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

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MEMORANDUM

Date: **May 19, 2010**

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**

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. The Draft Minutes are attached.

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;

(2) approval to publish proposed Rule 37;

(3) approval to publish proposed amendments to Rules 5 and 58;

(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.

The report also includes a discussion of the Committee's consideration of proposed amendments to Rule 16 (exculpatory evidence), Rule 12 (motions which must be made before trial), and Rule 11 (advice concerning the immigration consequences of a guilty plea), as well as its continued monitoring of issues concerning the implementation of the Crime Victims' Rights Act. We will also report on the return by the Supreme Court without comment of proposed revisions to Rule 15 to permit in limited circumstances the taking of testimony in foreign countries outside the physical presence of the defendant (to the extent we have learned in the interim why the rule was not endorsed and transmitted to Congress).

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

The Committee seeks 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 proceeding on arrest for failure to appear in other district

- Rule 41: deleting portions now covered by new Rule 4.1

• Rule 43: allowing arraignment, trial, and sentencing of misdemeanor to occur by video teleconference with defendant's written consent

• Rule 49: authorizing local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of 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 the public comments are included at the end of this memorandum. As appropriate, portions of individual rules and committee notes are excerpted in the body of this memorandum as well.

A. ACTION ITEM—Rule 1

The amendment expands the definition of "telephone" to include any technology enabling live voice conversations. No 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.

The Committee adopted the following amended language by a unanimous vote.

Rule (1). Scope; Definitions

1 * * * * *

2 **(b) Definitions.** The following definitions apply to these rules:

3 * * * * *

4 <u>(11) "Telephone" means any technology for transmitting live electronic voice communication.</u>

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 1 be approved as amended following publication and 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. No comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

Rule 3. The Complaint

1 The complaint is a written statement of the essential facts constituting

2 the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made

3 under oath before a magistrate judge or, if none is reasonably available,

4 before a state or local judicial officer.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 3 be approved as amended following publication and 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.

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

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

1 * * * * *

2 **(3)** ***Manner.***

3 (A) A warrant is executed by arresting the defendant. Upon arrest,

4 an officer possessing the original or a duplicate original
5 warrant must show it to the defendant. If the officer
6 does not possess the warrant, the officer must inform
7 the defendant of the warrant's existence and of the
8 offense charged and, at the defendant's request, must
9 show the original or a duplicate original warrant to the
10 defendant as soon as possible.
11 * * * * *
12 **(4)** ***Return.***
13 (A) After executing a warrant, the officer must return it to the judge
14 before whom the defendant is brought in accordance with Rule
15 5. The officer may do so by reliable electronic means. At the
16 request of an attorney for the government, an unexecuted
17 warrant must be brought back to and canceled by a magistrate
18 judge or, if none is reasonably available, by a state or local
19 judicial officer.
20 * * * * *
21 **(d) Warrant by Telephone or Other Reliable Electronic Means.** In
22 accordance with Rule 4.1, a magistrate judge may issue a warrant or
23 summons based on information communicated by telephone or other
reliable electronic means.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and 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 Federal Magistrate Judges Association (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 section 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.

The proposed text and committee note to Rule 4.1 provide as follows:

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
4 or 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***
12 ***Exhibits.***

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

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

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

25 (ii) have any recording or reporter's notes
26 transcribed, have the transcription
27 certified as accurate, and file it;

28 (iii) sign any other written record, certify
29 its accuracy, and file it; and
30 (iv) make sure that the exhibits are filed.
31 (3) ***Preparing a Proposed Duplicate Original of a***
32 ***Complaint, Warrant, or Summons.*** The
33 applicant must prepare a proposed duplicate
34 original of a complaint, warrant, or summons,
35 and must read or otherwise transmit its contents
36 verbatim to the judge.
37 (4) ***Preparing an Original Complaint, Warrant, or***
38 ***Summons.*** If the applicant reads the contents of
39 the proposed duplicate original, the judge must
40 enter those contents into an original complaint,
41 warrant, or summons. If the applicant transmits
42 the contents by reliable electronic means, the
43 transmission received by the judge may serve as
44 the original.
45 (5) ***Modification.*** The judge may modify the
46 complaint, warrant, or summons. The judge must
47 then:
48 (A) transmit the modified version to the
49 applicant by reliable electronic means; or

50 (B) file the modified original and direct the
51 applicant to modify the proposed duplicate
52 original accordingly.
53 **(6)** ***Issuance.*** To issue the warrant or summons, the
54 judge must:
55 (A) sign the original documents;
56 (B) enter the date and time of issuance on the
57 warrant or summons; and
58 (C) transmit the warrant or summons by reliable
59 electronic means to the applicant or direct the
60 applicant to sign the judge's name and enter
61 the date and time on the duplicate original.
62 **(c)** **Suppression Limited.** Absent a finding of bad faith,
63 evidence obtained from a warrant issued under this
64 rule is not subject to suppression on the ground that
65 issuing the warrant in this manner was unreasonable
66 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 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.

