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.[1] 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.[2] 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."[3]

Through the amendment the Advisory Committee seeks to eliminate a "troublesome ambiguity"[4] within rule 4. While the current rule 4(c) requires service of process by a United States marshal, rules 4(d)(7)[5]

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.

4. *Id.* at 2. *See* Farr & Co. v Cia. Intercontinental de Nav. de Cuba, S.A., 243 F.2d 342 (2d Cir. 1957); Giffin v. Ensign, 234 F.2d 307 (3d Cir. 1956); Bonan v. Leach, 22 F.R.D. 117 (E.D. Ill. 1957); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1083, at 334 (1969 & Supp. 1978).

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)[6] 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)[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,[8] but rule 4(c) has the force of statute;[9] its clear language resists alteration by mere expressions of intent.[10] Thus, the Advisory Committee's Note to rule 4(d)(7) only exacerbated the ambiguity within rule 4[11] and, as a consequence of this confusing statu-

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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.

7. 28 U.S.C. app. — Rules of Civil Procedure (1976).

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 subidivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co. v. Cia. 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.

Id.

9. *E.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941); John R. Alley & Co. v. Federal Nat'l Bank, 124 F.2d 995, 998 (10th Cir. 1942); Hoffman Motors Corp. v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D.N.Y. 1965); Oster v. Dominion of Canada, 144 F. Supp. 746, 748 (N.D.N.Y.), *aff'd sub nom.* Clay v. Dominion of Canada, 238 F.2d 400 (2d Cir.), *cert. denied*, 353 U.S. 936 (1956); C.J. Wieland & Son Dairy Prods. Co. v. Wickard, 4 F.R.D. 250, 252 (E.D. Wis. 1945). *See* Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); Rumsey v. George E. Failing Co., 333 F.2d 960, 962 (10th Cir. 1964); Clark County v. City of Los Angeles, 92 F. Supp. 28, 31-32 (D. Nev. 1950); 7 MOORE'S FEDERAL PRACTICE § 69.04[2] (2d ed. 1978). *Cf.* 28 U.S.C. § 2072 (1976) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

10. *See* C.J. Wieland & Son Dairy Prods. Co. v. Wickard, 4 F.R.D. 250, 252 (E.D. Wis. 1945) (Advisory Committee Notes considered persuasive, but not mandatory authority).

11. Courts and commentators have urged the adoption of a clarifying amendment. *See, e.g.*, Veeck v. Commodity Enterprises, Inc., 487 F.2d 423, 426 (9th Cir. 1973) (concurring opinion); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092 (1969 & Supp. 1978); 42 NOTRE DAME LAW. 284, 290 (1966).

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

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

13. *See* Sappia v. Lauro Lines, 130 F. Supp. 810 (S.D.N.Y. 1955). *Accord*, Dehne v. Hillman Inv. Co., 110 F.2d 456 (3rd Cir. 1940); Myers v. Slotkin, 13 F.R.D. 191 (E.D.N.Y. 1952); Weisler v. Matta, 95 F. Supp. 152 (W.D. Pa. 1951); Nola Elec. Co. v. Reilly, 93 F. Supp. 164 (S.D.N.Y. 1948). *See generally* Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedures*, 23 A.B.A.J. 629 (1937).

14. *See* Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966). *See also* White v. Secretary of HEW, 56 F.R.D. 497 (N.D.N.Y. 1972); Van Gundy v. Ellis, 246 F. Supp. 802 (S.D. Iowa 1965).

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); 4 C. WRIGHT & 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).

16. *See* Smith v. United States, 403 F.2d 448 (7th Cir. 1968). *See also* Spry v. Eastern Gas & Fuel Assocs., 234 F. Supp. 580, 581 (W.D. Pa. 1964), *rev'd on other grounds sub nom.* Eastern Gas & Fuel Ass'n v. Midwest-Raleigh, Inc., 374 F.2d 451 (4th Cir.), *cert. denied*, 389 U.S. 951 (1967); Morris v. Sun Oil Co., 88 F. Supp. 529 (D. Md. 1950); Sussan v. Strasser, 36 F. Supp. 266, 269 (E.D. Pa. 1941).

