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"Delivering" a Subpoena: What Constitutes "Good Service" Pursuant to Federal Rule of Civil Procedure 45?

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Abstract

Federal Rule of Civil Procedure 45(b)(1) makes clear that service of a subpoena requires "delivering a copy to the named person." Nevertheless, that rule does not make clear what satisfies the "delivery" requirement. Courts are split on the issue, with some requiring in-hand personal service, and others permitting alternative methods of "delivery," so long as the method is reasonably calculated to ensure that the subpoena is actually delivered to the person named in the subpoena. This lack of consistency engenders a lack of certainty about whether a court will find that a party has properly delivered a subpoena in compliance with the rule. The problem is not a new one, but it nevertheless deserves renewed attention. This article highlights the issue and offers several solutions, ultimately advocating for a revision to Federal Rule of Civil Procedure 45 that incorporates the service provisions of Federal Rules of Civil Procedure 4 and 5.

Introduction

One of the most powerful tools an attorney wields is the power to subpoena a person to produce documents in their possession, custody, or control, or to appear for a deposition or court proceeding. The subpoena power equips attorneys with the coercive power of the court, subjecting a non-compliant person to

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sanctions.[1] In federal court, this power flows from Federal Rule of Civil Procedure 45 ("Rule 45").

Yet, for all of the power with which Rule 45 arms attorneys, it suffers from a lack of clarity about how an attorney can effect service of a subpoena. To be sure, Rule 45 contains a provision dedicated to "service."[2] And that provision contains a subsection that purports to dictate how service is made: "Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fee for 1 day's attendance and the mileage allowed by law."[3] That particular subsection also makes clear that "[a]ny person who is at least 18 years old and not a party may serve a subpoena."[4] And that subsection further makes clear that the requirement that the "fees for 1 day's attendance and the mileage allowed by law" be tendered with the subpoena does not apply "when the subpoena issues on behalf of the United States or any of its officers or agencies."[5]

But what that subsection of Rule 45 lacks is any clarity about what it means to "deliver[] a copy to the named person."[6] The remaining provisions of Rule 45 that speak to "service" do not provide any guidance on that issue. Those remaining provisions specify that "[a] subpoena may be served at any place within the

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1. FED. R. CIV. P. 45(g) ("The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it."). Unless otherwise noted, all citations to the Federal Rules of Civil Procedure are to the version of those rules in effect at the time of the publication of this article.
2. FED. R. CIV. P. 45(b).
3. FED. R. CIV. P. 45(b)(1).
4. *Id.*
5. *Id.*
6. *See id.*

United States";[7] that "28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country";[8] and that "[p]roving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served," a statement that "must be certified by the server."[9]

"[D]elivering a copy to the named person"[10] could mean a number of different things. For instance, if an attorney arranges for FedEx, UPS, or another parcel delivery service to deliver a subpoena, then that attorney has literally arranged for "delivery" of the subpoena.[11] That is all the more true if the attorney requires that delivery service to obtain a signature from the person being served, in which case the attorney has some reasonable assurance that the subpoena has reached the person to whom the subpoena is directed. The same could be said of a subpoena sent via the United States Postal Service, particularly because other provisions of the Federal Rules of Civil Procedure seem to assume that documents sent through the mail will, in fact, be delivered to the intended recipient.[12] And, of course, "delivery" in

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7. FED. R. CIV. P. 45(b)(2).
8. FED. R. CIV. P. 45(b)(3).
9. FED. R. CIV. P. 45(b)(4).
10. FED. R. CIV. P. 45(b)(1).
11. *See, e.g.*, Hall v. Sullivan, 229 F.R.D. 501, 506 (D. Md. 2005) (denying a motion to quash and holding that "delivery of the subpoena via Federal Express comported with the service requirements of Rule 45").
12. *See, e.g.*, FED. R. CIV. P. 5(b)(2)(C) (providing that service may be completed by "mailing it to the person's last known address—in which event *service is complete upon mailing*" (emphasis added)); FED. R. CIV. P. 4(i)(1)(B) (requiring service of a complaint and summons served upon the United States by "send[ing] a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C."); *see also, e.g.*, Doe v. Hersemann, 155 F.R.D. 630, 630 (N.D. Ind. 1994) (holding "that personal service is not required by Rule 45(b)(1)" and denying a motion to quash where a subpoena was served by certified mail).

this context could—and certainly does—include personal service, i.e., hand delivery to the recipient by a process server.[13] Persons who are already represented parties to a case and therefore already subject to a court's jurisdiction[14] might theoretically also be "delivered" a copy of a Rule 45 subpoena by means of service on that party's attorney; indeed, for other "discovery paper required to be served on a party,"[15] the Federal Rules of Civil Procedure *require* that a document be served on the party's attorney "unless the court orders service on the party" itself.[16] Rule 45, however, does not say whether any of the above-mentioned possible methods of "delivery" suffice or are required.

The Rules Advisory Committee's notes to Rule 45, though lengthy, do not add any clarity to the issue.[17] Those notes include many references to "service," but none states what constitutes "delivery" within the meaning of Rule 45.[18]

This is by no means a new or novel issue; litigants, courts, and commentators have all been grappling with it for decades.[19] Nevertheless, this question—what "delivering a copy to the

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13. "The longstanding interpretation of Rule 45 has been that personal service of subpoenas is required." Oceanfirst Bank v. Hartford Fire Ins. Co., 794 F. Supp. 2d 752, 754 (E.D. Mich. 2011) (quoting 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2454, at 397 (3d ed. 2008)).
14. *See* FED. R. CIV. P. 4(k).
15. FED. R. CIV. P. 5(a)(1)(C).
16. FED. R. CIV. P. 5(b)(1).
17. *See* FED. R. CIV. P. 45 advisory committee's notes.
18. *See id.*
19. *See, e.g.*, Oceanfirst Bank v. Hartford Fire Ins. Co., 794 F. Supp. 2d 752, 753–54 (E.D. Mich. 2011) (noting the lack of "consensus" among courts on the issue); O'Neil v. Robinson (*In re* Pappas), 214 B.R. 84, 85 (Bankr. D. Conn. 1997) ("Although the rule does not use the term 'personal service,' most courts interpret this language to require personal service of a subpoena."); *In re* Deposition Subpoena Directed to Smith, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) ("[T]he Court has no discretion to permit alternative service when a party has difficulty effecting service.").

named person"[20] means—deserves renewed attention. Indeed, of the dozens of revisions to the federal rules pending at the time of this article's publication (e.g., the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure), none includes revisions to Rule 45.[21] This article will explore the contours of this issue and what can be done to remedy it. Part I will discuss the other provisions of the Federal Rules of Civil Procedure that govern service of different types of documents, which will serve as a useful point of comparison. Part II will proceed to discuss at a high level the conflicting caselaw around what constitutes "good service" pursuant to Rule 45, providing an overview of both the majority and minority positions—i.e., that personal service is required, and that personal service is *not* required, respectively. Part III will then propose three possible solutions that would provide the much-needed clarity about what Rule 45 requires when it refers to "delivery."

