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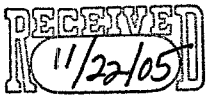

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On November 16, 2005, the Section unanimously approved the enclosed report entitled "Is Personal Service of a Subpoena Required Under Rule 45." On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Stephen P. Younger, Esq., Chair (w/encl.)
James F. Parver, Esq. (w/encl.)
Glenn LeFebvre, Esq. (w/encl.)

IS PERSONAL SERVICE OF A SUBPOENA REQUIRED UNDER RULE 45?

Summary

Although the language in Rule 45 of the Federal Rules of Civil Procedure governing how subpoenas are to be served has remained unchanged since it was first adopted in 1937, it is unclear whether a subpoena must be personally served on the person to whom it is addressed in order to be valid and enforceable. Rule 45(b)(1) provides that service of a subpoena shall be made "by delivering a copy thereof" to the person named in the subpoena. The Rule is silent as to whether "delivery" requires personal in-hand service or permits some form of substitute service. There is a split in authority (including a split within the federal courts in New York State) as to whether personal in-hand service is required. The supposed "majority rule" is that personal in-hand service is required. However, a significant number of decisions have held that personal in-hand service is not required.

The Section believes that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1); that, as a matter of policy, personal service should not be the only method of service permitted, particularly since service of a summons and complaint other than by personal in-hand service is permitted in the federal courts; and that non-personal service is and should be permitted, provided that the method of service employed satisfies the due process requirement of providing reasonable assurance that the subpoena has been received. The Section further believes that any method of service permitted under Rule 4 of Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide that.

A. Applicable Provisions of Rule 45 and Their History

Rule 45(b)(1) provides in pertinent part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . .." Rule 45(b)(3) provides in pertinent part: "Proof of service when necessary shall be made by filing . . . a statement of the date and manner of service . . .."

Rule 45(b)(1) does not specify whether a copy of the subpoena must be delivered personally to the witness named in the subpoena or whether some other means of delivery will suffice. The relevant language of Rule 45(b)(1) has remained unchanged since it was first adopted in 1937 as part of then Rule 45(c) of the original Federal Rules of Civil Procedure.[1] The language was moved from Rule 45(c) to Rule 45(b)(1) as part of the 1991 Amendments to the Federal Rules. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes."). Similarly, the language of Rule 45(b)(3) has remained unchanged, except for being moved from Rule 45(d)(1) to Rule 45(b)(3) as part of the 1991 Amendments. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(3) retains language formerly set forth in Paragraph (d)(1).").

The Advisory Committee Notes to the 1937 adoption of then Rule 45(c) state that subdivision (c) "provides for the simple and convenient method of service permitted under many state codes; *e.g.*, N.Y.C.P.A. (1937) §§ 220, 404...; Wash Rev. Stat. Ann. (Remington, (1932) § 1218." The Advisory Committee Notes give no indication as to whether personal service of a subpoena was intended to be required by then Rule 45(c).

[1] The proposed style revision to Rule 45(b)(1) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States does not alter the language or clarify what the term "deliver" means. *See* Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure (Feb. 2005).

Although then Rule 45(c) (now Rule 45(b)(1)) did not specify whether the term "delivering" required personal delivery or whether some form of non-personal delivery would be permitted, the 1951 edition of *Moore's Federal Practice* stated, without explanation, that "service must be made by delivering a copy to the person named personally." 5 *Moore's Fed. Practice* ¶ 45.06[1] (2d ed. 1951).

The state laws to which the 1937 Advisory Committee Notes refer do not clearly indicate whether it was intended that a subpoena had to be personally served. The reference to the New York Civil Practice Act supports the position that only personal service was intended to be permitted. Section 404 of the C.P.A. provided, in pertinent part:

> **§ 404. Service of Subpoena Issued out of a Court.** A subpoena issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:
>
> 1. The original subpoena must be exhibited to the witness.
>
> 2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.

C.P.A. § 404, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.).

The requirement that the original of the subpoena must be exhibited to the witness indicates that personal service was required.[2] And in *Broderick v. Shapiro*, 172 Misc. 28, 14

[2] At some point prior to 1958, the requirement that the original subpoena be exhibited to the witness was eliminated and C.P.A. § 404 required only that a copy of the subpoena be delivered to the witness. *See Application of Barbara*, 14 Misc.2d 223, 226, 180 N.Y.S.2d 924, 927 (Sup. Ct. Tioga Co. 1958), *aff'd*, 7 A.D.2d 340, 183 N.Y.S.2d 147 (3d Dep't 1959). That version of C.P.A. § 404 was construed by both the lower court and the Appellate Division in *Application of Barbara* to permit service of the subpoena by means other than personally handing the subpoena to the witness, at least where the witness sought to avoid service of the subpoena. In *Application of Barbara*, the process server went to the witness's home and told his wife that he had a subpoena and explained its contents, but she refused to summon the witness or accept the subpoena on his behalf. The process server observed the witness through a window and told him that he had a subpoena, exhibited the subpoena and stated its substance. Thereafter, he fastened the subpoena to the front door and, using a portable electronic amplifier, read the contents of the subpoena through the amplifier at least twelve more times from various positions around the house. In holding that the requirement of delivery was complied with, the Appellate Division stated that "the requirement that a subpoena 'be delivered to the witness' (Civil Practice Act, § 404) is somewhat less stringent then the provision that a summons be delivered 'to the defendant in person' (Civil Practice Act § 225)." 7 A.D.2d at 343, 183 N.Y.S.2d at 149.

