

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 19, 2010 (revised June 2010)

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on April 15-16, 2010, in Chicago, Illinois, and took action on a number of proposals.

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Action items:

(1) approval to transmit to the Judicial Conference a package of proposed amendments incorporating technology in Rules 1, 3, 4, 6, 9, 40, 41, 43, and 49 as well as new Rule 4.1;

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(4) approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 32; and

(5) approval of a technical and conforming amendment to Rule 41 without need for republication and approval to then transmit the version as amended to the Judicial Conference.

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II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

The Committee obtained at the June 14, 2010, meeting of the Standing Committee approval to forward to the Judicial Conference a package of amendments that were developed after a comprehensive review of all of the Rules of Criminal Procedure to incorporate technological advances.

New Rule 4.1: (1) incorporates the portions of Rule 41 allowing a search warrant to be issued on the basis of information submitted by reliable electronic means, and (2) makes those procedures applicable to complaints under Rule 3 and arrest warrants or summonses issued under Rules 4 and 9. Rule 4.1 also contains an innovation that deals with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email. The new rule requires a live conversation in which the affiant submitting the material is placed under oath, and also states that the judge may keep an abbreviated record of the oath, rather than transcribing verbatim the entire conversation and the material submitted electronically.

The remaining proposals amend existing rules, as follows:

- Rule 1: expanding the definition of telephone to include cell phone technology and calls over the internet from computers
- Rules 3, 4, and 9: authorizing the consideration of complaints and the issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1
- Rules 4 and 41: authorizing the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means and providing for duplicate original arrest warrants
- Rule 6: authorizing taking of a grand jury return by video teleconference
- Rule 40: with defendant's consent, allowing his appearance by video teleconference in a proceeding on arrest for failure to appear in another district

- Rule 41: deleting portions now covered by new Rule 4.1
- Rule 43: allowing arraignment, trial, and sentencing of misdemeanors and petty offenses to occur by video teleconference with the defendant’s written consent
- Rule 49: authorizing local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of the Judicial Conference.

The Committee also published for notice and comment a proposed amendment to Rule 32.1 that authorized a defendant—at his or her request—to participate by video teleconference in proceedings concerning the revocation or modification of probation or supervised release. After review of the public comments and further discussion, the Committee voted to withdraw this proposal, and it does not recommend its submission to the Judicial Conference.

Six written comments addressed to the technology rules were received during the public comment period. Most of the comments addressed new Rule 4.1, but there were also comments concerning Rules 6, 32.1, and 43. The full text of all of these rules and a summary of the public comments are included at the end of this memorandum.

A. ACTION ITEM—Rule 1

The amendment expands the definition of “telephone” to include any technology enabling live voice conversations. The Federal Magistrate Judges Association (FMJA) endorsed the amendment. No other public comments were received, but the text was rephrased by the Committee to refer to the telephone as a “technology for transmitting electronic voice communications” rather than a “form” of communication. The revised language tracks the published Committee Note and was intended to clarify the rule.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 1 be approved as amended following publication and that it be forwarded to the Judicial Conference.

B. ACTION ITEM—Rule 3

The proposed amendment to Rule 3 authorizes the consideration of complaints based upon information submitted by reliable electronic means as provided by Rule 4.1. The FMJA endorsed the amendment. No other comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 3 be approved as published and that it be forwarded to the Judicial Conference.

C. ACTION ITEM—Rule 4

The proposed amendment to Rule 4 authorizes (1) the issuance of an arrest warrant or summons based on information submitted by reliable electronic means, (2) the preparation and use of duplicate original arrest warrants when the original warrant is issued electronically, and (3) the return of warrants by reliable electronic means.

The FMJA endorsed the amendment. No other comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and that it be forwarded to the Judicial Conference.

D. ACTION ITEM—Rule 4.1

The provisions in Rule 41 that authorize the issuance of search warrants on the basis of information submitted by reliable electronic means have been relocated in new Rule 4.1 and made applicable when the court reviews a complaint or determines whether to issue an arrest warrant or summons. Comments were received from the FMJA, the National Association of Criminal Defense Lawyers (NACDL), and the California State Bar Committee on Federal Courts.

