TO: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Ed Carnes, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 18, 2004

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on May 6-7, 2004 in Monterey, California and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix G.

This Report addresses a number of action items: approval of published Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 for transmission to the Judicial Conference and approval for publication and comment on proposed amendments to Rules 5, 32.1, 40, 41, and 58.

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on May 6 and 7, 2004, in Monterey, California, and took action on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failure to Disclose.

- Rules 29, 33, 34 and 45. Proposed Amendments Re Rulings by Court on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release. Proposed Amendment Concerning Defendant's Right of Allocution.
- Rule 59; Proposed New Rule Concerning Rulings by Magistrate Judges.

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee considered and recommended amendments to the following Rules:

- Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.
- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.
- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

The Committee recommends that these rules be published for public comment.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

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

A. Summary and Recommendations

At its June 2003 meeting, the Standing Committee approved the publication of proposed amendments to Rule 12.2, 29, 32, 32.1, 33, 34, 45, and New Rule 58. The comment period for the proposed amendments was closed on February 15, 2004. The Advisory Committee received written comments from several persons and organizations commenting on all or some of the proposed amendments to the rules. The Committee has made several minor changes to rules and recommends that all of the proposed

amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM—Rule 12.2; Proposed Amendment Regarding Sanction for Failure to Produce Results of Examination.

The amendment to Rule 12.2 is intended to fill a perceived gap. Although the rule contains a sanctions provision for failing to comply with most of the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination. The Committee received four comments on the published amendment. One of the commentators, the Federal Bar Association, believes that the rule goes too far from a practical perspective and would prefer that it be left to the court in each case to decide an appropriate remedy, e.g., by providing the government with an ample opportunity to test the defendant.

Following consideration of the comments, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix A.

Recommendation—The Advisory Committee recommends that the amendments to Rule 12.2 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM—Rules 29, 33, 34 and 45; Proposed Amendments Regarding Time for Ruling on Motions Under Those Rules.

In June 2003, the Standing Committee approved for publication amendments to Rules 29, 33, 34, and 45 that would address the timing of rulings on motions filed under Rules 29, 33, and 34 and make a conforming amendment to Rule 45. In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion that is filed after the seven-day period. Accordingly, if a defendant moves for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that extension motion within the same seven-day period. If for some reason the court does not act on the motion for extension within the seven days, the court lacks jurisdiction to act on the underlying substantive motion. The amendments are designed to remedy that problem.

The Advisory Committee received four written comments, which supported the change, and made a minor clarifying change to the Committee Note. A copy of the rules is at Appendix B.

Recommendation—The Advisory Committee recommends that the amendments to Rules 29, 33, 34, and 45 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 32; Proposed Amendment Regarding Allocution by Victims of Felonies.

In June 2003, the Standing Committee approved publication of a proposed amendment to Rule 32, which would expand victim allocution to victims of non-sexual abuse and non-violent felonies. The Advisory Committee received four written comments from members of the public and also some suggested style changes from the Style Subcommittee. The public comments were mixed. Three supported the change with some reservations about implementing the rule. One commentator opposed the change. After the comment period closed, the Committee learned that Congress was in the process of considering the Victims' Right Act, which would implement a number of significant changes in federal criminal practice relating to victims of crime.

At its May 2004 meeting, the Advisory Committee considered the written comments, and the text of the pending Victims' Right Act. The Committee determined that the most appropriate course of action at this point would be to proceed with the proposed amendment to Rule 32, with the recommendation that if the Victims' Right Act is enacted, the proposed amendment be withdrawn. In that case, the Advisory Committee envisions that not only Rule 32, but other rules as well, would be examined with a view toward making changes that conform to the Act. The Committee approved the rule by a vote of 9 to 2. A copy of the rule is at Appendix C.

Recommendation—The Advisory Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference, with the understanding that if the Victims' Right Act is enacted, that the proposed amendment be withdrawn.

4. Action Item—Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments Concerning Defendant's Right of Allocution.

The amendment to Rule 32.1 would provide a person facing revocation or modification of probation or supervised release with a right of allocution. The amendment followed a suggestion in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution. The Standing Committee approved publication of the proposed amendment in June 2003; the comment period ended on February 16, 2004. The Advisory Committee received only two written comments on the amendment; both supported the change. The Committee approved the amendment, as published, by a unanimous vote.

A copy of the rule and Committee Note are at Appendix D.