N.Y.S.2d 542, 543 (Sup. Ct. N.Y. Co. 1939), the court held that "a subpoena must be served on a witness personally." *See also In re Depue*, 185 N.Y. 60, 69-70, 77 N.E. 798, 801 (1906).

Section 220 of the C.P.A. also referenced in the 1937 Advisory Committee Notes, provided that a summons could be served by any person over the age of 18 who was not a party and that "the provisions of this article relating to personal service, or a substitute for personal service, of an original summons apply to a supplemental summons." C.P.A. § 220, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). The provisions of the C.P.A. governing service of a summons provided for only personal service unless a court order for substituted service was obtained and such an order could only be obtained upon a showing that "the plaintiff has been or will be unable, with due diligence, to make personal service of the summons within the state." C.P.A. § 230, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). Section 230 provided for an order for substituted service upon a defendant that was a domestic corporation (with certain limited exceptions) or a natural person residing within the state. *See also* C.P.A. § 225 (personal service upon a natural person), § 228 (personal service upon a domestic corporation), § 229 (personal service upon a foreign corporation, § 231 (manner of making substituted service), and § 232 (order for service of summons by publication).

On the other hand, the Washington statute referenced in the 1937 Advisory Committee Notes suggests that at least some form of substituted service would be permissible. Section 1218 of Wash. Rev. Stat. Ann. (Remington) (1932) provided that a subpoena:

> may be served...by exhibiting and reading it to the witness, or by giving him a copy thereof, *or by leaving such copy at the place of his abode*.

(Emphasis added.)

B. Applicable Legal Authority

Many decisions have found that personal service of a subpoena is required by Rule 45.[3] This is the supposed "majority rule." *See Hall v. Sullivan*, 229 F.R.D. 501, 502 (D. Md. 2005) ("a majority of courts have held that personal service is required, while a growing minority of others have not"; court followed minority position in holding that personal service is not required in case of subpoena *duces tecum*); *Agran v. City of New York*, 1997 WL 107452, at * 1 (S.D.N.Y. Mar. 11, 1997) ("the weight of authority is that a subpoena duces tecum must be served personally"); *In re Shur*, 184 B.R. 640, 642 (E.D. Bankr. Ct. 1995) ("a majority of courts hold that Rule 45 requires personal service;" court followed other authorities in holding that

[3] *See Agran v. City of New York*, 1997 WL 107452 (S.D.N.Y. Mar. 11, 1997) (service by mail improper); *Alexander v. Jesuits of Missouri Province*, 175 F.R.D. 556, 560 (D. Kan. 1997) (leaving subpoena at home of witness with her husband improper); *Application of Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (personal service of a subpoena is required when an individual is subpoenaed; service on registered agent for corporation not proper when subpoena directed to individuals); *Barnhill v. United States*, 1992 WL 453880, at * 4 (N.D. Ind. Apr. 8, 1992), *rev'd on other grounds*, 11 F.3d 1360 (7th Cir. 1993) (service by certified mail improper); *Benford v. American Broadcasting Cos., Inc.*, 98 F.R.D. 40, 41 n. 5 (D. Md. 1983) (*dicta*); *Chima v. United States Dep't of Defense*, 2001 WL 1480640, at * 2 (9th Cir. Dec. 14, 2001) (unpublished decision) (service by mail improper); *In re Smith (Conanicut Inv. Co. v. Coopers & Lybrand)*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of the subpoena to the party named); *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1307, 1312-13 (D.D.C. 1980) (service by registered mail invalid); *Ghandi v. Police Dep't of City of Detroit*, 74 F.R.D. 115, 120-21 (E.D. Mich. 1977); *Gillam v. A. Shyman, Inc.*, 22 F.R.D. 475, 479 (D. Alaska 1958) (subpoena served on wife of witness not valid); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena *duces tecum* on plaintiff's counsel not valid); *In re Nathurst*, 183 B.R. 953, 955 (M.D. Fla. Bankr. Ct. 1995) (service by certified mail improper); *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct. 1997); *In re Smith*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of subpoena to party named); *James v. McKenna*, 2003 WL 348921, at * 2 (E.D. La. Feb. 6, 2003) (service by certified mail invalid); *Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. Mar. 4, 1994) (service of subpoena *duces tecum* directed to defendant invalid when served on defendant's attorney by regular mail); *Klockner Namasco Holdings Corp. v. Daily Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (service of subpoena made on wife of witness improper); *Lehman v. Kornblau*, 206 F.R.D. 345, 346-47 (E.D.N.Y. 2001) (service of subpoena by certified mail on counsel for non-parties was improper); *Northeast Women's Center, Inc. v. McMonagle*, 1987 WL 6665, at * 5 (E.D. Pa. Feb. 10, 1987) (subpoena served by mail improper); *Rotter v. Cambex Corp.*, 1995 WL 374275, at * 1 (N.D. Ill. Jun. 21, 1995) (service by mail improper); *Scarpa v. Saggese*, 1994 WL 38620 (1st Cir. Feb. 10, 1994) (unpublished opinion) ("a subpoena cannot be left at someone's home; it must be served upon the person"); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 685-86 (D. Kan. 1995) (service by certified mail improper); *Terre Haute Warehousing Serv. Inc. v. Grinnell Fire Protection Sys. Co.*, 193 F.R.D. 561, 562-63 (S.D. Ind. 1999) (service by certified, return receipt held improper); *Tidwell-Williams v. Northwest Georgia Health Sys., Inc.*, 1998 WL 1674745, at * 7 (N.D. Ga. Nov. 19, 1998) (subpoenas not properly served; plaintiff failed to show the subpoenas were personally served rather than faxed or mailed); *United States v. Philip Morris Inc.*, 312 F. Supp.2d 27, 37-38 (D.D.C. 2004) (deposition subpoenas left at mailroom of Justice Department or with support staff, but not personally served on witnesses, invalid); *Whitmer v. Lavida Charter, Inc.*, 1991 WL 256885 (E.D. Pa. Nov. 26, 1991) (not sufficient to leave subpoena at dwelling place of witness).