On the basis of public comments, the Committee made the following changes.

(1) Subdivision (a). The published rule referred to the action of a magistrate judge as “deciding whether to approve a complaint.” In response to the FMJA’s comment that the judge does not “approve” a complaint, the Committee amended the rule to refer to the judge as “reviewing a complaint or deciding whether to issue a warrant or summons.”

(2) Subdivisions (b)(2)(A) and (B). The FMJA recommended revision of subdivisions (b)(2) and (3), and the Committee’s style consultant recommended additional clarifying changes. The Committee combined these two subdivisions into subdivisions (b)(2)(A) and (B). The change was to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. (Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).)

At the suggestion of the style consultant, the clauses in subparagraph (B) were further divided into items (i) through (iv), which were also reordered to keep together the provisions regarding recordings and records.

(3) Subdivision (b)(5). This subdivision (published as (6)) deals with modification. In response to a comment from the NACDL, the Committee added language requiring a judge who

directs an applicant to modify a duplicate original to file the modified original. This change was intended to ensure that a complete record was preserved.

Additionally, at the suggestion of the style consultant, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

(4) Subdivision (b)(6) (published as (7)). The Committee eliminated the introductory language “If the judge decides to approve the complaint, or” As noted by the FMJA, a judge does not “approve” a complaint. Accordingly, the Committee revised the rule to refer only to the steps necessary to issue a warrant or summons, which is the action taken by the judicial officer.

In subdivision (b)(6)(A) the Committee amended the requirement that the judge “sign the original” to “sign the original documents.” This phrase is broad enough to encompass the current practice of the judge signing the complaint forms (we noted the judicial signature is not required by Rule 3 although there is a jurat for that purpose included on the AO form). The Committee discussed and did not favor spelling out each of the documents that might be involved in a particular case. These could include (a) the jurat on the affidavit(s); (b) the jurat on the complaint; (c) the summons; (d) the search warrant, if there is one; (e) the arrest warrant, if there is one; (f) the certifications of written records supplementing the transmitted affidavit; (g) any papers that correct or modify affidavits or complaints submitted initially; (h) trespass orders; and (i) authorizations to install pole cameras and “bumper beepers.”

In subdivision (b)(6)(B), we deleted the reference to the “face” of a document as superfluous and anachronistic, and clarified that the action is the entry of the date and time of “the approval of a warrant or summons.” Finally, as recommended by the NACDL, we modified (b)(6)(C) to require that the judge must direct the applicant not only to sign the duplicate original with the judge’s name, but also to note the date and time.

Although there were multiple changes in Rule 4.1, the Committee concluded that republication was not warranted. All of these changes were responsive to the public comments received, and they were clarifying rather than substantive. However, to obtain additional feedback on the post-publication changes, the Committee sent a copy of Rule 4.1 and an explanation of the changes made following publication to each of the individuals and groups that had submitted comments on Rule 4.1. Only one substantive comment was received. The FMJA wrote that it agreed that the post-publication revisions to the Rule “appear to be consistent with [its] suggestions for making the Rule more accurate and workable” and noted that it was “gratified by the response” to its comments on the published version of the rule.

Recommendation—The Advisory Committee recommends that proposed Rule 4.1 be approved as amended following publication and that it be forwarded to the Judicial Conference.

E. ACTION ITEM—Rule 6

The proposed amendment to Rule 6 allows the return of an indictment by video teleconference “to avoid unnecessary cost or delay.” Although having the judge in the same courtroom remains the preferred practice to promote the public’s confidence in the integrity and solemnity of federal criminal proceedings, there are situations where no judge is present in the courthouse where the grand jury sits, and a judge would have to travel a long distance to take the return, in some instances in bad weather and with dangerous road conditions. This amendment will be particularly useful when the nearest judge is hundreds of miles away from the courthouse in which the grand jury sits. The amendment preserves the judge’s time and safety, and accommodates the Speedy Trial Act’s requirement that an indictment be returned within thirty days of arrest. *See* 18 U.S.C. § 3161(b).

