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March 8, 2016

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: **Proposed Amendment to Federal Rule of Civil Procedure 45(b)(1)**

To the Committee:

The State Bar of Michigan Committee on United States Courts ("Committee") respectfully submits the following proposed amendment to FRCP 45(b)(1) for consideration:

(b) Service.

(1) By whom and How; Tendering Fees.

(A) Any person who is at least 18 years old and not a party may serve a subpoena.

(B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.

(C) If the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

For service of a subpoena to be effective, the current Rule "requires delivering a copy to the named person." "Delivering," however, is nowhere defined or clarified in the Rule. As discussed in detail in the accompanying memorandum, this ambiguity has led to piecemeal and inconsistent interpretations of the Rule by the courts and, concomitantly, to a large volume of motion practice relating to the service of discovery and trial subpoenas. This has led, in turn, to substantial delays in the progress of litigation and to unnecessary added costs of litigation, as well as to additional burden on the courts' dockets.

The proposed amendment to Rule 45(b)(1) brings the requirements for effective service of a subpoena in line with the requirements for service of process under Rule 4. The rationale for this change is also explained in detail in the accompanying memorandum, but of critical importance is the principle that service of a discovery subpoena should not be more difficult or restrictive than service of the summons and complaint, given the obviously heightened potential liability to which a defendant in a lawsuit is subjected.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges, clerks of the court, and attorneys who work in and are familiar with the federal court system.

The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. This Federal Civil Rule amendment proposal represents the position of the Committee on the United States Courts and shall not be considered a position of the State Bar of Michigan.

Thank you for your consideration, and please feel free to contact the Committee with any questions you may have.

Sincerely,

Jan Meir Geht
Chair, Committee on United States Courts

Attachment

PC: U.S. Courts Committee:
Thaddeus E. Morgan, Member
Michael W. Puerner, Member
Peter M. Falkenstein, Advisor

PROPOSAL TO REVISE FED. R. CIV. P. 45(b)(1)
TO CLARIFY ACCEPTABLE METHODS OF SERVING
A SUBPOENA ON A NON-PARTY WITNESS

I. Background:

Rule 45(b)(1) of the Federal Rules of Civil Procedure (the "Rule"), relating to service of a subpoena, provides in relevant part:

> Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person . . . .

(Underscore added.) Nowhere, however, does the Federal Rules clarify what constitutes effective "delivery" to the subpoenaed party, be it an entity or an individual. In contrast, other provisions of the Federal Rules specify in greater detail what methods of service of documents are acceptable. *See, e.g.,* Rule 4(e) and (f), specifying acceptable methods of service of a summons and complaint on an individual or a corporate entity; *see also* Rule 5(b), specifying acceptable methods of serving pleadings and other papers on all parties.

The failure of the Federal Rules to define "delivering" in Rule 45(b) has led to inconsistent rulings from Circuit to Circuit and from District to District as to what constitutes effective service of a subpoena. Moreover, this uncertainty as to the requirements for service plagues both litigation counsel for the parties and in-house or outside counsel for subpoenaed non-parties as to how to serve a subpoena and how to respond to the ostensible "service." This uncertainty has led to vast inefficiencies and delays in federal litigation, as (i) subpoenas are regularly challenged by objections and motions to quash, based on uncertainty as to the effectiveness of service; (ii) counsel seeking to serve a subpoena often has to move for an order permitting alternate methods of service; and (iii) discovery and trial schedules are often delayed, as motions relating solely to the effectiveness of service of a subpoena are briefed and heard.

Ultimately, it is often several months before the validity of service of the subpoena is upheld or, if it is deemed ineffective, re-service can be effected. In addition to delaying litigation unnecessarily, the confusion as to methods for serving a subpoena drives up the costs of litigation and unduly burdens court dockets with motions related to a procedural issue that can be better clarified by a revision to the Rule. Based on the clear problem currently plaguing our federal system and the analysis of the issues as addressed below, the Committee proposes to amend Rule 45(b)(1) in the manner attached as Exhibit 1 to this memorandum.