personal service is not required); 9 *Moore's Fed. Practice* § 45.03 [4][b][i], at 45-26 (3d ed.) ("[a] majority of courts have held that Rule 45 requires personal service").

However, there are a significant number of cases that have concluded that personal service is not required.[4] There is also a split of authority among the decisions of federal courts in New York. *Compare Agran*, 1997 WL 107452 (S.D.N.Y.); *In re Smith*, 126 F.R.D. at 462 (E.D.N.Y.); *Khachikian*, 1994 WL 86702, at * 1 (N.D.N.Y.); and *Lehman*, 206 F.R.D. at 346-47 (E.D.N.Y.), which conclude that personal service is required, *with Catskill Development, L.L.C.*, 206 F.R.D. at 84 n. 5 (S.D.N.Y.); *Cohen*, 2001 WL 257828, at * 3 (E.D.N.Y.); *Cordius Trust*, 2000 WL 10268 (S.D.N.Y.); *First City, Texas-Houston, N.A.*, 197 F.R.D. at 254-55 (S.D.N.Y.); *First Nationwide Bank*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct.); *Hinds*, 1988 WL 33123 (E.D.N.Y.); *King*, 170 F.R.D. 355 (E.D.N.Y.); and *Ultradent Prods., Inc.*, 2002 WL 31119425 (S.D.N.Y.), which find that personal service of a subpoena is not required.

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[4] *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 84 n. 5 (S.D.N.Y. 2002) (substituted service of subpoenas on tribal officials upheld; subpoenas served at the tribe's offices followed by mailing to the same address); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861, at * 1 (N.D. Fla. Oct. 15, 1999) (service by mail upheld); *Cohen v. Doyaga*, 2001 WL 257828, at * 3 (E.D.N.Y. Mar. 9, 2001) (service by mail upheld); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 (S.D.N.Y. Jan. 3, 2000) (court ordered service of subpoena by mail); *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994) (service by certified mail upheld); *Firefighters' Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000) (service by fax and mail held invalid because court could not be assured that delivery occurred; court indicated that substituted service that will ensure receipt of the subpoena may be proper); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 254-55 (S.D.N.Y. 2000) (service by attaching subpoena to door and mailing a copy to counsel for witness, which was a party, upheld after unsuccessful attempt to personally serve the agent the witness had appointed for service of process), *aff'd*, 281 F.3d 48, 55 (2d Cir. 2002) ("[a]lthough compliance with the service requirements may not have been exact, they were substantial and sufficient"); *In re Shur*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct. 1995) (court upheld service of subpoena mailed to witness's home with copy delivered to his counsel in another case); *Green v. Baca*, 2005 WL 283361, at * 1 (C.D. Cal. Jan. 31, 2005) (court upheld service where subpoenas left at various witnesses' offices); *Hall v. Sullivan*, 229 F.R.D. 501, 505-06 (D. Md. 2005) (holding personal service not required in case of subpoena *duces tecum*); *Hinds v. Bodie*, 1988 WL 33123 (E.D.N.Y. Mar. 22, 1988) (court ordered service of subpoena by alternate means and held witness in contempt for failure to comply); *King v. Crown Plastering Corp.*, 170 F.R.D. 355 (E.D.N.Y. 1997) (delivery of subpoena to witness's residence and mailing to residence upheld); *Ultradent Prods., Inc. v. Hayman*, 2002 WL 31119425, at ** 1, 2 (S.D.N.Y. Sept. 24, 2002) (service of subpoena *duces tecum* on corporation by service on Secretary of State upheld on ground that the method of service was authorized by New York state law); *Western Resources, Inc. v. Union Pacific R.R. Co.*, 2002 WL 1822432, at * 2 (D. Kan. Jul. 23, 2002) (court upheld service upon non-party's attorney and by Federal Express).