Recommendation—The Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM—New Rule 59; Proposed Rule Concerning Rulings by Magistrate Judges.

Proposed new Rule 59, which would parallel Civil Rule 72, is a response to a suggestion made by the Ninth Circuit Court of Appeals in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). The new rule addresses procedures for appealing decisions by magistrate judges. In June 2003, the Committee approved publication of the proposed new rule for public comment. The Criminal Rules Committee received three comments on the rule.

Based upon those recommendations, and several suggestions from the Style Subcommittee, the Advisory Committee made a number of minor clarifying changes to both the Rule and the Committee Note, and approved the new rule by a vote of 10 to 1. A copy of the rule and Committee Note are at Appendix E.

Recommendation—The Committee recommends that new Rule 59 be approved and forwarded to the Judicial Conference.

III. Action Items—Recommendation to Publish Amendments to Rules

The Advisory Committee has considered amendments to a number of rules and recommends that they be published for public comment. The rules are as follows:

A. Action Item—Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

At its Fall 2003 meeting, the Committee considered possible amendments to a number of rules that would provide for electronic transmission of various documents to magistrate judges or the court. A subcommittee, chaired by Judge Anthony Battaglia, studied those rules and proposed amendments that would permit such transmissions. Rule 5, Initial Appearance, is one of those rules. In particular, the proposed amendment to Rule 5 would permit the government to use "reliable electronic means" to transmit the warrant to the magistrate judge. The accompanying Committee Note suggests several factors that a court may consider in determining whether a particular electronic media is reliable. The Committee unanimously approved the amendment. The Rule and the accompanying Committee Note are at Appendix F.

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

B. Action Item—Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

As noted above, the Committee considered possible amendments to several Criminal Rules in order to permit the parties to submit materials to the magistrate judge or the court by electronic means. The Committee believed that the parties should be permitted to do so in Rule 32.1 proceedings, i.e., proceedings involving revocation or modification of probation or supervised release. Again, the Committee Note addresses the issue of what might constitute "reliable electronic means." The Committee approved the amendment by a unanimous vote. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

C. Action Item—Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

Based upon a suggestion from Magistrate Judge Robert Collings, the Committee has considered a conflict in Rules 32.1 and 40 concerning the ability of the court to consider bail in out-of-district cases. Although Rule 32.1(a)(6) permits a court to consider bail in out-of-district proceedings regarding revocation of release, Rule 40 does not. The Committee unanimously agreed to amend Rule 40 to conform to Rule 32.1. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be published for public comment.

D. Action Item—Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

In conducting a survey of magistrate judges concerning use of electronic transmissions in pretrial proceedings, the Committee determined that there was an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Committee unanimously agreed with an amendment to Rule

41(e) that would permit electronic transmission of the warrant itself. The current rule permits the court to dictate the contents of warrant to the officer for transcription and the execution. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

E. Action Item—Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

Magistrate Judge Nowak e-mailed the Committee to inform it that there was a possible inconsistency between Rules 5, 5.1, and 58, concerning the right of a defendant to a preliminary hearing. The Committee agreed and unanimously proposes that Rule 58(b)(2)(G) be amended by deleting any specific reference to the question of when a defendant is entitled to a preliminary hearing, and instead direct the reader to Rule 5.1, which specifically addresses preliminary hearings. The Rule and the accompanying Committee Note are at Appendix F.

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

IV. Information Items

A. Information Item—Congressional Consideration of Amendments to Rule 46.

Congress has continued to consider possible amendments to Rule 46 in response to proposals from bail bondsmen, who have urged Congress to amend that rule to prevent judges from revoking surety bonds for violation of any condition other than for failure to appear in court. The chair of the Criminal Rules Committee, Judge Carnes, and his predecessor, Judge Davis, have testified on the matter and presented arguments and statistical data supporting the current version of the rule. At this date, the issue continues to be considered by various Congressional committees.

B. Information Item—Congressional Amendments to Rule 6

As the restyled Criminal Rules were going into effect in December 2002, Congress further amended Rule 6 to permit the government to share grand jury information with foreign governments in terrorism cases. But the amendment was based on the former version of the rule, and therefore the legislation could not be executed. The Congressional amendment has been apparently considered to be a nullity because the

amending language was based upon the older version of Rule 6. The Committee has learned that the Department of Justice has prepared conforming language to remedy the conflict in the language, and that the problem may be remedied during the current legislative session. The Advisory Committee does not anticipate taking any additional action.

