

**RECENT CHANGES TO
FEDERAL CRIMINAL
PROCEDURE
RULES OF INTEREST TO LAW
ENFORCEMENT OFFICERS**

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The Federal Rules of Criminal Procedure (hereinafter “Rules”) establish and describe the federal prosecution process. While most of the Rules are of primary interest to trial lawyers and judges, many Rules directly affect how cases are investigated, search warrants and legal process are obtained, and how you process the defendant once an arrest is made.

A completely new set of Rules went into effect on December 1, 2002. This article discusses changes to the Rules that are of interest to federal officers. In addition, this article will also discuss changes reflected in the Rules and other statutes implemented by the USA PATRIOT ACT (P.L.107-56) and the Homeland Security Act of 2002 (P.L. 107-296) that affect federal criminal procedure. A complete copy of the new Rules is available at <http://www.house.gov/judiciary/Crim2002.pdf>.¹

Unless otherwise indicated, “judge” refers to either a federal magistrate or district court judge.

I. The Big Picture – New Style and Adopting Past Interpretations.

a. The Rules are now better organized. Paragraphs that addressed more than one topic were separated into different paragraphs. The language is succinct and clear. While there are some changes in Rule numbers, most of the Rules that impact you have the same Rule number.

b. Every set of rules is subject to interpretation, and those interpretations become part of the law when applying those rules. The new Rules incorporate “past practices” and interpretations. Of interest to law enforcement officers is:

(1) ***Preliminary Examinations are now called Preliminary Hearings.*** Rule 5.1.

(2) ***Whatever a magistrate judge can do, a district court judge can do.*** The old and new Rules stated that certain functions were to be performed by a “magistrate judge.” Though it is intuitive that district court judges can perform any function a magistrate judge could, that principle was not explicitly stated in the old Rules. For example, Rule 5 states that an initial appearance is to be conducted before a magistrate judge. Would the law permit the appearance to be conducted before a district court judge? Rule 1(c) makes clear that a district court judge can perform any function that a magistrate judge may perform. The practice should remain that officers will use magistrates for all the functions that a magistrate is allowed to perform, and use a district court judge for such functions under only extraordinary conditions, or when required by law such as in a Title III order.

¹ Officers can expect later modifications to Rule 6(e) as discussed in section V of this article.

II. Changes to Search and Seizure Procedure.

The Rules have always provided the basic procedural steps in obtaining search warrants. These Rules have been substantially expanded and give officers more flexibility.

a. *Categories of evidence for which a search warrant may be issued.* Every officer is familiar with the Rule 41 listing of the types of evidence that may be the subject of a search warrant. Even if you have probable cause that a particular item is presently in a particular location, a search warrant cannot be issued unless that evidence falls into one of the categories provided for in the Rules. Old Rule 41(b) is now Rule 41(c), and new Rule 41(c) provides:

“(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

- (1) evidence of a crime;
- (2) contraband, fruits of crime, or other items illegally possessed;
- (3) property designed for use, intended for use, or used in committing a crime; or
- (4) a person to be arrested or a person who is unlawfully restrained.”

You should note, that while the categories have not changed, the wording of the categories has. You should take care when preparing an application for a search warrant (AO Form 106 in most districts) to ensure the new language is used. Templates, “go-bys,” and other references should include the new language as well as show the Rule reference has changed from 41(b) to 41(c).

b. *Nationwide, domestic terrorism search warrants.* Once you develop

probable cause to search a particular location for a particular item, the Rules provide which judge may issue the warrant. New Rule 41(b)(1) permits a judge to issue warrants for property within that judge’s district. New Rule 41(b)(2) allows a judge to issue a warrant for property “located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed.” The new Rules did not change the law with respect to those provisions (though the wording is a little different.) The USA PATRIOT Act added a third category, reflected in new Rule 41(b)(3), which provides:

“ a magistrate judge--in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)--having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.”

(1) *Domestic terrorism defined² (18 U.S.C. § 2331).* Domestic terrorism

² International terrorism is defined as “activities that—

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended--

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or

- (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in

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(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.”

