Service of Process:
Amended Rule 4 and the
Presumption of Jurisdiction

Kent Sinclair*

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* Professor of Law, Director of Advocacy and Lawyer Training, University of Virginia School of Law. A.B. 1968, J.D. 1971, University of California. I wish to thank Daniel Poynor for his valuable research assistance in connection with this project.
I. Introduction

Service of process, it seems, has been in decline for decades. Modern procedural systems treat difficulties with service as paradigmatically waivable defects.\(^1\) Academic commentary has been ambivalent from the beginning of this century\(^2\) and the general attitude of those not in practice is captured by a student note from the 1960s on the theme, "Service of process: Who needs it?"\(^3\)

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1. Insufficiency of service of process is one of the waivable defenses of Rule 12 of the Federal Rules of Civil Procedure and generally must be raised in the earliest responsive pleading under Rule 12. When a Rule 12 motion is interposed prior to answer, the service defect (and any deficiencies in the form of the process papers themselves) must be raised in that motion. \textit{Fed. R. Civ. P. 12(h)(1)}; United States v. Tomasello, 569 F. Supp. 1, 2 (W.D.N.Y. 1983) (assertion of service defects in second motion to dismiss was untimely and was deemed waived by prior filing of motion omitting such an assertion); Charles W. Joiner, \textit{The New Civil Rules: A Substantial Improvement}, 40 F.R.D. 359, 360 (1966) (noting that amended Rule 12(h) requires that the defense of defective service of process must be asserted in the first motion made or in the answer). Under the provisions of Rule 12(h), the defendant may not amend the answer to assert the defense, unless amendment is permitted as a matter of right under Rule 15(a). Konigsburg v. Shute, 435 F.2d 551, 552 (3d Cir. 1970).

Other litigation steps or developments deemed to waive the right to assert service defects include the interposition of a cross-claim, Merz v. Hemmerle, 90 F.R.D. 566, 568 (E.D.N.Y. 1981), the failure to raise a defense in answer to a third-party claim, R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 848 (N.D. Miss. 1977), and the entry of a general appearance, Hays v. United Fireworks Mfg. Co., 420 F.2d 836, 844 (9th Cir. 1969).

A few courts have even extended the waiver provisions to the point of deeming silence for 20 days after service as waiver. \textit{See} Granger v. Kemm, Inc., 250 F. Supp. 644, 645-46 (E.D. Pa. 1966) (holding that failure to contest proper venue within 20 days of service of the complaint constitutes waiver); \textit{cf.} Tuckman v. Aerosonic Corp., 394 A.2d 226, 233 (Del. Ch. 1978) (holding failure to assert defenses in a timely manner results in waiver). Recent decisions continue to emphasize the waivability of service defects. \textit{See}, e.g., United States v. Gluklick, 801 F.2d 834, 836 (6th Cir. 1986) (party agreeing to accept service has waived the defense of improper service), \textit{cert. denied}, 480 U.S. 919 (1987). On the whole, therefore, opportunities for waiver abound under caselaw and Rule 12 itself, making the number of preserved claims of defect concerning Rule 4 all the more remarkable.


After leaving the service of process provisions in the original Federal Rules of Civil Procedure essentially unchanged for forty years, the Rule drafters proposed in 1981 to eliminate the complexities of service of process in federal practice by adopting a simplified system in which pleadings could be mailed to the defendant. But Congress balked and replaced the Advisory Committee’s proposal with its own system of mail service that has been embodied in Federal Rule 4(c)(2)(C)(ii) for the past decade. That Rule, dashed off with scant attention by Congress and calculated mainly to address financial concerns by removing the U.S. marshal from most service of process responsibilities, was plagued by drafting gaps and omissions of considerable practical importance. As long ago as 1989, the Rules drafters proposed to revamp the mail service procedure by replacing the entire construct of “service by mail” with a concept of a “waiver of service” that, naturally,


9. See Sinclair, supra note 5, at 1212 (arguing that the rule was “quite sloppy”).
would also be solicited by mail. The Advisory Committee circulated a preliminary draft of proposed amendments, but the changes were never promulgated by the Supreme Court. In 1993 the Rules drafters resurrected the waiver of service proposal by adopting concepts essentially identical to the 1989 proposed revisions. Sheltered by the existence of massive controversy over dramatic changes in other proposed Rules promulgated in the same instrument, the waiver of service provisions embodied in the 1993 proposed Rule revisions attracted almost no public attention. The Rule 4 changes went into effect on December 1, 1993.

Apart from a breezy overview of the operation of amended Rule 4 published in the Federal Rules Decisions, no direct treatment of the basic service mechanisms in the Rule has been published since the amendments became effective. However, some of the most far-reaching changes in the 1993 amendments relate to international litigation and have received some attention from practitioners in that


12. Id. at 258.

13. Minor differences are mainly stylistic, especially in what now appears in Rule 4 as subdivision (d)(2); other alterations changed the minimum number of days in which domestic defendants may return the waiver and the time within which domestic defendants must answer the complaint. Compare Amendments, supra note 11, at 270-73 with FED. R. CIV. P. 1-86.

14. Some of the controversy surrounded provisions featuring a revision of the sanction provisions of Federal Rule 11 and significant discovery procedure changes.


This Article will fill the gap by providing an overall evaluation of the new Rule 4.

The 1993 amendments have two overarching themes: One concerns domestic litigation and one concerns international lawsuits. For domestic litigation, Rule 4 emphasizes the polite invitation mechanism. Under that approach, plaintiffs send pleadings to defendants through the mails with a cover note of prescribed content that solicits a voluntary agreement to dispense with formal service of process. In the international sphere, the 1993 amendments take substantive steps to increase the likelihood of assertion of power over nonresidents. The amendments purport to change the focus of minimum contacts analysis and free courts and litigants to invent and experiment with new means of serving process.

Both of these developments clearly proceed from the premise that service of process is a pesky ministerial responsibility to be dispensed with as expeditiously as possible, and they reflect a deeper predisposition in favor of finding the existence of personal jurisdiction over the defendant.

II. What Service Might Attain

It is possible to distinguish two functions of the service event. For 4,000 years the commencement of litigation has been characterized in every legal system by some step that calls the defendant’s attention to the plaintiff’s desire to obtain adjudication. This first function was performed in ancient times by oral recitations and is reflected in the modern era by the due process, notice function of


19. Fed. R. Civ. P. 4(d); see generally infra notes 78-79 and accompanying text (comparing the new and old Rules).


21. See generally Sinclair, supra note 5, at 1187-91 (tracing the antecedents of service of process from the pre-Hammurabian Code of Eshnunna to the twentieth-century Zinacantan tribal practices in Mexico to the present day).
service in the sense referred to in *Mullane v. Central Hanover Bank & Trust Co.*\(^\text{22}\) and similar cases.

The second function of the service event is to mark the submission of the defendant to the personal jurisdiction of the court system.\(^\text{23}\) Medieval and early-modern-English procedure reflected this focus in a number of ways.\(^\text{24}\) First, the sheriff was the officer generally authorized to serve the writs that subjected a defendant to jurisdiction of the court system.\(^\text{25}\) This role of the sheriff on behalf of the sovereign emphasized the triangular relationship in which the litigants were at opposite poles on the base of private interest, but both were subject to the binding determination of the judicial structure.

For centuries, English commencement procedures relied on the mechanism of arrest as the most unambiguous means to exemplify the defendant’s submission to the power of the legal system.\(^\text{26}\) After arrest, release of the defendant pending entry and enforcement of judgment became a form of bail that continued the visible premise that the defendant at all times remained under the authority of the court.\(^\text{27}\)

Today, of course, it is recognized that parties may agree to be subject to the jurisdiction of particular courts through forum selection and similar provisions,\(^\text{28}\) and, as noted at the outset,

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\(^{23}\) *See* Oklahoma Radio Assocs. v. Federal Deposit Ins. Corp., 969 F.2d 940, 943 (10th Cir. 1992) (citing Hagmeyer v. United States Dept. of Treasury, 647 F. Supp. 1300, 1303 (D.D.C. 1986) (stating that one of the functions of service of process is to provide “a ritual that marks the court’s assertion of jurisdiction over the lawsuit”).

\(^{24}\) *See* Sinclair, *supra* note 5, at 1189-91.

\(^{25}\) *Id.*

\(^{26}\) ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 74-77 (1952); Sinclair, *supra* note 5, at 1189-90.

\(^{27}\) MILLAR, *supra* note 26, at 77.

\(^{28}\) *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595-96 (1991) (upholding the principle that parties may select a forum by contract); *see also* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) (holding that a foreign company implicitly submitted to jurisdiction in Pennsylvania by signing a Pennsylvania insurance contract); Equipment Rental, Ltd. v. Szukhtent, 375 U.S. 311, 315-16 (1964) (allowing parties to contract to be under the jurisdiction of a particular court); Bonny v. Society of Lloyd’s, 3 F.3d 156, 162-63 (7th Cir. 1993) (upholding a forum selection clause designating England as a proper forum); Cambridge Nutrition A.G. v. Potheringham, 840 F. Supp. 299, 301
objections to personal jurisdiction are eminently waivable.\textsuperscript{29} Nonetheless, the ultimate authority of the court system to make and enforce judgments ordering private rights and liabilities is a cardinal feature of court-based dispute resolution in the Western tradition.\textsuperscript{30} Hence there is a sense in which assertion of the system's authority should be signaled unambiguously to the defendant from the outset of the litigation.