At one time, *Moore's Federal Practice*, without explanation, took the position that Rule 45 (then Rule 45(c)) required personal service of a subpoena. *See* 5A *Moore's Fed. Practice* ¶ 46.06[1] (1994) and 5 *Moore's Fed. Practice* ¶ 45.06 [1] (2d ed. 1951). The current version of *Moore's* no longer adheres to that position. After stating that a majority of courts require personal service, it notes that several courts have declined to follow the majority rule and "have presented several effective arguments in opposition to requiring personal service." 9 *Moore's Federal Practice* § 45.03 [4][b][i], at 45-26 (3d ed.). Those arguments are discussed below. *Wright & Miller*, however, takes the position that personal service is required. 9A C. Wright & A. Miller, *Federal Practice & Procedure Civil 2d* § 2454, at 24-25 (1995) ("*Wright & Miller*"). It offers no explanation or analysis except to cite cases that found that personal service is required. As noted above, none of those cases provides any explanation for that conclusion. Although *Wright & Miller* also cites cases finding that personal service is not required, it does not address this split in authority or explain why requiring "personal service" is the better or correct conclusion. *Wright & Miller* § 2454, at 24-25 (1995).

Analyzing the 1991 changes to Rule 45, Professor David Siegel stated with respect to Rule 45(b)(1):

> No change is made in method, alas. The method is still by "delivering" the subpoena to the person to be served. Subdivision (b)(1). The substituted methods available for summons service under Rule 4 are not available for a subpoena, such as by delivery to a person of suitable age and discretion at the witness's dwelling house under Rule 4(d)(1). The word "delivering" has been rigidly construed. [citing *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson.*]

D. Siegel, "Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure," 139 F.R.D. 197, 207 (1992).

Rule 17(d) of the Federal Rules of Criminal Procedure contains the same language as Rule 45(b)(1), providing that "[s]ervice of a subpoena shall be made by delivering a copy thereof to the person named."[5] Rule 17(d) does not contain any language regarding proof of service. Thus, there is nothing comparable to the language in Rule 45(b)(3) regarding proof of "manner of service." The language in Rule 17(d) regarding service being made by "delivering" a copy of the subpoena has remained unchanged since the Rule first took effect in 1946. The Advisory Committee Notes to original Rule 17(d) specifically note that Rule 17(d) "is substantially the same as" then Rule 45(c) of the Federal Rules of Civil Procedure.

There is limited legal authority addressing whether Fed. R. Crim. P. 17(d) permits only personal service of a subpoena. All but one of the cases that could be found and two legal treatises say that personal service is required by Fed. R. Crim. P. 17(d). However, no analysis or explanation is provided for that conclusion. *See United States v. Grooms*, 6 Fed. Appx. 377, 381 (7th Cir. 2001) (in rejecting defendant's claim that a defense witness's failure to appear at trial denied defendant his Sixth Amendment right to compulsory process, the court stated "defendants bear the responsibility of using proper methods to secure their witnesses' presence in court, such as effecting personal service of subpoenas as required by Rule 17(d)"); *Arnsberg v. United States*, 757 F.2d 971, 974-75, 976 (9th Cir. 1985) ("the date of Arnsberg's scheduled appearance passed without the personal service required by Rule 17(d)"; "because Arnsberg had not been personally served, he had no obligation to appear before the grand jury and therefore could not lawfully be arrested for failing to do so"); 25 *Moore's Fed. Practice* § 617.05[2] (3d ed.)

[5] A number of states' provisions governing service of subpoenas also use the same language as Fed. R. Civ. P. 45(b)(1). *See* Ariz. R. Civ. P. 45(b)(1); Colo. R. Civ. P. 45(c); Del. Super. Ct. Civ. R. 45(b)(1); D.C. Super. Ct. R. Civ. P. 45(b)(1); Haw. R. Civ. P. 45(c); Idaho R. Civ. P. 45(c)(2); Me. R. Civ. P. 45(b)(1); Mo. Sup. Ct. R. Civ. P. 57.09(d); Nev. R. Civ. P. 45(b); N.J. R. Gen. Application 1:9-3; N.M. R. Civ. P. 1-045(B)(2); Wyo. R. Civ. P. 45(b)(1). Whether those state provisions have been construed to require personal service is beyond the scope of this report.

("personal service is required"); L. Levenson, *Federal Criminal Rules Handbook*, Rule 17(d) ("[S]ervice must be personal. Service by fax is not authorized and a subpoena may not simply be left at the witness's dwelling place.").