I. Rules Governing Service

Part of what makes the lack of clarity about what "delivery" means in the context of Rule 45 perplexing is that there are two Federal Rules of Civil Procedure that are explicit about what constitutes "good service": Federal Rule of Civil Procedure 4 ("Rule 4") and Federal Rule of Civil Procedure 5 ("Rule 5"). The following overview of these rules lends some possible insight about what "delivery" pursuant to Rule 45 might mean and provides a springboard for the discussion of possible solutions that is the subject of Part III of this article.

20. FED. R. CIV. P. 45(b)(1).

21. *Pending Rules and Forms Amendments*, U.S. CTS., https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments [https://perma.cc/CK4A-8AAU].

Rule 4 is clear that it applies to service of a summons and complaint.[22] Rule 4 is also clear about what it means to serve a summons and complaint. For persons being served within the United States, a person serving a summons and complaint may "follow[] state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district is located or where service is made" (in other words, follow state-law provisions that govern service of summonses);[23] "deliver[] a copy of the summons and of the complaint to the individual personally" (i.e., personal service as that concept is commonly understood—hand delivery by a process server);[24] "leav[e] a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there";[25] or "deliver[] a copy of each to an agent authorized by appointment or by law to receive service of process."[26]

Rule 5 is both more lax and more explicit. It contains a list of the types of documents to which it applies.[27] A document served pursuant to Rule 5 may be served by "handing it to the person";[28] leaving it "at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office";[29] "if the person has no office or the office is closed, [leaving it] at the person's dwelling or usual place of abode with

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22. *E.g.*, FED. R. CIV. P. 4(c)(1) ("A summons must be served with a copy of the complaint.").
23. FED. R. CIV. P. 4(e)(1).
24. Fed. R. Civ. P. 4(e)(2)(A). Although this is what Rule 4 *means*, it might be better if this provision mirrored the language in Rule 5 to make this explicit—namely, revising it to say, "handing it to the person." Fed. R. Civ. P. 5(b)(2)(A). But that is not the subject of this article.
25. FED. R. CIV. P. 4(e)(2)(B).
26. FED. R. CIV. P. 4(e)(2)(C).
27. FED. R. CIV. P. 5(a)(1). Most significantly, this list includes "a discovery paper required to be served on a party." FED. R. CIV. P. 5(a)(1)(C).
28. FED. R. CIV. P. 5(b)(2)(A).
29. FED. R. CIV. P. 5(b)(2)(B)(i).

someone of suitable age and discretion who resides there";[30] "mailing it to the person's last known address";[31] "leaving it with the court clerk if the person has no known address";[32] "sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing";[33] or "delivering it by any other means that the person consented to in writing."[34] And, as mentioned, if the party being served "is represented by an attorney, service under [Rule 5] must be made on the attorney unless the court orders service on the party."[35]

Nevertheless, whatever clarity Rules 4 and 5 contain about what constitutes "good service," those rules do not mention Rule 45. Indeed, the Rules Advisory Committee notes to Rule 4 make clear that "[s]ervice of a subpoena is governed by Rule 45"[36]—a statement that implies that Rule 4's service requirements do *not* apply to subpoenas an attorney issues pursuant to Rule 45. The Rules Advisory Committee notes to Rule 5 contain similar language: "Service under Rules 4, 4.1, 45(b), and 71A(d)(3)—as well as rules that invoke those rules—must be made as provided in those rules."[37] That language likewise implies that Rule 5 does *not* apply to subpoenas an attorney issues pursuant to Rule 45.

In short, the Rules Advisory Committee's notes to both Rules 4 and 5 make clear that those rules do *not* apply to service of a subpoena pursuant to Rule 45. As mentioned above, Rules 4 and 5 still serve as useful guideposts, however, because they

30. FED. R. CIV. P. 5(b)(2)(B)(ii).
31. FED. R. CIV. P. 5(b)(2)(C).
32. FED. R. CIV. P. 5(b)(2)(D).
33. FED. R. CIV. P. 5(b)(2)(E).
34. FED. R. CIV. P. 5(b)(2)(F).
35. FED. R. CIV. P. 5(b)(1).
36. FED. R. CIV. P. 4 advisory committee's note to 1993 amendment.
37. FED. R. CIV. P. 5 advisory committee's note to 2001 amendment.

provide insight into what "delivery" in the context of Rule 45 might mean and what it could mean.

II. Conflicting Case Law

Because of the ambiguity in Rule 45, courts have not been consistent in interpreting what constitutes "good service" pursuant to that rule.[38] That lack of consistency promotes a lack of certainty that most often results in risk-averse attorneys using "personal service" to serve Rule 45 subpoenas, lest a subpoena be quashed for failure to properly serve it.[39]

Moreover, as discussed above, one might imagine that different types of service could be appropriate depending on whether a person being subpoenaed is a party to a lawsuit who has already been properly served with a summons or is instead a non-party who is a stranger to the lawsuit. After all, service must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[40] Due process requires no less.[41] Service pursuant to Rule 5 would be "reasonably calculated" to alert a party who has already been served with a summons and brought within a court's jurisdiction[42] that they are being subpoenaed—at least, there is no reason to doubt otherwise, because Rule 5 governs service of, among other things, "a discovery paper."[43]

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38. *E.g.*, Fla. Media, Inc. v. World Publ'ns, LLC, 236 F.R.D. 693, 695 (M.D. Fla. 2006) ("There is a split among the circuits whether 'delivery' of the subpoena requires personal delivery.").

39. *See, e.g.*, Firefighters' Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000) (affirming the quashing of a subpoena where it was delivered by facsimile and regular mail).

40. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

41. *Id.*

42. *See* FED. R. CIV. P. 4(k).

43. FED. R. CIV. P. 5(a)(1)(C).

This article will not detail or catalogue the vast number of cases that confront whether a subpoena has been properly served. Indeed, many of the cases cited herein have already done that work to a large extent, surveying similar cases that have addressed the issue and providing an overview of those cases' analyses (to the extent those cases provide any analysis at all).[44] The purpose here is to provide an overview, to give a glimpse of the landscape, and to illustrate that this quandary is by no means illusory.

A. The Majority View

"A majority of courts hold that Rule 45 requires personal service."[45] "Both the Moore and the Wright & Miller treatises state, without elaboration, that Rule 45 requires a subpoena to be served by personally delivering a copy to the person named therein. Neither commentator discusses alternative means of service."[46]

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44. *E.g.*, Fla. Media, Inc. v. World Publ'ns, LLC, 236 F.R.D. 693, 695 (M.D. Fla. 2006); Windsor v. Martindale, 175 F.R.D. 665, 669 (D. Colo. 1997) (observing that some courts have permitted service of a subpoena by mail while others require personal service and collecting cases).

45. First Nationwide Bank v. Shur (*In re* Shur), 184 B.R. 640, 642 (Bankr. E.D.N.Y. 1995) (collecting cases); *see also, e.g.*, FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980) (observing that Rule 45 "does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness' dwelling place" and instead "compulsory process may be served upon an unwilling witness only in person," even though "service by registered U.S. mail . . . may be a valid means of serving a summons and a complaint").

46. *In re* Deposition Subpoena Directed to Smith, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (holding that personal service is required: "after reviewing Rule 45's language, the case law and the commentator's analysis, that the Court has no discretion to permit alternative service when a party has difficulty effecting service").

