The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the ''paper world.'' In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.

Changes Made to Proposed Amendment Released for Public Comment. The words ''copying or'' were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for ''documentary evidence pertaining to the sale and distribution of controlled substances'' to prohibit opening of files with a .jpg suffix) *and United States v. Fleet Management Ltd.*, 521 F. Supp. 2d 436 (E.D. Pa. 2007) (warrant invalid when it ''did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity'') *with United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; ''computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files''); *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

Minor changes were also made to conform to style conventions.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (e)(2). The amendment eliminates unnecessary references to ''calendar'' days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include ''every day, including intermediate Saturdays, Sundays, and legal holidays[.]''

Subdivisions (f)(1) and (2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically. Additionally, in subdivision (f)(2) the amendment eliminates unnecessary references to ''calendar'' days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include ''every day, including intermediate Saturdays, Sundays, and legal holidays[.]''

Changes Made to Proposed Amendment Released for Public Comment. Obsolescent references to ''calendar'' days were deleted by a technical and conforming amendment not included in the rule as published. No other changes were made after publication.

AMENDMENT BY PUBLIC LAW

2001—Subd. (a). Pub. L. 107–56 inserted before period at end ''and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district''.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment of this rule by order of the United States Supreme Court on Apr. 26, 1976, modified and approved by Pub. L. 95–78, effective Oct. 1, 1977, see section 4 of Pub. L. 95–78, set out as an Effective Date of Pub. L. 95–78 note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment of subd. (c)(1) by order of the United States Supreme Court of Apr. 26, 1976, effective Aug. 1, 1976, see section 1 of Pub. L. 94–349, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1956 AMENDMENT

Amendment by Order of April 9, 1956, became effective 90 days thereafter.

Rule 42. Criminal Contempt

(a) DISPOSITION AFTER NOTICE. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) SUMMARY DISPOSITION. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as

provided in 28 U.S.C. §636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

The rule-making power of the Supreme Court with respect to criminal proceedings was extended to proceedings to punish for criminal contempt of court by the Act of November 21, 1941 (55 Stat. 779), 18 U.S.C. 689.

Note to Subdivision (a). This rule is substantially a restatement of existing law, *Ex parte Terry*, 128 U.S. 289; *Cooke v. United States*, 267 U.S. 517, 534.

Note to Subdivision (b). 1. This rule is substantially a restatement of the procedure prescribed in 28 U.S.C. 386–390 [now 18 U.S.C. 401, 402, 3285, 3691], and 29 U.S.C. 111 [now 18 U.S.C. 3692].

2. The requirement in the second sentence that the notice shall describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in *McCann v. New York Stock Exchange*, 80 F.2d 211 (C.C.A. 2d). See also *Nye v. United States*, 313 U.S. 33, 42–43.

3. The fourth sentence relating to trial by jury preserves the right to a trial by jury in those contempt cases in which it is granted by statute, but does not enlarge the right or extend it to additional cases. The respondent in a contempt proceeding may demand a trial by jury as of right if the proceeding is brought under the Act of March 23, 1932, c. 90, sec. 11, 47 Stat. 72, 29 U.S.C. 111 [now 18 U.S.C. 3692] (Norris-La Guardia Act), or the Act of October 15, 1914, c. 323, sec. 22, 38 Stat. 738, 28 U.S.C. 387 (Clayton Act).

4. The provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him, is based, in part, on 29 U.S.C. former §112 (Contempts; demand for retirement of judge sitting in proceeding) and the observations of Chief Justice Taft in *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 69 L.Ed. 767.

5. Among the statutory provisions defining criminal contempts are the following:

U.S.C., Title 7:

Section 499m (Perishable Agricultural Commodities Act; investigation of complaints; procedure; penalties; etc.—(c) Disobedience to subpenas; remedy; contempt)

U.S.C., Title 9:

Section 7 (Witnesses before arbitrators; fees, compelling attendance)

U.S.C., Title 11:

Section 69 [former] (Referees; contempts before)

U.S.C., Title 15:

Section 49 (Federal Trade Commission; documentary evidence; depositions; witnesses)

Section 78u (Regulation of Securities Exchanges; investigation; injunctions and prosecution of offenses)

Section 100 (Trademarks; destruction of infringing labels; service of injunction, and proceedings for enforcement)

Section 155 (China Trade Act; authority of registrar in obtaining evidence)

U.S.C., Title 17:

Section 36 [now 502] (Injunctions; service and enforcement)

U.S.C., Title 19:

Section 1333 (Tariff Commission; testimony and production of papers—(b) Witnesses and evidence)

U.S.C., Title 22:

Section 270f (International Bureaus; Congresses, etc.; perjury; contempts; penalties)

U.S.C., Title 28:

Section 385 [now 459; 18 U.S.C. 401] (Administration of oaths; contempts)

Section 386 [now 18 U.S.C. 402, 3691] (Contempts; when constituting also criminal offense)