Recommendation—The Advisory Committee recommends that proposed Rule 4.1 be approved as amended following publication and 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 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).

Two 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.

Rule 6. The Grand Jury

1 * * * * *

2 **(f) Indictment and Return.** A grand jury may indict only if at
3 least 12 jurors concur. The grand jury — or its foreperson or
4 deputy foreperson — must return the indictment to a magistrate
5 judge in open court. <u>To avoid unnecessary cost or delay, the</u>
6 <u>magistrate judge may take the return by video teleconference</u>
7 <u>from the court where the grand jury sits.</u> If a complaint or
8 information is pending against the defendant and 12 jurors do
9 not concur in the indictment, the foreperson must promptly and
10 in writing report the lack of concurrence to the magistrate
11 judge.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 6 be approved as published and 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. No comments on the proposed amendment were received, and the Advisory Committee voted unanimously to recommend that it be forwarded to the Standing Committee.

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

1 * * * * *

2 (d) **Warrant by Telephone or Other Means.** In accordance with Rule

3 4.1, a magistrate judge may issue an arrest warrant or summons

4 based on information communicated by telephone or other reliable

5 electronic means.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 9 be approved as published and 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).

No 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).

As approved by the Committee, the amendment provides:

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

1 * * * * *

2 **(d) Video Teleconferencing.** Video teleconferencing may be used to

3 conduct an appearance under this rule if the defendant consents.

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

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

Rule 41. Search and Seizure

1 * * * * *

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

3 * * * * *

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

5 *Electronic Means.* In accordance with Rule 4.1, a magistrate

6 judge may issue a warrant based on information communicated by

7 telephone or other reliable electronic means.

8 ~~(A) *In General.* A magistrate judge may issue a warrant based~~
9 ~~on information communicated by telephone or other~~
10 ~~reliable electronic means.~~
11 ~~(B) *Recording Testimony.* Upon learning that an applicant is~~
12 ~~requesting a warrant under Rule 41(d)(3)(A), a magistrate~~
13 ~~judge must:~~
14 ~~(i) place under oath the applicant and any person on~~
15 ~~whose testimony the application is based; and~~
16 ~~(ii) make a verbatim record of the conversation with a~~
17 ~~suitable recording device, if available, or by a court~~
18 ~~reporter, or in writing.~~
19 ~~(C) *Certifying Testimony.* The magistrate judge must have any~~
20 ~~recording or court reporter's notes transcribed, certify the~~
21 ~~transcription's accuracy, and file a copy of the record and~~
22 ~~the transcription with the clerk. Any written verbatim~~
23 ~~record must be signed by the magistrate judge and filed~~
24 ~~with the clerk.~~
25 ~~(D) *Suppression Limited.* Absent a finding of bad faith,~~
26 ~~evidence obtained from a warrant issued under Rule~~
27 ~~41(d)(3)(A) is not subject to suppression on the ground that~~
28 ~~issuing the warrant in that manner was unreasonable under~~
29 ~~the circumstances.~~