These courts have concluded that Rule 45 requires personal service as a nondiscretionary matter, with alternative modes of "delivery" inadequate to constitute "good service."[47] These courts also provide little analysis to explain *why* Rule 45's "delivery" requirement should be read to require personal service; they routinely merely cite to other cases that required personal service (or to commentary stating the same) or provide no analysis at all.[48] As one court explained, "the primary civil procedure treatises assert without explanation that personal service of a subpoena is required by Rule 45," and district courts requiring personal service likewise fail "to explain their conclusions."[49]

What the majority view lacks in reasoning, however, it makes up for in predictability and simplicity. Under this view, personal service is *always* required. An attorney is not left to wonder whether the method of "delivery" they employed satisfies Rule 45: If it was not personal service, it is not "good service" under Rule 45. However inconvenient, expensive, time-consuming, or even outright impossible personal service (in the case of a person purposefully evading service) might be at times, there is value in consistency, a bright-line rule, and absolute knowledge about whether a subpoena has been properly "delivered."

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47. *Id.* ("Nowhere in Rule 45 is the Court given discretion to permit alternate service in troublesome cases.").

48. *See In re* Johnson & Johnson, 59 F.R.D. 174, 177 (D. Del. 1973) (stating without analysis that, under Rule 45, "personal service of a subpoena is required when an individual is subpoenaed").

49. Doe v. Hersemann, 155 F.R.D. 630, 631 (N.D. Ind. 1994) ("Not one of these cases explains its conclusion, however; each simply refers to the text of Rule 45, which, as noted, does not command personal service. The persuasive authority of these cases is, accordingly, *de minimis*."); *see also, e.g.*, Hall v. Sullivan, 229 F.R.D. 501, 504 (D. Md. 2005) (observing "the circular reasoning employed by the majority" position).

B. *The Minority View*

A growing minority of courts no longer construe Rule 45 as requiring in-hand personal service.[50] For example, "[d]istrict courts in the Second Circuit routinely authorize service via other means besides personal service, i.e., 'alternative' service, under Rule 45."[51] And over two decades ago, the Court of Appeals for the Eighth Circuit concluded that "the method of service needs to be one that will ensure the subpoena is placed in the actual possession or control of the person to be served," and that this "interpretation of Rule 45(b)(1) *may* allow service by other than personal delivery."[52] These courts have recognized that "that language [of Rule 45(b)(1)] neither requires in-hand service nor prohibits alternative means of service."[53]

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50. Bland v. Fairfax Cnty., 275 F.R.D. 466, 471 (E.D. Va. 2011) (noting this "growing minority trend," collecting cases, and holding that personal service was not required where the subpoenaed person "actually received the at-issue subpoenas in advance of trial, and the non-personal service was effected by means reasonably sure to complete delivery").

51. *In re* Three Arrows Capital, Ltd., 647 B.R. 440, 453 (Bankr. S.D.N.Y. 2022) (collecting cases) ("Where alternative service is 'reasonably calculated' to provide timely actual notice to the subpoenaed non-party, courts in this circuit have found such service to meet the requirements of Rule 45."); *see also* Cartier v. Geneve Collections, Inc., No. CV 2007-0201 (DLI) (MDG), 2008 WL 552855, at *1 (E.D.N.Y. Feb. 27, 2008) (collecting cases) (expressing agreement "with the reasoning of a growing number of courts that have held that 'delivery' under Rule 45 means a manner of service reasonably designed to ensure actual receipt of a subpoena by a witness, rather than personal service" once diligent attempts at personal service have been made).

52. Firefighters' Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000) (emphasis added). However, the court went on to hold that its interpretation of Rule 45 "is not broad enough to include either fax or regular mail because the court cannot be assured that delivery has occurred." *Id.*

53. *See* King v. Crown Plastering Corp., 170 F.R.D. 355, 356 (E.D.N.Y. 1997) (holding that Rule 45 does not require personal in-hand service "so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness").

Moreover, in addition to the lack of language in Rule 45(b)(1) that proscribes "delivery" by means other than personal service, there is other language in Rule 45 from which one can infer that other modes of "delivery" are, in fact, permitted. Rule 45(b)(4) demands proof of service, when required to be shown, to include "a statement showing the date and *manner of service* and the names of the persons served."[54] "If the only manner of service permitted under the rule were by hand, no statement of the manner of service would be necessary."[55]

Furthermore, courts increasingly look to other Federal Rules of Civil Procedure for guidance. One court, for example, recognized that there is no principled reason for distinguishing between "good service" pursuant to Rule 4 and "good service" pursuant to Rule 45.[56] Courts have also pointed to the provision in Rule 4 that permits a summons and complaint be delivered "to the individual personally."[57] That provision would be "surplusage" if Rule 45 were read to require personal service:

> If "delivering . . . to such person," as stated in Rule 45(b)(1), required personal, in-hand service, then "personally" in Rule 4(e)[(2)(A)] would be pure surplusage.

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54. FED. R. CIV. P. 45(b)(4) (emphasis added). The reference to "the names of the persons served," *id.*, may also lend support to the notion that a subpoena need not be delivered *directly* "to the named person," FED R. CIV. P. 45(b)(1), and might instead be delivered "to the named person" through that person's agent, such as her attorney.

55. *King*, 170 F.R.D. at 356; *see also, e.g.*, *In re* Falcon Air Express, Inc., No. 06-11877-BKC-AJC, 2008 WL 2038799, at *3 (Bankr. S.D. Fla. May 8, 2008).

56. *See, e.g.*, *In re Three Arrows Capital, Ltd.*, 647 B.R. at 456 ("[T]he Court finds no principled reason for denying the applicability of the Rule 4 alternative service cases to the Rule 45 context."). In addition, even courts adhering to the majority approach look to Rule 4 "for guidance" "[b]ecause Rule 45 does not specify what constitutes personal service upon a corporation." O'Neil v. Robinson (*In re* Pappas), 214 B.R. 84, 85 (Bankr. D. Conn. 1997).

57. FED. R. CIV. P. 4(e)(2)(A); *see, e.g.*, Hall v. Sullivan, 229 F.R.D. 501, 504–05 (D. Md. 2005); Doe v. Hersemann, 155 F.R.D. 630, 630–31 (N.D. Ind. 1994).

> The better conclusion is that the drafters knew how to indicate a personal service requirement and that they chose not to do so when they created Rule 45.[58]

Additionally, Federal Rule of Civil Procedure 1 provides that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[59] Courts have cited to this provision as support for the conclusion that personal service of a subpoena is not required where an alternative mode of service is reasonably calculated to accomplish "delivery" of the subpoena to the named person in it.[60] As one court put it, "categorically barring sending . . . subpoenas via FedEx and certified mail would not secure the just, speedy, and inexpensive determination of the action."[61]

Aside from relying on the plain text of Rule 45 and other provisions of the Federal Rules of Civil Procedure, courts sometimes also cite to other modern practices regarding service to conclude that Rule 45 does not require in-hand personal service. For instance, "under modern New York procedural law even so-called 'personal service' can be made other than by delivery in hand simply by delivery to a person of suitable age and discretion at the residential address coupled with mailing to the residential address."[62]

The growing minority view is no doubt the more sound view for the reasons courts that adhere to it provide (as opposed

58. *Doe*, 155 F.R.D. at 631 (quoting FED. R. CIV. P. 45(b)(1) (1993)).

