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# Federal Rules Update: How Rules Are Made: A Brief Review

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# How Rules Are Made: A Brief Review

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees that draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States they are forwarded to the Supreme Court, which reviews the rules, makes any appropriate changes, and, in turn, forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years.

## Pending rules

The following rules are scheduled for amendment on December 1, 2006—unless Congress amends them further or disapproves of the changes.

**Rule 5. Initial appearance; transfer to another district.** Rule 5 contains two amendments. First, Rule 5(c)(3)(C) would be amended to parallel a change to Rule 58(b)(2)(G) that removes a conflict between Rule 58 and Rule 5.1(a), concerning when a defendant is entitled to a preliminary hearing. The second amendment permits the magistrate judge to accept filings of warrants by reliable electronic means. Currently the rule permits the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy. The amendment substitutes the term "reliable electronic" for facsimile. The advisory committee believed the expansion of electronic filings, and the dependability of such transmissions, supported the proposed change. The committee also envisioned that a court or magistrate judge would determine whether a particular electronic means or method would be reliable. This change parallels similar amendments to Rules 32.1 and 41.

**Rule 6. The grand jury.** The proposed changes to Rule 6 are purely technical in nature and were made to conform congressional changes to the rule (Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, Title VI, § 6501(a), 118 Stat. 3760, to the writing conventions used in the restyling of the Criminal Rules.

**Rule 32.1. Revoking or modifying probation or supervised release.** Rule 32(a)(5), which addresses procedural aspects of a person's initial appearance at a proceeding to revoke or modify probation or supervised release, is being amended to permit the government to produce certified copies of the judgment, warrant, or warrant application by "reliable electronic means." This amendment parallels a similar amendment to Rule 5, and recognizes the dependability of routine use of electronic filings in both state and federal courts.

**Rule 40. Arrest for failing to appear in another district.** The amendment to Rule 40 is designed to fill a gap in the current rule—which makes no provision for magistrate judges, in the district where a person is arrested, to set release conditions for someone who has been arrested for violating other conditions for release. Under the amendment, a person who has violated conditions of release established in another district, must be taken without unnecessary delay to a magistrate judge in the district where the person was arrested. The title of the rule has also been changed to reflect the change.

**Rule 41. Search and seizure.** The proposed amendments to Rule 41 effect three changes. First, the rule has been amended to provide specific guidance on issuing "tracking-device" warrants. Second, the rule would provide for delaying any notice provisions in the rule. And, third, the rule has been amended to permit magistrate judges to use reliable electronic transmissions to issue warrants.

The proposed amendment would explicitly address the procedures for issuing and executing tracking-devices warrants. Although the topic of using tracking devices is addressed in the case law and by statute, 18 U.S.C. § 3117(a), current Rule 41 does not include any guidance on the subject.

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Under the amendments to the rule, a magistrate judge would have the authority to issue a warrant to permit entry into areas where there is a reasonable expectation of privacy, for installation, monitoring, maintenance, and removal of the tracking device. The committee note recognizes, however, that if officers intend to use tracking devices in areas where there is no reasonable expectation of privacy, no tracking-device warrant is required. (*See, e.g., United States v. Knotts*, 460 U.S. 276 (1983).) The note also states that the amendment is not intended to resolve the question on the standard to be applied and does not require that tracking-device warrants may issue only on probable cause. The rule, the committee note continues, only states that the magistrate judge must issue the warrant if probable cause is found.

The second amendment to the rule appears in new Rule 41(f)(3), which would permit the magistrate judge to grant a government request to delay any notice provision in Rule 41. This change is coextensive with 18 U.S.C. § 3103a(b), which authorizes a court to delay any notice required in conjunction with search warrants.

Finally, Rule 41 has been amended to reflect that magistrates may use reliable electronic means to issue search warrants. This amendment parallels similar amendments to Rules 5 and 32.1.

**Rule 58. Petty offenses and misdemeanors.** Currently, Rule 58(b)(2)(G)—which addresses the advice that magistrates are to give to defendants at an initial appearance—creates some confusion and conflict with Rule 5.1(a). The language in Rule 58 states that defendant is entitled to a preliminary hearing under Rule 5.1 if the defendant is in custody. Although Rule 5.1 provides a correct statement concerning the defendant's right to a preliminary hearing, the current language in Rule 58 is incomplete. As the committee note to the amendment states, the committee believed it was better to simply direct the reader to Rule 5.1, rather than attempt to expand or clarify the language in Rule 58. ■