Finally, the procedures for service of process should give assurance that the notice and jurisdiction-signaling functions have been appropriately completed. Thus, the third function is to ensure that the system has a reliable basis on which to proceed into default mechanisms in the event that the defendant does not appear before the court to defend.

This Article describes the features of the 1993 amendments and assesses their effect in light of these three functions.

III. Overview of the Amended Service Rules

The 1993 amendments to the Federal Rules seek to complete and make more effective the two fundamental thrusts of the Rule changes undertaken ten years ago: The elimination of any significant role in service of process for the United States Marshal's office and the softening of the impact of service by encouraging plaintiffs to mail an invitation asking the defendant to cooperate by agreeing to become subject to the court's jurisdiction without need of any of the traditional service of process mechanisms.

A. \textit{Means of Discharging the Service Obligation}

1. \textit{Overview}.—Service under the revised Rules is expected to be obviated in many instances by a new procedure in which the

\footnotesize


\textsuperscript{30} Early on, consent of the parties was a central feature in conferring this power upon a court. Millar, \textit{supra} note 26, at 14-15.
plaintiff mails an invitation to the defendant to waive formal service.\textsuperscript{31} Where this consensual arrangement is not used, service may be accomplished in domestic American litigation through any of the following approaches:

1. Personal delivery of the process by a nonparty adult process server. This is the only specific service mechanism spelled out in current Rule 4.\textsuperscript{32} The Rule preserves the options of leaving the process at the dwelling house of an individual defendant, with a person of suitable age and discretion residing there, and of manually delivering a copy of the process to an authorized agent.\textsuperscript{33}

2. Service pursuant to the law of the state where the federal district court in which the action has been filed is located.\textsuperscript{34}

3. Service pursuant to the law of the state where service is to be effected.\textsuperscript{35} This provision did not exist in the prior Rule, but has been made an option in the 1993 revisions.\textsuperscript{36}

General mail service, used in hundreds of thousands of cases since the 1983 Rule revisions and the subject of hundreds of interpretative decisions in the courts, was abolished by the 1993 amendments.\textsuperscript{37}

Thus, the mechanism will be available to a federal plaintiff only if the state where the federal court sits, or the state where a defendant resides, provides for mail service.\textsuperscript{38} Other state law modes of

\begin{itemize}
\item \textsuperscript{31} \textit{Infra} notes 76-78 and accompanying text.
\item \textsuperscript{32} \textit{FED. R. CIV. P.} 4(e)(2).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} 4(e)(1).
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.} 4 Advisory Committee's Notes.
\item \textsuperscript{37} \textit{FED. R. CIV. P.} 4(d)-(e).
\item \textsuperscript{38} \textit{See} \textit{ARIZ. REV. STAT. ANN. R.} 4.1(c) (1987) (providing for mail service, which is effective only if the defendant acknowledges the service); \textit{CAL. CIV. PROC. CODE} § 415.30 (West 1975) (authorizing service by mail); \textit{DEL. CODE. ANN. tit. 10, § 3112(b) (1974) (providing for mail service on nonresident motor vehicle operators); HAW. REV. STAT. §§ 634-636 (Supp. 1992) (authorizing mail service); \textit{KY. R. CIV. P.} 4.01(a) (Michie 1994) (authorizing mail service by certified mail, return receipt requested, and specifying that service is complete upon delivery); \textit{LA. REV. STAT. ANN. § 13:3204(A) (West Supp. 1994) (authorizing mail service); \textit{N.C. GEN. STAT. § 1A-1, R. 4(j)(1)(c) (Michie 1990) (authorizing mail service).}
\end{itemize}
service, such as posting and publication, are permitted if authorized in the appropriate state.

Subdivision (g) provides that infants and incompetents may be served only according to the law of the state in which they are served. It also makes provision for effecting service upon foreign infants and foreign incompetents.

A corporation or association that has not waived service may be served within a judicial district of the United States by delivering a summons and a copy of the complaint to the person who is authorized to receive process. When requesting a waiver, it is important to address the mail to the properly authorized person and not just to the company in general. A corporation may be served outside a judicial district of the United States "in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof."

Service on a foreign state or its political subdivisions is governed by the Foreign Sovereign Immunities Act of 1976.

39. See FLA. STAT. ANN. § 49.11 (West 1988) (authorizing service by posting in prominent locations); cf. MASS. GEN. L. ch. 262, § 16 (1992) (specifying that "the fees shall be one dollar for posting a copy on each parcel of land"); N.J. STAT. ANN. § 39:7-8 (West 1990) (authorizing service upon a nonresident driver by posting notice upon the vehicle); TENN. CODE. ANN. § 29-18-115 (1980) (authorizing service by posting notice on the front door of the premises).

40. For a sampling of various state provisions authorizing service by publication, see ALA. SUP. CT. R. 4.3 (1990); ARIZ. REV. STAT. ANN. R. 4(e)(3) (1989); COLO REV. STAT. ANN. R. 4(g) (1990); FLA. STAT. ANN. § 49.021 (West 1988); HAW. REV. STAT. §§ 634-36 (Supp. 1992); ILL. ANN. STAT. ch. 625, para. 5/13-829 (Smith-Hurd 1993); MONT. CODE ANN. § 25-3-502 (1993); N.C. GEN. STAT. § 1A-1, Rule 4(j)(1) (1992); see also Tulsa Prof. Collection Servs. v. Pope, 485 U.S. 478, 490 (1988) (stating that publication notice can be sufficient when the whereabouts of interested parties are not "reasonably ascertainable"); cf. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799-800 (1983) (stating the required means to ensure actual notice when the name and address of the interested party is reasonably ascertainable).

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

42. Id. 4(g).

43. Id.

44. Id. 4(n)(1).

45. Id. 4 Advisory Committee's Notes.

46. FED. R. CIV. P. 4(f) ("Service Upon Individuals in a Foreign Country").

47. Id. 4(n)(2).

48. 28 U.S.C. § 1608 (providing guidelines for service upon a foreign state, political subdivision, agency, or instrumentality and requiring an answer within 60 days).
Service upon a state or local government must be effected by delivering a copy of the summons and complaint to the chief executive officer of the proper entity or by serving the summons and complaint in compliance with the rules of the particular state.\(^49\) The request-for-waiver provisions do not apply to subdivision (j).\(^50\)

2. **Role of the United States Marshal.**—The 1993 revisions of Rule 4 carry even further the 1983 effort to reduce the role of the marshal.\(^51\) Under the provisions applicable for the prior ten years, the availability of the marshal to serve civil process was reduced from the tradition of general availability to just three circumstances: requests by indigent plaintiffs and seamen, orders granted to ordinary litigants who desired the marshal to effect service in a particular action, and cases in which service was sought on behalf of the United States or its officers and agents.\(^52\) In the new version of the Rule, the message is even clearer.

Rule 4(c) is now revised to start with a clear statement that service of process is the party plaintiff's responsibility.\(^53\) This responsibility includes the basic accomplishment of delivery, along with the ministerial obligation of providing copies of the process to the person performing the service, and the obligation to complete the event in the time provided under Rule 4(m).\(^54\)

The marshal's role is reduced by the elimination of the absolute right of the government to call upon this officer to effect service.\(^55\) The United States is now treated "like other civil litigants"\(^56\) for


\(^50\) Id. 4 Advisory Committee's Notes.

\(^51\) See Sinclair, supra note 5, at 1198-1204 (explaining that prior revisions of Rule 4 were adopted to relieve the heavy burden on U.S. marshals as well as to resolve ambiguities regarding whether a person permitted to serve process under state laws could do so for federal cases).


\(^55\) Fed. R. Civ. P. 4(c) Advisory Committee's Notes (stating that one purpose of the revision of Rule 4(c) was to relieve the marshal's office of the burden of serving summonses in all actions in which the United States seeks service).

\(^56\) Id.
service purposes and is expected to proceed by designating any adult nonparty to effect service.\textsuperscript{57}

It appears that a second reduction in availability of the marshal may be implied in the rewording of Rule 4(c). Formerly, the Rule permitted indigents and seamen to "request" service, which the marshal was then obligated to provide.\textsuperscript{58} Other litigants were required to obtain a court order.\textsuperscript{59} The new Rule requires that all litigants obtain a court order.\textsuperscript{60} Thus, while the court is obligated to grant such an order upon proper application by an indigent or seaman,\textsuperscript{61} the revised Rule clarifies that these protected categories of plaintiffs may not simply provide their papers to the marshal’s office and expect service. A court order must be obtained first.

\textbf{B. Forms and Procedures Generally}

The first two subdivisions of Rule 4 cover the form of the summons and the procedures by which it is issued. These provisions, which deal with fairly ministerial matters, have been significantly rewritten and restructured. The former Rule began with "issuance" and then prescribed "form."\textsuperscript{62} The revised Rule starts with matters of form and then deals with issuance by specifying that the plaintiff prepares and submits the summons for review and endorsement by the clerk of court.

Subdivision (a) is substantively the same as the previous subdivision that dealt with the form of the summons.\textsuperscript{63} It lists the items that the summons must contain, including the signature of the

\textsuperscript{57} Id.
\textsuperscript{59} See id. (allowing service by a U.S. marshal only on behalf of a party proceeding in forma pauperis, a seaman, the United States, an officer or agent of the United States, or by order of the court).
\textsuperscript{60} Fed. R. Ctv. P. 4(c).
\textsuperscript{61} Id. Advisory Committee’s Notes.
clerk, the seal of the court, and the name of the court and the parties.