In *United States v. Venecia*, 172 F.R.D. 438 (D. Or. 1997), the court held, without any explanation, that service by fax is not authorized by Criminal Rule 17(d). In *United States v. Crosland*, 821 F. Supp. 1123, 1128 n. 5 (E.D. Va. 1993), the court stated: "[A]lso somewhat questionable is the use of facsimile transmission to effect service. It is unclear whether facsimile transmission is contemplated by Rule 17(d)'s reference to 'delivering' the subpoena. In the civil context, several courts have found that facsimile transmissions do not constitute valid service under Rule 5(b) of the Federal Rules of Civil Procedure. *See, e.g., Mushroom Assocs. v. Monterey Mushrooms, Inc.*, 1992 WL 442898, *3 (N.D. Cal. 1992); *Salley v. Board of Governors, University of North Carolina*, 136 F.R.D. 417 (M.D. N.C. 1991)."[6] *See also Ferrari v. United States*, 244 F.2d 132, 141 (9th Cir. 1957) (service of a subpoena on a former employer who plainly says he has no intention of finding the named witness does not meet the requirements of Rule 17(d)).

However, in *United States v. Williams*, 557 F. Supp. 616 (E.D. Tenn. 1982), the court upheld service of a subpoena under Fed. R. Crim. P. 17(d) where the subpoena was personally delivered to the secretary of the witness after the witness was notified of the subpoena by his secretary, acknowledged the subpoena, and the secretary accepted it in his behalf. The court stated: "as to such federal process, '* * * in-hand service is not required * * * '", citing *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). *Id.* at 622 n. 2.

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[6] *Mushroom Associates* and *Salley* involved the issue of whether service of discovery requests on a party by fax is proper under Fed. R. Civ. P. 5(b), which covers service of papers on a party in an action represented by an attorney. Both courts held that it was not.

C. Reasons For and Against Construing Rule 45(b)(1) to Permit Non-Personal Service

1. Reasons to Find Personal Service is not Required

The decisions finding that Rule 45 does not require personal service offer five reasons for that conclusion. First, the language of Rule 45 does not explicitly require personal service and does not explicitly preclude non-personal service. Rather, it only requires that a copy of the subpoena be "delivered" to the person named. *See, e.g.*, *Cordius*, 2000 WL 10268, at * 2; *King*, 170 F.R.D. at 356; *Doe*, 155 F.R.D. at 630; *Green*, 2005 WL 283361, at * 1 n. 1. A number of courts have relied upon a dictionary definition of the word "deliver" and their belief that nothing in the everyday meaning of the term suggests a requirement of by-hand delivery to the recipient. Delivery by regular, registered or certified mail, for example, does not require the personal presence of the addressee. *See Doe*, 155 F.R.D. at 360 ("'Delivery' connotes simply 'the act by which the *res* or the substance thereof is placed within the actual . . . possession or control of another,'" quoting *Black's Law Dictionary*); *In re Shur*, 184 B.R. at 642 ("Deliver" is defined as "to bring or transport to the proper place or recipient;" "Transport" is defined as "[t]o carry from one place to another; convey;" "Convey" is defined as "to communicate or make known; impart," quoting *American Heritage Dictionary of the English Language*; also relying on *Black's Law Dictionary*.) However, as discussed below, the term deliver, as used in Rule 45(b)(1), as well as in other Federal Rules, has been construed, albeit without analysis, to require personal service.

The second reason courts have found for not requiring personal service is that the drafters of the Federal Rules of Civil Procedure knew how to indicate that personal service was required when that requirement was intended. *See* Fed. R. Civ. P. 4(e)(2) and 4(f)(2)(C)(i). Rule 4(e)(2), which covers service of a summons and complaint upon an individual within the United States,

provides, in pertinent part, for "delivering a copy of the summons and of the complaint to the individual *personally* . . .." (emphasis added). Similarly, Rule 4(f)(2)(C)(i), which covers service of a summons and complaint upon an individual in a foreign country, provides, in pertinent part, for "(i) delivery to the individual *personally* of a copy of the summons and complaint . . .." (emphasis added.) If "delivering" in Rule 45(b)(1) requires personal, in-hand service, then the word "personally" in Rules 4(e)(1) and 4(f)(2)(C)(i) would be mere surplusage. *See, e.g., Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630-31; *In re Shur*, 184 B.R. at 642-43.

The language in Rule 4(e)(2) that is quoted above appeared in the predecessor of that Rule - - Rule 4(d)(1) - - when it was adopted as part of the Federal Rules in 1937. Rule 45(c), adopted at the same time and which covered service of a subpoena, only required, as Rule 45(b)(1) now does, that a subpoena be delivered; there was no express requirement that a subpoena be delivered personally to the witness. The fact that the drafters specified personal delivery in Rule 4(d)(1), but did not specify personal delivery in Rule 45(c), suggests that when Rule 45(c) was adopted in 1937, it was not intended that a subpoena had to be personally delivered.

The predecessor of Rule 4(f)(2)(C)(i) was adopted in 1963 as then Rule 4(i)(1)(C) and contained the same language as Rule 4(f)(2)(C)(i) now does - - "delivery to the individual personally." It could be argued that if the word deliver, standing alone, was understood to require personal delivery, then the word "personally" would not have been included as part of the new provision. On the other hand, it is at least equally plausible, if not more so, that the drafters were simply using the same language that was contained in then Rule 4(d)(1), which covered

service on individuals in the United States, when they added a provision expressly addressing service on individuals in a foreign country.