(2) ***The effect of Rule 41(b)(3) search warrants.*** In the usual, non-terrorism case, when you have probable cause that evidence of a crime is located in several districts, you must obtain a search warrant from a judge in each district.³ Such a process can delay or compromise an investigation. If the case is one of domestic or international terrorism, any judge in any district in which activities related to the terrorism may have occurred may issue the warrant. Further, that warrant may authorize searches outside the judge’s district. The judge who issues the search warrant does not have to be in the district where the crime occurred, only a district where activities relating to the crime occurred. This is a powerful tool. You must be clear, however, that a Rule 41(b)(3) warrant is not a blank check to search for anything in any district; the Rule does not change the requirement to establish probable cause to search, to include both probable cause that a

particular item exists and probable cause that it is where you want to search. Rule 41(b)(3) will only reduce the number of search warrant applications in cases of terrorism where there is probable cause to search for evidence in more than one district.

c. ***Covert Entry (“Sneak and Peek”) Warrants.*** The usual search warrant allows an intrusion in order to search for and/or seize particular evidence. Once the warrant has been executed, you are required to prepare an inventory, deliver a copy of the search warrant to the affected person or persons, provide a receipt for the property taken, and make a return. (Rule 41(f)). But, what can you do when you have probable cause that evidence of a crime is in a suspect’s home, you want to look at it – and maybe photograph it – but you do not want the suspect to know you are on the case? If you execute the traditional warrant, you are required to give the suspect a copy of the warrant and make a return. Our suspect will then know he or she is under investigation.

Though some districts have permitted a delay in the return and delivery of a copy of the warrant, the Rules do not support that procedure. Section 213 of the USA PATRIOT Act, now codified in 18 U.S.C. § 3103a, allows you to request, and judges to grant, delays in notice provisions if evidence is not going to be seized and the court finds “reasonable cause” to believe that providing immediate notification of the execution of the warrant may have an adverse result.⁴ The statute does not say

which their perpetrators operate or seek asylum.

³ Section 220 of the USA PATRIOT ACT also permits nationwide search warrants for non-terrorism crimes when searching for certain electronic communications. That topic is beyond the scope of this article.

⁴ The full provisions reads: “(b) Delay. With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any

for how long the delay can or should be granted; you will have to articulate in your search warrant application why a delay is required, the adverse effect if notice is given, and how long the delay should last.

Armed with a covert entry warrant (one where the judge permits a delay in the Rule notice requirements), you can develop probable cause that a conspirator has documents in his home naming other co-conspirators, enter the house to read and copy the documents, and delay tipping off the defendant that the documents had been seen by law enforcement.

Though in many cases, a covert entry warrant will not involve the seizure of evidence to avoid tipping off the suspect, if the judge finds “reasonable necessity,” you may make a covert entry, seize evidence, and be allowed to delay notice that a search was conducted. A covert entry warrant still requires probable cause that evidence is in the place you

property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if--

(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);

(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121 [18 USCS §§ 2701 et seq.], any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.”

want to enter. So, if in our co-conspirator example above, you only *suspected* the documents were in the house, the judge should not issue a search warrant of any kind – covert entry or not.

III. Initial Appearance Issues.

a. *Where to take the defendant for an initial appearance?* Old Rule 5(a) provided that, after an arrest, the defendant should be taken “without unnecessary delay before the nearest available magistrate judge” for an initial appearance. How do you determine which judge is the “nearest?” Is that tested by distance, or the time necessary to get to the judge’s chambers? What does “available” mean? Some districts also silently incorporated the requirement that the nearest available magistrate judge was one in the district of arrest, and crossing district boundaries for an initial appearance could present procedural issues. New Rule 5(c) resolves these questions.

If the defendant is arrested in the district where the crime allegedly occurred, the defendant *must* be taken to a judge in the district of arrest. That would probably be your preference anyway.

When the defendant is arrested in a district other than the district where the crime allegedly occurred, you have three options in where to take the defendant for an initial appearance:

(1) The district of arrest,

(2) An adjacent district if the initial appearance can occur more promptly there,

or

(3) An adjacent district if the crime was allegedly committed there and the initial appearance will occur on the day of arrest.

The requirement that the initial appearance be held “without unnecessary delay” has not changed. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) is viewed in most districts as providing a 48 hour standard of when an initial appearance must be held.⁵

b. ***Initial appearance upon a summons.*** The old Rules did not make explicit that a defendant can be subjected to an initial appearance if a summons was issued instead of appearing after arrest. Rule 5(a)(3) now provides for an initial appearance when the defendant has received a summons.

c. ***Returns on an arrest warrant.*** The old Rules provided that a return on an unexecuted arrest warrant will be made to the judge who issued the warrant. There are cases when the magistrate judge who issued the warrant is unavailable when the return needs to be made. New Rule 4(c)(4)(A) provides that the return may be “cancelled by a magistrate judge.”

IV. Subpoenas.

a. ***New Rule 17(c)(1) adds “data” to the list of items that may be subpoenaed.*** While the previous categories of “books, papers, documents, or other objects the subpoena designates” probably covered data, the addition of the

“data” is important when you want not only printouts of data, but the actual data itself for analysis.

b. ***Contempt for disregarding a subpoena.*** New Rule 17(g), implementing changes to 28 USCS § 636, permits judges who issue subpoenas to hold the one who fails to respond to the subpoena in contempt. The prior Rule stated that failure to obey a subpoena could be *deemed* as contempt.