The 1993 revisions have unified the form of the summons. The former Rule had a provision that required conformity with the style of the state summons format when service was made on a nonresident of the forum under the terms of former Rule 4(e). The 1993 revision deletes that requirement, so that a single form of summons may be used in commencing federal cases, regardless of the manner of service or the location of the defendant.

It is not clear which or how many of the form and content requirements for the summons a plaintiff may omit before rendering process invalid. The drafters apparently did not see a need to give further guidance on the extent to which deviations from the standard form of summons will invalidate service. However, problems with the form of summons are rare, and the drafters did relocate

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64. The revision changed the language "be under the seal of the court" to "bear the seal of the court." FED R. CIV. P. 4(a). The advisory commentary does not explain this change, which may have been intended to avoid disputes arising from the place on the summons where the seal is located or from the similarity between this language and the practice of filing items "under seal" when they are not to be part of the public record. Id. 4 Advisory Committee's Notes.

65. Id. 4(a). In another unexplained change in this subdivision, the drafters replaced the requirement that the summons "contain the name of the court and the names of the parties," Fed. R. Civ. P. 4(b), 28 U.S.C. app. R. 4(b) (1988), with a requirement that the summons "identify the court and the parties," FED. R. CIV. P. 4(a).


67. Id. ("[S]ummons . . . shall correspond as nearly as may be to that required by statute or rule" of the state's procedural code.).

68. FED. R. CIV. P. 4 Advisory Committee's Notes ("Few states now employ distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney.").

authorization for amendment of the summons from a little used niche in former Rule 4(h) to the summons section proper.\textsuperscript{70} The amended Rule also recasts issuance. Previously, the Rule called for the plaintiff to appear in the clerk’s office with copies of the complaint, and the clerk would then be required to generate the summons to be affixed thereto.\textsuperscript{71} Under the revised Rule,\textsuperscript{72} the plaintiff presents a precompleted summons form to the clerk for review. “If the summons is in proper form,” the clerk will then affix the seal of the court and sign the summons.\textsuperscript{73} As in prior practice, multiple summonses will normally be issued so that there is one for each defendant.\textsuperscript{74} However, if the summons is addressed to multiple defendants, copies of a single original may be served instead of providing to each defendant a summons form that is hand signed by the clerk and that bears an individual impression of the court’s seal.\textsuperscript{75}

C. The Waiver of Service Mechanism

1. Goals of Waiver.—Subdivision (d) provides a way for the defendant to help save money by waiving formal service. This subdivision evolved from the 1983 subdivision (c)(2)(C)(ii), which provided that the mailing of a summons and a complaint to the defendant would achieve valid service if the defendant signed an acknowledgment form and returned it in the enclosed postage-paid envelope.\textsuperscript{76}

Although somewhat similar in mechanics, the new Rule is conceptually different. The justification of the former Rule was that the mailing procedure effected actual service by a streamlined

\textsuperscript{70} See \textit{Fed. R. Civ. P.} 4(a) Advisory Committee’s Notes (explaining that wording from the former Rule 4(ii) authorizing summons amendment was rarely used and was moved to new Rule 4(a)).


\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} Under prior practice, summons forms were generally typed individually for each defendant, even when the caption of the complaint consolidated large numbers of parties.

method.\textsuperscript{77} The revised Rule specifies a procedure that does not purport to provide a method of service, only a request for \textit{waiver} of service.\textsuperscript{78}

The goals of the drafters in making the waiver device the centerpiece of Rule 4\textsuperscript{79} are to eliminate costs, and to "foster cooperation among adversaries and counsel."\textsuperscript{80} But the Advisory Commentary cites no horrific instances of costs associated with service, and caselaw does not seem to reflect any particular issue here,\textsuperscript{81} since the minute expense of service pales in comparison to attorney's fees and other costs.\textsuperscript{82} The cooperation ethos bespeaks the drafters' model of consensual dispute resolution.

The advisory commentary includes a sales pitch directed at foreign defendants, suggesting that reducing conceivably taxable costs and obtaining more time to file an answer warrant compliance with the process.\textsuperscript{83} In order to further encourage prospective defendants to cooperate in the waiver process, the drafters included in the current Rule an assurance that by waiving service the defendant does not foreclose the opportunity to raise other valid objections, including venue or jurisdiction.\textsuperscript{84}


\textsuperscript{78} \textit{Fed. R. Civ. P. 4} Advisory Committee's Notes.

\textsuperscript{79} Together with the associated form, the provisions for soliciting the waiver consume a substantial share of the lines of the entire Rule.

\textsuperscript{80} \textit{Fed. R. Civ. P. 4} Advisory Committee's Notes.

\textsuperscript{81} The cost of personal service is minimal, rarely exceeding $300. \textit{See} Sinclair, \textit{supra} note 5, at 1265 (pointing out Rule 4's flawed implementation and subsequent confusion to courts, practitioners, and defendants for whom the work is largely directed); \textit{see also} Housley v. Law Practice of Meyer & Mitchell, No. C-92-2898, 1993 U.S. Dist. LEXIS 680, at *1 (N.D. Cal. Jan. 18, 1993) (requiring the defendants to pay the plaintiff $76.00 for the cost of having process personally served); D'Amario v. Russo, 750 F. Supp. 560, 565 (D.R.I. 1990) (requiring the four defendants to pay the $150.00 cost incurred in personally serving them). \textit{But see} Menke v. Monchecourt, 17 F.3d 1007, 1008 (7th Cir. 1994) (affirming $1,018.69 judgment against the defendant for the plaintiff's cost in obtaining a private process server).

\textsuperscript{82} The Advisory Committee suggests that the costs of translating pleadings to a foreign language when serving a non-United States defendant might be obviated by the new Rule. \textit{Fed. R. Civ. P. 4} Advisory Committee's Notes (discussing the Federal Judicial Conference Committee Report on the new amendments to Rule 4).

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}
There are three reasons adumbrated in the commentary accompanying the revised Rule that explain why it is theoretically better to think of this procedure as a waiver and not as actual service of process.

First, a request by a private citizen of the United States asking a foreign defendant to waive service appears less offensive to foreign sovereigns than a formal judicial notice that purports to summon the foreign defendant to a United States court.\footnote{85}{It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the ‘service-by-mail’ provisions of the former rule.}

Second, the “waiver” conception obviates an aberrant result reached by the Second Circuit in \textit{Morse v. Elmira Country Club},\footnote{86}{752 F.2d 35 (2d Cir. 1984).} in which the facts presented the issue of whether receipt of the service, if deliberately not acknowledged, was nonetheless sufficient to confer jurisdiction.\footnote{87}{\textit{Id.} at 37.} \textit{Morse} held that if it could be proven that the defendant actually received the mailed summons,\footnote{88}{\textit{Id.} at 41 n.12 (contemplating that a hearing will be required to determine if the mailed complaint was actually received).} service would be considered to have been made on the date when the defendant “received the mail and accordingly obtained actual notice.”\footnote{89}{\textit{Id.} at 41.} The other steps required under Rule 4(c)(2)(C)(ii) at the
time were seen as a second service needed only to permit a return to be filed.\textsuperscript{90} The resolution in \textit{Morse} was rejected in the bulk of considered opinion in other federal circuits,\textsuperscript{91} but the Rule drafters

\textsuperscript{90} Morse, 752 F.2d at 39.

\textsuperscript{91} Tso v. Delaney, 969 F.2d 373, 376-77 (7th Cir. 1992) (holding that the plaintiffs did not show good cause for their lawyer's failure to make proper service of process on the defendants within the time period); Adatsi v. Mathur, 934 F.2d 910, 911 (7th Cir. 1991) (holding that service by mail was "complete" and the period for serving answer began to run on the date on which the defendant acknowledged receipt of the papers by executing the provided form); Media Duplication Servs., Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1233-35 (1st Cir. 1991) (holding that service of process was defective because it was not returned and the plaintiff did not follow up); Friedman v. Presser, 929 F.2d 1151, 1155-56 (6th Cir. 1991) (holding that the defendant's knowledge of ensuing action was no cure for service rendered ineffective by the defendant's failure to return acknowledgment); Schnabel v. Wells, 922 F.2d 726, 728 (11th Cir. 1991) (holding that "actual notice is not adequate when mail service is properly effected but the defendant chooses not to return the acknowledgment form"); McDonald v. United States, 898 F.2d 466, 468 (5th Cir. 1990) (stating that rendering dismissal for delayed service is not left to the general discretion of the district court, but is mandatory unless good cause is shown); Gulley v. Mayo Found., 886 F.2d 161, 165-66 (8th Cir. 1989) (finding that service was ineffectual where there was no acknowledgment, even though service was made by certified mail and even though the defendant's failure to acknowledge promptly caused the statute of limitations to toll); Young v. Mt. Hawley, 864 F.2d 81, 82-83 (8th Cir. 1988) (holding that service was ineffective because the defendant failed to file an acknowledgment of his receipt of the summons, complaint, and order that were sent to him by certified mail); Geiger v. Allen, 850 F.2d 330, 333 (7th Cir. 1988) (citing the 7th Circuit rule that service by mail is not complete until acknowledgment is filed with the court); Worrell v. B.F. Goodrich Co., 845 F.2d 840, 841-42 (9th Cir. 1988) (holding that service was not complete unless signed acknowledgment of receipt was properly returned), \textit{cert. denied}, 491 U.S. 907 (1989); Combs v. Nick Garin Trucking, 825 F.2d 437, 443 (D.C. Cir. 1987) (ruling that if the defendant did not return the acknowledgment, the plaintiff must make a second attempt to secure service); Green v. Humphrey Elevator and Truck Co., 816 F.2d 877, 879-80 (3d Cir. 1987) (holding that personal service was required to effectuate service of process if the defendant failed to return the acknowledgment within the designated time period); Stranahan Gear Co. v. NL Indus., 800 F.2d 53, 56 (3d Cir. 1986) (holding that the purchaser's acknowledgment that the purchaser had received by mail the summons and the complaint did not preclude striking of the default judgment against the purchaser); Armco Inc. v. Penrod-Stauffer Bldg. Sys., Inc., 733 F.2d 1087, 1089 (4th Cir. 1984) (holding that when the defendant did not acknowledge service by mail, "there was no valid service of process, the district court was without jurisdiction of the defendant, and the default judgement was void"); Pfeiffer v. Concourse Hotel, No. 93-C-3598, 1994 U.S. Dist. LEXIS 7295, at *1 (N.D. Ill. May 4, 1994) (vacating the lower court judgment because the defendant's failure to return the acknowledgment form created a defect in the service of process); Amgas, Inc. v. Cal O'Hare, Ltd., No. 93-C-635,
felt it necessary to make certain that the error in *Morse* did not resurface. \(^92\) Under the revised Rule, subdivision (d) makes it clear that the mail procedure merely contemplates a request for a waiver; jurisdiction is not asserted on the basis of plaintiff's mailing. \(^93\) In those cases in which service is required to toll the statute of