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.[18] 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.[19]

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.[20] 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;[21] thus "a marshal or any other person authorized to make service under rule 4(c) need play no part in the process."[22]

To avoid inconsistent court rulings, the Advisory Committee's proposed amendment chose the *Ospina* approach.[23] 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)

18. Ospina v. Vanelli, 34 F.R.D. 151, 152 (D. Minn. 1964) (referring to FED. R. CIV. P. 64). *See also* Free State Receivables, Ltd. v. Claims Processing Corp., 76 F.R.D. 85, 87 (D. Md. 1977)

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."

20. *E.g.*, Veeck v. Commodity Enterprises, Inc., 487 F.2d 423 (9th Cir. 1973); Thompson v. Battle, 54 F.R.D. 222, 225 (N.D. Ill. 1971); Townsend v. Fletcher, 9 F.R.D. 711 (N.D. Ohio 1949); 2 MOORE'S FEDERAL PRACTICE ¶ 4.08, at 4-98 (2d ed. 1978); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092, at 353 (1969 & Supp. 1978).

21. Wells v. English Elec., Ltd., 60 F.R.D. 573 (W.D. La. 1973) (adopting the dissent of Judge Brown in Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838, 848-49 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966)).

22. 4 C. WRIGHT & A. MILLER, *supra* note 20, at 354. *Accord*, Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838, 848-49 (5th Cir.) (Brown, J., dissenting), *cert. denied*, 385 U.S. 971 (1966); Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, S.A., 243 F.2d 342 (2d Cir. 1957); 1 W. BARRON & A. HOLTZOLFF, FEDERAL PRACTICE AND PROCEDURE §§ 175, 182.1 (rev. ed. C. Wright 1960); 2 MOORE'S FEDERAL PRACTICE ¶ 4.08 (2d ed. 1978).

23. *See* notes 1-3 & 17-19 *supra* and accompanying text.

provides a balance between the need for effective[24] and reliable service (U.S. marshals) and the judicial discretion necessary for flexibility and practical convenience (court appointments).[25] Courts have used this discretion either to allow appointments[26] or, when necessary, to insist that a U.S. marshal serve process.[27] 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.[28]

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.[29] Courts treat the return of service as either a conclusive presumption of service,[30] or as a rebuttable presumption overcome only by

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24. Courts have held the due process clauses of the U.S. Constitution to require that service of process reasonably notify the party served of the pendency of the action. *E.g.*, SEC v. Beisinger Indus. Corp., 552 F.2d 15 (1977); Albert Levine Assocs., Inc. v. Hudson, 43 F.R.D. 392 (S.D.N.Y. 1967); Tarbox v. Walters, 192 F. Supp. 816 (E.D. Pa. 1961); *see* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 292 (1969 & Supp. 1978). For illustrations of what constitutes reasonable notice, *see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-35 (1950); Hess v. Pawloski, 274 U.S. 352 (1927); Pennoyer v. Neff, 95 U.S. 714 (1877).

25. *See* Tanos v. St. Paul Mercury Ins. Co., 361 F.2d 838, 842-43 n.9 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES-CLEVELAND 203 (W. Dawson ed. 1938) (remarks of Dean Charles E. Clark). *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1091, at 351 (1969 & Supp. 1978); Sunderland, *New Federal Rules of Civil Procedure as Related to Judicial Procedures in Ohio*, 13 U. CIN. L. REV. 1, 22 (1939). *Cf. In re* Evanishyn, 1 F.R.D. 202 (S.D.N.Y. 1939) (court exceeded its discretion to appoint petitioner's attorney to serve process); Modric v. Oregon & N.W.R. Co., 25 F. Supp. 79 (D. Or. 1938) (court lacked discretion to appoint more than one person).

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).

30. *See* Goldlawr, Inc. v. Shubert, 169 F. Supp. 677, 688 (E.D. Pa. 1958), *aff'd*, 276 F.2d 614 (3rd Cir. 1960). *Cf.* Harriman v. Rockaway Beach Pier, 5 F. 461 (E.D.N.Y. 1880) (service stands while marshal defends in an action for false return).

"strong and convincing evidence."[31] 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.

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31. Hicklin v. Edwards, 226 F.2d 410, 414 (8th Cir. 1955). *Accord*, Halpert v. Appleby, 23 F.R.D. 5 (S.D.N.Y. 1958); Publix Food Mkt., Inc. v. Bitar, 156 F. Supp. 274 (D. Mass. 1957).

32. *See* United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970); Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972); Comment, 6 HARV. C.R.-C.L. L. REV. 414 (1971).