59. FED. R. CIV. P. 1.

60. *E.g.*, *Hall*, 229 F.R.D. at 504–05; *Doe*, 155 F.R.D. at 630.

61. Bland v. Fairfax Cnty., 275 F.R.D. 466, 471–72 (E.D. Va. 2011).

62. King v. Crown Plastering Corp., 170 F.R.D. 355, 356 (E.D.N.Y. 1997) (citing N.Y. C.P.L.R. § 308(2)); *see also* Performance Credit Corp. v. EMC Mortg. Corp., No. SACV07-383 DOC (RNBx), 2009 WL 10675694, at *2–3 (C.D. Cal. Apr. 16, 2009) (citing and quoting *King*, 170 F.R.D. at 356).

to the lack of analysis by the courts adhering to the majority view). Nevertheless, this approach leaves too many questions unanswered: Must a party first attempt personal service before resorting to alternative methods of "delivery"?[63] Similarly, must a party first apply to a court before employing so-called alternative service (i.e., service that is not personal service)?[64] And whether or not prior attempts at personal service or an application to the court are required before resorting to other modes of "delivery," what types of service are adequate to reasonably ensure "delivery" of the subpoena—e.g., Federal Express, certified mail, delivery to someone at the subpoenaed person's

63. *See, e.g.*, *In re* Delta Air Lines, Inc., No. LA CV20-00786-JAK (SKx), 2023 WL 9018986, at *4 (C.D. Cal. Dec. 4, 2023) (permitting alternative—i.e., not personal—service where the defendant "provided evidence that it twice attempted personal service of the first subpoena and attempted personal service at least three time[s] of the second one"); Abraham, Inc. v. United States, No. 2:18-cv-1306, 2020 U.S. Dist. LEXIS 104358, at *7 (S.D. Ohio June 15, 2020) ("When approving service by alternate means, however, courts routinely require that the serving party first demonstrate diligence in having attempted personal service."); Tindal v. Def. Tax Grp. Inc., No. 8:19-cv-2907-T-60JSS, 2020 WL 6491821, at *3 (M.D. Fla. Sep. 11, 2020) ("Personal service must be diligently attempted in the first instance. After two or three unsuccessful attempts at personal service at a proper place, substitute service may be used." (citations omitted)).

64. *See, e.g.*, *In re Delta Air Lines, Inc.*, 2023 WL 9018986, at *4; State Farm Mut. Auto. Ins. Co. v. Precious Physical Therapy, No. 19-10835, 2021 WL 210842, at *1 (E.D. Mich. Jan. 20, 2021) (observing that the court had previously granted an application for "alternate means of service" after attempts at personal service were unsuccessful); TracFone Wireless, Inc. v. SCS Supply Chain LLC, 330 F.R.D. 613, 616 (S.D. Fla. 2019) (the plaintiff sought "permission to serve its third-party subpoenas via FedEx or UPS, as opposed to by personal delivery"); Accurso v. Cooper Power Sys., Inc., No. 06CV848S, 2008 WL 2510140, at *4 (W.D.N.Y. June 19, 2008) ("This Court, however, agrees with the majority of jurisdictions (and commentators) and holds that Rule 45(b)(1) requires personal delivery of a subpoena upon the party being served, *absent an Order to the contrary authorizing alternative service*." (emphasis added)).

residence, or email (or perhaps some combination of the foregoing methods of "delivery")?[65]

Thus, while the minority view rests on a more solid analytical footing, it offers less certainty than the majority view.[66] It will not always be clear a priori whether a particular method of service will be acceptable to a court.[67] And, as noted above in subpart II(A), there is real value in knowing whether a particular method of delivery is acceptable before one attempts to use that method to "deliver" a subpoena. So, while the minority view is almost certainly the more analytically sound position, it might not be the most pragmatic approach. It is certainly the approach that engenders the most uncertainty.

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65. *See In re* Procom Am., LLC, 638 B.R. 634, 641–42 (Bankr. M.D. Fla. 2022) ("For instance, courts have upheld service of a subpoena by first class U.S. mail; service by certified mail; service by certified mail and Federal Express; and service by e-mail and U.S. mail. Other courts have upheld service of subpoenas that were served on a deponent's spouse. Still others have upheld service of process on a witness' housekeeper." (footnotes omitted)); *see also, e.g.*, Castleberry v. Camden Cnty., 331 F.R.D. 559, 562 (S.D. Ga. 2019).

66. SiteLock, LLC v. GoDaddy.com, LLC, 338 F.R.D. 146, 153–54 (D. Or. 2021) ("This emerging minority position could cause confusion and may prompt clarification of the rule. Until that happens, however, personal delivery of the subpoena is the safest course for counsel to follow." (quoting 9A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2454 (3d ed. Supp. Oct. 2020)).

67. *See, e.g.*, Fujikura Ltd. v. Finisar Corp., No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *5 (N.D. Cal. May 14, 2015) ("There appears to be a growing—although still minority—trend among courts to allow substitute service of a Rule 45 subpoena, such as mail delivery, *so long as the method of service is reasonably calculated to provide timely, fair notice and an opportunity to object or file a motion to quash*." (emphasis added)). As noted above, an attorney serving a subpoena has no way to know a priori whether a court will agree that her method of service was "reasonably calculated to provide timely, fair notice and an opportunity to object or file a motion to quash." *See id.*

C. *Parties versus Non-Parties*

The vast majority of cases addressing service pursuant to Rule 45 arise in the context of subpoenas issued to non-parties. That makes sense, because typically there is no need to issue a subpoena to a party; the opposing side will simply serve notice of a deposition pursuant to Federal Rule of Civil Procedure 30 or a request for the production of documents, electronically stored information, or tangible things pursuant to Federal Rule of Civil Procedure 34, all served in accordance with Rule 5.[68]

However, the Federal Rules of Civil Procedure do specifically contemplate that a subpoena may be served on a party.[69] Rule 45 imposes a 100-mile radius limitation, requiring that the place of compliance be "within 100 miles of where the person resides, is employed, or regularly transacts business in person."[70] That limitation does *not* apply if the person subpoenaed

68. *See, e.g.*, Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146, 1158 (9th Cir. 2010) ("If a person is a party, a simple notice of deposition is sufficient to compel attendance, while a non-party's attendance can be compelled only by subpoena."); *see also* FED. R. CIV. P. 5(a)(1)(C) (requiring that "discovery paper[s]" be served in accordance with Rule 5).

69. Prior to the 2013 amendments to Rule 45, courts were split on this issue. *See, e.g.*, Mortg. Info. Servs. v. Kitchens, 210 F.R.D. 562, 564 (W.D.N.C. 2002) (noting the split among courts and commentators about whether one party may serve a Rule 45 subpoena upon another party). To the extent that courts still debate this issue, the 2013 amendments should have put the debate to rest for reasons stated above. *Compare* FED. R. CIV. P. 45(b)(2) (2012), *with* FED. R. CIV. P. 45(c) (2013). *But see, e.g.*, Tara Prods., Inc. v. Hollywood Gadgets, Inc., No. 09-61436-CIV, 2014 WL 1047411, at *3 (S.D. Fla. Mar. 18, 2014) ("The Eleventh Circuit has not expressly addressed whether a Rule 45 subpoena may be properly served on a party. Other courts, however, are divided on the issue. . . . But even if service of a subpoena on a party were permissible, a subpoena may not [be] used to circumvent or do an 'end-run' around the discovery rules that apply to a party.").