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1993 U.S. Dist. LEXIS 1887, at *4 (N.D. Ill. Feb. 12, 1993) (holding that default judgment is not obtainable when the defendant fails to return the acknowledgment); Billy v. Ashland Oil Inc., 102 F.R.D. 230, 233, 234-35 (W.D. Pa. 1984) (holding that a corporation that failed to return the acknowledgment form had not been properly served but would be responsible for the costs of personal service); Federal Deposit Ins. Corp. v. Sims, 100 F.R.D. 792, 794 (N.D. Ala. 1984) (finding that the failure of service by mail leaves only the option of personal service); Jaffe v. Federal Reserve Bank of Chicago, 100 F.R.D. 443, 444-45 (N.D. Ill. 1983) (holding that service of process on agents by mail service at their place of employment was proper after the agents returned the acknowledgment of service); Carrington, *supra* note 10, at 735 ("[N]either the dispatch nor the receipt of the mail is effective to impose the jurisdiction of the court on the defendant or even to satisfy the notice requirements of Rule 4 because the assent of the defendant is required."); \(^{cf.}\) O'Brien v. R.J. O'Brien & Assoc., 998 F.2d 1394, 1398 (7th Cir. 1993) (acknowledged service is valid even if never filed by the plaintiff). *But see* Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248, 255-56 (10th Cir. 1987) (holding that although it appeared that only a copy of the summons and complaint were mailed and that the "notice and acknowledgement" and return envelope were omitted, "the federal courts generally take a permissive attitude towards the mechanism employed for service of process when the defendant actually receives notice"); Henry S. Wolkins Co. v. Dimen-Pascua Const. Co., 123 F.R.D. 413, 414 (D. Mass. 1988) (holding that service was complete since the plaintiff mailed the summons within 120 days after filing with the federal district court, even though the defendant did not receive the summons and complaint within 120 days and obviously did not return the acknowledgment of service within 120 days); Erickson v. Niles Co., 123 F.R.D. 2, 3 (D. Mass. 1988) (holding that the defendant's failure to execute and return the acknowledgment form did not viti ate the service of summons and complaint by mail when the defendant conceded that it had received the summons and complaint); Lee v. Carlson, 645 F. Supp. 1430, 1432-33 (S.D.N.Y. 1986) (holding that the failure to include the acknowledgment form and addressed, prepaid return envelope did not render service ineffective), *aff'd*, 812 F.2d 712 (2d Cir. 1987).


93. *Id.*
limitations, the service is not deemed complete until the plaintiff files the returned waiver with the court.\footnote{94} Third, the waiver concept repudiates the idea of "equitable tolling."\footnote{95} This idea arose because \textit{Morse} could also be understood to more narrowly hold that unacknowledged service was valid service only if the defendant deliberately did not acknowledge it in order to defeat the statute of limitations.\footnote{96} The 1993 Rule drafters addressed this issue: "The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected."\footnote{97} Far from considering the defendant blameworthy for not hurrying to help toll the statute of limitations, the Rule drafters place the responsibility on the plaintiff to find a quicker way of serving the defendant and note that "unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h)."\footnote{98}

\footnote{94} This requirement only applies in diversity cases governed by the law of states that require completion of service to toll the running of the statute. In cases in which federal law governs the merits, the statute of limitations is tolled upon filing of the complaint. \textit{See id.} 3 (discussing commencement of a civil action).

In diversity cases, the federal court employs state statute of limitations requirements. Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980) (holding that state law determines when an action is commenced for limitations purposes in a diversity action in federal court); \textit{see also} Guaranty Trust Co. v. York, 326 U.S. 99, 109-11 (1945) (stating that if limitations would bar an action in state court, it is barred in federal court also). However, the federal court uses federal rules regarding how service or waiver of service is made, Hanna v. Plumer, 380 U.S. 460, 473 (1965), unless there is direct conflict between the state law and the federal law. \textit{See Walker}, 446 U.S. at 752 (establishing the rule that state law determines when an action is commenced for limitations purposes in a diversity action in federal court). Thus, the determination of when the statute tolls is substantive, but the manner of serving process is procedural.

\footnote{95} \textit{See} Sinclair, \textit{supra} note 5, at 1274-83 (discussing factual contexts in which courts have been asked to find that a limitation period has not yet run, even though the plaintiff has not met the necessary requirements).

\footnote{96} \textit{See Morse}, 752 F.2d at 40 (stating that there is no rationale for allowing a properly served defendant to acquire a statute-of-limitations defense by deliberately refusing to acknowledge service).

\footnote{97} \textit{Fed. R. Civ. P.} 4 Advisory Committee's Notes.

\footnote{98} \textit{Id.}
2. Mechanics and Theory of the Waiver.—Soliciting a waiver is not mandatory: The Rule provides that to avoid costs, the plaintiff "may" notify a defendant of the option to waive service.\textsuperscript{99} Where the plaintiff undertakes this procedure, the Rule makes several obligations applicable:

1. The notice and request must be in writing addressed to an appropriate person.\textsuperscript{100}

2. The notice must be sent by first class mail or "other reliable means."\textsuperscript{101}

3. The notice package must enclose a copy of the complaint with an identification of the court wherein the action has been filed.\textsuperscript{102}

4. The notice must advise the defendant "by means of a text prescribed in an official form" of the features of the waiver procedure.\textsuperscript{103}

5. The notice must indicate the date the waiver request was sent and specify a reasonable time for response (at least thirty days for domestic American defendants).\textsuperscript{104}

6. The notice must contain "an extra copy of the notice and request" along with a prepaid means for returning an executed copy to the plaintiff.\textsuperscript{105}

3. How the Form and Rule Will Work.—The Advisory Committee provided a model form of notice in the appendix to the 1993 Rules.\textsuperscript{106} In prior practice under the mail service rule, plaintiffs did not have to follow the form word for word,\textsuperscript{107} but, as noted

\textsuperscript{99} \textit{Id.} 4(d)(2).
\textsuperscript{100} \textit{Id.} 4(d)(2)(A) (listing defendants or "an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process)" when an entity is a defendant).
\textsuperscript{101} \textit{Id.} 4(d)(2)(B).
\textsuperscript{102} \textit{Fed. R. Civ.} P. 4(d)(2)(C).
\textsuperscript{103} \textit{Id.} 4(d)(2)(D).
\textsuperscript{104} \textit{Id.} 4(d)(2)(E)-(F).
\textsuperscript{105} \textit{Id.} 4(d)(2)(G).
\textsuperscript{106} \textit{Id.} Appendix of Forms.
above, the revised Rule requires use of the text prescribed in the official form, so that the material provisions must be included.\textsuperscript{108}

The new official form remedies some of the difficulties that existed with the prior version of the notice associated with mail service. That notice was misleading because it instructed the defendant to return the acknowledgment “within 20 days” but failed to make clear whether that was within twenty days of the mailing of the notice or within twenty days of the receipt of the notice.\textsuperscript{109} The new model waiver form deals squarely with this issue, stating that the waiver must be returned within the number of days specified by the plaintiff\textsuperscript{110} after the date designated as the date on which the waiver request was sent.

On the whole, the model waiver form seems clearer and more understandable than the previous acknowledgment form. However, some difficulties still remain. Rule 4(a) does not require that the request for waiver instruct the defendant that he should consult with an attorney.\textsuperscript{111} It would seem preferable to include this warning,\textsuperscript{112} however, it is probably not unethical to fail to do so.\textsuperscript{113}

\textsuperscript{108} \textit{Fed. R. Civ. P. 4(d)(2)(D)}.

\textsuperscript{109} For more on the problems associated with the “20 day rule” under the old form, see Sinclair, \textit{supra} note 5, at 1226-33.