The FMJA endorsed the amendment, and two other public comments were received. Magistrate Judges Stewart (09-CR-003) and Ashmanskas (09-CR-004) urged that the rule be amended to follow Oregon state practice, which allows the grand jury to file indictments with the clerk’s office.

The Advisory Committee did not endorse this recommendation, which is inconsistent with an important tradition of a public return with solemnity. The Advisory Committee voted unanimously to recommend that the amendment be forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 6 be approved as published and that it be forwarded to the Judicial Conference.

F. ACTION ITEM—Rule 9

The proposed amendment to Rule 9 authorizes the consideration of an arrest warrant or summons upon the basis of information submitted by reliable electronic means as provided by Rule 4.1. The FMJA endorsed the amendment. No other comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 9 be approved as published and that it be forwarded to the Judicial Conference.

G. ACTION ITEM—Rule 40

Rule 40 requires a person to be taken without unnecessary delay before a magistrate judge in the district of his arrest if he has been arrested under a warrant issued in another district for either failure to appear or violating the conditions of release in that district. This procedure parallels the general requirement of an initial appearance in Rule 5. Rule 5(f) allows the initial appearance to be held using video teleconferencing if the defendant consents.

The amendment would allow a defendant to consent to video teleconferencing in proceedings under Rule 40, bringing procedures under that rule into conformity with Rule 5(f).

The FMJA endorsed the amendment. No other comments were received on this rule, but Committee members questioned why the published rule was worded differently than Rule 5(f). The difference was attributed to restyling. Since the provisions were intended to be parallel, the Committee voted to amend the published language to track current Rule 5(f).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be approved as amended following publication and that it be forwarded to the Judicial Conference.

H. ACTION ITEM—Rule 41

The published amendment makes two changes in Rule 41. First, it authorizes the return of warrants and inventories by reliable electronic means. Second, it deletes the material transferred to new Rule 4.1, which governs the use of reliable electronic means in connection with complaints, summonses, search warrants, and arrest warrants.

The FMJA endorsed the amendment. No other comments were received from the public, and the Advisory Committee voted unanimously to recommend that the amendment be forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as published and that it be forwarded to the Judicial Conference.

I. ACTION ITEM—Rule 43

As published, the amendment made two changes.

1. Rule 43(a)

The published proposal amended Rule 43(a)'s list of exceptions to the requirement that the defendant "must be present," adding a cross reference to Rule 32.1. This change dovetailed with a proposed amendment to Rule 32.1 authorizing a defendant to request that he be permitted to participate by video teleconference in proceedings revoking or modifying probation or supervised release. After consideration of the public comments and extended discussion, the Committee voted to withdraw the proposed amendment to Rule 32.1, and accordingly it also withdraws the related amendment to Rule 43(a).

2. Rule 43(b)(2)

The published amendment also authorized the use of video teleconferencing with the defendant's written consent in misdemeanor and petty offense proceedings, and the Committee recommends that this amendment be approved.

Rule 43(b)(2) currently allows the court to conduct arraignment, plea, trial, and sentencing "in the defendant's absence" with his written consent if the offense is punishable by a fine and/or imprisonment for not more than one year. These provisions are applicable to many minor offenses, including traffic offenses that occur in national parks. Requiring a defendant who faces a minor penalty to return for the arraignment, plea, trial, or sentencing can impose a significant hardship. The rules currently allow the court in such cases to permit a defendant to make a written waiver of his right to be present.

The amendment gives the court and the defendant an additional alternative limited to cases in which the maximum penalty is a fine or imprisonment of less than one year. It authorizes—but does not require—the court to permit a defendant to consent in writing to appear by video teleconferencing for those proceedings (arraignment, plea, trial, and sentencing) which can now occur in the defendant's absence. Although video teleconferencing is not the equivalent of physical presence, it allows a defendant who cannot be physically present to participate in these proceedings.

No public comments focused on Rule 43(b)(2). The Advisory Committee voted, with two dissents, to forward the amendment to the Standing Committee as published.