Third, none of the cases that conclude that personal service of a subpoena is required provide any analysis in support of that position or even attempt to explain the basis for that conclusion. *See Doe*, 155 F.R.D. at 631; *First Nationwide Bank*, 184 B.R. at 642-43; *see* other cases cited in note 1, above.

Fourth, there is no persuasive policy reason for a requirement that a subpoena must be personally served. There is no meaningful policy distinction that would justify a requirement of personal service of a subpoena under Rule 45 when personal service of a summons and complaint is not required under Rule 4 in the case of certain categories of defendants.[7] The policy underlying both Rules is that the method of service must comply with the due process requirement that it be reasonably calculated to give actual notice. *See, e.g., Green*, 2005 WL 283361, at * 1 n. 1; *First Nationwide Bank*, 184 B.R. at 643. *See also* discussion at pp. 16-17, below.

Fifth, Rule 45(b)(3) requires proof of service of the subpoena that indicates the "manner of service." If the only manner of service permitted were by in-hand, personal service, no statement as to the manner of service would be necessary. *See, e.g., Cordius*, 2000 WL 10268, at * 2; *Green*, 2005 WL 283361, at * 1 n. 1; *Western Resources, Inc.*, 2002 WL 1822432, at * 2.

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[7] Rule 4 contains a number of provisions allowing non-personal service of a summons and complaint. In the case of service upon an individual in the United States, Rule 4(e)(1) permits service in accordance with the law of the state in which the district court is located or in which service is effected and Rule 4(e)(2) permits leaving copies of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion or by delivering copies to an agent authorized to receive service of process. In the case of service upon individuals in a foreign country, Rule 4(f)(2)(C) provides that, unless prohibited by the law of the foreign country, a summons and complaint may be served by any form of mail requiring a signed receipt. In the case of service upon a corporation in the United States, Rule 4(h)(1) provides that service may be made in the manner prescribed for individuals in Rule 4(e)(1), which, in turn, provides for non-personal service.

Courts have also relied upon Fed. R. Civ. P. 1, which provides that the Rules should "be construed and administered to secure the just, speedy and inexpensive determination of every action." *Hall*, 229 F.R.D. at 504; *Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630; *Western Resources, Inc.*, 2002 WL 1822463, at *2.

2. Reasons to Find Personal Service is Required

As indicated above, the decisions finding that personal service of a subpoena is required by Rule 45 provide no explanation for or analysis of that conclusion, except to say that Rule 45 does not authorize any other method of service, apparently construing (without explanation) the term "delivering" to mean personal, in-hand delivery. *See, e.g., In re Smith*, 26 F.R.D. at 462; *Agran*, 1997 WL 107452, at * 1; *Application of Johnson & Johnson*, 59 F.R.D. at 177. The closest thing to an explanation is the Court's statement in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), as follows:

> Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the Rule provides for a wide range of alternative methods of service, including registered mail, each designed to ensure the receipt of actual notice of the pendency of the action by the defendant. By contrast, Federal Rule 45(c), governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness's dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person. Even within the United States, and even upon a United States citizen, service by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.

636 F.2d at 1312-13. The court evidently concluded that absent an affirmative provision expressly authorizing a method of service other than personal service, personal service was the only method permitted.

There are five reasons that can be advanced for requiring only personal in-hand service of a subpoena. First, Rule 45(b)(1) does not expressly authorize any other method of service.

When the drafters of the Federal Rules of Civil Procedure have wanted to authorize service of a summons and complaint by a method other than personal service, they have explicitly said so. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(1)-(3); *see also* Fed. R. Civ. P. 4(e)(1) (service pursuant to state law). The countervailing argument is that when the drafters wanted to require personal service, they explicitly said that. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(2)(C)(i).

Second, courts have construed the word "delivering" as used in Federal Rules governing the service of subpoenas in criminal cases and the service of the summons and complaint in the case of certain categories of defendants in civil cases as requiring personal service.

"Delivering" as used in Fed. R. Crim. P. 17(d), which governs service of subpoenas in criminal cases, has been construed to require personal service. *See* pp. 7-9, above.

Similarly, the word "delivering" in Fed. R. Civ. P. 4(h)(1), which governs service of a summons and complaint on a corporation in the United States, and provides that service may be made by "delivering" copies on certain specified individuals, has been construed to require personal service. *See Taylor v. Stanley Works*, 2002 WL 32058966, at ** 4-5 (E.D. Tenn. Jul. 16, 2002); *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 286-87 (E.D.N.Y. 2000); *Mettle v. First Union Nat'l Bank*, 279 F. Supp. 2d 598, 602 (D.N.J. 2003); *Petrolito v. 1st Nat'l Credit Servs. Corp.*, 2005 WL 331741, at * 1 n. 2 (D. Conn. Feb. 2, 2005); *Osorio v. Emily Morgan Enters., L.L.C.*, 2005 WL 589620, at * 2 (W.D. Tex. Mar. 14, 2005); *Cataldo v. United States Dep't of Justice*, 2000 WL 760960, at * 7 (D. Me. May 15, 2000); 1 *Moore's Fed. Practice 3d*, § 4.53 [2]; *see also BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 84 (D.D.C. 2003) (mailing summons and complaint to employee of corporate subsidiary of corporation being sued "does not fulfill any part of [the] requirement" of Rule 4(h)(1)).[8]

[8] Unlike Rule 4(h)(1), Rule 45 does not address, in the case of a corporation, to whom the subpoena must be delivered. Courts have looked to Rule 4(h)(1) for guidance. In *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct.