\textsuperscript{110} The plaintiff may allow the defendant anywhere between 30 and 120 days in which to return the waiver. Rule 4(d)(2)(F) mandates that he allow the defendant at least 30 days. \textit{Fed. R. Civ. P. 4(d)(2)(F)}. Rule 4(m) provides that the plaintiff’s case will be dismissed if he is unable to effect service within 120 days of the filing of the complaint. \textit{Id. 4(m)}.

\textsuperscript{111} \textit{Id. 4(a)}.

\textsuperscript{112} \textit{See} Sinclair, \textit{supra} note 5, at 1291 n.621 (discussing Oregon Rule of Civil Procedure 7C(3), which includes use of the phrase, “If you have any questions, you should see an attorney immediately.”).

\textsuperscript{113} Rule 4.2 of the Model Rules of Professional Conduct, which governs communication with persons represented by counsel, provides the following: “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” \textit{MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2} (1992). Service of process falls within the “authorized by law” exception. \textit{GEOFFREY C. HAZARD, JR. \& W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 743} (1993).

Rule 4.3 of the Model Rules of Professional Conduct, which governs communication with unrepresented persons, provides the following:
In addition, it would seem advantageous to include a line for the defendant to print his name as well as a space for his signature, through the official form does not require such an entry.\textsuperscript{114}

It appears from this Rule that there are many valid methods for requesting waiver. The request for a waiver need not be sent only by U.S. Mail. "[P]rivate messenger service or electronic communications . . . may be equally reliable."\textsuperscript{115} Registered or certified mail is a sufficient means of requesting waiver,\textsuperscript{116} but that additional step is not necessary. The request need not be sent to the defendant’s home or business,\textsuperscript{117} but the plaintiff has an incentive to see that the method and location chosen for communicating the request are likely to find the defendant. The plaintiff, however, has no option regarding the inclusion of a "pre-paid means of compliance in writing."\textsuperscript{118}

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

\textbf{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 4.3 (1992). It would seem that the model waiver request is clear enough to avoid misunderstandings.

Rule 4.3 omits the prohibition against "giving advice" to an unrepresented person that was included in Disciplinary Rule 7-104(A)(2) of the Code of Professional Responsibility. That Rule "prevented a lawyer from influencing (advising) a lay person to do something or to waive a right that would be in the interest of the lawyer’s client, but not in the interest of the unrepresented person." HAZARD & HODES, \textit{supra}, at 747. The drafters of Rule 4(d) might argue that waiver is in the defendant’s best interests because it avoids cost shifting, but in certain situations (such as where the statute of limitations is about to expire) the defendant would be best served by not waiving.

\textsuperscript{114} Siegel, \textit{Part I, supra} note 17, at 452.


\textsuperscript{116} Sinclair, \textit{supra} note 5, at 1221 n.210 (citing cases holding that service of process by registered or certified mail will not be found to be defective).

\textsuperscript{117} Siegel, \textit{Part I, supra} note 17, at 451; see also Jaffe v. Federal Reserve Bank of Chicago, 100 F.R.D. 443, 445 (N.D. Ill. 1983) (finding that "it matters not a whit whether he or she receives [the service-by-mail] at home, at work, at play or anywhere else").

The question arising under the old Rules was whether it was permissible for the plaintiff or his attorney to personally mail the service themselves. That theoretical problem is solved by calling the procedure a request for waiver. Nonetheless, the practical difficulty remains that the plaintiff is on an honor system when filling out the date upon which the request for waiver was sent, which controls the due date for the defendant’s response.\(^\text{119}\)

The model waiver form makes clear that the waiver must be signed\(^\text{120}\) and returned “within [the number of days specified by the plaintiff] after the date designated [on the request for waiver] as the date on which this Notice and Request is sent.”\(^\text{121}\) The plaintiff may allow the defendant anywhere between 30 and 120 days in

\(^{119}\) Of course, practical considerations would encourage the plaintiff to give the defendant a reasonable amount of time. For a more in-depth discussion of the nonparty service requirement, see Sinclair, supra note 5, at 1217-20 (discussing the nonparty service requirement and the inherent difficulties in allowing the plaintiff or plaintiff’s counsel to participate in the service of process).

\(^{120}\) FED. R. CIV. P. FORM 1A, 1B. Is it possible for another person to waive service for a defendant by signing and returning the waiver form? An answer may be attempted only by analogy to cases under the prior Rule. See, e.g., Hicklin v. Edwards, 226 F.2d 410, 414 (8th Cir. 1955) (finding that a marshal’s testimony regarding serving the defendant could be overcome only by strong evidence), quoted in O’Brien v. R.J. O’Brien & Assoc., 998 F.2d 1394, 1398 (7th Cir. 1993) (“A signed return of service constitutes prima facie evidence of valid service ‘which can be overcome only by strong and convincing evidence.’”). Presumably, proof that someone had signed someone else’s waiver form would be enough to render process invalid. The only cases under the prior Rule that address this question deal with the situation of a wife signing a certified mail receipt for her husband with no return of the acknowledgment. Absent other factors, the courts generally did not consider that act enough to render service valid. See Mason v. Genisco Technology Corp., 960 F.2d 849, 852 (9th Cir. 1992) (finding that service was ineffective under federal law when the mail return receipt was signed by the spouse of the person to be served and the person to be served never signed nor returned an acknowledgment form); Bernard v. Strang Air, 109 F.R.D. 336, 337 (D. Neb. 1985) (quashing a summons when the defendant did not send with the summons either a self-addressed, prepaid, return envelope or two copies of a notice and acknowledgment form, but instead sent just the summons via certified mail, return receipt requested). One court that considered such a situation to constitute valid service seemed to be infected by the reasoning in Morse. See Ames v. Uranus, Inc., No. 92-2170-JWL, 1993 U.S. Dist LEXIS 6531, at *8-9 (D. Kan. Apr. 13, 1993) (holding that service was valid even though the attempted service did not meet all of the technical requirements of the Federal Rules because the person upon whom service was attempted had actual notice of the lawsuit prior to expiration of the time limits for service).

\(^{121}\) FED. R. CIV. P. FORM 1A.
which to return the waiver.\textsuperscript{122} Subdivision (d)(2)(F) mandates that plaintiffs allow defendants at least 30 days, "or 60 days . . . if the defendant is addressed outside any judicial district of the United States," to return the waiver.\textsuperscript{123} Subdivision (m) provides that the case will be dismissed if the plaintiff is unable to effect service within 120 days of the filing of the complaint.\textsuperscript{124}

Reasons why a defendant might agree to waive service include extra time to file an answer and a desire to avoid paying the costs of formal service. A defendant who agrees to waive service has sixty days from the date on which the request for waiver was sent in which to answer the complaint.\textsuperscript{125} A defendant served with process in person would have only twenty days to respond.\textsuperscript{126} If the defendant refuses to waive service, he must pay the cost of having personal service made.\textsuperscript{127} Costs include the hiring of a process server and the attorney's fee for filing any motion to recover this cost.\textsuperscript{128} The attorney's fee for actually arranging to have process served is usually not recouped.\textsuperscript{129} One interesting wrinkle is that

\textsuperscript{122} Id. 4(d)(2)(F), 4(m).
\textsuperscript{123} Id. 4(d)(2)(F).
\textsuperscript{124} Id. 4(m); see infra at notes 147-53 and accompanying text.
\textsuperscript{125} FED. R. CIV. P. 4(d)(3). A defendant outside any judicial district of the United States is permitted 90 days in which to file a complaint. Id.
\textsuperscript{126} FED. R. CIV. P. 12(a)(1)(A).
\textsuperscript{127} Id. 4(d)(2)(G). The defendant may avoid this cost shifting if he can show good cause for his failure to comply with the request for waiver. Id. See Larson v. Stow, No. 4-91-868, 1992 U.S. Dist LEXIS 7605, at *2-4 (D. Minn. May 1, 1992) (finding that good cause existed when the defendants were unsure whether they were being sued in their official capacity as government officers or as individuals).
\textsuperscript{128} FED. R. CIV. P. 4(d)(5).
\textsuperscript{129} Id. (failing to include such fees as costs imposed on the defendant); see also Siegel, \textit{Part I, supra} note 17, at 453 (noting that such fees are usually not compensable).

Under the prior Rule 4, most cases allowed the plaintiff to recover attorney's fees associated with arranging for service of process. \textit{See} Andrews v. Pediatric Surgical Group, P.C., 138 F.R.D. 611, 612-13 (N.D. Ga. 1991) (allowing recovery as "costs of personal service" for special process-server fee necessary to obtain personal service on famous defendants when one defendant failed to acknowledge service attempts by mail); Premier Bank, Nat'l Ass'n v. Ward, 129 F.R.D. 500, 501-02 (M.D. La. 1990) (allowing recovery of attorney's fees incurred in obtaining service on defendant who failed to acknowledge service by mail); \textit{cf.} Green v. Humphrey Elevator and Truck Co., 816 F.2d 877, 883 (1987) (holding that the costs charged to a nonacknowledging defendant may include the attorney's fees both in arranging personal service and in making the motion to recover costs). But see Menke
the costs only shift if the defendant and plaintiff are both "located in the United States." 130 Thus, costs will not be shifted for foreign plaintiffs or defendants, but it is not entirely clear whether the pertinent location is determined by residency, citizenship, or the place where the defendant was when he received the request or dispatched a signed waiver. 131

In many instances the timing and modest cost will not be enough to encourage a defendant to waive service. A defendant could conceivably arrogate more time to answer the complaint by not waiving service, on the theory that there will be at least thirty days before the plaintiff knows that the defendant will not return the waiver, plus several days while the plaintiff attempts to serve process in another way, and then the twenty days that the defendant would have upon finally being served. 132 The benefit of purchasing extra time might often outweigh any costs that would be shifted, especially when those costs are compared with the overall expense of modern major litigation. 133 Moreover, if the statute of limitations period is about to expire, there may be overriding reasons not to sign a waiver of service.