C. Information Item—Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.

For the last several meetings, the Advisory Committee has considered a proposal from the Department of Justice to amend Rule 29 to require that all motions for a judgment of acquittal be deferred until after the jury has returned a verdict. Currently the rule permits the court to defer its ruling. The Department's proposal was driven in large part by the view that the court's ruling on a Rule 29 motion creates an anomaly because it is the only ruling not appealable, as a result of the double jeopardy clause. The Department has identified cases in which granting the motion was clearly incorrect. The Department's proposal to require that ruling be deferred until after verdict would, in its view, protect the defendant from double jeopardy and at the same time permit the government to appeal.

At its Fall 2003 meeting, the Committee identified two main areas where the amendment could prove particularly problematic—in those cases where there were multiple defendants or multiple counts and in those cases where the jury is unable to reach a verdict. The Department agreed to attempt to draft an amendment addressing those concerns, and was able to do so, only with regard to the hung jury scenario. In an attempt to reach a middle ground, Judge Levi proposed amendments to Rule 29 that would have permitted the defendant to receive a pre-verdict ruling on the motion, subject to a waiver of double jeopardy claims.

At its May 2004 meeting, the Committee discussed at length the underlying and competing policy concerns and the proposed amendments to Rule 29. Ultimately, the Committee voted 9 to 2 to leave Rule 29 as it is with the court having the discretion to rule on a motion for judgment of acquittal either before or after verdict.

Attachments:

Appendix A. Rule 12.2.
Appendix B. Rules 29, 33, 34 and 45.
Appendix C. Rule 32.
Appendix D. Rule 32.1.
Appendix E. New Rule 59.

Appendix F. Proposed Amendments to Rules 5, 32.1, 40, 41, and 58 for publication.

Appendix G. Minutes of April 2004 Meeting.

APPENDIX A

RULE 12.2. NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

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

Rule 12.2. Notice of Insanity Defense; Mental Examination

1 * * * * *

2 **(d) Failure to Comply.**

3 **(1)** ***Failure to Give Notice or to Submit to***

4 ***Examination.*** ~~If the defendant fails to give~~

5 ~~notice under Rule 12.2(b) or does not submit to~~

6 ~~an examination when ordered under Rule~~

7 ~~12.2(c), the~~ The court may exclude any expert

8 evidence from the defendant on the issue of the

9 defendant's mental disease, mental defect, or any

10 other mental condition bearing on the

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

11 defendant's guilt or the issue of punishment in a
12 capital case. if the defendant fails to:
13 (A) give notice under Rule 12.2(b); or
14 (B) submit to an examination when ordered
15 under Rule 12.2(c).
16 **(2)** ***Failure to Disclose.*** The court may exclude any
17 expert evidence for which the defendant has failed to
18 comply with the disclosure requirement of Rule
19 12.2(c)(3).
20 * * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to relate only to the evidence related to the matters addressed in the report, which the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed, as required in Rule 12.2(c)(3).

The rule assumes that the sanction of exclusion will result only where there has been a complete failure to disclose the report. If the report is disclosed, albeit in an untimely fashion, other relief may be appropriate, for example, granting a continuance to the government to review the report.

SUMMARY OF COMMENTS ON RULE 12.2

The Committee received four comments on the proposed amendment. Three of the commentators supported the change. The fourth, the Federal Bar Association, believes that the amendment is unnecessary.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley generally supports the proposed amendments to all of the published rules, without any specific reference to Rule 12.2.

Federal Magistrate Judges Association (CR-03-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the amendment and notes that the change "appropriately entrusts to the court to fashion an appropriate sanction."

Criminal Section (03-CR-007)
Federal Bar Association
(Kevin J. Cloherty, Chair)
February 23, 2004

The Federal Bar Association believes that the proposed amendment goes too far, from a practical perspective. The Association notes that if defense counsel does not provide notice and the evidence is excluded, an appeal will follow on grounds of ineffective assistance of counsel. Instead of this amendment, the Association suggests that the government be given "ample opportunity" to test the defendant and prepare a rebuttal.

Changes Made After Publication and Comment—RULE 12.2

The Committee made no additional changes to Rule 12.2, following publication.

APPENDIX B

RULES 29, 33, 34 & 45.