Section 387 [now 18 U.S.C. 402] (Same; procedure; bail; attachment; trial; punishment) (Clayton Act; jury trial; section)

Section 388 [former] (Same; review of conviction)

Section 389 [now 18 U.S.C. 402, 3691] (Same; not specifically enumerated)

Section 390 [now 18 U.S.C. 3285] (Same; limitations)

Section 390a [now 18 U.S.C. 402] (''Person'' or ''persons'' defined)

Section 648 [now Rule 17(f), FRCP, 18 U.S.C., Appendix; Rule 45(d), FRCP, 28 U.S.C., Appendix] (Depositions under dedimus potestatem; witnesses; when required to attend)

Section 703 [former] (Punishment of witness for contempt)

Section 714 [now 1784] (Failure of witness to obey subpena; order to show cause in contempt proceedings)

Section 715 [now 1784] (Direction in order to show cause for seizure of property of witness in contempt)

Section 716 [now 1784] (Service of order to show cause)

Section 717 [now 1784] (Hearing on order to show cause; judgment; satisfaction)

Section 750 [now 2405] (Garnishees in suits by United States against a corporation; garnishee failing to appear)

U.S.C., Title 29:

Section 111 [now 18 U.S.C. 3692] (Contempts; speedy and public trial; jury) (Norris-La Guardia Act)

Section 112 [now Rule 42, FRCP, 18 U.S.C., Appendix] (Contempts; demands for retirement of judge sitting in proceeding)

Section 160 (Prevention of unfair labor practices—(h) Jurisdiction of courts unaffected by limitations prescribed in sections 101–115 of Title 29)

Section 161 (Investigatory powers of Board—(2) Court aid in compelling production of evidence and attendance of witnesses)

Section 209 (Fair Labor Standards Act; attendance of witnesses)

U.S.C., Title 33:

Section 927 (Longshoremen's and Harbor Workers' Compensation Act; powers of deputy commissioner)

U.S.C., Title 35:

Section 56 [now 24] (Failing to attend or testify)

U.S.C., Title 47:

Section 409 (Federal Communications Commission; hearing; subpenas; oaths; witnesses; production of books and papers; contempts; depositions; penalties)

U.S.C., Title 48:

Section 1345a (Canal Zone; general jurisdiction of district court; issue of process at request of officials; witnesses; contempt)

U.S.C., Title 49:

Section 12 [see 721(c)(2), 13301(c)(2)] (Interstate Commerce Commission; authority and duties of commission; witnesses; depositions—(3) Compelling attendance and testimony of witnesses, etc.)

Federal Rules of Civil Procedure:

Rule 45 (Subpoena) subdivision (f) (Contempt)

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 42 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The revised rule is intended to more clearly set out the procedures for conducting a criminal contempt proceeding. The current rule implicitly recognizes that an attorney for the government may be involved in the prosecution of such cases. Revised Rule 42(a)(2) now explicitly addresses the appointment of a ''prosecutor'' and adopts language to reflect the holding in *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). In that case the Supreme Court indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The rule envisions that a disinterested counsel should be appointed to prosecute the contempt.

Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply. *See, e.g., United States v. Martin-Trigona*, 759 F.2d 1017 (2d Cir. 1985). Further, Rule 42(b) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

TITLE IX. GENERAL PROVISIONS

Rule 43. Defendant's Presence

(a) WHEN REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) WHEN NOT REQUIRED. A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. §3582(c).

(c) WAIVING CONTINUED PRESENCE.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(35), July 31, 1975, 89 Stat. 376; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law, *Lewis v. United States*, 146 U.S. 370; *Diaz v. United States*, 223 U.S. 442, 455. This principle does not apply to hearings on motions made prior to or after trial, *United States v. Lynch*, 132 F.2d 111 (C.C.A. 3d).

2. The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, *Diaz v. United States*, 223 U.S. 442, 455; *United States v. Noble*, 294 F. 689 (D.Mont.)—affirmed, 300 F. 689 (C.C.A. 9th); *United States v. Barracota*, 45 F.Supp. 38 (S.D.N.Y.); *United States v. Vassalo*, 52 F.2d 699 (E.D.Mich.).

3. The fourth sentence of the rule empowering the court in its discretion, with the defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence adopts a practice prevailing in some districts comprising very large areas. In such districts appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed. The rule, which is in the interest of defendants in such situations, leaves it discretionary with the court to permit defendants in misdemeanor cases to absent themselves and, if so, to determine in what types of misdemeanors and to what extent. Similar provisions are found in the statutes of a number of States. See A.L.I. Code of Criminal Procedure, pp. 881–882.

4. The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved.

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

The revision of rule 43 is designed to reflect *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970). In *Allen*, the court held that ''there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.'' 397 U.S. at 343–344, 90 S.Ct. 1057.

Since rule 43 formerly limited trial in absentia to situations in which there is a ''voluntary absence after the trial has been commenced,'' it could be read as precluding a federal judge from exercising the third option held to be constitutionally permissible in *Allen*. The amendment is designed to make clear that the judge