Is it unethical for an attorney to advise his client not to waive? 134 The Rule expressly seeks to assert that the defendant

v. Monchecourt, 17 F.3d 1007, 1010 (7th Cir. 1994) (holding that a court shall order payment of costs of personal service if the person served does not complete and return notice even though notice and acknowledgment of receipt of summons did not provide for award of attorney's fees as part of costs of serving evasive defendants).


131. See Siegel, Part I, supra note 17, at 454 (discussing the revised Rule 4, specifically the changes in personal jurisdiction).

132. Fed. R. Civ. P. 4(d)(2)(F); id. 12(a) (giving the defendant 20 days to answer a complaint).

133. Siegel, Part I, supra note 17, at 456. Professor Siegel suggests that the defendant could even attempt to avoid paying the cost of the attorney's fee by merely sending the plaintiff a check for the amount of the process server's bill. Id. at 457.

134. See Sinclair supra, note 5, at 1226 n.246 (noting that "Rule [4] does not clearly include any moral or legal obligation to respond in the contemplated fashion"). Rule 3.2 of the Model Rules of Professional Conduct provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983); see also Billy v. Ashland Oil Inc., 102 F.R.D. 230, 234 (W.D. Pa. 1984) (stating that the failure of an attorney to acknowledge service effected upon his client by mail under the former Rule "approached a breach of ethical and professional duties in failing to respond, either by answer or motion").
has a duty to save costs of service, but the punishment for breaching that duty is the cost shifting previously noted. If the defendant is willing to bear this cost, then it would seem ethical for an attorney to advise him to do so, especially if the statute of limitations is about to run.\footnote{See HAZARD & HODES, supra note 113, at 568 ("[T]here are many times when vigorous advocacy requires use of legitimate but time-consuming procedures.")}. The Rule places the responsibility for service firmly upon the plaintiff; if the statute of limitations runs because of the plaintiff's tardiness, the defendant is not at fault merely because he refused to help extricate the plaintiff from that situation.\footnote{Fed. R. Civ. P. 4 Advisory Committee's Notes ("[T]he device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).")}. This interpretation flowed from language in the former Rule 4(c)(2)(C)(ii), which required that when an acknowledgment is not

135. See HAZARD & HODES, supra note 113, at 568 ("[T]here are many times when vigorous advocacy requires use of legitimate but time-consuming procedures.").

136. Fed. R. Civ. P. 4 Advisory Committee's Notes ("[T]he device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).")

137. Fed. R. Civ. P. 4(c)(2)(C)(ii), 28 U.S.C. app. R. 4(c)(2)(C)(ii) (1988). See Combs v. Nick Garin Trucking, 825 F.2d 437, 443-44 (D.C. Cir. 1987) ("The unmistakable meaning of [Rule 4(c)(2)(C)(ii)] is that if a defendant does not return notice of acknowledgment, the plaintiff must make a second attempt to secure service on that defendant if he is to be further pursued in the litigation."); Stranahan Gear Co. v. NL Indus., Inc., 800 F.2d 53, 56 (3d Cir. 1986) ("If an acknowledgment form is not returned, the formal requirements of mail service are not met and resort must be had to personal service."); Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc., 733 F.2d 1087, 1089 (4th Cir. 1984) (holding that attempted but ineffective service under the Federal Rules could nevertheless be effective service under state law); Kosta v. St. George's Univ. Sch. of Medicine, 641 F. Supp. 606, 610-11 (E.D.N.Y. 1986) (allowing service by mail but requiring some sort of personal delivery if the plaintiff does not receive acknowledgment of service by mail). But see S.J. Groves & Sons Co. v. J.A. Montgomery, Inc., 866 F.2d 101, 102-03 (4th Cir. 1989) (prohibiting second, separate attempt at service under available state law procedures where the plaintiff unsuccessfully attempted service on an out-of-state corporation by mail); Humana, Inc. v. Jacobson, 804 F.2d 1390, 1393 (5th Cir. 1986) (prohibiting service under state law procedure if an attempt to effect service by mail fails); Pascalides v. Irwin Yacht Sales N., Inc., 118 F.R.D. 298, 301 (D.R.I. 1988) (holding that service on a defendant under state rules of procedure was proper following the court's determination that the first attempted service by mail under federal procedure was invalid).
received, "service of such summons and complaint shall be made" by personal service.\textsuperscript{138} Thus, the courts have sometimes held that a plaintiff was not allowed to attempt service by mail a second time and even have refused to grant the defendant an extension to effect personal service.\textsuperscript{139} The revised Rule does not limit the plaintiff to only one attempt at securing a waiver. Subdivision (e) merely describes how service must be effected "upon an individual from whom a waiver has not been obtained."\textsuperscript{140} It says nothing about how many attempts the plaintiff may make in soliciting a waiver. The only requirement is that service be completed within 120 days of the filing of the complaint.\textsuperscript{141}

The Rules limit the plaintiff's ability to request waiver against specified parties. A plaintiff may not make a request for a waiver of service upon the United States or the agencies, corporations, and officers of the United States; furthermore, the plaintiff may not make such a request upon any foreign nation or any local or state government.\textsuperscript{142} The plaintiff must either deliver the summons to the authorized person at the U.S. Attorney's Office in the district or mail a copy of the summons and complaint by registered or certified mail to each of the civil process clerks at the Office of the United States Attorney, the Attorney General, and, in an action against an agency, the agency.\textsuperscript{143} Ostensibly, this provision exists because the government's "mail receiving facilities are inadequate,"\textsuperscript{144} but it also exists because of policy reasons against forcing the govern-

\textsuperscript{139} See Sinclair, supra note 5, at 1228-29 (discussing the illogic of such holdings). That interpretation showed signs of weakening. See Carimi v. Royal Carribbean Cruise Line, Inc., 959 F.2d 1344, 1347 (5th Cir. 1992) (stating that in the event that the defendant does not complete the acknowledgment form, alternative methods of service can be made); Humana, Inc. v. Jacobson, 804 F.2d 1390, 1393 (5th Cir. 1986) (holding that the hospital could serve a pathologist in accordance with Texas service of process rules after an unsuccessful attempt by mail). Mail was also permitted after an unsuccessful attempt at service by the marshal. Prather v. Raymond Const. Co., 570 F. Supp. 278, 281 (N.D. Ga. 1983).
\textsuperscript{140} Fed. R. Civ. P. 4(e). Any statute of limitations problem in diversity cases must also be considered. Supra note 94.
\textsuperscript{141} Fed. R. Civ. P. 4(m).
\textsuperscript{142} Id. 4(i); see also Carrington, supra note 10, at 751 (illustrating the prospects for successful reform of Rule 4).
\textsuperscript{143} Fed. R. Civ. P. 4.
\textsuperscript{144} Id. 4 Advisory Committee's Notes.
ment to bear “the cost of service in cases in which they ultimately prevail.”\textsuperscript{145} In addition, the court may not ask infants or incompetents to waive service.\textsuperscript{146}

\textbf{D. Timing and Other Considerations}

Except in the case of international service,\textsuperscript{147} all attempts at service of process, whether by federal or state methods, must be completed within 120 days of the filing of the complaint.\textsuperscript{148} The court will grant the plaintiff an extension for good cause,\textsuperscript{149} but a plaintiff should not attempt the request for waiver procedure if the time limit provided in Section (m) is about to expire.\textsuperscript{150} The plaintiff will not normally be granted an extension in which to complete the waiver process unless it appears that the defendant has been attempting to evade service or that the failure to grant an extension would effectively bar the plaintiff from refiling due to the statute of limitations.\textsuperscript{151} However, in actions against the United States or its officers, the revised Rules also allow the plaintiff a reasonable time to serve all of the proper parties, provided that either the U.S. Attorney or the Attorney General is served within a

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.} 4(g).
  \item \textsuperscript{147} \textit{Id.} 4(m). \textit{See} Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992) (finding it to be an abuse of discretion for a court to dismiss a complaint where the plaintiff failed to serve a Swiss defendant even though there “exist[ed] a reasonable prospect that service may yet [have been] obtained”).
  \item \textsuperscript{148} \textit{FED. R. CIV. P.} 4(m).
  \item \textsuperscript{149} \textit{Id.} 4 Advisory Committee’s Notes. \textit{See} Tso v. Delaney, 969 F.2d 373, 375 (7th Cir. 1992) (stating that the trial judge has discretion in determining whether good cause exists); Geiger v. Allen, 850 F.2d 330, 333 (7th Cir. 1988) (showing that the plaintiff bears the burden of showing good cause). The Ninth Circuit, interpreting the prior Rule, found good cause to be at a minimum, “excusable neglect.” \textit{See} Boudette v. Barnett, 923 F.2d 754, 756 (9th Cir. 1991) (holding that an in forma pauperis plaintiff who did not request service by a marshal was responsible for timely service and that, if the plaintiff failed to show good cause for the failure to serve process within 120 days, the plaintiff would suffer a dismissal of a cause of action); Siegel, \textit{Part II, supra} note 18, at 259-60 (explaining the extensive overhaul of the service provisions).
  \item \textsuperscript{150} \textit{FED. R. CIV. P.} 4 Advisory Committee’s Notes.
  \item \textsuperscript{151} \textit{Id.} For a discussion of the significance of state statute of limitations requirements in diversity cases, see \textit{supra} note 94.
\end{itemize}
timely fashion. A dismissal for failure to serve process within 120 days will be without prejudice.