II. The Split Among Courts in Setting Forth Acceptable Methods of "Delivering" a Subpoena to a Non-Party Witness

A majority of courts have adopted the position that "delivering" a subpoena requires personal service. *See, e.g., OceanFirst Bank v. Hartford Fire Ins. Co.,* 794 F. Supp. 2d 752,

753 (E.D. Mich. 2011) ("The Sixth Circuit has not addressed whether Rule 45 requires personal service; however, the Fifth, Ninth, and D.C. Circuits have held that personal service is required.") *citing Robertson v. Dennis (In re Dennis),* 330 F.3D 696, 705 (5th Cir. 2003); *Chima v. United States Dep't of Defense,* 23 Fed. App'x. 721, 724 (9th Cir. 2001); *FTC v. Copmagnie De Saint-Gobain-Pon-A-Mousson,* 636 F.2d 1300, 1312-13 (D.C. Cir. 1980). "A majority of lower also have held that Rule 45 requires personal service." *OceanFirst Bank,* 794 F. Supp. 2d at 753 (numerous citations omitted).

"There is no consensus on that point, however. A number of courts 'have permitted service by certified mail and other means if the method of service is made in a manner designed to reasonably insure actual receipt of the subpoena by the witness.'" *Id.* For example, the court in *Doe v. Hersemann,* 155 F.R.D. 630 (N.D. Ind. 1994), held that service of a subpoena via certified mail is sufficient under Rule 45, particularly when the subpoenaed party does not deny actual receipt. In adopting and further clarifying that position, a Maryland district court subsequently explained:

> The courts that have embraced the minority position have in common a willingness to acknowledge that Rule 45 itself does not expressly require personal in-hand service, and a practical appreciation for the fact that the obvious purpose of Rule 45(b) is to mandate effective notice to the subpoenaed party, rather than slavishly adhere to one particular type of service.

Hall v. Sullivan, 229 F.R.D. 501, 504 (D. Md. 2005). Building upon the reasoning in *Doe v. Hersemann,* the *Hall* court continued:

> Nothing in the language of the rule suggests in-hand personal service is required to effectuate "delivery," or that service by certified mail is *verboten.* The *plain* language of the rule requires only that the subpoena be delivered to the person served by a qualified person. Delivery connotes simply "the act by which the *res* or substance thereof is placed within the actual . . . possession or control of another."

Id. Furthermore,

> In further support of its conclusion that personal, in-hand service is not required by rule 45, the *Doe* court looked to Rule 4(e)(1), which addresses the type of service required for a summons and complaint. . . . Rule 4(e)(1), in relevant part, states that "service may be effected by delivering a copy of the summons and of the complaint to the individual *personally* . . .(emphasis added). . . . [W]hen the drafters of the Federal Rules wanted to require "personal service" of a pleading or paper, they were capable of doing so unambiguously. . . . [T]o read the word "personally" into Rule 45 would render the use of "personally" in Rule 4(e)(1) "pure surplusage," a practice not advocated.

Id. citing Doe v. Hersemann, 155 F.R.D. at 631. A growing number of courts have thus adopted the position that service by means other than personal service is permitted, if designed to

reasonably give notice of the subpoena to the subpoenaed party, or where the subpoenaed party acknowledges receipt of the subpoena. Such means may include service by certified mail, first class U.S. mail, delivery to non-party's office, or delivery to non-party via Federal Express as well as non-party's counsel. *See, e.g. Green v. Baca*, 2005 WL 283361 at *5 n.1 (C.D. Cal. Jan. 31, 2005) (unpublished opinion) (permitting service by leaving subpoena at witnesses' offices); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 at *2 (S.D. N.Y. Jan. 3, 2000) (unpublished opinion) (permitting service by certified mail); *Windsor v. Martindale*, 175 F.R.D. 665 (D. Colo. 1997) (service by certified mail sufficient); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861 at *1-2 (M.D. Fla. Oct. 15, 1999) (unpublished opinion) (permitting service by first class U.S. mail); *Western Resources, Inc. v. Union Pacific R. Co.*, 2002 WL 1822432 at *1-2 (D. Kan. July 23, 2002) (unpublished opinion) (permitting service via Federal Express with a signature release waiver and upon non-party's counsel); *OceanFirst Bank*, 794 F. Supp. 2d at 754 (E.D. Mich. 2011) (first-class mail accompanied by posting at known residence sufficient)(in dictum). And, certainly, in any case in which the subpoenaed party or its counsel contacts the attorney for the subpoenaing party to acknowledge receipt, but also to object to the method of service, the service will be deemed effective. *See, e.g., Ott v. City of Milwaukee*, 274 F.R.D. 238, 241-42 (E.D. Wis. 2011); *Jorden v. Steven J. Glass, MD*, 2010 WL 3023347 at *4 n.1 (D.N.J. July 23, 2010) (unpublished opinion).

