may be served only as authorized by and pursuant to the procedures set forth in paragraph (8) of this subdivision of the rule.

(8) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule the summons and complaint may be served, by the plaintiff by any person authorized to serve process pursuant to Rule 4(c), including a United States marshal, by registered or certified mail, return receipt requested and delivery restricted to the addressee. The return receipt or the

returned envelope showing refusal or failure to claim by the defendant shall constitute prima facie evidence of the service of process, but service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person. If no such return receipt or envelope showing refusal is in the record and the person so served fails to appear in person or by counsel, service other than by mail shall be made as provided in this subdivision of this rule.

* * *

(e) SAME: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. 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 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, except that service by mail must be made pursuant to the procedures set forth in paragraph (8) of subdivision (d) of this rule.

* * *

(g) RETURN. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make

affidavit thereof. If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope if and when received by him showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service mailed to the defendant pursuant to paragraph (8) of subdivision (d) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become part of the record.

* * *

(j) SUMMONS: TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's own initiative. If service is made by mail pursuant to Rule 4(d)(8), service shall be deemed to have been made for the purposes of this provision as of the date on which the process was accepted, refused, or returned as unclaimed. This provision shall not apply to service in a foreign country pursuant to Rule 4(i).

ADVISORY COMMITTEE NOTE

Subdivision (a). This is a technical amendment to conform this subdivision with the amendment to subdivision

(c), and to emphasize the Committee's intent that methods of service other than by United States marshals should be utilized whenever appropriate.

Subdivision (c). The purpose of this amendment is to reduce the burden on the United States Marshal Service of serving civil process in private litigation, without endangering the effective and efficient service of civil process. Service of summonses, complaints, and subpoenas, which now comprise the bulk of service by a marshal, rarely require the presence of any enforcement officer. However, the alternative of restricting such service to a narrow group, such as registered professional process servers, would impose excessive administrative burdens on the court. The amendment therefore permits service to be made by any non-party adult, a procedure that has functioned successfully in a number of jurisdictions where it is presently authorized. See, e.g., Cal. Civ. Code §414.10 (West); D.C.C.E. Superior Ct. Rules - Civil 4(c)(2); N.M. Stat. Ann. §21-1-1 (Rule 4(e)(1)); N.Y. Civ. Prac. Law §2103(a); N.D. R. Civ. P. 4(d)(1); Va. Code §8.01-293(2); Wisc. R. Civ. P. 801.10(1); Wisc. Stat. Ann. §801.10(1) (West). To the extent that other facilities for personal service of process (as distinguished from service by mail, see subdivision (d)(8) of this Rule, infra), such as sheriffs, court officers, or professional process servers, remain available, the amendment would not preclude their being used; provided the person making service is a non-party over 18 years of age.

Under subparagraph (c)(1)(A), service will upon request be made by marshal or a special appointee in in forma pauperis and seamen's cases. Subparagraph (c)(1)(B) preserves all specific statutory provisions for service by marshal, including service on behalf of the United States pursuant to Title 28, §569(b). Subparagraph (c)(1)(C) permits a federal district court to authorize continued marshal service by local rule if private process servers are not available in that district. However, such rules should not be issued unless they really are necessary, and they should encourage the use of methods that do not involve the marshal to the extent that is possible. Subparagraph (c)(1)(D) provides for case-by-case orders authorizing service by a marshal or special appointee when the court is satisfied that successful service by a private process server is unlikely.

Under paragraph (c)(2), forms of process which require an enforcement presence, such as temporary restraining

orders, injunctions, attachments, arrests, and orders relating to judicial sales, shall be served by marshals, their deputies, and persons specially appointed by the court. This language continues the current practice of district courts and encourages the use of special appointees when an enforcement presence is not necessary or a marshal is not available.

Paragraph (c)(3) places responsibility on the plaintiff for arranging service by private process server, special appointee, or marshal. It also provides for courts to make special appointments under paragraphs (c)(1) and (2) freely.

Subdivision (d)(7). The amendment makes subdivision (d)(8) the exclusive procedure in federal courts for serving summonses and complaints by mail. This provision, however, deals only with the procedure for use of the mails for service and does not otherwise affect federal or state statutory authorizations for service of process.

Subdivision (d)(8). The proposed amendment authorizes the service of summonses and complaints by registered or certified mail upon individual defendants other than infants and incompetent persons and upon defendants that are business entities. Service upon defendants described in paragraphs (2), (4), (5) and (6) of this subdivision is not affected. Service that could be made pursuant to paragraph (c)(1) may be mailed by the plaintiff or his attorney. When the marshal, his deputy, or a special appointee is called upon to make service upon an individual or business entity pursuant to one of the subparagraphs of paragraph (c)(1) including routine in forma pauperis and seamen's cases, such person may serve by mail except when personal service is required by statute.

The proposed amendment is designed to permit mail service to be the basis for the entry of defaults and default judgments when actual notice reasonably can be expected to have occurred. Thus, if the defendant or a person authorized to accept process for him either has signed the return receipt or has refused to accept the process, a default could be entered. In the case of a refusal, additional notice must be sent to the defendant. It is important to note that because paragraph (d)(8) restricts delivery to the addressee, only the defendant or persons expressly authorized to accept for the defendant -- for example, by letter -- could sign the return receipt.

Subdivision (4)(e). The added sentence simply makes clear that when service under this subdivision is made by mail, it shall be in the manner prescribed by subdivision (d)(8).

Subdivision (g). The proposed amendment specifies additional procedures for making proof of service of process, which are necessitated by the proposed amendment to subdivision (d)(8).

Subdivision (j). Rule 4, as it presently is drafted, provides no time limit for the service of summonses and complaints. As long as service was performed by marshals such a restriction was not necessary. However, the proposed gradual elimination of marshal service raises new concerns about timeliness. Thus, the proposed amendment requires service of process to be made within 120 days after filing the complaint. Unless the time is enlarged by the court pursuant to Rule 6(b), failure to meet this deadline will result in dismissal of the action without prejudice. This provision does not apply to attempted service in a foreign country pursuant to Rule 4(i).