The plaintiff may request a waiver and attempt personal service at the same time, but the cost of personal service in that situation will not be shifted to the defendant. The defendant will also be able to take advantage of the extension that the waiver allows in answering the complaint, provided that, before he is personally served, the defendant timely returns the waiver.

Subdivision (n) provides for in rem and quasi in rem jurisdiction. The drafters, however, felt that, in most states, long arm statutes have made quasi in rem superfluous.

Subdivision (k)(1) allows for either personal service or waiver for a defendant "who is a party joined under Rule 14 or Rule 19 [using the 100 mile "bulge rule"] . . . or who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335." Paragraph (k)(1)(D) also refers to the power of district courts to effect nationwide service of process with respect to specified federal actions.

Subdivision (l), dealing with proof of service, is substantively the same as the Rule it replaces. Unless a marshal effects service, the person who made service must provide an affidavit. Proof of service may be amended by leave of court.

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152. FED. R. CIV. P. 4(i)(3).
153. Id. 4(m). If the dismissal occurs after the statute of limitations has run, then, depending on the state, the dismissal may constitute an adjudication on the merits. Bachenski v. Malnati, 11 F.3d 1371, 1378-79 (7th Cir. 1993).
154. FED. R. CIV. P. 4 Advisory Committee's Notes ("To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver.").
155. Id.
156. Id. 4(n).
157. Id. 4 Advisory Committee's Notes.
158. Id. 4(k)(1).
159. FED. R. CIV. P. 4(k)(1); see also 1 ROBERT CASAD, JURISDICTION IN CIVIL ACTIONS 5-7 to 5-35 (2d ed. 1991) (explaining the provisions regarding service of process in federal cases).
160. FED. R. CIV. P. 4(l).
162. FED. R. CIV. P. 4(l).
163. Id.
IV. International Service of Process

Prior to the revision of Rule 4, federal courts could only obtain jurisdiction over foreign defendants if the forum state had a long arm statute or if a federal statute explicitly included a provision for a "national contacts" test. Subdivision (f) renders such "explicit authorization" unnecessary, and paragraph (k)(2) provides a federal long arm law that is limited only by the constraints of the Fifth Amendment.

A. Overview of Rule 4(f)

A defendant in a foreign country who has not waived service may be served in three ways. The first option is service by an internationally agreed upon means such as the Hague Convention. If no internationally agreed upon means exists, the plaintiff may choose personal delivery or any form of mail requiring a signed receipt unless those means are prohibited by the law of the foreign country, in which case the plaintiff may choose any manner prescribed by the law of the foreign country or directed by the foreign country in response to a letter of request. Finally, the court may direct any means not prohibited by international agreement (the method directed by the court, however, may be in contravention of foreign law). Rule 4(f) does not provide for borrowing of state long arm statutes, but the basic catch-all provision of paragraph (f)(3) probably renders such borrowing unnecessary.

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164. Born & Vollmer, supra note 18, at 222.
165. FED. R. CIV. P. 4 Advisory Committee’s Notes ("[I]t is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.").
166. Id.; U.S. CONST. amend V.
167. FED. R. CIV. P. 4(f)(1); id. 4 Advisory Committee’s Notes.
168. Id. 4(f)(2), 4 Advisory Committee’s Notes.
169. Id. 4(f)(3); see also Levin v. Ruby Trading Corp., 248 F. Supp. 537, 540 (S.D.N.Y. 1965) (specially authorizing the use of ordinary mail).
170. FED. R. CIV. P. 4(f); see also id. 4(e)(1) (allowing federal courts to effect service pursuant to the law of the forum state or the state in which service is made).
171. Id. 4(f)(3), 4 Advisory Committee’s Notes.
B. Nationwide Contacts

Rule 4(k)(2) allows courts to obtain personal jurisdiction in federal question cases over defendants based on "nationwide contacts." This option allows jurisdiction based on significant contacts with the nation as a whole, even absent sufficient contacts with any one state; in fact, the rule in (k)(2) may not be invoked if a single state will provide jurisdiction.

The revised Rule allows federal courts in federal question cases to exercise jurisdiction over any defendant located outside the territory of the United States. However, the jurisdiction must be consistent with the due process requirements of the Fifth Amendment.

Thus, jurisdiction over aliens must comply with the same due process requirements that the Fifth Amendment guarantees to

172. Id. 4 Advisory Committee's Notes.


174. Rule 4(k)(2) only applies where the defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state." FED. R. CIV. P. 4(k)(2). It is unclear which party bears the burden of proving whether or not any state would provide jurisdiction. It seems a rather onerous task for the plaintiff to be forced to prove the negative, and it would be rather incongruous for the defendant to help the plaintiff by suggesting a state in which he could be effectively served. Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993) ("Typically, a defendant must first raise defenses related to personal jurisdiction, after which the plaintiff continues to have the burden of persuasion."); cited by Born & Vollmer, supra note 18, at 227; Doe v. National Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992) (holding that the plaintiff bears a burden of making only a prima facie showing that establishes personal jurisdiction over the defendant prior to trial); Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991) (holding that the plaintiff bears the burden of establishing that jurisdiction exists); see also Siegel, Part I, supra note 17, at 252-53 (discussing the personal jurisdiction aspects of Rule 4).

175. FED. R. CIV. P. 4 Advisory Committee's Notes (explaining that the Fifth Amendment requires "affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction" and that "there also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice'.")
citizens.\textsuperscript{176} The requirements include minimum contacts,\textsuperscript{177} as well as a forum convenient enough to satisfy “fair play and substantial justice.”\textsuperscript{178} Although the changes in the Rule seem to pass constitutional muster, the drafters included a “special note” designed to signal their uncertainty as to whether the method of amendment

\textsuperscript{176} See Lilly, supra note 173, at 116 (discussing whether Congress could through appropriate legislation empower a state court entertaining a state-law claim to avail itself of a national contacts test); see also, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 n.7 (9th Cir. 1977) (discussing an alien defendant’s rights to due process under the Fifth Amendment); Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292, 294 n.7 (6th Cir. 1964) (discussing the application of state law to foreign defendants); Elliott E. Cheatham, \textit{Some Developments in Conflict of Laws}, 17 VAND. L. REV. 193, 200-01 (1963) (discussing the roles of federal law and federal courts in the international conflicts-of-law doctrine); Note, \textit{Jurisdiction Over Alien Corporations After} Shaffer v. Heitner, 10 LOY. U. CHI. L.J. 739, 759-62 (1979) (reconciling the treatment of extraterritorial jurisdiction and alien corporations with modern constitutional standards governing federal and state law); cf. Graham v. Richardson, 403 U.S. 365, 365 (1971) (invalidating, as violative of the Equal Protection Clause of the Fourteenth Amendment, state statutes denying welfare benefits to resident aliens or requiring fifteen-year residency for aliens); Galvan v. Press, 347 U.S. 522, 530-31 (1954) (holding that the Due Process Clause restricts political discretion in deporting aliens).

\textsuperscript{177} FED. R. CIV. P. 4 Advisory Committee’s Notes (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.”). Cf. \textit{Wells Fargo}, 556 F.2d at 418 (discussing the possibility of an amendment to the Federal Rules authorizing the aggregation of foreign defendants’ contacts with the United States).

\textsuperscript{178} FED. R. CIV. P. 4 Advisory Committee’s Notes (recommending that special care be taken with alien defendants to see that the forum selected is not “so onerous that injustice could result”); see also Asahi Metal Indus. v. Superior Court of Cal., 480 U.S. 102, 115 (1987) (standing for the proposition that a party who injects its products into the “stream of commerce” may be hauled into court if the exercise of jurisdiction comports with “fair play and substantial justice”); United States v. First Nat’l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) (maintaining that once personal jurisdiction over a party is obtained, a federal district court may freeze the personal assets of that party regardless of the fact that the party is an alien defendant); see also Born & Vollmer, \textit{supra} note 18, at 225-26 (“In practice, of course, courts might be more likely to find that personal jurisdiction exists based on constitutionally sufficient minimum contacts and to use the forum non conveniens doctrine to provide relief if the forum is unreasonable.”); Lilly, \textit{supra} note 173, at 128 n.159 (arguing for a “national contacts” test for federal question and diversity cases); Siegel, \textit{Part I, supra} note 17, at 256 (discussing the immediacy and the importance of the Rule 4 amendments).
was appropriate to extend personal jurisdiction. This issue arose in 1946 when the Supreme Court held that the Rules Enabling Act was not violated by subdivision 4(f) provisions allowing district courts to serve process in other districts within the same state. Thus, most commentators believe that rule (k)(2) does not violate the Enabling Act. Neither should (k)(2) run afoul of Rule 82.

