

communication and excludes voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

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 permit electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred

4 FEDERAL RULES OF CRIMINAL PROCEDURE

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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 canceled
24 by a magistrate judge or, if none is reasonably
25 available, by a state or local judicial officer.

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

**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 deciding whether to
4 approve a complaint or 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) Recording Testimony.** The judge must make a
12 verbatim record of the testimony with a suitable
13 recording device, if available; by a court reporter;
14 or in writing. But a written summary or order
15 suffices if the testimony is limited to attesting to

16 the contents of a written affidavit submitted by
17 reliable electronic means.

18 **(3) Certifying Testimony.** The judge must have any
19 verbatim recording or court reporter's notes
20 transcribed, certify the transcription's accuracy,
21 and file a copy of the record and the transcription
22 with the clerk. But the judge must simply sign and
23 file with the clerk any written verbatim record or
24 any written summary or order.

25 **(4) Preparing a Proposed Duplicate Original of a**
26 **Complaint, Warrant, or Summons.** The applicant
27 must prepare a proposed duplicate original of a
28 complaint, warrant, or summons, and must read or
29 otherwise transmit its contents verbatim to the
30 judge.

31 **(5) Preparing an Original Complaint, Warrant, or**
32 **Summons.** If the applicant reads the contents of

33 the proposed duplicate original, the judge must
34 enter those contents into an original complaint,
35 warrant, or summons. If the applicant transmits
36 the contents by reliable electronic means, that
37 transmission may serve as the original.

38 **(6) *Modification.*** The judge may modify the
39 complaint, warrant, or summons. The judge must
40 transmit the modified version to the applicant by
41 reliable electronic means or direct the applicant to
42 modify the proposed duplicate original
43 accordingly.

44 **(7) *Signing.*** If the judge decides to approve the
45 complaint, or to issue the warrant or summons, the
46 judge must immediately:

47 (A) sign the original;

48 (B) enter on its face the exact date and time it is
49 approved or issued; and

50 (C) transmit it by reliable electronic means to the
 51 applicant or direct the applicant to sign the
 52 judge’s name on the duplicate original.

53 (c) **Suppression of Evidence Limited.** Absent a finding of
 54 bad faith, evidence obtained from a warrant issued under
 55 this rule is not subject to suppression on the ground that
 56 issuing the warrant in this manner was unreasonable
 57 under the circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. 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. Limited to “magistrate judges,” 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 retains 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). Former Rule 41(d)(3)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2) 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 the written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge can simply prepare a written *summary* or order memorializing the affirmation of the oath. Rule 4.1(b) (7) specifies that any written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of documenting the warrant application process.

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

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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

to another district where the original sentence was imposed. If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel. The amendment does not address whether victims, witnesses, or others may participate in any hearing under Rule 32.1 through video teleconferencing or other means. The same standards and procedures for the use of video teleconferencing that were suggested in the Committee Note accompanying the 2002 amendment to Rule 5 are applicable here.

**Rule 40. Arrest for Failing to Appear in Another District
or for Violating Conditions of Release Set in Another
District**

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(d) Video teleconferencing. If the defendant consents, video

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teleconferencing may be used to conduct an appearance

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under this rule.

Committee Note

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

Rule 41. Search and Seizure

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(d) Obtaining a Warrant.

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(3) *Requesting a Warrant by Telephonic or Other*

Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

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

~~(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 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 the~~
27 ~~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.**

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38 ~~(3) *Warrant by Telephonic or Other Means.* If a~~
39 ~~magistrate judge decides to proceed under Rule~~
40 ~~41(d)(3)(A), the following additional procedures~~
41 ~~apply:~~

42 ~~(A) *Preparing a Proposed Duplicate Original*~~
43 ~~*Warrant.* The applicant must prepare a~~
44 ~~“proposed duplicate original warrant” and~~
45 ~~must read or otherwise transmit the contents of~~
46 ~~that document verbatim to the magistrate~~
47 ~~judge.~~

48 ~~(B) *Preparing an Original Warrant.* If the~~
49 ~~applicant reads the contents of the proposed~~

50 ~~duplicate original warrant, the magistrate~~
51 ~~judge must enter those contents into an~~
52 ~~original warrant. If the applicant transmits the~~
53 ~~contents by reliable electronic means, that~~
54 ~~transmission may serve as the original~~
55 ~~warrant.~~

56 ~~(C) *Modification.* The magistrate judge may~~
57 ~~modify the original warrant. The judge must~~
58 ~~transmit any modified warrant to the~~
59 ~~applicant by reliable electronic means under~~
60 ~~Rule 41(e)(3)(D) or direct the applicant to~~
61 ~~modify the proposed duplicate original~~
62 ~~warrant accordingly.~~

63 ~~(D) *Signing the Warrant.* Upon determining to~~
64 ~~issue the warrant, the magistrate judge must~~
65 ~~immediately sign the original warrant, enter~~
66 ~~on its face the exact date and time it is issued;~~

67 and transmit it by reliable electronic means to
68 the applicant or direct the applicant to sign
69 the judge's name on the duplicate original
70 warrant.

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

72 **(1) *Warrant to Search for and Seize a Person or***
73 ***Property.***

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75 (D) *Return.* The officer executing the warrant
76 must promptly return it — together with a
77 copy of the inventory — to the magistrate
78 judge designated on the warrant. The officer
79 may do so by reliable electronic means. The
80 judge must, on request, give a copy of the
81 inventory to the person from whom, or from
82 whose premises, the property was taken and
83 to the applicant for the warrant.

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

85 (A) *Noting the Time.* The officer executing a
86 tracking-device warrant must enter on it the
87 exact date and time the device was installed
88 and the period during which it was used.

89 (B) *Return.* Within 10 calendar days after the use
90 of the tracking device has ended, the officer
91 executing the warrant must return it to the
92 judge designated in the warrant. The officer
93 may do so by reliable electronic means.

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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 (f)(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.

Rule 43. Defendant's Presence

1 **(a) When Required.** Unless this rule, Rule 5, or Rule 10,
2 or Rule 32.1 provides otherwise, the defendant must be
3 present at:

- 4 **(1)** the initial appearance, the initial arraignment, and
5 the plea;
- 6 **(2)** every trial stage, including jury impanelment and
7 the return of the verdict; and
- 8 **(3)** sentencing.

9 **(b) When Not Required.** A defendant need not be present
10 under any of the following circumstances:

- 11 **(1) *Organizational Defendant.*** The defendant is an
12 organization represented by counsel who is
13 present.

14 (2) *Misdemeanor Offense.* The offense is punishable
15 by fine or by imprisonment for not more than one
16 year, or both, and with the defendant's written
17 consent, the court permits arraignment, plea, trial,
18 and sentencing to occur by video teleconferencing
19 or in the defendant's absence.

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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.

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.