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

31 * * * * *

32 ~~(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge~~

33 ~~decides to proceed under Rule 41(d)(3)(A), the following~~

34 ~~additional procedures apply:~~

35 ~~(A) *Preparing a Proposed Duplicate Original Warrant.* The~~

36 ~~applicant must prepare a "proposed duplicate original~~

37 ~~warrant" and must read or otherwise transmit the contents~~

38 ~~of that document verbatim to the magistrate judge.~~

39 ~~(B) *Preparing an Original Warrant.* If the applicant reads the~~

40 ~~contents of the proposed duplicate original warrant, the~~

41 ~~magistrate judge must enter those contents into an original~~

42 ~~warrant. If the applicant transmits the contents by reliable~~

43 ~~electronic means, that transmission may serve as the~~

44 ~~original warrant.~~

45 ~~(C) *Modification.* The magistrate judge may modify the~~

46 ~~original warrant. The judge must transmit any modified~~

47 ~~warrant to the applicant by reliable electronic means under~~

48 ~~Rule 41(e)(3)(D) or direct the applicant to modify the~~

49 ~~proposed duplicate original warrant accordingly.~~

50 ~~(D) *Signing the Warrant.* Upon determining to issue the~~

51 ~~warrant, the magistrate judge must immediately sign the~~

52 ~~original warrant, enter on its face the exact date and time it~~
53 ~~is issued, and transmit it by reliable electronic means to the~~
54 ~~applicant or direct the applicant to sign the judge's name on~~
55 ~~the duplicate original warrant.~~
56 **(f) Executing and Returning the Warrant.**
57 **(1) *Warrant to Search for and Seize a Person or Property.***
58 * * * * *
59 (D) *Return.* The officer executing the warrant must promptly
60 return it — together with a copy of the inventory — to the
61 magistrate judge designated on the warrant. <u>The officer</u>
62 <u>may do so by reliable electronic means.</u> The judge must,
63 on request, give a copy of the inventory to the person from
64 whom, or from whose premises, the property was taken and
65 to the applicant for the warrant.
66 **(2) *Warrant for a Tracking Device.***
67 (A) *Noting the Time.* The officer executing a tracking-device
68 warrant must enter on it the exact date and time the device
69 was installed and the period during which it was used.
70 (B) *Return.* Within 10 calendar days after the use of the
71 tracking device has ended, the officer executing the warrant
72 must return it to the judge designated in the warrant. <u>The</u>
73 <u>officer may do so by reliable electronic means.</u>
74 * * * * *

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

Rule 43. Defendant's Presence

1 * * * * *

2 **(b) When Not Required.** A defendant need not be present under any of

3 the following circumstances:

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

5 represented by counsel who is present.

6 **(2)** ***Misdemeanor Offense.*** The offense is punishable by fine or by

7 imprisonment for not more than one year, or both, and with the

8 defendant's written consent, the court permits arraignment, plea,

9 trial, and sentencing to occur <u>by video teleconferencing or</u> in the

10 defendant's absence.

11 * * * * *

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 43(b)(2) be approved as published and 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 was based upon Civil Rule 5(d)(3).

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.

Rule 49. Serving and Filing Papers

1 **(a) When Required.** A party must serve on every other party any written
2 motion (other than one to be heard ex parte), written notice,
3 designation of the record on appeal, or similar paper.
4 * * * * *
5 **(e) Electronic Service and Filing.** A court may, by local rule, allow
6 papers to be filed, signed, or verified by electronic means that are
7 consistent with any technical standards established by the Judicial
8 Conference of the United States. A local rule may require electronic
9 filing only if reasonable exceptions are allowed. A paper filed
10 electronically in compliance with a local rule is written or in writing
11 under these rules.

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

III. Action Items—Recommendations to Publish Amendments to the Rules

A. ACTION ITEM—Rule 37

New Appellate Rule 12.1 and Civil Rule 62.1 (which went into effect on December 1, 2009) create a mechanism for obtaining "indicative rulings." These rules are designed to facilitate remands to the district court to enable that court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. At its October 2009 meeting, the Committee voted unanimously to approve a new Criminal Rule that would parallel Civil Rule 62.1. At its April 2010 meeting, the Committee considered proposed changes to the Committee Note to accompany Rule 37.

The Committee's deliberations in October and April focused on two questions: (1) whether it would be desirable for the Rules of Criminal Procedure to expressly authorize indicative rulings, and (2) if so, whether any specific provisions should be added to the rule or the note to minimize problems such as confusion among pro se petitioners or frivolous use by jailhouse

lawyers. In considering these issues, the Committee benefitted greatly from the advice of Professor Catherine Struve, the reporter for the Advisory Committee on Appellate Rules.

The Committee concluded that it would be desirable for the Criminal Rules to follow the lead of Rules 12.1 and 62.1 in authorizing and providing procedures for indicative rulings. An amendment to the Criminal Rules is not necessary in order for the parties in criminal cases to seek indicative rulings. (Indeed, the practice was recognized by the Supreme Court in *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), and it was made applicable to criminal cases by the local rules in some circuits.[1]) But this was equally true of the use of indicative rulings in civil cases. The purpose of Rules 12.1 and 62.1 was to promote awareness of the possibility of indicative rulings, ensure that the possibility was available in all circuits, and render the relevant procedures uniform throughout the circuits. Those purposes are applicable to criminal cases as well. Indeed the case for an express authorization in the Criminal Rules was strengthened by the adoption of Civil Rule 62.1, because practitioners or courts might draw the erroneous conclusion that the absence of a parallel Rule of Criminal Procedure means that the procedure is not applicable in criminal cases. Adoption of a rule tracking Civil Rule 62.1 is also supported by the Judicial Conference's policy of consistency throughout the rules in dealing with the same general issue.