Rule 4(k)(2) seeks to extend federal court jurisdiction to the fullest extent "consistent with the Constitution and laws of the

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181. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445-46 (1946) (holding that Rule 4(f) did not interfere with the Rules Enabling Act); see also, Coleman v. American Export Isbrandtsen Lines, 405 F.2d 250, 252 (2d Cir. 1968) (holding that the Rules Enabling Act did not prohibit Rule 4(f) from allowing service of process within the "100-mile bulge" range).

182. The Rules Enabling Act provides that "such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1988). The history of the Act and the cases interpreting it make clear that the rules governing personal jurisdiction do not implicate a "substantive right." Ralph U. Whitten, Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4, 40 Me. L. Rev. 41, 86-93 (1988) (examining the permissible scope of supervisory rulemaking by the Supreme Court and the separation-of-powers doctrine). One commentator has argued that amending the Federal Rules of Civil Procedure is superior to statutory modification. Lilly, supra note 173, at 151 (stating that it would be more efficient and would incorporate the input of the Judicial Conference).

183. Fed. R. Civ. P. 82 (providing that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts"). See Siegel, Part II, supra note 18, at 253 ("'Jurisdiction' under [Rule 82] has been generally understood to mean subject matter jurisdiction, not personal jurisdiction, and subdivision (k)(2) affects personal jurisdiction only."); see also 4 Wright & Miller, supra note 29, § 533 (providing a general overview of the long-arm aspect of Rule 4); Carol E. Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 Stan. L. Rev. 395, 431-43 (1976) (analyzing the different approaches of courts in formulating jurisdictional tests following procedural changes and suggesting conformity jurisdiction tests for the new procedural concepts). But cf. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 715 (1982) (Powell, J., concurring) (viewing as a violation of Rule 82 an interpretation of Rule 37 that would allow federal district courts to assert jurisdiction over persons not in compliance with discovery orders).
United States." Thus, it appears that any federal court may
exert jurisdiction over a defendant served by "tag" service anywhere
in the United States (provided, of course, that the state in which he
was tagged had no law prohibiting tag service) since the Supreme
Court has held that "tag" service does not violate the Fourteenth
Amendment. Even U.S. citizenship alone might be enough to
confer jurisdiction.

C. Other Aspects of International Service

Although subdivision (k)(2) only applies to federal question
cases, the Advisory Committee’s Notes suggest that service based
upon nationwide contacts will be available to reach defendants sued
on a claim giving rise to supplemental jurisdiction. Since the
prospect of nationwide service for any state claim related to a federal
claim might cause a heavy influx of such cases into the federal
courts, the courts have discretion to decline supplemental juris-
diction.

Rule 4 allows plaintiffs to request waiver from foreign defen-
dants, but it does not impose costs on defendants who refuse to
waive. It does not allow costs to shift from a U.S. defendant to
a foreign plaintiff either; this is a change from the prior Rule,
which allowed cost shifting to foreign defendants. The costs,
however, may be taxed to a defendant who ultimately loses the
litigation, so there is perhaps some incentive for defendants to

jurisdiction obtained by service on the defendant while in the state did not violate due
process requirements). Thus, tag service should be permissible under the Fifth
Amendment as well. Born & Vollmer, supra note 18, at 228.
186. Siegel, Part II, supra note 18, at 254-65.
187. Fed. R. Civ. P. 4 Advisory Committee’s Notes. See generally Jon Heller,
Note, Pendent Personal Jurisdiction and Nationwide Service of Process, 64 N.Y.U.
L. Rev. 113 (1989).
188. Carrington, supra note 10, at 746-47.
189. 28 U.S.C. § 1367(c); Fed. R. Civ. P. 4 Advisory Committee’s Notes.
191. Id.; see also Born & Vollmer, supra note 18, at 234 (stating that the “cost
shifting provision applies only when both the plaintiff and defendant are located within
the United States”).
192. For a history of this change, see Born & Vollmer, supra note 18, at 231-33.
reduce costs.\textsuperscript{193} Foreign defendants are also encouraged to waive service by the incentives of extra time in which to return the waiver (sixty days) and to answer the complaint (ninety days).\textsuperscript{194} Of course, as previously noted, defendants may be able to take the extra time even if they ultimately decline to waive service.

V. Conclusion: Mechanics and Aspiration—Kinder, Gentler Service of Process

As noted above, under the 1993 revision, plaintiffs may serve process in a number of ways, but the hope of the drafters is that, for a large segment of federal litigation, consent will obviate the technicality of service.

For the same reason that most trial lawyers never liked the rule in Queen Caroline's Case,\textsuperscript{195} it is doubtful that the gentle, "let's not have to get nasty and have the process server come" approach of the waiver provisions in Rule 4 is terribly attractive to the plaintiffs of the world. Plaintiffs want certainty that the service of process is bulletproof, and they want service that will provide a solid predicate for the entry of the default judgment if the defendant does not appear and defend. Moreover, and in a broader sense, the party commencing a lawsuit is saying that any prior negotiations have failed and that the plaintiff intends to proceed aggressively to obtain a judicial determination of rights and responsibilities. To package this opening salvo in a letter that says, in effect, "Hello, please help me save a few dollars and the service of process complications by

\textsuperscript{193} FED. R. CIV. P. 4 Advisory Committee's Notes.
\textsuperscript{194} Id. 4(d)(2)(F), (d)(3).
\textsuperscript{195} The Queen's Case, 129 Eng. Rep. 976 (1820) (holding that a cross-examiner is required to broach the circumstances of a prior statement with a witness prior to impeachment). Prior to the advent of the Federal Rules of Evidence, it was commonly required that impeachment of witnesses by prior inconsistent statements proceed with the form of advance warning that this process requires. FED. R. EVID. 613(a) Advisory Committee's Notes. The late Irving Younger used to maintain that this rule required counsel to tell the witness, in effect, "Look out, I'm about to try to embarrass you with a contradiction. Start thinking about how you will react to this. Are you ready? OK, here goes—Didn't you previously say?" Irving Younger, Lecture Given in Boulder, Colo., at the July 1975 Session of the National Institute for Trial Advocacy (videotape on file with Media Services Department, University of Virginia School of Law).
agreeing to be subject to the jurisdiction of the court," probably does not send the message the plaintiff wants to convey.\textsuperscript{196}

This Article began by noting that every method of service must provide the following three functions: effective notice, assertion of the court's authority over the parties, and certainty. The revised provisions of Rule 4 seem to perform these three functions adequately. From the standpoint of notice, the Rule places almost no restrictions on the methods by which a plaintiff may transmit the request for waiver. It could be argued that the plaintiff has a greater incentive under the current revision to make sure the request reaches the defendant since the Rule is now clear that service requirements are not met until the defendant files the waiver, but the prior Rule (with the exception of the view advanced in \textit{Morse}) was interpreted to provide that service was not made until the defendant returned the acknowledgment. Thus, there is little practical difference between the two Rules with respect to provision of notice.

But the change in nomenclature, which provides no advantages in the notice department, succeeds in considerably weakening the capacity of the process to signal either the authority of the judicial system or the intensity of plaintiff's grievance. Under the revised Rule, a plaintiff who wants to appear conciliatory can indeed send to the defendant a photocopy of the complaint (i.e., without even a photocopy of the summons reflecting the court's imprimatur) in an

\textsuperscript{196} I remember commencing a lawsuit in the heyday of mail service under Rule 4(c)(2)(C)(ii), a diversity action by a sister against her alcoholic brother who was running the family lumber mill business into the ground. Years of cajoling had done no good. The family's single substantial asset was being wasted. Preliminary steps, such as a review of books and records pursuant to state corporation law, had not captured the attention of the defendants. So instead of sending Form 18A, about which I had some knowledge at the time, I retained the services of the bulkiest process server in central Virginia, who appeared about 6'6" tall and weighed nearly 300 pounds. After determining that local rules did not specify a required color for litigation backs, I went to the stationery store and purchased blood-red, heavyweight paper. Wrapping the summons and complaint in its red warning wrapper, and dispatching the process server, I sat back. The process was delivered into the hands of the principal defendant at 10 A.M. By 2 P.M., he was checked into an alcohol detoxification facility for two months of supervised treatment.
envelope adorned with a fuchsia-toned airbrush portrait of Elvis Presley, if that is the message the plaintiff wishes to convey.\textsuperscript{197} The notice will then advise the recipient that he has the option to cooperate in getting past the commencement phase of litigation with minimum cost. The message is anything but powerful.

On the bright side, though, the revised Rule will enhance the parties’ certainty as to whether the defendant has successfully been subjected to the jurisdiction of the court. Since the Rule makes clear that the filing of a waiver marks completion of service, the calculation of the date when the statute of limitations is tolled (in those cases in which filing is not sufficient) will be clear.

On balance, it seems beneficial for plaintiffs to have the option of requesting waiver in situations in which they consider saving fifty dollars in service costs to be more important than conveying a threatening message to the defendant. But, when the plaintiff desires certainty or speed, or when the authority of the court needs to be signaled, even the Rule drafters remind plaintiffs that there is no substitute for personal service.\textsuperscript{198}

\begin{figure}[h]
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\includegraphics[width=0.5\textwidth]{elvis_stamp}
\caption{Used by permission of the U.S. Postal Service.}
\end{figure}

\textsuperscript{197} See 29-cent commemorative stamp on file with The Review of Litigation.\textsuperscript{198} Fed. R. Civ. P. 4 Advisory Committee’s Notes (noting, for example, that where time before expiration of a limitations period is short, “the plaintiff should proceed directly to the formal methods for service”).