Although the Standing Committee recognized that the amendment authorized the use of video teleconferencing only for misdemeanor or petty offense cases in which the rules now authorize trial in absentia (with the defendant's written consent), members wanted to accompany the amendment with a strong statement of the importance of the defendant's appearance in person in a federal courtroom. Accordingly, it voted to add the following to the Committee Note:

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 43(b)(2) be approved as published and that it be forwarded to the Judicial Conference.

J. ACTION ITEM—Rule 49

This amendment authorizes the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means consistent with any technical standards of the Judicial Conference of the United States. It is based upon Civil Rule 5(d)(3).

The FMJA endorsed the amendment. One comment was received from the NACDL, which was supportive of the purpose of the amendment but proposed a change in wording as well as a new provision. NACDL’s comments were discussed by the Committee (and its Technology Subcommittee), which declined to adopt the alternative language proposed by the NACDL.

The Committee voted unanimously to recommend the amendment to Rule 49 as published.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 49 be approved as published and that it be forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules and Technical and Conforming Amendments

C. ACTION ITEM—Rule 32 (technical and conforming amendment)

On the recommendation of our style consultant, Professor Kimble, the Committee unanimously approved amendments to Rule 32(d)(2)(F) and (G) to remedy two technical problems created by our recent package of forfeiture-related rules: (1) a lack of parallelism and (2) the addition of a provision before the catch-all, which must come at the end of the series. The Department of Justice confirmed that the recommended change has no substantive effect.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 be approved and forwarded to the Judicial Conference as a technical and conforming amendment.

D. ACTION ITEM—Rule 41 (technical and conforming amendment)

Criminal Rule 41(e)(2)(C)(i), dealing with tracking-warrant applications, sets the time for completing installation as “no longer than 10 calendar days,” and Rule 41(f)(2)(B) and (C) require the return of tracking-device warrants and service of a copy of the warrant on the person who was tracked (or whose property was tracked) within “10 calendar days after the use of the tracking device has ended.” The references to “calendar” are unnecessary. During the time-computation project, which adopted a “days are days” approach, all other references to “calendar days” were deleted. It

would be desirable to eliminate the references to “calendar days” in Rule 41 when an opportunity to do so arises, though it is not urgent because they do no harm.

The Committee’s proposed amendments to Rule 41 (which form part of the package of technology rules) provide an excellent opportunity to clean up this problem with a technical, conforming amendment.

Although this amendment was not discussed at the Committee’s April meeting, the Committee was informed by e-mail of the proposal to forward a technical and conforming amendment deleting the reference to “calendar days” with the other amendments to Rule 41. Committee members were asked to advise the chair of any reservations. No member of the Committee reported having any reservations, and nine members of the Committee notified the chair of their affirmative support for the proposed amendment.

Because the deadlines deal with the limit on time to install tracking devices, which is arguably substantive, the Committee is not recommending an increase to 14 days. Nor, for the same reason, did it attempt to alter the 45-day limit on the use of the device without a judicially authorized extension.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved and forwarded to the Judicial Conference as a technical and conforming amendment.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 1. Scope; Definitions

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(b) Definitions. The following definitions apply to these

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rules:

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(11) “Telephone” means any technology for

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transmitting live electronic voice communication.

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~~**(11)**~~**(12)** “Victim” means a “crime victim” as defined in

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18 U.S.C. § 3771(e).

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Committee Note

Subdivisions (b)(11) and (12). The added definition clarifies that the term “telephone” includes technologies enabling live voice conversations that have developed since the traditional “land line” telephone. Calls placed by cell phone or from a computer over the internet, for example, would be included. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice

*New material is underlined; matter to be omitted is lined through.

communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The text was rephrased by the Committee to describe the telephone as a “technology for transmitting live electronic voice communication” rather than a “form” of communication.

Rule 3. The Complaint

1 The complaint is a written statement of the essential
2 facts constituting the offense charged. ~~It~~ Except as provided
3 in Rule 4.1, it must be made under oath before a magistrate
4 judge or, if none is reasonably available, before a state or
5 local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means; however, the rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made

by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permits electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

Rule 4. Arrest Warrant or Summons on a Complaint

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(c) Execution or Service, and Return.