The Advisory Committee also found persuasive the action of the Appellate Rules Committee and the Standing Committee, which declined to exclude criminal cases from Rule 62.1 or to limit its applicability to certain kinds of cases. Former Solicitor General Seth Waxman, who first proposed an appellate rule on indicative rulings, favored explicitly excluding criminal cases. While Rule 62.1 was under consideration, the Department of Justice expressed concern that pro se prisoners would clog the system with inappropriate efforts to employ the indicative ruling procedure unless it was limited to a specific class of cases: (1) Rule 33 motions based upon newly discovered evidence, (2) government motions for substantial assistance sentence reductions under Rule 35(b), and (3) motions for a reduction based upon a retroactive change in the Sentencing Guidelines. After thorough consideration of these arguments, the Appellate Rules Committee and the Standing Committee concluded, as a policy matter, that the new indicative rulings procedure should not be restricted to certain classes of cases and should remain flexible. It was neither possible nor desirable to define in advance all of the situations in which courts might find it useful to employ the new procedure.

Mindful of this history, the Advisory Committee considered but rejected a suggestion to add language in the Committee Note indicating that the indicative rulings procedure was not available in actions brought under 28 U.S.C. § 2255. Instead, the Advisory Committee added language to the note accompanying proposed Rule 37 drawn from the Rule 62.1 Committee Note. It states that "the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see*

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[1] Those local rules may be repealed or revised because Rules 12.1 and 62.1 went into effect on December 1, 2009.

United States v. Cronic, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)."

The proposed rule and accompanying committee note are reprinted below.

Rule 37. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

1 **(a) Relief Pending Appeal.** If a timely motion is made for relief that the
2 court lacks authority to grant because of an appeal that has been
3 docketed and is pending, the court may:
4 (1) defer considering the motion;
5 (2) deny the motion; or
6 (3) state either that it would grant the motion if the court of appeals
7 remands for that purpose or that the motion raises a substantial
8 issue.
9 **(b) Notice to the Court of Appeals.** The movant must promptly notify
10 the circuit clerk under Federal Rule of Appellate Procedure 12.1 if
11 the district court states that it would grant the motion or that the
12 motion raises a substantial issue.
13 **(c) Remand.** The district court may decide the motion if the court of
14 appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion

without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Recommendation—The Advisory Committee recommends that proposed Rule 37 be published for public comment.

B. ACTION ITEM—Rules 5 and 58

The Committee approved proposed amendments to Rules 5 and 58 designed to address certain aspects of the international extradition process and to ensure that the treaty obligations of the United States are satisfied.

The Committee recommends two changes to Rule 5, and one parallel change to Rule 58. First, the Committee approved an amendment that clarifies where an initial appearance should take place for persons who have been surrendered to the United States in accordance with an extradition request to a foreign country. Second, it recommends that Rule 5 and Rule 58 be amended to require federal courts to inform a defendant in custody, at the initial court appearance, that if he is not a United States citizen, an attorney for the government or federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest, and will make any other notification required by treaty or other international agreement.[2]

The proposed amendments are important to assist federal courts in dealing with unique aspects of the international extradition process and to ensure that foreign defendants arrested pursuant to U.S. charges receive the notifications to which they are entitled pursuant to the obligations of the United States under the multilateral Vienna Convention on Consular Relations ("the Vienna Convention"), or other bilateral agreements.

1. Rule 5(c)(4)

According to longstanding practice, persons who are charged with criminal offenses in United States federal or state jurisdictions and who are surrendered to the United States following extradition proceedings in a foreign country make their initial appearance in the jurisdiction that sought the person's extradition. Although these individuals are taken into U.S. custody outside the territory of the United States, the onward transportation of such persons to the jurisdiction that sought the extradition is appropriate and authorized by statute, *see* 18 U.S.C. § 3193.

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[2] In some cases, pursuant to a bilateral agreement between the United States and a foreign country, consular officials must be notified of the arrest or detention regardless of the national's wishes. Those "mandatory notification" countries are designated in the State Department public website at http://travel.state.gov_notify.html.

Contrary to the usual practice, recent experience indicates that, occasionally, the extradited person has his Rule 5 initial appearance hearing in the first federal district in which he arrives rather than in the district that sought his extradition. For example, in a federal district bordering Mexico, one judge ordered that the Rule 5 hearing be held in that district for a number of persons extradited and surrendered simultaneously to the United States by Mexico, despite the fact that many of the defendants were sought for prosecution in various other federal jurisdictions. Although the judge may have reacted to a brief delay in the onward transportation of those defendants to their final destinations as a result of delays in connecting flights or other logistical difficulties, requiring the Rule 5 hearing in the district of first arrival only caused additional delay and extended detentions for those defendants whose alleged crimes occurred in different jurisdictions.

