

# PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF CRIMINAL PROCEDURE

Effective December 1, 2016



The following rules were adopted by the Supreme Court and transmitted to Congress on April 28, 2016. The amendments will take effect on December 1, 2016, unless Congress enacts legislation to the contrary. For further information regarding rule changes, please visit the U.S. Court Rulemaking page located at [www.uscourts.gov/rules-policies](http://www.uscourts.gov/rules-policies).

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## Amendments to Federal Rules of Civil Procedure

### Rule 4 Summons

- The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation.

### Rule 6 Computing and Extending Time; Time for Motion Papers

- The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.
- Another proposed amendment to Rule 6(d) is to substitute “after being served” for “after service.” The purpose of the amendment is to correct a potential ambiguity that was created when the “after service” language was included in the rule when it was amended in 2005.

### Rule 82. Jurisdiction and Venue Unaffected

- Civil Rule 82 addresses venue for admiralty and maritime claims and is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

## **Amendments to Federal Rules of Criminal Procedure**

### **Rule 4 Arrest Warrant or Summons on a Complaint**

- The proposed amendment fills a gap in the current rule (without expanding judicial authority) by specifying that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons.
- The amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization.
- The amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these specifically enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

### **Rule 41 Search and Seizure**

The proposed amendment to Rule 41 addresses venue for obtaining warrants for certain remote electronic searches.

- New subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include damaged computers located in five or more districts.
- The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

### **Rule 45. Computing and Extending Time**

- The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.

**AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE**  
(redline)\*

**Rule 4. Summons**

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**(m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, the court on motion or on its own after notice to the plaintiff must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

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**Committee Note**

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m). This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Invoking service “in the manner prescribed by Rule 4(f)” could easily be read to mean that service under Rule 4(h)(2) is also service “under” Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say— service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

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

## Rule 6. Computing and Extending Time; Time for Motion Papers

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- (d) **Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E)~~, or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

### Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day- of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means” of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 “to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served.” A potential ambiguity was created by substituting “after service” for the earlier references to acting after service “upon the party” if a paper or notice “is served upon the party” by the specified means. “[A]fter service” could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). “[A]fter being served” is substituted for “after service” to dispel any possible misreading.

## **Rule 82. Jurisdiction and Venue Unaffected**

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392.~~

### **Committee Note**

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

**AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE**  
(redline)\*

**Rule 4. Arrest Warrant or Summons on a Complaint**

(a) **Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

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(c) **Execution or Service, and Return.**

- (1) **By Whom.** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.
- (2) **Location.** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.
- (3) **Manner.**
  - (A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant,

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

the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

- (B) A summons is served on an individual defendant:
- (i) by delivering a copy to the defendant personally; or
  - (ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.
- (C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~ if the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization ~~organization's last known address within the district or to its principal place of business elsewhere in the United States.~~
- (D) A summons is served on an organization not within a judicial district of the United States:
- (i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or
  - (ii) by any other means that gives notice, including one that is:
    - (a) stipulated by the parties;
    - (b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or
    - (c) permitted by an applicable international agreement.

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### **Committee Note**

**Subdivision (a).** The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

**Subdivision (c)(2).** The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

**Subdivision (c)(3)(C).** The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

**Subdivision (c)(3)(D).** This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

**Subdivision (c)(3)(D)(i).** Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

**Subdivision (c)(3)(D)(ii).** Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

## Rule 41. Search and Seizure

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(b) ~~Authority to Issue a Warrant~~ **Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

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- (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:
- (A) the district where the media or information is located has been concealed through technological means; or
- (B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

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(f) **Executing and Returning the Warrant.**

(1) *Warrant to Search for and Seize a Person or Property.*

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(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

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## Committee Note

**Subdivision (b).** The revision to the caption is not substantive. Adding the word “venue” makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

**Subdivision (b)(6).** The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of “botnets”) may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms “protected computer” and “damage” have the meaning provided in 18 U.S.C. § 1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched

or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only “if the delay is authorized by statute.” See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

## Rule 45. Computing and Extending Time

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(c) **Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified period time after service being served and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E)~~, or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

### Committee Note

**Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow “day-of-the-week” counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by

invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service “by any other means of delivery” under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.