Former Fed. R. Civ. P. 4(d)(4), now part of Fed. R. Civ. P. 4(i)(1)(A), which governed service of a summons and complaint on the United States, provided that service was to be made "by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought * * *." The term "delivering" in former Rule 4(d)(4) has been held to require personal service. *See Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir. 1994); *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993); *McDonald v. United States*, 898 F.2d 466, 467-68 (5th Cir. 1990); *Dowdy v. Sullivan*, 138 F.R.D. 99, 100 (W.D. Tenn. 1991) (service by certified mail on U.S. Attorney was improper service; personal service required); *accord* 1 *Moore's Fed. Practice* § 4.55 [1], at 4-72 (3d ed.) (if service on the U.S. attorney is effected under Rule 4(i)(1)(A) by delivery, "the summons and complaint must be personally delivered").

Fed. R. Civ. P. 4(j)(2) provides that service of a summons and complaint upon a state municipal corporation, or other governmental organization shall be effected by, among other things, "delivering" copies of the summons and complaint to its chief executive officer. The term "delivering" has been construed to require personal service. *See* 4B C. Wright & A. Miller, *Federal Practice & Procedure: Civil 3d* § 1109, p. 47 (2002); *Gilliam v. County of Tarrant*, 94 Fed. Appx. 230 (5th Cir. 2004) (use of certified mail does not satisfy Rule 4(j)(2)); *Husner v. City of Buffalo*, 172 F.3d 37 (Table), 1999 WL 48776, at ** 1 (2d Cir. Feb. 1, 1999); *Cambridge Mut. Fire Ins. Co. v. City of Claxton, Ga.*, 720 F.2d 1230, 1232 (11th Cir. 1983) (applying predecessor of Rule 4(j)(2), then Rule 4(d)(6)); *Gil v. Vogilano*, 131 F. Supp. 2d 486, 494

1997), the court held that service of a subpoena on a corporation's receptionist constituted valid service under Rule 45(b)(1) after first concluding that Rule 45(b)(1) requires personal service of a subpoena. The court reached its conclusion as to the propriety of the service in question by finding that because Rule 45 does not specify what constitutes personal service upon a corporation, courts look to Rule 4(h)(1) for guidance, and that under applicable state law, service upon a corporation's receptionist constituted personal service. *See Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. 1994) (look to Rule 4(d)(3) (now Rule 4(h)) to determine who can be served with subpoena addressed to corporation); *In re Grand Jury Subpoenas*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (same).

(S.D.N.Y. 2001) (service by mail not proper); *Barrett v. City of Allentown*, 152 F.R.D. 46, 48-49 E.D. Pa. 1993) (applying former Rule 4(d)(6)); *Miles v. WTMX Radio Network*, 2002 WL 1359398, at * 2 (N.D. Ill. Jun. 20, 2002), *report and recommendation approved in part*, 2002 WL 1613762 (N.D. Ill. Jul. 17, 2002); *Oltremari by McDaniel v. Kansas Social & Rehabilitative Serv.*, 871 F. Supp. 1331, 1353 (D. Kan. 1994).

However, none of the authorities construing Fed. R. Crim. P. 17(d), Fed. R. Civ. P. 4(h)(1) and 4(j)(2), and former Rules 4(d)(4) and 4(d)(6) contains any explanation, discussion or analysis as to why the term "delivering" requires personal service. They simply state that personal service is required. And as indicated on pp. 4-6, above, courts have split in deciding whether the term "delivering", as used in Rule 45(b)(1), requires only personal service. *See* cases cited in notes 2 and 3, above.

Because the term "delivering" does not intrinsically mandate only personal service, a conclusion that only personal service is authorized, based on the use of that word, is not warranted. Such a conclusion also ignores the fact that Rule 45(b)(1) does not use the term "personally", as contrasted with Rules 4(e)(1) and 4(f)(2)(C)(i), which are explicit in requiring personal service, and that Rule 45(b)(3) requires proof of the "manner of service" employed, which suggests that more than one method is permissible.