The Committee concluded that the initial appearance should take place in the district where the defendant was charged even in cases in which an extradited defendant arrives first in another district. The earlier stages of the extradition process will already have fulfilled the key functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Given the nature of the foreign extradition proceeding (which may have taken many months, or even years, to complete) there is little to gain by conducting an initial appearance in the district of first arrival in the United States. Accordingly, it is preferable not to delay an extradited person's transportation in order to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at that point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

2. Rules 5(d)(1)(F) and 58(b)(2)(H)

The second proposed amendment to Rule 5 (and a parallel amendment to Rule 58 for misdemeanor cases) corresponds to certain obligations of the United States, with respect to foreign nationals arrested in the United States, which arise pursuant to the Vienna Convention multilateral treaty. The Vienna Convention sets forth basic obligations that a country owes foreign nationals who are arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 of the Vienna Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Over the past several years, there has been a great deal of litigation over the manner by which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution.

In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was the appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The Court, however, did not rule on the preliminary question of whether the Vienna

Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence obtained following a violation of the Vienna Convention is not an appropriate remedy.

Notwithstanding the position of the United States in *Sanchez-Llamas v. Oregon* that the Vienna Convention does not create an enforceable, individual right, the government has created policies and taken substantial measures to ensure that the United States fulfills its international obligation to other signatory states regarding Article 36 consular provisions.[3]

The proposed amendments would require federal courts to inform a non-citizen defendant in custody that an attorney for the government or a federal law enforcement officer will, upon request, notify a consular officer from the defendant's country of nationality of his arrest, and also that the government will make any other consular notification required by its international agreements. The Department of Justice proposed these amendments as a further step in fully meeting the United States' international obligation under Article 36 of the Vienna Convention. The Department supports these amendments notwithstanding the Supreme Court's reservation of important questions surrounding the existence of any individual rights stemming from the Vienna Convention and any possible domestic remedies for a violation of the Convention. The amendments mandate a procedure that is uniformly supported without getting into unresolved questions of the extent of substantive rights or remedies. The Department noted, however, the importance of making it clear that the adoption of these amendments would not create substantive rights, modify in any respect extant Supreme Court case law construing Article 36 of the Vienna Convention, or address the various questions left open by the courts.

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[3] For example, the Department of Justice has issued regulations that establish a uniform procedure for consular notification when non-United States citizens are arrested and detained by officers of the Department of Justice. *See* 28 C.F.R. 50.5. Additionally, the Department of State has published and placed on a public website, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers law enforcement personnel can use to obtain advice and assistance. The Department of State also has published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages that police can post in their facilities. The Department of State regularly provides training and communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention. Moreover, the United States is committed to ensuring that when a law enforcement authority fails to give notice to the consulate of a detained foreign national, measures will be taken to immediately inform the consulate, address the situation to the extent possible, and prevent a reoccurrence.

The Committee approved the amendments and directed the reporters to circulate an appropriate Committee Note following the meeting. The reporters circulated draft Committee Notes as well as slightly revised language for the text of Rules 5 and 58 based upon suggestions proposed by Professor Joseph Kimble, the style consultant. Before circulating this language, the reporters consulted with the Department to be certain that changes intended to simplify and clarify the proposed amendments did not introduce any difficulties.

The Committee approved the revised language in Rules 5 and 58 and the Committee Notes by an email vote.

The proposed amendments and Committee Notes are reprinted below.

Rule 5. Initial Appearance

1 * * * * *

2 **(c) Place of Initial Appearance; Transfer to Another District.**

3 * * * * *

4 (4) ***Procedure for Persons Extradited to the United States.*** If
5 the defendant is surrendered to the United States in
6 accordance with a request for the defendant's extradition, the
7 initial appearance must be in the district (or one of the
8 districts) where the offense is charged.

9 **(d) Procedure in a Felony Case.**

10 **(1)** ***Advice.*** If the defendant is charged with a felony, the judge
11 must inform the defendant of the following:

12 * * * * *

13 (D) any right to a preliminary hearing; ~~and~~

14 (E) the defendant's right not to make a statement, and that
15 any statement made may be used against the defendant~~.~~;
16 and

17 (F) if the defendant is held in custody and is not a United
18 States citizen, that an attorney for the government or a
19 federal law enforcement officer will:
20 (i) notify a consular officer from the defendant's
21 country of nationality that the defendant has been
22 arrested if the defendant so requests; or
23 (ii) make any other consular notification required by
24 treaty or other international agreement.
25 * * * * *

Committee Note

Subdivision 5(c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Accordingly, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision 5(d)(1)(F). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be

invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *

2 **(b) Pretrial Procedure.**

3 * * * * *

4 (2) ***Initial Appearance.*** At the defendant's initial appearance on
5 a petty offense or other misdemeanor charge, the magistrate
6 judge must inform the defendant of the following:

