

## Technology-Related Rules

BY DAVID A. SCHLUETER

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

### Federal Rules of Criminal Procedure Pending Public Comment

In June 2009, the Standing Committee on the Rules authorized publication for comment on a number of rules of criminal procedure. The comment period for these proposed amendments ends February 15, 2010. More information about filing those comments is available at [www.uscourts.gov/rules](http://www.uscourts.gov/rules). All of the proposed changes, in some way, reflect the greater use of technology in the judicial system.

**Criminal Rule 1. Scope; Definitions.** Rule 1 would be amended by stating that the terms “telephone,” “telephonic,” or “telephonically” mean any form of live electronic voice communication. The Committee Note indicates that the added definition recognizes the technologies that enable live voice conversations, other than the traditional “land line.” The drafters state that although the definition is limited to “live” communications, it would cover not only cell phones but also calls placed by a computer over the Internet.



**DAVID A. SCHLUETER** is the Hardy Professor of Law and Director of Advocacy Programs at St. Mary's University Law School in San Antonio, Texas. He served as the reporter for the Advisory Committee on the Federal Rules of Criminal Procedure from 1988 to 2005. He is an associate editor to *Criminal Justice magazine*.

**Rule 3. The Complaint.** Under the proposed amendment to Rule 3, officers would be permitted to submit a complaint and supporting material by telephone or other reliable electronic means. The Committee Note observes that Rule 41 already provides for use of electronic applications for search warrants and, according to the drafters, the successful application of the provisions in that rule support a comparable change in the process of making arrests.

**Rule 4. Arrest Warrant or Summons on a Complaint.** There are three proposed changes to Rule 4. First, the rule would be amended to provide that a law enforcement officer could retain a duplicate original of an arrest warrant, which could be issued electronically. Second, Rule 4 would be changed to permit an officer to return an arrest warrant electronically, to parallel a similar change in Rule 41, *infra*, dealing with search warrants. And third, the rule would permit magistrate judges to issue arrest warrants or summons based on information received electronically—under procedures spelled out in proposed new Rule 4.1, *infra*.

**Rule 4.1 Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means.** Proposed new Rule 4.1 would permit magistrate judges to consider information presented by telephone or other reliable electronic means in deciding whether to issue a warrant (search or arrest) or summons or approve a complaint. The purpose of the proposed new rule is to consolidate a number of provisions addressing the use of telephones or reliable electronic means. Provisions in current Rule 41, dealing with use of “telephonic or other means” in obtaining and issuing search warrants, have been moved to Rule 4.1, with one exception. The current provisions in Rule 41(d)(3) and 41(e)(3)—which requires the magistrate judge to make a verbatim record of the complete telephone conversation with the applicant for the warrant, would be changed. Instead, where the warrant application and affidavit are sent to the magistrate electronically and the telephone conversation between the applicant and the magistrate is limited to attesting to the documents, the magistrate judge would only be required to prepare a written summary or order memorializing the affirmation of the oath.

**Rule 9. Arrest Warrant or Summons on an Indictment or Information.** The amendment to Rule 9 would permit a court to issue a summons or

arrest warrant based on information supplied by telephone or other reliable electronic means.

**Rule 32.1 Revoking or Modifying Probation or Supervised Release.** Under the proposed amendment to Rule 32.1, at the request of the defendant, a court may allow use of video teleconferencing in a proceeding to decide whether to revoke or modify the defendant's probation or supervised release.

**Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District.** The proposed amendment to Rule 40 would permit video teleconferencing for appearances under the rule, if the defendant consents.

**Rule 41. Search and Seizure.** The proposed amendments to Rule 41 would move the current provisions dealing with requesting warrants by telephonic and other reliable electronic means to proposed Rule 4.1. In addition, the rule would be changed to permit a law enforcement officer to return the warrant by reliable electronic means.

**Rule 43. Defendant's Presence.** Rule 43 would

be changed to permit the court to use video teleconferencing for the arraignment, plea, trial, and sentencing in misdemeanor cases—if the defendant consents in writing.

**Rule 49. Serving and Filing Papers.** Finally, the proposed amendment to Rule 49 addresses electronic service and filing, in accordance with any technical standards adopted by the Judicial Conference of the United States.

## Federal Rules of Evidence Pending Public Comment

In addition to approving publication for comment of the preceding Federal Rules of Criminal Procedure, the Standing Committee in June 2009 also approved the publication of the “restyled” Federal Rules of Evidence. The restyling project on those rules parallels similar restyling of the Criminal, Civil, and Appellate Rules of Procedure. The deadline for public comments on the Evidence Rules is also February 15, 2010. More information about filing those comments is available at [www.uscourts.gov/rules](http://www.uscourts.gov/rules). ■