70. FED. R. CIV. P. 45(c)(1)(A).

"is a party or a party's officer";[71] in that case, the geographical limitation is "within the state where the person resides, is employed, or regularly transacts business in person."[72] That provision makes Rule 45 a potent tool, because a "deponent's attendance may be compelled by subpoena under Rule 45."[73] One can readily imagine a scenario where one party may want to subpoena a party to appear for a deposition at a location that is inconvenient for the party-deponent but convenient for the party taking the deposition—for example, if a plaintiff who resides in San Diego seeks to depose a defendant who resides in San Francisco, and the parties cannot agree on a mutually convenient location (or there is no such location).[74]

71. FED. R. CIV. P. 45(c)(1)(B)(i).

72. FED. R. CIV. P. 45(c)(1)(B).

73. FED. R. CIV. P. 30(a)(1).

74. It is worth observing that, in the above hypothetical, the party-deponent would have to move to quash the subpoena in the U.S. District Court for the Southern District of California—i.e., "the district where compliance is required," FED. R. CIV. P. 45(d)(3)(A)—although that court could then transfer the motion "to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances," FED. R. CIV. P. 45(f). So, in the hypothetical, if the action were pending in the U.S. District Court for the Northern District of California, the party-deponent would nevertheless be required to file a motion to quash the subpoena in the very district in which she would be attempting to avoid having to appear for the deposition. While that motion could be transferred to the district in which the action was pending, an attorney or party-deponent might determine that it is more efficient and less costly to simply comply with the subpoena, rather than file a new case in the district where compliance is required (along with attendant motion practice, including at least the motion to quash, but also possibly including a transfer motion). On that score, it is worth further observing that (1) it costs money to open a new case, *see, e.g.*, *Fees of the U.S. District Court*, U.S. DIST. CT. S.D. CAL. (Dec. 1, 2023), https://www.casd.uscourts.gov/_assets/pdf/courtinfo/Fees%20of%20the%20U.S.%20District%20Court%20(CASD).pdf [https://perma.cc/ZB9Z-6N57], and (2) a compliant party-deponent would be entitled to "the fees for 1 day's attendance and the mileage allowed by law," FED. R. CIV. P.

One might intuit that, since a simple notice of deposition served pursuant to Rule 5 would suffice to require a party to appear for a deposition,[75] a subpoena requiring that party's attendance at a deposition might also be served pursuant to Rule 5. However, courts generally do not distinguish between subpoenas served on parties and subpoenas served on non-parties. For example, one court concluded that, even though defendants had already been personally served with a complaint, Rule 45 nevertheless governed discovery sought from defendants who had defaulted and that those defaulting defendants should be treated as non-parties.[76] And courts that have considered the issue have generally found that service of a subpoena on a party's attorney does not satisfy Rule 45; service must be made on the party itself,[77] even though service of discovery papers generally *must* be

45(b)(1), a requirement in Rule 45 that applies irrespective of whether the person subpoenaed is a party or a non-party, *see id.* (excusing the requirement that a subpoena be delivered with witness and mileage fees only "when the subpoena issues on behalf of the United States or any of its officers or agencies").

75. *See, e.g.*, Jules Jordan Video, Inc. v. 144941 Canada, Inc., 617 F.3d 1146, 1158 (9th Cir. 2010) ("If a person is a party, a simple notice of deposition is sufficient to compel attendance . . . .").

76. Cartier v. Geneve Collections, Inc., No. CV 2007-0201 (DLI) (MDG), 2008 WL 552855, at *1 (E.D.N.Y. Feb. 27, 2008) ("[N]otwithstanding the fact both defendants had previously been personally served with the complaint, they should now be treated as non-parties with respect to any discovery sought from them. Plaintiff thus must comply with Rule 45 of the Federal Rules of Civil Procedure in conducting discovery against the defaulting defendants." (citation omitted)).

77. *E.g.*, Harrison v. Prather, 404 F.2d 267, 273 (5th Cir. 1968) (agreeing that "service of [a] subpoena on plaintiff's counsel, as opposed to the plaintiff himself, renders such service a nullity"); Wayside Church v. Van Burden Cnty., No. 1:14-cv-1274, 2023 WL 9064869, at *1 (W.D. Mich. Nov. 13, 2023); United States v. Brennerman, No. 17-cr-0155 (LAK), 2017 WL 4513563, at *1 (S.D.N.Y. Sept. 1, 2017) (collecting cases) ("Even a party to a civil case who is represented by counsel must be served personally with a subpoena. Service on a party's lawyer is not sufficient."); Aristocrat Leisure Ltd. v. Deutsche Bank Tr.

served on a party's attorney pursuant to Rule 5.[78] The reason for that seems obvious enough, at least for the courts that adhere to the majority approach. As mentioned above, the Rules Advisory Committee's notes to the 2001 amendments to Rule 5 provide that "[s]ervice under Rules 4, 4.1, 45(b), and 71A(d)(3)—as well as rules that invoke those rules—must be made as provided in those rules."[79] The clear implication is that Rule 5 does *not* apply to subpoenas an attorney might issue pursuant to Rule 45, and Rule 45 makes plain that "[s]erving a subpoena requires delivering a copy *to the named person*."[80]

These observations perhaps add little to the understanding of the majority and minority views about what qualifies as "delivery" pursuant to Rule 45 discussed above in subparts II(A)

Co. Ams., 262 F.R.D. 293, 304 (S.D.N.Y. 2009) ("Unlike service of most litigation papers, service on an individual's lawyer will not suffice."); Khachikian v. BASF Corp., 91-CV-573, 1994 WL 86702, at *1 (N.D.N.Y. Mar. 4, 1994). *But see, e.g.*, Peyton v. Burdick, No. 07-cv-0453 LJO TAG, 2008 WL 880573, at *1 (E.D. Cal. Mar. 31, 2008) (finding that a subpoena issued to a party was required to be served on the party's attorney, reasoning that service of a subpoena on a party is essentially a form of discovery that must comply with other rules of discovery); First City, Tex.-Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250, 254–55 (S.D.N.Y. 2000) (finding service of a subpoena on a party's attorney sufficient, particularly because the party did "not deny that it received timely actual notice of the subpoena"), *aff'd*, 281 F.3d 48 (2d Cir. 2002).

78. FED. R. CIV. P. 5(a)(1)(C), (b)(1). As discussed above in note 54, *supra*, the provision in Rule 45 that requires a proof of service to include "the names of the persons served" lends support to the position that a subpoena may be delivered indirectly to the person named in the subpoena and need not be delivered directly to that person. *See* FED. R. CIV. P. 45(b)(4).