V. Grand Jury Secrecy.

a. Rule 6(e) continues to limit the conditions under which grand jury matters may be disclosed, to whom disclosure may be made, and who may authorize disclosure. The framework of when and how this is done is preserved. The USA PATRIOT Act and the Homeland Security Act of 2002 added some other situations when grand jury matters may be disclosed. The new Rules include changes made by the USA PATRIOT Act.

b. ***Foreign intelligence disclosures under the USA PATRIOT ACT.*** Rule 6(e)(3)(D) is new and permits “an attorney for the government” (which includes US Attorneys and AUSAs) to disclose grand jury matters involving foreign intelligence or counterintelligence to other federal officials. There are limitations on the recipient agency’s further disclosure and the court must be informed of the disclosure. Foreign intelligence information is defined in Rule 6(e)(3)(D)(iii) as:

“(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--

. actual or potential attack or

⁵ You should note that both the Rules, and the Committee Notes by the drafters of the Rules, emphasize that even in cases where you may use a state or local judicial officer for an initial appearance, that option should not be used unless a federal judge is unavailable.

other grave hostile acts of a foreign power or its agent;

. sabotage or international terrorism by a foreign power or its agent; or

. clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--

. the national defense or the security of the United States; or

. the conduct of the foreign affairs of the United States.”

c. ***Disclosures for use in connection with civil forfeiture provisions under the USA PATRIOT ACT.*** Rule 6(e)(3)(A)(iii) is new and based upon an amendment to 18 U.S.C. § 3322. The Rule permits an AUSA to disclose grand jury matters to another AUSA for government use in enforcing section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 USCS § 1833a].

d. ***The Homeland Security Act of 2002 amendments to Rule 6(e).*** The Homeland Security Act of 2002 was passed on November 25, 2002, and included changes to Rule 6(e). Unfortunately, this Act amended the language in the *old* Rules at a time when the *new* Rules were pending Congressional approval. When both the Homeland Security Act and the changes to the Rules become law, there was conflict in the language. Below are the changes made to the Rules by the Homeland Security Act that are not yet reflected in the new Rules.

(1) Allows disclosure to

appropriate federal, state, local or foreign government officials for the purpose of prevention or response, of grand jury matters involving a threat of grave acts of a foreign power, domestic or international sabotage or terrorism, or clandestine intelligence gathering by an intelligence service or network of a foreign power, within the United States or elsewhere;

(2) Permits disclosure to appropriate foreign government officials of grand jury matters that may disclose a violation of the law of such government;

(3) Requires state, local, and foreign officials to use disclosed information only in conformity with guidelines jointly issued by the Attorney General and the Director of Central Intelligence, and

(4) Treats as contempt of court any knowing violation of guidelines jointly issued by the Attorney General and Director of Central Intelligence with respect to disclosure of grand jury matters.

VI. Presence of the Defendant and Video-Teleconferencing.

a. ***Presence of the defendant in court.*** The Rules have been amended to specifically allow the defendant to be absent from the initial appearance, arraignment, and, in the case of a trial of a Class A misdemeanor or less, the trial itself. The absence must be with both the defendant's and the court's consent, and then only if certain other conditions are met.

b. ***“Video Teleconferencing.”*** Of far greater significance to federal officers is that the new Rules permit teleconferencing at the initial appearance

and arraignment. The committee that drafted the Rules, to include several Supreme Court Justices who were part of the Rules making process, struggled with the teleconferencing provisions and elected to allow trial judges to decide whether to use teleconferencing on a case-by-case basis. You may expect judges to be very conservative in deciding whether to use video teleconferencing even if the resources to do so are available.

VII. Acceptability of Hearsay.

The old Rules contained numerous provisions that hearsay was acceptable at certain pretrial stages and in affidavits. For example, old Rule 41(c)(1) stated a search warrant affidavit could be based on hearsay, in whole or in part. The word “hearsay” does not appear at all in the new Rules, but the acceptability of hearsay in obtaining a warrant and other process has *not* changed.

The Committee that drafted the new Rules observed that the hearsay rule is part of the Federal Rules of Evidence. With the exception of privileges, the Federal Rules of Evidence apply only to trials. Grand jury proceedings, criminal complaints, non-trial proceedings, and affidavits, by definition, are not part of “the trial.” The Rules Committee believed it redundant to state in the Rules what the Federal Rules of Evidence already said.

Affidavits based in whole or part on hearsay, as well as hearsay at non-trial proceedings, remain legally acceptable.