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(3) Manner.

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(A) A warrant is executed by arresting the

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defendant. Upon arrest, an officer possessing

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the original or a duplicate original warrant

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must show it to the defendant. If the officer

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does not possess the warrant, the officer must

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inform the defendant of the warrant's

4 FEDERAL RULES OF CRIMINAL PROCEDURE

11 existence and of the offense charged and, at
12 the defendant's request, must show the
13 original or a duplicate original warrant to the
14 defendant as soon as possible.

15 * * * * *

16 (4) *Return.*

17 (A) After executing a warrant, the officer must
18 return it to the judge before whom the
19 defendant is brought in accordance with Rule
20 5. The officer may do so by reliable
21 electronic means. At the request of an
22 attorney for the government, an unexecuted
23 warrant must be brought back to and
24 canceled by a magistrate judge or, if none is
25 reasonably available, by a state or local
26 judicial officer.

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28 **(d) Warrant by Telephone or Other Reliable Electronic**
 29 **Means.** In accordance with Rule 4.1, a magistrate judge
 30 may issue a warrant or summons based on information
 31 communicated by telephone or other reliable electronic
 32 means.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1(b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

**Rule 4.1. Complaint, Warrant, or Summons by
Telephone or Other Reliable Electronic Means**

- 1 **(a) In General.** A magistrate judge may consider
2 information communicated by telephone or other
3 reliable electronic means when reviewing a complaint or
4 deciding whether to issue a warrant or summons.
- 5 **(b) Procedures.** If a magistrate judge decides to proceed
6 under this rule, the following procedures apply:
- 7 **(1) Taking Testimony Under Oath.** The judge must
8 place under oath — and may examine — the

9 applicant and any person on whose testimony the
10 application is based.

11 **(2) *Creating a Record of the Testimony and Exhibits.***

12 (A) *Testimony Limited to Attestation.* If the
13 applicant does no more than attest to the
14 contents of a written affidavit submitted by
15 reliable electronic means, the judge must
16 acknowledge the attestation in writing on the
17 affidavit.

18 (B) *Additional Testimony or Exhibits.* If the
19 judge considers additional testimony or
20 exhibits, the judge must:

21 (i) *have the testimony recorded verbatim*
22 *by an electronic recording device, by a*
23 *court reporter, or in writing;*

8 FEDERAL RULES OF CRIMINAL PROCEDURE

- 24 (ii) have any recording or reporter's notes
25 transcribed, have the transcription
26 certified as accurate, and file it;
27 (iii) sign any other written record, certify its
28 accuracy, and file it; and
29 (iv) make sure that the exhibits are filed.

30 **(3) Preparing a Proposed Duplicate Original of a**
31 **Complaint, Warrant, or Summons.** The applicant must
32 prepare a proposed duplicate original of a complaint,
33 warrant, or summons, and must read or otherwise
34 transmit its contents verbatim to the judge.

35 **(4) Preparing an Original Complaint, Warrant, or**
36 **Summons.** If the applicant reads the contents of the
37 proposed duplicate original, the judge must enter those
38 contents into an original complaint, warrant, or
39 summons. If the applicant transmits the contents by

40 reliable electronic means, the transmission received by
41 the judge may serve as the original.

42 **(5) *Modification.*** The judge may modify the complaint,
43 warrant, or summons. The judge must then:

44 (A) transmit the modified version to the applicant by
45 reliable electronic means; or

46 (B) file the modified original and direct the applicant
47 to modify the proposed duplicate original
48 accordingly.

49 **(6) *Issuance.*** To issue the warrant or summons, the judge
50 must:

51 (A) sign the original documents;

52 (B) enter the date and time of issuance on the warrant
53 or summons; and

54 (C) transmit the warrant or summons by reliable
55 electronic means to the applicant or direct the

10 FEDERAL RULES OF CRIMINAL PROCEDURE

56 applicant to sign the judge’s name and enter the
57 date and time on the duplicate original.
58 **(c) Suppression Limited.** Absent a finding of bad faith,
59 evidence obtained from a warrant issued under this rule
60 is not subject to suppression on the ground that issuing
61 the warrant in this manner was unreasonable under the
62 circumstances.