7 * * * * *

8 (F) the right to a jury trial before either a magistrate judge
9 or a district judge – unless the charge is a petty offense;
10 ~~and~~

11 (G) any right to a preliminary hearing under Rule 5.1, and
12 the general circumstances, if any, under which the
13 defendant may secure pretrial release~~.~~ ; and

14 (H) if the defendant is held in custody and is not a United
15 States citizen, that an attorney for the government or a
16 federal law enforcement officer will:

17 (i) notify a consular officer from the defendant's
18 country of nationality that the defendant has been
19 arrested if the defendant so requests; or

20 (ii) make any other consular notification required by
21 treaty or other international agreement.

22 * * * * *

Committee Note

Subdivision (b)(2)(H). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 5 and 58 be published for public comment.

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.

Rule 32. Sentencing and Judgment.

22 **(d) Presentence Report.**

23 * * * * *

24 **(2)** ***Additional Information.*** The presentence report must also

25 contain the following:

26 (A) the defendant's history and characteristics, including:

27 (i) any prior criminal record;

28 (ii) the defendant's financial condition; and

29 (iii) any circumstances affecting the defendant's behavior
30 that may be helpful in imposing sentence or in
31 correctional treatment;
32 (B) information that assesses any financial, social,
33 psychological, and medical impact on any victim;
34 (C) when appropriate, the nature and extent of nonprison
35 programs and resources available to the defendant;
36 (D) when the law provides for restitution, information sufficient
37 for a restitution order;
38 (E) if the court orders a study under 18 U.S.C. § 3552(b), any
39 resulting report and recommendation;
40 ~~(F) any other information that the court requires, including~~
41 ~~information~~
42 ~~relevant to the factors under 18 U.S.C. § 3553(a); and~~
43 ~~(G) specify whether the government seeks forfeiture under Rule~~
44 ~~32.2 and any other provision of law;~~
45 (F) a statement of whether the government seeks forfeiture under
46 Rule 32.2 and any other law; and
47 (G) any other information that the court requires, including
48 information relevant to the factors under 18 U.S.C. §
49 3553(a).

Committee Note

Subdivision (d)(2). This technical and conforming amendment is intended to remedy two technical problems: (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.

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.

Rule 41. Search and Seizure

22 * * * * *

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

24 * * * * *

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

26 * * * * *

27 (C) *Warrant for a Tracking Device.* A tracking-device
28 warrant must identify the person or property to be
29 tracked, designate the magistrate judge to whom it must
30 be returned, and specify a reasonable length of time that
31 the device may be used. The time must not exceed 45
32 days from the date the warrant was issued. The court
33 may, for good cause, grant one or more extensions for a
34 reasonable period not to exceed 45 days each. The
35 warrant must command the officer to:
36 (i) complete any installation authorized by the warrant
37 within a specified time no longer than 10 ~~calendar~~
38 days;
39 * * * * *
40 **(f) Executing and Returning the Warrant.**
41 * * * * *
42 **(2) *Warrant for a Tracking Device.***
43 * * * * *
44 (B) *Return.* Within 10 ~~calendar~~ days after the use of the tracking
45 device has ended, the officer executing the warrant must
46 return it to the judge designated in the warrant.
47 (C) *Service.* Within 10 ~~calendar~~ days after the use of the tracking
48 device has ended, the officer executing a tracking-device
49 warrant must serve a copy of the warrant on the person who
50 was tracked or whose property was tracked. Service may be

51 accomplished by delivering a copy to the person who, or
52 whose property, was tracked; or by leaving a copy at the
53 person's residence or usual place of abode with an individual
54 of suitable age and discretion who resides at that location
55 and by mailing a copy to the person's last known address.
56 Upon request of the government, the judge may delay notice
57 as provided in Rule 41(f)(3).
58 * * * * *

Committee Note

Subdivisions (e)(2) and (f)(2). This technical and conforming amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1)(B) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

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.

IV. Discussion Items

A. Rule 16 and Exculpatory Evidence

The Committee is continuing its consideration of the question whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory evidence to the defense or to create a broader pretrial disclosure obligation. To inform its deliberations, the Committee is gathering information on how the system is currently functioning and seeking wide input on the question whether an amendment to the rules would be desirable.

On February 1, 2010, the Subcommittee held a consultative session on Rule 16 in Houston, Texas, that brought together representatives from all parts of the criminal justice system to engage in a full and frank exchange. Participants included judges, prosecutors, and defense lawyers who had extensive experience in a wide range of cases ranging from white collar cases to prosecutions involving organized crime and national security. Subcommittee members found the meeting extremely useful.