- **Copy of Rules**
- **Committee Notes**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 29. Motion for a Judgment of Acquittal

1 * * * * *

2 **(c) After Jury Verdict or Discharge.**

3 **(1) Time for a Motion.** A defendant may move for

4 a judgment of acquittal, or renew such a motion,

5 within 7 days after a guilty verdict or after the court

6 discharges the jury, whichever is later~~, or within any~~

7 ~~other time the court sets during the 7-day period~~.

8 * * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34.

Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time.

Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 33. New Trial

1 * * * * *

2 **(b) Time to File.**

3 * * * * *

4 **(2) Other Grounds.** Any motion for a new trial
5 grounded on any reason other than newly discovered
6 evidence must be filed within 7 days after the verdict
7 or finding of guilty~~, or within such further time as the~~
8 ~~court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the

underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

1 * * * * *

2 **(b) Time to File**. The defendant must move to arrest

3 judgment within 7 days after the court accepts a verdict or

4 finding of guilty, or after a plea of guilty or nolo

5 contendere~~, or within such further time as the court sets~~

6 ~~during the 7-day period~~.

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the

seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

1 * * * * * *

2 **(b) Extending Time.**

3 **(1) I*n General*.** When an act must or may be done
4 within a specified period, the court on its own may
5 extend the time, or for good cause may do so on a
6 party's motion made:

7 **(A)** before the originally prescribed or
8 previously extended time expires; or

9 **(B)** after the time expires if the party failed to
10 act because of excusable neglect.

11 **(2)** ~~***Exceptions***~~. <u>***Exception***</u> The court may not extend
12 the time to take any action under <u>Rule</u> ~~Rules 29, 33,~~
13 ~~34 and~~ 35, except as stated in ~~those rules~~ <u>that rule</u>.

14 * * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

SUMMARY OF COMMENTS ON RULES 29, 33, 34, and 45

The Committee received four comments on the proposed amendments; three commentators supported the change and the fourth noted a grammatical error in the Committee Note to Rule 34.

Professor Peter Lushing (03-CR-001)
Benjamin N. Cardozo School of Law
New York, NY
Oct. 14, 2003

Professor Lushing noted that in the Committee Note for Rule 34 the word "acquittal" seems to be misplaced.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley generally approved of the proposed rules package, but did not offer any specific comments on these particular rules.

Committee on United States Courts (03-CR-005)
State Bar of Michigan
(Joseph G. Scoville, Chair)
Lansing, Michigan
February 2, 2004

The United States Courts Committee of the State Bar of Michigan suggests that any changes to Civil Rule 6 concerning time requirements for filings should also be reflected in Criminal Rule 45. The Committee apparently offers no specific comments on the current proposed change to Rule 45.

Federal Magistrate Judges Association (CR-03-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45.

Changes Made After Publication and Comment—Rules 29, 33, 34, & 45

The Committee made no substantive changes to Rules 29, 33, 34, and 45 following publication.

APPENDIX C

RULE 32. SENTENCING AND JUDGMENT

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 32. Sentencing and Judgment

1 * * * * *

2 **(i) Sentencing.**

3 * * * * *

4 ***(4) Opportunity to Speak***

5 * * * * *

6 (B) *By a Victim of a Crime of Violence or*
7 *Sexual Abuse*. Before imposing sentence, the
8 court must address any victim of any crime of
9 violence or sexual abuse who is present at
10 sentencing and must permit the victim to speak
11 or submit any information about the sentence.
12 Whether or not the victim is present, a victim's
13 right to address the court may be exercised by
14 the following persons if present:

15 (i) a parent or legal guardian, if the
16 victim is younger than 18 years or is
17 incompetent; or
18 (ii) one or more family members or
19 relatives the court designates, if the victim
20 is deceased or incapacitated.
21 (C) *By a Victim of a Felony Other Than a Crime*
22 *of Violence or Sexual Abuse*. Before imposing
23 sentence, the court must address any victim of a
24 felony, not involving violence or sexual abuse,
25 who is present at sentencing and must permit the
26 victim to speak or submit any information about
27 the sentence. If the felony involved multiple
28 victims, the court may limit the number of
29 victims who will address the court.

30 ~~(C)~~ (D) *In Camera Proceedings.* Upon a party's
31 motion and for good cause, the court may hear in
32 camera any statement made under Rule 32(i)(4).
33 * * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large

number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless, there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

SUMMARY OF COMMENTS ON RULE 32

The Committee received four comments from members of the public and also some suggested changes from the Style Subcommittee of the Standing Committee. Three of the commentators support the amendment; one opposes it. The Style Subcommittee questioned why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." The Committee made that change.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley supports the package of amendments published in 2003, but offers no specific comments about the proposed change to Rule 32.