Committee Note

New Rule 4.1 brings together in one rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants “by telephonic or other means,” formerly in Rule 41(d)(3) and (e)(3), have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new rule preserves the procedures formerly in Rule 41 without change. By

using the term “magistrate judge,” the rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Published subdivision (a) referred to the action of a magistrate judge as “deciding whether to approve a complaint.” To accurately describe the judge’s action, it was rephrased to refer to the judge “reviewing a complaint.”

Subdivisions (b)(2) and (3) were combined into subdivisions (b)(2)(A) and (B) to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. The clauses in subparagraph (B) were reordered and further divided into items (i) through (iv). Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).

In subdivision (b)(5), language was added requiring the judge to file the modified original if the judge has directed an applicant to modify a duplicate original. This will ensure that a complete record is preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to a judge’s approval of a complaint was deleted, and the rule was revised to refer only to the steps necessary to issue a warrant or summons, which are the actions taken by the judicial officer.

In subdivision (b)(6)(A), the requirement that the judge “sign the original” was amended to require signing of “the original documents.” This is broad enough to encompass signing a summons, an arrest or search warrant, and the current practice of the judge signing the jurat on complaint forms. Depending on the nature of the case, it might also include many other kinds of documents, such as the jurat on affidavits, the certifications of written records

supplementing the transmitted affidavit, or papers that correct or modify affidavits or complaints.

In subdivision (b)(6)(B), the superfluous and anachronistic reference to the “face” of a document was deleted, and rephrasing clarified that the action is the entry of the date and time of “the approval of a warrant or summons.” Additionally, subdivision (b)(6)(C) was modified to require that the judge must direct the applicant not only to sign the duplicate original with the judge’s name, but also to note the date and time.

Rule 6. The Grand Jury

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(f) **Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson

14 FEDERAL RULES OF CRIMINAL PROCEDURE

11 must promptly and in writing report the lack of
12 concurrence to the magistrate judge.

13 * * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

**Rule 9. Arrest Warrant or Summons on an Indictment
or Information**

1

* * * * *

2

(d) Warrant by Telephone or Other Means. In

3

accordance with Rule 4.1, a magistrate judge may issue

4

an arrest warrant or summons based on information

5

communicated by telephone or other reliable electronic

6

means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

Rule 32. Sentencing and Judgment

1

* * * * *

2

(d) Presentence Report.

3

* * * * *

4

(2) *Additional Information.* The presentence report

5

must also contain the following:

6

(A) the defendant's history and characteristics,

7

including:

8

(i) any prior criminal record;

9

(ii) the defendant's financial condition; and

10

(iii) any circumstances affecting the

11

defendant's behavior that may be

12

helpful in imposing sentence or in

13

correctional treatment;

- 14 (B) information that assesses any financial,
15 social, psychological, and medical impact on
16 any victim;
- 17 (C) when appropriate, the nature and extent of
18 nonprison programs and resources available
19 to the defendant;
- 20 (D) when the law provides for restitution,
21 information sufficient for a restitution order;
- 22 (E) if the court orders a study under 18 U.S.C.
23 § 3552(b), any resulting report and
24 recommendation;
- 25 ~~(F) any other information that the court requires,~~
26 ~~including information relevant to the factors~~
27 ~~under 18 U.S.C. § 3553(a); and~~
- 28 ~~(G) specify whether the government seeks~~
29 ~~forfeiture under Rule 32.2 and any other~~
30 ~~provision of law;~~

4 defendant consents.

Committee Note

Subdivision (d). The amendment provides for video teleconferencing in order to bring the rule into conformity with Rule 5(f).