In collaboration with the Committee, the Federal Judicial Center is conducting a national survey of judges, prosecutors, and defense lawyers to gather information about their experiences, their opinions, and their recommendations. The Committee discussed the design and focus of the survey at its April meeting. Although the original intent had been to survey only those districts that have local rules requiring disclosure beyond the requirements of Rule 16, at the April meeting Committee members concluded that it would be desirable to survey all 94 districts. The responses from districts with pretrial disclosure requirements will help the Committee assess how useful those rules have been and what, if any, problems have arisen because of the expanded disclosure requirements. The inclusion of districts without such rules will provide a baseline against which to assess those responses. After the April meeting, Laural Hooper of the Federal Judicial Center circulated three draft survey instruments (designed for judges, prosecutors, and defense counsel, respectively) and solicited additional comments and suggestions from Committee members and the reporters. On the basis of this feedback, Ms. Hooper refined the survey instruments, and they are now being pretested.

At the April meeting the Committee also received a briefing about various initiatives undertaken by the Department of Justice. Assistant Attorney General Lanny Breuer informed the Committee of new guidelines issued by the Deputy Attorney General concerning pretrial disclosure, and he stated that 5,000 federal prosecutors have completed training courses on how to meet their disclosure obligations. The Department is also developing training curricula and creating a deskbook to provide guidance to prosecutors. General Breuer introduced Andrew Goldsmith, who was appointed to the Department's newly created position of National Criminal Discovery Coordinator. Mr. Goldsmith was a prosecutor for 27 years and is recognized as an expert on the policies and procedures governing electronically stored information. Mr. Goldsmith said that in his new capacity, he operates out of the Deputy Attorney General's Office, which gives him broad authority. His responsibilities include reviewing the discovery plans of all 94 U.S. Attorney's Offices, overseeing the creation of a "bluebook" on discovery practices written by experts, designing training for law enforcement agents and for paralegals, developing a discovery "bootcamp" for new prosecutors, and consulting with judges and members of the defense bar to absorb all points of view on the issue of criminal discovery.

General Breuer commented that the issues raised by the Committee and the discovery-related tasks facing the Department, particularly when dealing with other agencies, constituted "profound challenges." In order to meet those challenges, General Breuer favored a "friendly" as opposed to an "adversarial" approach. The Department is also attempting to improve the use of technology to better manage discovery information in its cases.

At the invitation of the chair, Judge Emmet Sullivan of the United States District Court for the District of Columbia also attended the April meeting. Judge Sullivan presided over the trial of former Senator Ted Stevens and he wrote the Committee in April 2009 requesting that it consider amending Rule 16 to require disclosure of all exculpatory and potentially impeaching evidence. Judge Sullivan explained that his interest in amending Rule 16 grew out of the Stevens case but transcended it and amounted to seeking justice. Although he applauded the Department's efforts to improve the administration of justice by training prosecutors and offering guidance on discovery, he questioned whether these efforts are sufficient. Administrations change, new leaders take over the Department, and *Brady* issues resurface every

few years and present a perennial problem. He urged the adoption of the proposed change to Rule 16 that the Standing Committee recommitted to the Advisory Committee in 2007.

The Advisory Committee continues to study proposals to amend the rule. The Rule 16 Subcommittee expects to review all of the information being collected by the Federal Judicial Center through its comprehensive survey and prepare a recommendation for the September 2010 meeting.

B. Rule 12 (Pleadings and Pretrial Motions)

The Advisory Committee on Criminal Rules is continuing work on a proposal that was presented to the Standing Committee in June 2009. The Advisory Committee's earlier proposal was designed to conform Rule 12 to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so.

The Standing Committee declined to publish the proposed amendment and remanded it to the Advisory Committee for further study. Although members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12, they urged the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Advisory Committee had used "waiver" because it was part of the existing language of Rule 12.

The Rule 12 Subcommittee is now considering a more fundamental revision of the rule that would clarify which motions and claims must be raised before trial, distinguish clearly which claims are forfeited and which are waived, and clarify the relationship between Rule 52 and these waiver and forfeiture provisions.

C. Rule 11 (Immigration Consequences of Guilty Plea)

The recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651, March 31, 2010), held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation. *Padilla* highlights the importance of informing an alien defendant of the immigration consequences of a guilty plea.