A third reason that could be advanced for requiring only personal service of a subpoena is the severity of the sanction that can be imposed for ignoring a subpoena -- contempt of court. *See* Fed. R. Civ. P. 45(e). It could be argued that personal service ensures that before such a severe sanction is imposed, there is no dispute about whether the party received the subpoena.[9] On the other hand, the failure to respond to a summons and complaint can also result in a severe

[9] There will always be the possibility of dispute over receipt, even in the case of personal service, if the recipient attempts to lie about receiving it or in the case of sewer service.

sanction -- a default judgment against the defaulting party. *See* Fed. R. Civ. P. 55(a) & (b). In the case of a default judgment, the defaulting party can seek to have it vacated for good cause. *See* Fed. R. Civ. P. 55(c) & 60(b). In the case of a subpoena that has allegedly been ignored, before the sanction of contempt can be imposed, the defaulting party will have an opportunity to argue that the subpoena was never properly served. Due process requires that the allegedly defaulting party be given adequate notice and an opportunity to be heard on a motion for contempt. *See Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975); 9A *Wright & Miller* § 2465, at 82 (1995). In addition, in order to hold the witness in contempt, the subpoena must be valid and the witness must not have an adequate excuse for the noncompliance. *Id.* at 85-86. Thus, there does not seem to be any policy reason based on the potential severity of the sanction for requiring personal service of a subpoena when personal service of a summons and complaint is not always required.

A fourth reason is that when Fed. R. Civ. P. 45(c) was amended in 1991 to move the language concerning the method of service of a subpoena into Rule 45(b)(1), all the decisions addressing whether personal service was required by Rule 45(c) had found that it was, except for the decision in *Hinds*, 1988 WL 33123. *See* case cited in footnotes 2 and 3, above; *see also* Note, "Rule 45(b): Ambiguity in Federal Subpoena Service," 20 *Cardozo L. Rev.* 1065, 1071 (1999). If the Advisory Committee had thought that the courts had improperly construed Rule 45(c) to require personal service, presumably there would have been a proposed or actual amendment of the Rule to change that requirement, or the Advisory Committee would have commented on those decisions, which it did not. This would suggest that the decisions requiring personal service were correct.

A fifth reason that could be advanced for construing the word "deliver" in Rule 45(c) to require personal delivery would be based on Rule 5, which covers service on a party represented by an attorney. Rule 5(b)(2)(A) provides a definition of "deliver" for that limited purpose and does not limit the term to personal delivery:

> (A) Delivering a copy to the person served by:
> (i) handing it to the person;
> (ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or
> (iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

Virtually the same language was contained in Rule 5(b) when it was adopted in 1937.[10]

It could be argued that the need to spell out in then Rule 5(b) that "deliver" did not require only personal delivery, shows that the word "deliver" was understood in 1937 to require personal delivery unless otherwise provided. However, that would be inconsistent with the perceived need to expressly require in then Rule 4(d)(1) that delivery of a summons and complaint on an individual in the United States had to be delivered to the individual "personally." Thus, the argument would appear, at most, to support the idea that the word "deliver", standing alone, is inherently ambiguous as to whether delivery must be personal delivery. Then Rule 5(b), as Rule 5(b)(2)(B) does now, also permitted, as an alternative to delivery, service by mail. This might lend support to the argument that even if delivery does not mean personal delivery, it would not encompass service by mail.

It could also be argued that it is somewhat unfair to involve a person with no stake in a lawsuit without providing that person with the best notice possible, that is, personal service. But

[10] Then Rule 5(b) provided in pertinent part: "Service upon the attorney or upon a party shall be made by delivering a copy to him * * *. Delivery of a copy within this rule means: handing it to the attorney or the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

we fail to see how the need of the parties to involve others in their dispute should require the *best* notice possible, rather than notice sufficient to satisfy the requirements of due process. The countervailing policies of seeking to provide justice and have the truth come to light override the concern of third parties not to be involved in a dispute about which they have necessary information.

D. Due Process Requirements

Due process requires a method of service of a summons or a subpoena that is reasonably calculated, under the circumstances, to provide actual notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995); *S.E.C. v. Tome*, 833 F.2d 1086, 1093 (2d. Cir. 1987); *Cordius Trust*, 2000 WL 10268, at * 2 (service of subpoena by certified mail satisfies due process); *First Nationwide Bank*, 184 B.R. at 644 (after 6 failed attempts at personal service, mailing a subpoena to witness at his home address and then delivering it to his counsel in another case held to satisfy due process); *King*, 170 F.R.D. at 356 (delivery of subpoena by hand to someone at witness' residence and mailing copy to the same address satisfied due process); *Doe*, 155 F.R.D. at 630 (delivery by certified mail upheld, but leaving the document at the served individual's dwelling "would not assure delivery *to the person*").

As the foregoing cases indicate, due process does not require in-hand personal service. While it is beyond the scope of this Report to address which methods of service, other than personal service, would satisfy due process, it appears that any method authorized under Rule 4 would satisfy such requirements.

Conclusion

After considering the applicable authority and the reasons in favor and against construing Rule 45(b)(1) to require personal in-hand service of a subpoena, the Section has concluded that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1), that there is no policy reason why only personal in-hand service should be required, particularly since personal in-hand service of a summons and complaint is not required in many situations in federal court. The Section further believes that any method of service permitted under Rule 4 of the Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide for that.

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