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

Rule 41. Search and Seizure

1 * * * * *

2 **(d) Obtaining a Warrant.**

3 * * * * *

4 **(3) *Requesting a Warrant by Telephonic or Other***
5 **Reliable Electronic Means.** In accordance with
6 Rule 4.1, a magistrate judge may issue a warrant
7 based on information communicated by telephone
8 or other reliable electronic means.

20 FEDERAL RULES OF CRIMINAL PROCEDURE

9 ~~(A) *In General.* A magistrate judge may issue a~~
10 ~~warrant based on information communicated~~
11 ~~by telephone or other reliable electronic~~
12 ~~means.~~

13 ~~(B) *Recording Testimony.* Upon learning that an~~
14 ~~applicant is requesting a warrant under Rule~~
15 ~~41(d)(3)(A), a magistrate judge must:~~

16 ~~(i) place under oath the applicant and any~~
17 ~~person on whose testimony the~~
18 ~~application is based; and~~

19 ~~(ii) make a verbatim record of the~~
20 ~~conversation with a suitable recording~~
21 ~~device, if available, or by a court~~
22 ~~reporter, or in writing.~~

23 ~~(C) *Certifying Testimony.* The magistrate judge~~
24 ~~must have any recording or court reporter's~~
25 ~~notes transcribed, certify the transcription's~~

26 accuracy, and file a copy of the record and
27 the transcription with the clerk. Any written
28 verbatim record must be signed by the
29 magistrate judge and filed with the clerk.

30 ~~(D) *Suppression Limited.* Absent a finding of bad~~
31 ~~faith, evidence obtained from a warrant~~
32 ~~issued under Rule 41(d)(3)(A) is not subject~~
33 ~~to suppression on the ground that issuing the~~
34 ~~warrant in that manner was unreasonable~~
35 ~~under the circumstances.~~

36 **(e) Issuing the Warrant.**

37 * * * * *

38 **(2) Contents of the Warrant.**

39 * * * * *

40 (C) *Warrant for a Tracking Device.* A tracking-
41 device warrant must identify the person or
42 property to be tracked, designate the magistrate

22 FEDERAL RULES OF CRIMINAL PROCEDURE

43 judge to whom it must be returned, and specify a
44 reasonable length of time that the device may be
45 used. The time must not exceed 45 days from the
46 date the warrant was issued. The court may, for
47 good cause, grant one or more extensions for a
48 reasonable period not to exceed 45 days each. The
49 warrant must command the officer to:

- 50 (i) complete any installation authorized by
51 the warrant within a specified time no
52 longer than 10 ~~calendar~~ days;
- 53 (ii) perform any installation authorized by
54 the warrant during the daytime, unless
55 the judge for good cause expressly
56 authorizes installation at another time;
57 and
- 58 (iii) return the warrant to the judge
59 designated in the warrant.

60 ~~(3) *Warrant by Telephonic or Other Means.* If a~~
61 ~~magistrate judge decides to proceed under Rule~~
62 ~~41(d)(3)(A), the following additional procedures~~
63 ~~apply:~~

64 ~~(A) *Preparing a Proposed Duplicate Original*~~
65 ~~*Warrant.* The applicant must prepare a~~
66 ~~“proposed duplicate original warrant” and~~
67 ~~must read or otherwise transmit the contents~~
68 ~~of that document verbatim to the magistrate~~
69 ~~judge.~~

70 ~~(B) *Preparing an Original Warrant.* If the~~
71 ~~applicant reads the contents of the proposed~~
72 ~~duplicate original warrant, the magistrate~~
73 ~~judge must enter those contents into an~~
74 ~~original warrant. If the applicant transmits the~~
75 ~~contents by reliable electronic means, that~~

24 FEDERAL RULES OF CRIMINAL PROCEDURE

76 ~~transmission may serve as the original~~
77 ~~warrant.~~

78 ~~(C) *Modification.* The magistrate judge may~~
79 ~~modify the original warrant. The judge must~~
80 ~~transmit any modified warrant to the~~
81 ~~applicant by reliable electronic means under~~
82 ~~Rule 41(e)(3)(D) or direct the applicant to~~
83 ~~modify the proposed duplicate original~~
84 ~~warrant accordingly.~~

