Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §2072, and with the district's local rules. This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices—or attaching instructions to a notice setting a case for conference or trial—would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 57 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.

Rule 58. Petty Offenses and Other Misdemeanors

(a) SCOPE.

(1) *In General.* These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise.

(2) *Petty Offense Case Without Imprisonment.* In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.

(3) *Definition.* As used in this rule, the term ''petty offense for which no sentence of imprisonment will be imposed'' means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.

(b) PRETRIAL PROCEDURE.

(1) *Charging Document.* The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.

(2) *Initial Appearance.* At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

(A) the charge, and the minimum and maximum penalties, including imprisonment, fines, any special assessment under 18 U.S.C. §3013, and restitution under 18 U.S.C. §3556;

(B) the right to retain counsel;

(C) the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required;

(D) the defendant's right not to make a statement, and that any statement made may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a district judge—unless:

(i) the charge is a petty offense; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) the right to a jury trial before either a magistrate judge or a district judge—unless the charge is a petty offense; and

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) *Arraignment.*

(A) *Plea Before a Magistrate Judge.* A magistrate judge may take the defendant's plea in a petty offense case. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere.

(B) *Failure to Consent.* Except in a petty offense case, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.

(c) ADDITIONAL PROCEDURES IN CERTAIN PETTY OFFENSE CASES. The following procedures also apply in a case involving a petty offense for which no sentence of imprisonment will be imposed:

(1) *Guilty or Nolo Contendere Plea.* The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty.

(2) *Waiving Venue.*

(A) *Conditions of Waiving Venue.* If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere; to waive venue and trial in the district where the proceeding is pending; and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.

(B) *Effect of Waiving Venue.* Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) *Sentencing*. The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

(4) *Notice of a Right to Appeal*. After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.

(d) PAYING A FIXED SUM IN LIEU OF APPEARANCE.

(1) *In General*. If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law.

(2) *Notice to Appear*. If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address.

(3) *Summons or Warrant*. Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by an attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.

(e) RECORDING THE PROCEEDINGS. The court must record any proceedings under this rule by using a court reporter or a suitable recording device.

(f) NEW TRIAL. Rule 33 applies to a motion for a new trial.

(g) APPEAL.

(1) *From a District Judge's Order or Judgment*. The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence.

(2) *From a Magistrate Judge's Order or Judgment*.

(A) *Interlocutory Appeal*. Either party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence*. A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

(C) *Record*. The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

(D) *Scope of Appeal*. The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

(3) *Stay of Execution and Release Pending Appeal*. Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.

(Added May 1, 1990, eff. Dec. 1, 1990; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1990

This new rule is largely a restatement of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates which were promulgated in 1980 to replace the Rules for the Trial of Minor Offenses before United States Magistrates (1970). The Committee believed that a new single rule should be incorporated into the Rules of Criminal Procedure where those charged with its execution could readily locate it and realize its relationship with the other Rules. A number of technical changes have been made throughout the rule and unless otherwise noted, no substantive changes were intended in those amendments. The Committee envisions no major changes in the way in which the trial of misdemeanors and petty offenses are currently handled.

The title of the rule has been changed by deleting the phrase ''Before United States Magistrates'' to indicate that this rule may be used by district judges as well as magistrates. The phrase ''and Petty Offenses'' has been added to the title and elsewhere throughout the rule because the term ''misdemeanor'' does not include an ''infraction.'' *See* 18 U.S.C. §3559(a). A petty offense, however, is defined in 18 U.S.C. §19 as a Class B misdemeanor, a Class C misdemeanor, or an infraction, with limitations on fines of no more than $5,000 for an individual and $10,000 for an organization.

Subdivision (a) is an amended version of current Magistrates Rule 1. Deletion of the phrase ''before United States Magistrates under 18 U.S.C. §3401'' in Rule 1(a) will enable district judges to use the abbreviated procedures of this rule. Consistent with that change, the term ''magistrate'' is amended to read ''the court,'' wherever appropriate throughout the rule, to indicate that both judges and magistrates may use the rule. The last sentence in (a)(1) has been amended to reflect that the rule also governs an appeal from a magistrate's decision to a judge of the district court. An appeal from

a district judge's decision would be governed by the Federal Rules of Appellate Procedure. Subdivision (a)(2) rephrases prior language in Magistrate Rule 1(b). Subdivision (a)(3) adds a statutory reference to 18 U.S.C. §19, which defines a petty offense as a ''Class B misdemeanor, a Class C misdemeanor, or an infraction'' with the $5,000 and $10,000 fine limitations noted *supra*. The phrase ''regardless of the penalty authorized by law'' has been deleted.

Subdivision (b) is an amended version of current Magistrates Rule 2. The last sentence in current Rule 2(a) has been deleted because 18 U.S.C. §3401(a), provides that a magistrate will have jurisdiction to try misdemeanor cases when specially designated to do so by the district court or courts served by the Magistrate.

Subdivision (b)(2) reflects the standard rights advisements currently included in Magistrates Rule 2 with several amendments. Subdivision (b)(2)(A) specifically requires that the defendant be advised of all penalties which may be imposed upon conviction, including specifically a special assessment and restitution. A number of technical, nonsubstantive, changes have been made in the contents of advisement of rights. A substantive change is reflected in subdivision (b)(2)(G), currently Magistrates Rule 2(b)(7), and (8). That rule currently provides that, unless the prosecution is on an indictment or information, a defendant who is charged with a misdemeanor other than a petty offense has a right to a preliminary hearing, if the defendant does not consent to be tried by the magistrate. As amended, only a defendant in custody has a right to a preliminary hearing.