Hon. Robert Holmes Bell (03-CR-003)
W.D. Michigan
Grand Rapids, Michigan
October 29, 2003

Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposes the amendment to the extent it requires the court to hear victim testimony. He notes that victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. He adds that the definition of victim is so vague that many people demand to be heard. He concludes by suggesting that the entire section (B) should be rewritten to give the court the discretion to hear from the victims.

Committee on Federal Courts (03-CR-004)
State Bar of California
(Robert J. Schulze, Chair)
San Francisco, California
Feb. 14, 2004

The State Bar of California, Committee on Federal Courts, supports the amendment to Rule 32.

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the proposed change but identifies two concerns. First, the amendment does not explicitly state who is a "victim." For example, the Association questions who the victims would be in a conspiracy to distribute drugs. Second, the amendment may unduly restrict the discretion of the court. Although the rule uses the term "must," the Committee Note seems to signal some discretion to the court. The Association offers the following as additional language:

> "In particular cases, the court, may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means."

Changes Made After Publication and Comment—RULE 32

The Committee made no substantive changes to Rule 32 following publication.

APPENDIX D

RULE 32.1. REVOKING OR MODIFYING PROBATION OR SUPERVISED RELEASE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 * * * * *

2 **(b) Revocation.**

3 * * * * *

4 **(2) Revocation Hearing.** Unless waived by the
5 person, the court must hold the revocation hearing
6 within a reasonable time in the district having
7 jurisdiction. The person is entitled to:
8 (A) written notice of the alleged violation;
9 (B) disclosure of the evidence against the
10 person;
11 (C) an opportunity to appear, present evidence,
12 and question any adverse witness unless the
13 court determines that the interest of justice does
14 not require the witness to appear; ~~and~~

15 (D) notice of the person's right to retain counsel
16 or to request that counsel be appointed if the
17 person cannot obtain counsel ~~.~~ ; and
18 (E) an opportunity to make a statement and
19 present any information in mitigation.
20 **(c) Modification.**
21 ***(1) In General***. Before modifying the conditions of
22 probation or supervised release, the court must hold a
23 hearing, at which the person has the right to counsel ~~.~~
24 and an opportunity to make a statement and present
25 any information in mitigation.
26 * * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a

person upon revocation of supervised release. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2) and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

SUMMARY OF COMMENTS ON RULE 32.1

The Committee received only two written comments on the proposed amendment to Rule 32.1. Both of them supported the amendment.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Jack Horsley commented favorably on the package of published amendments. He did not, however, comment on the specific amendment to Rule 32.1

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Federal Magistrate Judges Association supports the amendment, noting that it "wisely fills a gap in the rule noted in case law."

Changes Made After Publication and Comment—RULE 32.1

The Committee made no changes to Rule 32.1 following publication.

APPENDIX E

NEW RULE 59. MATTERS BEFORE A MAGISTRATE JUDGE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 59. Matters Before a Magistrate Judge

1 **(a) Nondispositive Matters**. A district judge may refer
2 to a magistrate judge for determination any matter that does
3 not dispose of a charge or defense. The magistrate judge
4 must promptly conduct the required proceedings and, when
5 appropriate, enter on the record an oral or written order
6 stating the determination. A party may serve and file
7 objections to the order within 10 days after being served
8 with a copy of a written order or after the oral order is
9 stated on the record, or at some other time the court sets.
10 The district judge must consider timely objections and
11 modify or set aside any part of the order that is contrary to
12 law or clearly erroneous. Failure to object in accordance
13 with this rule waives a party's right to review.
14 **(b) Dispositive Matters**.