79. FED. R. CIV. P. 5 advisory committee's note to 2001 amendments.

80. FED. R. CIV. P. 45(b)(1) (emphasis added). *But see* note 78, *supra*. While these courts' reasoning may be obvious enough, it is not obvious why there should be a meaningful distinction between indirectly delivering a subpoena to a person by giving to that person's attorney to deliver versus indirectly delivering a subpoena to a person by, for example, giving it to UPS to deliver.

and II(B), *supra*, and thus may seem out of place in this article. Nevertheless, these observations are worth making, because, as discussed in subpart III(A), *infra*, the distinction between subpoenas issued to parties and subpoenas issued to non-parties is one that *should* matter.

III. Possible Solutions

There are several possible solutions to this problem—i.e., the lack of clarity about what "delivering a copy" of a subpoena means.[81] Two are relatively straightforward and involve amending Rule 45 to provide the clarity that Rule 45 currently lacks. A third is similarly straightforward in theory but may prove difficult in practice: a ruling by the Supreme Court.

A. Incorporating Rules 4 and 5

As discussed above, the Federal Rules of Civil Procedure already contain two separate rules that are explicit about what constitutes "good service." One solution would be to merely incorporate those rules—Rules 4 and 5—into Rule 45. In other words, the Rules Advisory Committee could recommend adding a sentence to Rule 45(b)(1) that clarifies that "delivering" a subpoena means service pursuant to Rule 4 in the case of non-parties or parties who have not yet appeared in an action or pursuant to Rule 5 in the case of parties who have appeared in an action.

That approach has logical allure and is the most sensible. As noted above, Rule 4 does not necessarily require personal service. Rule 4 is satisfied, for instance, if the "state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made" is followed.[82] Or, for example, a party may "leav[e] a copy of each [i.e., the summons and the complaint] at the

81. *See* FED. R. CIV. P. 45(b)(1).

82. FED. R. CIV. P. 4(e)(1).

individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there."[83]

It is important here to keep in mind that Rule 4 governs the service of a summons and complaint—the documents that initiate a lawsuit and "establish[] personal jurisdiction over a defendant."[84] There is no readily apparent reason why someone being subpoenaed to appear to testify or to produce documents should be afforded additional protection in the form of in-hand personal service than a person who is being sued. If Rule 4 is sufficient to provide adequate notice of a lawsuit, it should be sufficient to provide adequate notice of a subpoena.[85]

That is especially true once one considers the consequences. As mentioned above, if a person does not respond to a Rule 45 subpoena, they could be held in contempt.[86] Being held in contempt is a serious matter, to be sure. However, "[i]n civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena."[87] Furthermore, "[o]ften contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command."[88]

In comparison, if a person does not respond to a summons and complaint, a default judgment could be entered against

83. FED. R. CIV. P. 4(e)(2)(B).

84. FED. R. CIV. P. 4(k)(1).

85. *See In re* Falcon Air Express, Inc., No. 06-11877-BKC-AJC, 2008 WL 2038799, at *3 (Bankr. S.D. Fla. May 8, 2008) (observing that requiring personal service for Rule 45 "would result in the standard for service of a nonparty witness subpoena being more rigorous than the service required for a summons and complaint").

86. FED. R. CIV. P. 45(g).

87. FED. R. CIV. P. 45 advisory committee's note to 2013 amendment.

88. *Id.* The Committee's note continues to explain that "[d]isobedience of such an order may be treated as contempt." *Id.*

them.[89] In other words, failing to respond to a summons and complaint could result in the *in-absentia* determination of a party's legal rights and obligations. A clerk of the court "must" enter a default if a party's failure to defend an action "is shown by affidavit or otherwise."[90] Once a default is entered, a clerk "must" enter a default judgment if a "claim is for a sum certain or a sum that can be made certain by computation";[91] otherwise, a party must apply to the court for the entry of a default judgment.[92] A default judgment then can be set aside only pursuant to Federal Rule of Civil Procedure 60(b),[93] a rule that has "demanding standards."[94]

In the case of parties who have already been served with a summons and complaint—and, as noted, are already subject to a court's personal jurisdiction[95]—there is again no readily apparent reason to provide additional protection in the form of in-hand personal service, rather than merely follow the procedures Rule 5 provides. Rule 5 governs service of, among other things, "a discovery paper required to be served on a party,"[96] a category of documents that on its face would appear to include a subpoena.[97] The consequences of failing to comply with a discovery

89. FED. R. CIV. P. 55.

90. FED. R. CIV. P. 55(a).

91. FED. R. CIV. P. 55(b)(1).

92. FED. R. CIV. P. 55(b)(2).

93. FED. R. CIV. P. 55(c).

94. *Id.* advisory committee's note to 2015 amendment.

95. *See, e.g.*, FED. R. CIV. P. 4(k)(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").

96. FED. R. CIV. P. 5(a)(1)(C).

97. *See* Integra Lifesciences I, Ltd. v. Merck KgaA, 190 F.R.D. 556, 561 (S.D. Cal. 1999) ("Case law establishes that *subpoenas under Rule 45 are discovery*, and must be utilized within the time period permitted for discovery in a case." (emphasis added)); *cf.* Jordan v. Comm'r, Miss. Dep't of Corr., 947 F.3d 1322, 1329 (11th Cir. 2020) ("While Rule 45

demand—whether it is a notice to appear for a deposition or a request for the production of documents—are at least as severe as failing to comply with a subpoena, if not more so. A party who fails to comply with discovery demands is subject to sanctions.[98] Those sanctions could be quite draconian, including "striking pleadings in whole or in part,"[99] "dismissing the action or proceeding in whole or in part,"[100] or "rendering a default judgment against the disobedient party."[101] With such severe potential consequences for failing to comply with a discovery paper served pursuant to Rule 5—consequences that are arguably *more* severe than failing to comply with a Rule 45 subpoena—it is entirely unclear why Rule 5's service provisions are insufficient to

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does not specifically identify irrelevance as a reason to quash a subpoena, it is generally accepted that *the scope of discovery allowed under Rule 45* is limited by the relevancy requirement of the federal discovery rules." (emphasis added)); BNSF Ry. Co. v. Ctr. for Asbestos Related Disease, Inc., No. CV 19-40-M-DLC, 2022 WL 1442854, at *4 (D. Mont. May 6, 2022) ("Rule 45 is not designed 'to provide an end-run around *the regular discovery* process under Rules 26 and 34' . . . ." (emphasis added) (quoting Burns v. Bank of Am., No. 03 Civ. 1685(RMB)(JCF), 2007 WL 1589437, at *14 (S.D.N.Y. June 4, 2007))); Richardson v. Sexual Assault/Spouse Abuse Rsch. Ctr., Inc., 270 F.R.D. 223, 225–26 (D. Md. 2010) ("[R]egardless whether a subpoena may be served on a party, a subpoena is not a proper means for obtaining documents previously sought through a Rule 34 production request, after the adverse party objected to the request.").

98. FED. R. CIV. P. 37(d).

99. FED. R. CIV. P. 37(b)(2)(A)(iii).

100. FED. R. CIV. P. 37(b)(2)(A)(v).

101. FED. R. CIV. P. 37(b)(2)(A)(vi). The type of sanctions available may include those listed in Federal Rule of Civil Procedure 37(b)(2)(A)(i)–(vi). FED. R. CIV. P. 37(d)(3). However, "[i]nstead of or in addition to these sanctions, the court *must* require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.* (emphasis added).

provide reasonable assurance that a party to a lawsuit will actually receive a subpoena.[102]

In short, the Federal Rules of Civil Procedure already include two provisions that are explicit about what amounts to "good service": Rules 4 and 5. In the absence of any compelling reason to provide additional protection in the form of in-hand personal service to the exclusion of any other method of "delivery," the Rules Advisory Committee could leverage these existing rules to alleviate the lack of clarity from which Rule 45(b)(1) suffers about what satisfies its "delivery" requirement.