A Rule 11 Subcommittee has been appointed to study the question whether these consequences should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11. The Subcommittee will also consider whether, as an interim measure, the Committee should ask the Federal Judicial Center to amend the DISTRICT JUDGES' BENCHBOOK by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

D. Implementation of the Crime Victims' Rights Act

The Committee continues to monitor the implementation of the Crime Victims' Rights Act. At the April meeting the reporters and the chair of the CVRA Subcommittee, Justice Robert Edmunds, reported their conclusion that the Administrative Office annual report on the rights of crime victims (which was included in the Committee's Agenda Book) raised no concerns that would prompt consideration of further changes to the Criminal Rules.

In the ensuing discussion, one member described a "procedural anomaly" that he had encountered while representing a crime victim in a case before the District of Columbia District Court. Because the crime victim was not a party, the court's electronic filing system did not allow the lawyer to file a motion asserting the crime victim's rights. This raised the question whether there are unintended barriers to access by crime victims inherent in the structure of a court's electronic filing system. After discussion, the Committee concluded that this was not an issue that could be addressed by the Criminal Rules, but rather would fall within the jurisdiction of the Committee on Court Administration & Case Management ("CACM"). After the meeting, Judge Tallman wrote to the Chair of CACM raising the issue for its consideration.

TAB

6B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

1 * * * * *

2 **(b) Definitions.** The following definitions apply to these

3 rules:

4 * * * * *

5 (11) "Telephone" means any technology for

6 transmitting live electronic voice communication.

7 ~~(11)~~(12) "Victim" means a "crime victim" as defined in

8 18 U.S.C. § 3771(e).

9 * * * * *

Committee Note

Subdivision (b)(11). 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

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*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 electronic voice communication" rather than a "form" of communication.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

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 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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

Rule 4. Arrest Warrant or Summons on a Complaint

1 * * * * *

2 **(c) Execution or Service, and Return.**

3 * * * * *

4 **(3)** ***Manner.***

5 (A) A warrant is executed by arresting the
6 defendant. Upon arrest, an officer possessing
7 the original or a duplicate original warrant
8 must show it to the defendant. If the officer
9 does not possess the warrant, the officer must
10 inform the defendant of the warrant's
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.

27 * * * * *

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.

PUBLIC COMMENTS ON RULE 4

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

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;

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

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 subsection (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 was preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to 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, (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.

PUBLIC COMMENTS ON RULE 4.1

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA strongly endorsed the principle underlying the proposed rule and suggested clarifying language that would not suggest that the magistrate judge approves of the charges and would reflect the respective roles of the court reporter and the court.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL suggested additional language in subdivisions (b)(6) and (b)(7) requiring the judge to make and keep a record of modifications that were verbally directed and direct that the date and time of approval be noted on the duplicate original. Additionally, NACDL recommended elimination of a provision which was added to Rule 41 by the USA PATRIOT Act and carried over into new Rule 4.1. Finally, NACDL recommended a clarification of the Committee Note's reference to "magistrate judges" by adding either the words "federal judges" or a cross reference to Rule 1(c).

09-CR-007, Joan Jacobs Levie, State Bar of California, Committee on Federal Courts. The California Bar Committee expressed concern about the possibility of losing a complete and accurate record of the probable cause determination as a result of the provision allowing the magistrate judge to record only a written summary or order when an affiant does no more than swear to the accuracy of a written affidavit submitted by reliable electronic means.

Rule 6. The Grand Jury

1 * * * * *

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

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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-003, Magistrate Judge Janet Stewart. Although noting that allowing grand jury returns by video conference would be an improvement, Judge Stewart recommended that the rule be amended to follow Oregon state practice, which allows the grand jury to file indictments with the clerk's office.

09-CR-004, Magistrate Judge Donald Ashmanskas. Judge Ashmanskas recommended that the federal rules allow the return of indictments to the clerk's office, and also recommended substituting the phrase "presiding juror" for "foreperson."

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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

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

1 * * * * *

2 **(d) Video Teleconferencing.** Video teleconferencing may

3 be used to conduct an appearance under this rule if the

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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

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.

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 ~~(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~~

46 ~~of 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~~
53 ~~the 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.***
74 * * * * *
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.
94 * * * * *

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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the amendment as published.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

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.

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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL opposed the amendment to Rule 43(a), which has been withdrawn.

09-CR-008, Shamila Shohni, Jenner and Block. Ms. Shohni opposed the amendment to Rule 43(a), which has been withdrawn.

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.
5 * * * * *
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.

PUBLIC COMMENTS

09-CR-005, Thomas C. Mummert, III, Federal Magistrate Judges Association. The FMJA endorses the proposed amendment.

09-CR-006, Peter Goldberger, National Association Criminal Defense Lawyers. NACDL suggests that the wording of the proposed amendment could be clarified to make it clear that the rule applies to statutory filing requirements and that compliance with the local rule for electronic filing is "a requirement, not merely an option."