15 ***(1) Referral to Magistrate Judge.*** A district judge
16 may refer to a magistrate judge for recommendation a
17 defendant's motion to dismiss or quash an indictment
18 or information, a motion to suppress evidence, or any
19 matter that may dispose of a charge or defense. The
20 magistrate judge must promptly conduct the required
21 proceedings. A record must be made of any
22 evidentiary proceeding and of any other proceeding if
23 the magistrate judge considers it necessary. The
24 magistrate judge must enter on the record a
25 recommendation for disposing of the matter, including
26 any proposed findings of fact. The clerk must
27 immediately serve copies on all parties.
28 *(2)* **Objections to Findings and Recommendations.**
29 Within 10 days after being served with a copy of the
30 recommended disposition, or at some other time the

31 court sets, a party may serve and file specific written
32 objections to the proposed findings and
33 recommendations. Unless the district judge directs
34 otherwise, the objecting party must promptly arrange
35 for transcribing the record, or whatever portions of it
36 the parties agree to or the magistrate judge considers
37 sufficient. Failure to object in accordance with this
38 rule waives a party's right to review.
39 ***(3) De Novo Review of Recommendations***. The
40 district judge must consider de novo any objection to
41 the magistrate judge's recommendation. The district
42 judge may accept, reject, or modify the
43 recommendation, receive further evidence, or
44 resubmit the matter to the magistrate judge with
45 instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is stated on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is contrary to law or is clearly erroneous, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation by a magistrate judge whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn, supra,* at 154. *See also Matthews v. Weber*, 423 U.S. 261, 270-271 (1976).

Although the rule distinguishes between "dispositive" and "nondispositive" matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law.

SUMMARY OF COMMENTS ON RULE 59

The Committee received three comments on the proposed rule. All three support the rule. The Style Subcommittee also offered some suggested style changes to the Rule; most of those suggestions were incorporated into the rule.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Jack Horsley commented favorably on the package of rule amendments but offered no specific comments on Rule 59.

Committee on Federal Courts (03-CR-004)
State Bar of California
(Robert J. Schulze, Chair)
San Francisco, California
Feb. 14, 2004

The Committee on Federal Courts of the California State Bar supports the proposed new rule.

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association offered a number of suggested changes to the rule:

- The Association believes that in order to avoid confusion, the Committee should consider addressing the question of whether the terms "dispositive" and "nondispositive" should be given the same meaning in both Rule 59 and Civil Rule 72. It suggests that the words, "matter not dispositive of a charge or defense of a party," is preferable and would be similar to the language in Rule 72.

- It notes some ambiguity in the rule regarding the time for filing objections. It suggests that the language be changed to reflect the differences in those instances where the ruling is made orally on the record and where the ruling is written.

- The Association suggests that Rule 72 be changed to include the language in Rule 59, concerning the failure to object.

- It states that the provision in the rule that would permit the judge to alter the time for filing objections is problematic and recommends that the 10-day time limit in Rule 72 be added to Rule 59 or that if an extension is requested, that it must be made within the 10-day period.

- The Association suggests that it would be helpful to expand the Committee Note to address the differences in the scope of Rules 59 and 72, regarding referral of matters to magistrate judges. It notes that the "broad scope for Rule 59(a)" may lead to further amendments to Rule 72.

- Finally, the Association states that the rule does not address the effect of a report and recommendation in the absence of an objection. It suggests addition of a new Rule 54(b)(4) that would state that where no objection is filed that the report and recommendation is not self-executing and has no effect until the district court enters an order or judgment.

Changes Made After Publication and Comment

The Committee adopted almost all of the style suggestions by the Style Subcommittee, and several of the suggestions by the Federal Magistrate Judges' Association. In particular the Committee adopted a variation of the language suggested by the Association concerning matters disposing of a "charge or defense." The Committee also addressed the issue in Rule 59(a) of clarifying the starting point for the 10 days in which to file objections by changing the word "made" in line 9 to read "stated." In Rule 59(b)(1) the Committee rearranged the order of the sample motions that would be considered "dispositive." Finally, the Committee included a paragraph at the end of the Committee Note, addressing the decision not to further specify in the rule, or the Note, what matters might be dispositive or nondispositive.

APPENDIX F

PROPOSED AMENDMENTS TO RULES FOR PUBLICATION AND COMMENT

- **Proposed Amendment to Rule 5 & Committee Note**
- **Proposed Amendment to Rule 32.1 & Committee Note**
- **Proposed Amendment to Rule 40 & Committee Note**
- **Proposed Amendment to Rule 41 & Committee Note**
- **Proposed Amendment to Rule 58 & Committee Note**

Rule 5. Initial Appearance

1 * * * * *

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

4 * * * * *

5 **(3)** ***Procedures in a District Other Than Where the***
6 ***Offense Was Allegedly Committed.*** If the initial
7 appearance occurs in a district other than where the
8 offense was allegedly committed, the following
9 procedures apply:

10 * * * * *

11 (C) the magistrate judge must conduct a
12 preliminary hearing if required by Rule 5.1 ~~or~~
13 ~~Rule 58(b)(2)(G)~~;

14 (D) the magistrate judge must transfer the
15 defendant to the district where the offense was
16 allegedly committed if:
17 (i) the government produces the warrant,
18 a certified copy of the warrant ~~, a facsimile~~
19 ~~of either,~~ or ~~other appropriate~~ a reliable
20 electronic form of either; and
21 * * * * *

COMMITTEE NOTE

The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee

believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether

security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 **(a) Initial Appearance.**

2 * * * * *

3 **(5)** ***Appearance in a District Lacking Jurisdiction.***
4 If the person is arrested or appears in a district that
5 does not have jurisdiction to conduct a revocation
6 hearing, the magistrate judge must:

7 * * * * *

8 (B) if the alleged violation did not occur in the
9 district of arrest, transfer the person to the district
10 that has jurisdiction if:
11 (i) the government produces certified
12 copies of the judgment, warrant, and
13 warrant application, or copies of those

14 certified documents by reliable electronic

15 means; and

16 (ii) the judge finds that the person is the

17 same person named in the warrant.

18 * * * * *

COMMITTEE NOTE

Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by facsimile or by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short,

in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

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

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena—the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear, as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by subpoena; or

14 (ii) violating conditions of release set in another

15 district.

16 * * * * *

COMMITTEE NOTE

Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g.*, *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believed that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Rule 41. Search and Seizure

1 * * * * *

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

3 * * * * *

4 **(3)** ***Requesting a Warrant by Telephonic or Other***
5 ***Means.***

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

9 (B) *Recording Testimony*. Upon learning that
10 an applicant is requesting a warrant under Rule
11 41(d)(3)(A), a magistrate judge must:

12 (i) place under oath the applicant and any
13 person on whose testimony the application
14 is based; and

15 (ii) make a verbatim record of the
16 conversation with a suitable recording
17 device, if available, or by a court reporter,
18 or in writing.

19 * * * * *

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

21 * * * * *

22 **(3)** ***Warrant by Telephonic or Other Means.*** If a
23 magistrate judge decides to proceed under Rule
24 41(d)(3)(A), the following additional procedures
25 apply:

26 (A) *Preparing a Proposed Duplicate Original*
27 *Warrant.* The applicant must prepare a "proposed
28 duplicate original warrant" and must read or
29 otherwise transmit the contents of that document
30 verbatim to the magistrate judge.

31 (B) *Preparing an Original Warrant.* If the
32 applicant reads the contents of the proposed
33 duplicate original warrant, the ~~The~~ magistrate
34 judge must enter ~~the~~ those contents ~~of the~~
35 ~~proposed duplicate original warrant~~ into an
36 original warrant. If the applicant transmits the
37 contents by reliable electronic means, that
38 transmission may serve as the original warrant.
39 (C) *Modification~~s~~.* The magistrate judge may
40 modify the original warrant. The judge must
41 transmit any modified warrant to the applicant by
42 reliable electronic means under Rule 41(e)(3)(D)
43 or direct the applicant to modify the proposed
44 duplicate original warrant accordingly. ~~In that~~
45 ~~case, the judge must also modify the original~~
46 ~~warrant.~~

47 *(D) Signing the ~~Original Warrant and the~~*
48 *~~Duplicate Original~~ Warrant.* Upon determining
49 to issue the warrant, the magistrate judge must
50 immediately sign the original warrant, enter on
51 its face the exact date and time it is issued, and
52 transmit it by reliable electronic means to the
53 applicant or direct the applicant to sign the
54 judge's name on the duplicate original warrant.
55 * * * * *

COMMITTEE NOTE

Rule 41(e) has been amended to permit the magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by

electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may

consider whether there are reliable means of preserving the document for later use.

Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *

2 **(b) Pretrial Procedure.**

3 * * * * *

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

8 * * * * *

9 **(G)** ~~if the defendant is held in custody and~~
10 ~~charged with a misdemeanor other than a petty~~
11 ~~offense, the~~ any right to a preliminary hearing
12 under Rule 5.1, and the general circumstances, if

13 any, under which the defendant may secure
14 pretrial release.
15 * * * * *

COMMITTEE NOTE

Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases were the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.