B. Adding More Detail to Rule 45

Another, but perhaps more complicated, solution would be to add more detail to Rule 45(b)(1)—or even add an entirely new subsection to Rule 45(b)—that explains what "delivering a copy" means.[103] That detail could be explicit that "delivery" means in-hand personal service if that is what Rule 45(b)(1), in fact, means. Indeed, "[p]ersonal service guarantees actual notice of the pendency of a legal action."[104] But it could also explicitly permit other methods of "delivery," such as "leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there," just like Rule 4 does.[105]

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102. Of course, Rule 45 as currently drafted explicitly requires that a subpoena be delivered "to the named person." FED. R. CIV. P. 45(b)(1). The above proposal would require either amending that language or including new verbiage that makes clear that a party can achieve such "delivery" by serving a party's attorney "[i]f a party is represented by an attorney," *see* FED. R. CIV. P. 5(b)(1), even though a party's attorney is not "the named person," *see* FED. R. CIV. P. 45(b)(1); *see also* notes 54 and 78, *supra* (discussing how Rule 45 as currently drafted could be read to permit indirect delivery to the person named in the subpoena).

103. *See* FED. R. CIV. P. 45(b)(1).

104. Greene v. Lindsey, 456 U.S. 444, 449 (1982).

105. FED. R. CIV. P. 4(e)(2)(B).

This approach is more or less a variation of the first possible solution discussed in subpart III(A), *supra*, because it would also require amending Rule 45 to fill in the detail about what "delivery" means that the rule currently lacks. But rather than simply incorporate Rules 4 and 5 into Rule 45, it would make Rule 45's service provision a standalone requirement, without the need to cross-reference another rule to determine whether a particular method of "delivery" will constitute "good service."[106] However, it is also likely less efficient, because, as discussed above, the Federal Rules of Civil Procedure already contain two rules—Rules 4 and 5—that are clear about what amounts to "good service."[107] And it would be more complicated, because it would require drafting an entirely new definition of "delivery," rather than employing the already-well-established methods of service that Rules 4 and 5 provide.

Of course, this route *would* be the most efficient if the Rules Advisory Committee has intended all along that "delivering a copy"[108] means "personal service," a possibility suggested above. If that was the Rules Advisory Committee's intended meaning, then simply tweaking the phrase "delivering a copy to the named person"[109] to something more along the lines of "handing it to the person"[110] would be more practicable than the more wide-ranging proposal discussed above in subpart III(A), *supra*. In other words, this solution is the best one if Rule 45(b)(1)'s "delivery" requirement means, and has all along

106. That said, it would not be an aberration for one provision of the Federal Rules of Civil Procedure to cross-reference another provision. *See, e.g.*, FED. R. CIV. P. 11(c)(2) (cross-referencing Federal Rule of Civil Procedure 5); FED. R. CIV. P. 22(b) (cross-referencing Federal Rule of Civil Procedure 20); FED. R. CIV. P. 37(a)(3) (cross-referencing Federal Rules of Civil Procedure 26(a), 30, 31, 33, and 34).

107. *See* Part I, *supra*.

108. FED. R. CIV. P. 45(b)(1).

109. *Id.*

110. *See* FED. R. CIV. P. 5(b)(2)(A).

meant, that a party must ensure in-hand personal service of a subpoena.

C. *A Ruling by the Supreme Court*

As this article has hopefully made clear, Rule 45 does not exist in a vacuum. Courts have provided a veneer of interpretation, construing its "delivery" requirement as requiring either personal service or permitting something else. The split among courts could be resolved by a ruling by the Supreme Court; indeed, that is how circuit splits are resolved.[111]

Of the three proposed solutions, this is the least ideal for two reasons. First, it would require a party to be willing to litigate the issue all the way to the Supreme Court. That seems unlikely, because parties whose subpoenas have been quashed could simply re-serve the subpoenas to comply with the method of service a particular court requires. For parties or non-parties who have had a motion to quash denied, the costs associated with litigating two rounds of appeals may well be more than the costs associated with complying with the subpoena they sought to quash. All of this is to say that it may be unlikely that there is a litigant who is actually willing to present this issue to the Supreme Court. That is all the more true when one considers that there have been few Courts of Appeals to consider the issue,

111. *See, e.g.*, Smith v. Spizzirri, 114 S. Ct. 1173, 1176 (2024) (noting that the court granted certiorari to resolve a circuit split); Yegiazaryan v. Smagin, 143 S. Ct. 1900, 1907 (2023) (same); Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712 (2022) (same). However, as discussed below, *see* note 112, *infra*, one could debate whether there is even a sufficient "circuit" split, because the majority of Circuit Courts of Appeals have not addressed the issue; instead, the split is primarily among district courts, irrespective of the circuit in which the courts sit.

suggesting litigants' unwillingness to litigate even one round of appeals.[112]

Second, the Supreme Court typically decides only discrete and narrow issues.[113] To take just one example, in *Riley v. California*,[114] the Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not apply to cellphones.[115] It did not answer any broader

112. *See, e.g.*, Souza v. Thurston, 819 F. App'x 636, 639 (10th Cir. 2020) (noting the magistrate judge's observation that "there is no binding precedent in the Tenth Circuit addressing whether Rule 45 requires hand-to-hand service," but declining to address that issue); Robertson v. Dennis (*In re* Dennis), 330 F.3d 696, 704 (5th Cir. 2003) (observing in dicta that "proper service requires . . . personal delivery of the subpoena"); BG Strategic Advisors, LLC v. Freighthub, Inc., No. 21-80299-Civ-Matthewman, 2023 WL 114864, at *4 (S.D. Fla. Jan. 6, 2023) (observing that district courts in the Eleventh Circuit are split on the issue and the absence of "binding precedent" (quoting Lucas v. Desilva Auto. Servs., No. 17-CV-61808-VALLE, 2018 WL 11432022, at *2 n.2 (S.D. Fla. June 11, 2018))); SiteLock, LLC v. GoDaddy.com, LLC, 338 F.R.D. 146, 154 (D. Or. 2021) (observing "the absence of direction from the Ninth Circuit" and adopting the majority position); Smith v. Club Exploria LLC, No. 3:20-CV-00580, 2021 WL 4375907, at *2 (M.D. Pa. Sept. 24, 2021) ("The Third Circuit has not interpreted the meaning of 'delivering' in the context of Rule 45(b)(1) . . . ."); Hale v. Bunce, No. 1:16-cv-02967, 2017 WL 10978845, at *1 (N.D. Ohio Oct. 3, 2017) ("It does not appear that the Sixth Circuit Court of Appeals has addressed the issue of whether the language of Rule 45(b)(1) requires personal service."); Hall v. Sullivan, 229 F.R.D. 501, 502 (D. Md. 2005) (noting "the lack of guidance in this area").