Subdivision (b)(3)(A) is based upon Magistrates Rule 2(c) and has been amended by deleting the last sentence, which provides that trial may occur within 30 days ''upon written consent of the defendant.'' The change is warranted because the Speedy Trial Act does not apply to petty offenses. *See* 18 U.S.C. §3172(2). Subdivision (b)(3)(B), ''Failure to Consent,'' currently appears in Magistrates Rule 3(a). The first sentence has been amended to make it applicable to all misdemeanor and petty offense defendants who fail to consent. The last sentence of Rule 3(a) has been deleted entirely. Because the clerk is responsible for all district court case files, including those for misdemeanor and petty offense cases tried by magistrates, it is not necessary to state that the file be transmitted to the clerk of court.

Subdivision (c) is an amended version of current Magistrates Rule 3 with the exception of Rule 3(a), which, as noted *supra* is now located in subdivision (b)(3)(B) of the new rule. The phrase ''petty offense for which no sentence of imprisonment will be imposed'' has been deleted because the heading for subdivision (c) limits its application to those petty offenses. The Committee recognizes that subdivision (c)(2) might result in attempted forum shopping. *See*, *e.g.*, *United States v. Shaw*, 467 F. Supp. 86 (W.D. La. 1979), *affm'd*, 615 F. 2d 251 (5th Cir. 1980). In order to maintain a streamlined and less formal procedure which is consistent with the remainder of the Rule, subdivision (c)(2) does not require the formal ''consent'' of the United States Attorneys involved before a waiver of venue may be accomplished. *Cf*. Rule 20 (Transfer From the District for Plea and Sentence). The Rule specifically envisions that there will be communication and coordination between the two districts involved. To that end, reasonable efforts should be made to contact the United States Attorney in the district in which the charges were instituted. Subdivision (c)(4), formerly Rule 3(d), now specifically provides that the defendant be advised of the right to appeal the sentence. This subdivision is also amended to provide for advising the defendant of the right to appeal a sentence under the Sentencing Reform Act when the defendant is sentenced following a plea of guilty. Both amendments track the language of Rule 32(a)(2), as amended by the Sentencing Reform Act.

Subdivision (d) is an amended version of Magistrates Rule 4. The amendments are technical in nature and no substantive change is intended.

Subdivision (e) consists of the first sentence of Magistrates Rule 5. The second sentence of that Rule was deleted as being inconsistent with 28 U.S.C. §753(b) which gives the court discretion to decide how the proceedings will be recorded. The third sentence is deleted to preclude routine waivers of a verbatim record and to insure that all petty offenses are recorded.

Subdivision (f) replaces Magistrates Rule 6 and simply incorporates by reference Rule 33.

Subdivision (g) is an amended version of Magistrates Rule 7. Because the new rule may be used by both magistrates and judges, subdivision (g)(1) was added to make it clear that the Federal Rules of Appellate Procedure govern any appeal in a case tried by a district judge pursuant to the new rule. Subdivision (g)(2)(B), based upon Magistrates Rule 7(b), now provides for appeal of a sentence by a magistrate and is thus consistent with the provisions of 18 U.S.C. §3742(f). Finally, subdivision (g)(3) is based upon Magistrates Rule 7(d) but has been amended to provide that a stay of execution is applicable, if an appeal is taken from a sentence as well as from a conviction. This change is consistent with the recent amendment of Rule 38 by the Sentencing Reform Act.

The new rule does not include Magistrates Rules 8 and 9. Rule 8 has been deleted because the subject of local rules is covered in Rule 57. Rule 9, which defined a petty offense, is now covered in 18 U.S.C. §19.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendments are technical. No substantive changes are intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101–650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The Federal Courts Improvement Act of 1996, Sec. 202, amended 18 U.S.C. §3401(b) and 28 U.S.C. §636(a) to remove the requirement that a defendant must consent to a trial before a magistrate judge in a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction. Section 202 also changed 18 U.S.C. §3401(b) to provide that in all other misdemeanor cases, the defendant may consent to trial either orally on the record or in writing. The amendments to Rule 58(b)(2) and (3) conform the rule to the new statutory language and include minor stylistic changes.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 58 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.

The title of the rule has been changed to ''Petty Offenses and Other Misdemeanors.'' In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee amended the rule to require that the ''district clerk,'' instead of the magistrate judge, inform the original district clerk if the defendant waives venue and the prosecution proceeds in the district where the defendant was arrested. The Committee intends no change in practice.

In Rule 58(g)(1) and (g)(2)(A), the Committee deleted as unnecessary the word ''decision'' because its meaning is covered by existing references to an ''order, judgment, or sentence'' by a district judge or magistrate judge. In the Committee's view, deletion of that term does not amount to a substantive change.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance

on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. §3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

Changes Made After Publication and Comment. The Committee [made] no changes to the Rule or Committee note after publication.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

REFERENCES IN TEXT

The Federal Rules of Appellate Procedure, referred to in subd. (g)(1), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Rule 59. Matters Before a Magistrate Judge

(a) NONDISPOSITIVE MATTERS. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) DISPOSITIVE MATTERS.

(1) *Referral to Magistrate Judge.* A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) *Objections to Findings and Recommendations.* Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) *De Novo Review of Recommendations.* The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.

(Added Apr. 25, 2005, eff. Dec. 1, 2005; amended Mar. 26, 2009, eff. Dec. 1, 2009.)

COMMITTEE NOTES ON RULES—2002

Rule 59, which dealt with the effective date of the Federal Rules of Criminal Procedure, is no longer necessary and has been deleted.

COMMITTEE NOTES ON RULES—2005

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of a magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is stated on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is contrary to law or is clearly erroneous, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. §636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).