Other courts have staked out a middle ground between the most restrictive majority view requiring personal service, and the most permissive minority view, authorizing a variety of alternate methods of service. This middle ground is essentially a hybrid position, adopting the majority view as the default position, but permitting alternative methods of service upon motion to the court; but only upon a showing that diligent efforts to personally serve the subpoena have failed. *See, e.g., OceanFirst Bank,* 794 F. Supp. 2d at 754:

> "Courts that have sanctioned alternative means of service under Rule 45 often have done so only after the party requesting the accommodation diligently attempted to effectuate personal service." (Citation omitted.) . . . The Court is persuaded by and adopts the reasoning of the courts that interpret Rule 45 to allow service of a subpoena by alternate means once the party seeking evidence demonstrates an inability to effectuate service after a diligent effort. The alternate means must be reasonably calculated to achieve actual delivery. (Citations omitted.)

The *OceanFirst* court then noted that "[m]ailing by first-class mail to the actual address of the intended recipient generally will suffice, (citation omitted), especially when the mailing is accompanied by posting at the known address of the prospective witness." *Id. See also Bland v. Fairfax County, Va.*, 275 F.R.D. 466, 471-72 (E.D. Va. 2011) (permitting service "where [subpoenaed] witnesses agreed to testify, actually received the at-issue subpoenas in advance of trial, and the non-personal service was effected by means reasonably sure to complete delivery.").

Thus, the current judicial landscape comprises three wholly different interpretations of what constitutes effective delivery of a subpoena under Rule 45 – (i) the majority view, requiring personal service; (ii) the growing minority view, authorizing a variety of alternate means of service; and (iii) the hybrid view, authorizing alternate service only upon motion and a showing

that diligent attempts at personal service have been unavailing. As illustrated by the large number of opinions devoted to this issue, valuable resources are being wasted in trying to interpret a rule that could be easily clarified and settled by an amendment to Rule 45(b).

III. Evaluating the Various Approaches

In evaluating the various approaches taken by the courts, the Committee has taken into account the evolving views as to the purpose of the Federal Rules, as exemplified by the Duke Conference of 2010, along with amendments to the Federal Rules emanating from that conference. The Duke Conference examined problems in federal civil litigation, particularly excessive costs and delay and the adequacy of the Federal Rules of Civil Procedure to address them. As emphasized in the aftermath of the Duke Conference, and exemplified by the amendment to Rule 1: the Rules will be "construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee thus views the various approaches to Rule 45(b)(1) with a critical focus on whether each promotes the just, speedy, and inexpensive determination of the action.

With respect to Rule 45(b)(1) in particular, the Committee also is cognizant of the overview taken by the respected treatise Moore's Federal Practice, as summarized in *Hall v. Sullivan*, 229 F.R.D. at 505:

> Moore's Federal Practice provides insight into the position of the courts following the minority rule that personal service . . . is not required by Rule 45:
>
> (1) The actual language of the rule does not require personal service;
> (2) As Rule 4(e) demonstrates, the drafters of the Federal Rules knew how to require personal service when they wanted it;
> (3) The cases holding that personal service is required by Rule 45 do not provide meaningful analysis, but instead, simply quote the rule; and
> (4) There is absolutely no policy distinction that would justify permitting "lesser" forms of service for a summons and a complaint – which actually commence a lawsuit – but not for a subpoena. [Moore's Federal Practice – Civil ¶ 45.03(b)(1).]
>
> This last reason is the most persuasive. It is illogical to permit a person to be brought into a lawsuit, with all its attendant risks of personal liability, on less than personal service, but to require personal service of a discovery or trial subpoena. The objective should be to ensure fair notice to the person summoned and an opportunity to challenge the subpoena, without unnecessarily imposing on the party seeking the discovery an unnecessarily cumbersome or expensive service requirement.

A. The Majority Approach (Personal Service Requirement).

The Committee views the majority approach, requiring personal service of a discovery or trial subpoena to be inefficient, overly restrictive, and not justified by sound policy. As noted in

Moore's Federal Practice, nothing in Rule 45 itself requires personal service – the requirement is simply a gloss on the rule, manufactured by the courts themselves. Thus, this approach is more restrictive than the actual language of the rule requires.

It also is illogical from a policy perspective. Subjecting an individual or a company to a lawsuit should clearly require the most effective forms of notice, given the liability to which the putative defendant may be subjected. And Rule 4, while taking this into account, provides for a variety of acceptable means for service of the summons and complaint. It makes no sense to sharply narrow the acceptable methods of service of a discovery or trial subpoena, where the risk to the subpoenaed party is not nearly as great as that of a putative defendant.