113. *E.g.*, United States v. Sineneng-Smith, 140 S. Ct. 1575, 1582 (2020) (observing that the Court ordered supplemental briefing "to determine whether the case could be resolved on a basis narrower than the question presented"); Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 147 (1974) (declining to address a "broader issue" and instead deciding only "the narrow issue" presented).

114. 573 U.S. 373 (2014).

115. *Id.* at 403. The search-incident-to-arrest exception permits police officers to search an arrestee's person and immediate personal belongings without first obtaining a search warrant. *See id.* at 382–85 (describing the exception and its development).

question about whether other digital devices—tablets, laptops, smart watches, virtual reality headsets, etc.—are also excluded from the search-incident-to-arrest exception.[116] The reason for that is simple: Whether those devices should also be excluded from the search-incident-to-arrest exception was not a question that was before the Court. Or to take a more recent example, in *New York State Rifle & Pistol Association v. Bruen*,[117] the Supreme Court held that New York's law requiring a license to carry a handgun was unconstitutional,[118] but it did not specify what sorts of regulations or licensing regimes might pass constitutional muster.[119]

Other examples abound, because the Supreme Court tends to leave related questions such as those open for lower courts to resolve in the first instance, stepping in only if and when enough justices see a need to impose uniformity.[120] As the Supreme

116. *See, e.g.*, Tristan M. Ellis, Note, *Reading* Riley *Broadly: A Call for a Clear Rule Excluding All Warrantless Searches for Mobile Digital Devices Incident to Arrest*, 80 BROOK. L. REV. 463, 468 (2015). The Court also did not answer other ancillary questions, such as whether cellphones are also carved out of the border exception to the Fourth Amendment's warrant requirement. *Cf.* Abidor v. Napolitano, 990 F. Supp. 2d 260, 281 (E.D.N.Y. 2013) (observing that the Court of Appeals for the Second Circuit "has not addressed the issue of border searches of electronic devices," but that a district judge in the circuit had "held that laptop computers are analogous to other closed containers, which may be inspected without reasonable suspicion or probable cause in a routine border search").

117. 142 S. Ct. 2111 (2022).

118. *Id.* at 2122 ("Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.").

119. *See id.* at 2132–33 (prefacing the Court's holding by acknowledging that its decision does not provide "an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment").

120. *E.g.*, Montgomery v. Louisiana, 577 U.S. 190, 199–200 (2016) (observing that the Court previously left as an open question whether the

Court recently explained, it "does not opine on issues that are either tangential to the question presented or were not passed upon below."[121]

So, even if a litigant were willing to take the issue all the way to the Supreme Court, the question presented would almost certainly be framed narrowly. If a party attempted to serve a subpoena by certified mail, and the lower courts opined about whether that qualified as "delivery" pursuant to Rule 45, the question before the Court would be whether "delivery" by certified mail satisfies Rule 45; the question would not be whether other methods of service could *also* satisfy Rule 45 (and if so, which methods). That path, nevertheless, is not entirely certain, because the question presented might be framed more broadly as whether Rule 45 requires personal service. But even that broader question would leave open other questions, such as whether service by certified mail suffices, whether service of a subpoena on a party's attorney suffices, or whether any other host of potential alternative methods of service suffice.[122] In

exceptions to the retroactivity bar announced in *Teague v. Lane*, 489 U.S. 288 (1989), "are binding on the States as a matter of constitutional law"); United States v. Flores-Montano, 541 U.S. 149, 154 n.2 (2004) (answering the question presented but "again leav[ing] open the question 'whether, and under what circumstances, a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out'" (quoting United States v. Ramsey, 431 U.S. 606, 618 n. 13, (1977))); Sumner v. Shuman, 483 U.S. 66, 77 & n.6 (1987) (observing that the Court had "reserved judgment on the constitutionality of" a particular type of statute applicable to "a life-term inmate who has been convicted of murder" and chastising the petitioners for advancing an argument that "would defeat the entire purpose of deferring resolution of [an] issue"); Kleppe v. New Mexico, 426 U.S. 529, 546 (1976) (declining "to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands").

121. Macquarie Infrastructure Corp. v. Moab Partners, L.P., 144 S. Ct. 885, 892 n.2 (2024).

122. Indeed, as discussed above in subpart II(B), *supra*, courts that have found that a particular mode of service satisfies Rule 45's delivery

sum, even if a party were willing to litigate the issue all the way to the Supreme Court (a dubious proposition), and even if the Supreme Court were to address what qualifies as "delivery" pursuant to Rule 45(b)(1), the answer it would provide would most likely not offer the same level of clarity that an amendment to Rule 45 would supply.

Conclusion

As noted at the outset, what constitutes "delivery" pursuant to Rule 45(b)(1) is by no means a novel question.[123] Yet, it is a persistent one. The cases cited herein are merely a sampling and far from a full catalogue of courts' decisions on the issue, and the issue is one that parties continue to litigate.[124] Moreover, the ad hoc decisions of lower courts that adhere to the minority view do not answer broader questions about what may or may not qualify as "good service" under Rule 45's "delivery" requirement—or a litany of other ancillary issues, such as whether a party must first make efforts to effect in-hand personal service or whether a party must first make an application to a court before relying on a method of "delivery" that is not in-hand personal service.[125] The most sensible solution to this problem would be to amend Rule 45 to clarify what "delivery" means in the context of that

requirement have answered only the question of whether the particular mode of service a party employed satisfied Rule 45, without opining more broadly about whether another method of delivery would also satisfy Rule 45—so there is little reason to think that the Supreme Court would provide a sweeping holding that definitively resolves the issue. That is because "[a] court can only decide issues which are before it." United States v. M/V Santa Clara I, 859 F. Supp. 980, 986 (D.S.C. 1994).

123. *See supra* note 19.

124. *E.g.*, Mizrahi v. Equifax Info. Servs., LLC, 345 F.R.D. 392, 396 (E.D.N.Y. 2024) (adopting the minority view and finding that handing a copy of a subpoena to a party's receptionist satisfied Rule 45).

125. *See* subpart II(B), *supra*.

rule, ideally by incorporating the extant service provisions of Rule 4 and 5, as discussed in subpart III(A), *supra*.

Nevertheless, the Rules Advisory Committee does not seem poised to address this problem anytime soon.[126] Nor is it likely that the Supreme Court will take up the issue—and even if it were, the guidance it might provide would almost certainly fall short of offering the sort of definitive guidance the bar and bench both need.[127] In the meantime, attorneys would be well advised to either ensure in-hand personal service of a subpoena—a method of "delivery" all courts agree constitutes "good service" under Rule 45—or first seek the court's permission before relying on any other method of "delivery."[128]

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126. *Pending Rules and Forms Amendments*, U.S. CTS., https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments [https://perma.cc/E5Q9-L69W].

127. *See* subpart III(C), *supra*.

128. *See, e.g.*, SiteLock, LLC v. GoDaddy.com, LLC, 338 F.R.D. 146, 153–54 (D. Or. 2021) ("This emerging minority position could cause confusion and may prompt clarification of the rule. Until that happens, however, personal delivery of the subpoena is the safest course for counsel to follow." (quoting 9A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2454 (3d ed. Supp. Oct. 2020)).