85 ~~(D) *Signing the Warrant.* Upon determining to~~
86 ~~issue the warrant, the magistrate judge must~~
87 ~~immediately sign the original warrant, enter~~
88 ~~on its face the exact date and time it is issued,~~
89 ~~and transmit it by reliable electronic means to~~
90 ~~the applicant or direct the applicant to sign~~
91 ~~the judge's name on the duplicate original~~
92 ~~warrant.~~

93 (f) **Executing and Returning the Warrant.**

94 (1) ***Warrant to Search for and Seize a Person or***
95 ***Property.***

96 * * * * *

97 (D) *Return.* The officer executing the warrant
98 must promptly return it — together with a
99 copy of the inventory — to the magistrate
100 judge designated on the warrant. The officer
101 may do so by reliable electronic means. The
102 judge must, on request, give a copy of the
103 inventory to the person from whom, or from
104 whose premises, the property was taken and
105 to the applicant for the warrant.

106 (2) ***Warrant for a Tracking Device.***

107 (A) *Noting the Time.* The officer executing a
108 tracking-device warrant must enter on it the

26 FEDERAL RULES OF CRIMINAL PROCEDURE

109 exact date and time the device was installed
110 and the period during which it was used.

111 (B) *Return.* Within 10 ~~calendar~~ days after the use
112 of the tracking device has ended, the officer
113 executing the warrant must return it to the
114 judge designated in the warrant. The officer
115 may do so by reliable electronic means.

116 (C) *Service.* Within 10 ~~calendar~~ days after the use
117 of the tracking device has ended, the officer
118 executing a tracking-device warrant must
119 serve a copy of the warrant on the person
120 who was tracked or whose property was
121 tracked. Service may be accomplished by
122 delivering a copy to the person who, or
123 whose property, was tracked; or by leaving a
124 copy at the person's residence or usual place
125 of abode with an individual of suitable age

126 and discretion who resides at that location
 127 and by mailing a copy to the person’s last
 128 known address. Upon request of the
 129 government, the judge may delay notice as
 130 provided in Rule 41(f)(3).

131 * * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (e)(2). The amendment eliminates unnecessary references to “calendar” days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include “every day, including intermediate Saturdays, Sundays, and legal holidays[.]”

Subdivisions (f)(1) and (2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically. Additionally, in subdivision (f)(2) the amendment eliminates unnecessary references to “calendar” days. As amended effective

December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include “every day, including intermediate Saturdays, Sundays, and legal holidays[.]”

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Obsolescent references to “calendar” days were deleted by a technical and conforming amendment not included in the rule as published. No other changes were made after publication.

Rule 43. Defendant’s Presence

1

2

(b) When Not Required. A defendant need not be present

3

under any of the following circumstances:

4

(1) *Organizational Defendant.* The defendant is an

5

organization represented by counsel who is

6

present.

7

(2) *Misdemeanor Offense.* The offense is punishable

8

by fine or by imprisonment for not more than one

9

year, or both, and with the defendant’s written

10

consent, the court permits arraignment, plea, trial,

11 and sentencing to occur by video teleconferencing
12 or in the defendant's absence.

13 * * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Because the Advisory Committee withdrew its proposal to amend Rule 32.1 to allow for video teleconferencing, the cross reference to Rule 32.1 in Rule 43(a) was deleted.

Rule 49. Serving and Filing Papers

1 **(a) When Required.** A party must serve on every other
2 party any written motion (other than one to be heard ex
3 parte), written notice, designation of the record on
4 appeal, or similar paper.

* * * * *

6 **(e) Electronic Service and Filing.** A court may, by local
7 rule, allow papers to be filed, signed, or verified by
8 electronic means that are consistent with any technical
9 standards established by the Judicial Conference of the
10 United States. A local rule may require electronic filing
11 only if reasonable exceptions are allowed. A paper filed
12 electronically in compliance with a local rule is written
13 or in writing under these rules.

Committee Note

Subdivision (e). Filing papers by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the rule as published.