Finally, the majority approach does not serve the goals of the speedy and inexpensive determination of litigation. Attempts to personally serve a subpoena, particularly where the subject may wish to avoid service, can be extremely time consuming and drive up litigation costs. And, where personal service cannot be obtained at all, the goal of a "just determination" of the litigation is ill-served, as material witnesses may never be examined and critical documents may never be produced.

Therefore, the Committee finds that the majority approach is the least appropriate of the approaches currently taken by the courts.

B. The Hybrid Approach (Alternate Service Upon Motion After Diligent Personal Service Attempts Fail)

The hybrid approach, permitting various alternate methods of service, but only upon motion to the court and a showing that diligent attempts at personal service have failed, is an improvement upon the majority approach in one regard – it better promotes the "just determination" of the litigation by ultimately permitting less restrictive service methods; thereby increasing the likelihood that material witnesses and documents will ultimately be made available to the litigants. This is accomplished via the discretion of the court, upon motion, to authorize alternate methods of service.

The hybrid approach, however, in no way promotes the "speedy and inexpensive determination" of the litigation. Parties attempting to serve a subpoena are still required to go through the motions of diligently trying to personally serve the subpoena, thereby incurring the same costs and delays inherent in the majority approach. Moreover, once those attempts fail, the serving party must suffer the expense of filing a motion with the court and, if successful, then following through on the alternate means of service authorized by the court. The delays inherent in this approach are onerous, particularly where discovery deadlines or a trial date are looming. It can often be two months or more from the time a party recognizes that it cannot effect personal service until the time it is able to obtain an order for substitute service via motion, and then effect service through alternative means.

Neither does the hybrid approach serve legitimate policy concerns any better than the majority approach. There is no more basis in Rule 45 itself, or the policy relating to service of various documents as discussed in Moore's, that would justify establishing a default position of

first requiring attempts at personal service, than would justify only permitting personal service. By taking a position that is highly congruous with the majority approach – that one *must* attempt personal service of a subpoena – the hybrid approach stands on equally shaky policy footing as the majority approach.

For the reasons stated, the Committee concludes that the hybrid approach does not adequately serve the goals of the Federal Rules.

C. The Minority Approach (Permitting Methods of Service Designed to Reasonably Insure Actual Notice to the Subpoenaed Party)

Moore's Federal Practice recognizes that sound policy compels the conclusion that the methods of service authorized for service of a subpoena should be no more restrictive than those authorized for service of a summons and complaint. Courts adopting the minority approach have explicitly or implicitly agreed.

Expansion of the acceptable methods of service of a subpoena to those encompassed by Rule 4 will certainly promote the just determination of litigation by making it most likely that material witnesses and documents will become available to the litigants, as it will be more difficult for a recalcitrant witness to dodge service. The speedy and inexpensive determination of litigation will also be served dramatically, as litigants will no longer be required, as under the hybrid approach, to make numerous attempts at personal service, and then to file costly and time consuming motions to obtain an order for substitute service. In sum, under the minority approach, all of the same methods of service that are available under the hybrid approach only after lengthy and costly delays, will be available to the parties immediately.

For these reasons, the Committee concludes that the minority approach bests serves all of the interests set forth as goals for the administration of justice under the Federal Rules, including the interests of the Courts, the counsel for the parties, the counsel for non-parties who are subject to subpoenas, and, of course, the parties themselves. Further, when coupled with the courts' inherent discretion to authorize alternate methods of service, the minority approach comes as close as possible to serving the stated goals of the Federal Rules.

IV. The Committee's Recommendation

The Committee Recommends amending Rule 45(b)(1) by striking all of the current language in that subsection and inserting instead the language annexed to this proposal as **Exhibit 1.** The Committee recognizes that among the courts adopting the minority approach there is not absolute congruity, as there have been authorized a variety of different means of service. The Committee concludes that in order to provide a consistent and clearly understandable protocol for service of subpoenas, a rule for service that is congruent with Rule 4 of the Federal Rules makes the most sense. Additionally, the proposed rule makes clear that the Court's inherent discretion to provide for alternate methods of service when necessary and appropriate is preserved.

Submitted by,

/s/ Peter M. Falkenstein
/s/ Thaddeus E. Morgan
/s/ Michael W. Puerner

Date: January 12, 2016

EXHIBIT 1

Rule 45(b)(1) of the Federal Rules of Civil Procedure is amended by deleting the language of the current rule and inserting the language below as the substitute rule:

(b) Service.

(1) ***By Whom and How; Tendering fees.***

(A) Any person who is at least 18 years old and not a party may serve a subpoena.

(B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.

(C) If the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.