

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58 with a recommendation that they be approved and transmitted to the Judicial Conference. The scheduled public hearings on the amendments were canceled because no person submitted a request to testify.

The proposed amendments to Rules 5(c), 32.1, and 41 authorize a magistrate judge to handle discrete transactions in certain proceedings by reliable electronic means, including by facsimile. The amendments recognize the growing number of courts accepting electronic filings and are intended to facilitate the use of electronic transmissions of official documents as an efficient and convenient means of conducting business. In determining which electronic means are reliable, a court is advised to consider the expected quality, security, and clarity of the transmission.

Under the proposed amendment to Rule 5(c), a magistrate judge may accept an arrest warrant transmitted by reliable electronic means when ordering the transfer of a defendant arrested in a district other than where the offense was allegedly committed to the district where the offense allegedly was committed. The present rule requires the government to produce the warrant, a certified copy, or a facsimile copy of either document.

Under the proposed amendment to Rule 32.1, a magistrate judge may accept a certified copy of a judgment, warrant, or warrant application by reliable electronic means, including by facsimile, when ordering the transfer of a defendant arrested in a district that does not have jurisdiction to hold a revocation hearing to the district that has jurisdiction to conduct a probation or supervised release revocation or modification hearing.

The proposed amendment to Rule 41 authorizes a magistrate judge to issue a search and seizure warrant based on information communicated by reliable electronic means or by telephone.

The proposed amendment to Rule 6 makes technical changes to the language added to the rule by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458) in order to conform the new language with the conventions adopted during the comprehensive restyling of the Criminal Rules. No substantive change is made. The amendments were not published for comment because they are entirely technical and conforming in nature.

The proposed amendment to Rule 40 authorizes a magistrate judge to set conditions of release for a defendant arrested for violating any condition of release set originally in another district. The present rule authorizes a magistrate judge to set release conditions for a defendant who fails to appear in another district as ordered by the court in that other district. The advisory committee concluded that it is inconsistent to empower a magistrate judge to release a defendant who fails to appear altogether, but not to release one who only violated conditions of release in a minor way.

The proposed amendment to Rule 41 provides procedural guidance to a judge issuing a “tracking device” warrant authorized under 18 U.S.C. § 3117 and case law. These warrants may be required to monitor devices when they are used to track persons or property in areas where there is a reasonable expectation of privacy. The proposed amendment regulates the installation

of the device; the contents, execution, and return of a tracking-device warrant; and the notice to the person who had been subject to the tracking device. The proposed amendment conforms to the USA PATRIOT ACT (Pub. L. No. 107-56) and includes a provision authorizing a judge to delay any notice required in conjunction with issuing any search warrant. The proposed amendment to Rule 41 had been approved by the Committee at its June 2003 meeting, but it was later withdrawn at the request of the Department of Justice. After further review, the Department of Justice had no additional recommendations and voted in favor of the proposal.

The proposed amendment to Rule 58 clarifies that a defendant's right to a preliminary hearing is governed by Rule 5.1, and it is not limited to defendants held in custody.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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