

October 1, 2007

Hon. Richard C. Tallman
Circuit Judge
Ninth Circuit Court of Appeals
Chair, Advisory Committee on Criminal Rules
Park Place Building
1200 Sixth Avenue, 21st Floor
Seattle, WA 98101-3123

Re: Proposed Amendment to Federal Rules of Criminal Procedure

Dear Judge Tallman:

I am writing on behalf of myself and the other Magistrate Judges of the Eastern District of New York at the suggestion of Senior United States District Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules. We are writing to suggest that the Federal Rules of Criminal Procedure be amended to permit judges to receive and grant applications for orders and warrants, including arrest warrants, pen registers and trap and trace orders, by telephone or other reliable electronic means.

Federal Rule of Criminal Procedure 41 was amended in 2006 to permit judges to issue warrants "based on information communicated by telephone or other reliable electronic means." 2006 Amendments, Advisory Committee Note to Subdivision (e) This amendment, recognizing the widespread use of facsimile transmissions and email messages, makes it far easier and more efficient for warrant applications to be made and considered when court is not in session. The Advisory Committee explicitly recognized that transmitting documents electronically can be a reliable means of promoting efficient use of judicial resources. Id.

We propose that the scope of the rule be clarified and expanded. More specifically, we propose that any application that could be made in writing may also be submitted and ruled upon by telephone or any reliable electronic means. We envision at least two practical applications of such a rule.

First, the amendment to Rule 41 discussed above apparently does not apply to arrest warrants sought pursuant to Rule 4. While late-night warrant requests are more frequently made for search and seizure warrants than arrest warrants, there are occasions when arrest warrants are

sought on an emergency basis ¹

Second, the proposed rule change would permit an application for a pen register or trap and trace device to be made by electronic means. Although emergency applications for pen registers or trap and trace devices are rare, at least in this district, they do occur, particularly when a law enforcement investigation involving undercover agents or active informants goes awry, and agents seek immediate information about calls being made to or from one or more telephones

We do recognize that the requirement that an application for a pen register or trap and trace be made in writing is contained in a statute, 18 U.S.C. § 3122(a), rather than a rule. We believe that even a writing required by a statute may include, particularly if the rules so provide, a written document transmitted by electronic means. However, if the Committee believes it is inappropriate to adopt a rule arguably expanding upon the terms of a statutory provision, we propose in the alternative and at a minimum that Rule 4 be amended to state explicitly that an arrest warrant may be sought and issued pursuant to the procedures set forth in Rule 41. This might be accomplished simply by adding a sentence to Rule 4(a) providing that an arrest warrant may be obtained and issued pursuant to the procedures set forth in Rule 41(d) and (e).

Thank you for your attention to our proposal. We would of course be happy to answer any questions the committee may have.

Sincerely,

Steven M. Gold
U.S. Magistrate Judge

¹Coincidentally, one of my fellow magistrate judges was recently called upon to consider an application for arrest warrants that had to be made late on a Friday night. The agents seeking the warrants were required to travel a substantial distance from where they were located to present their application to the magistrate judge at her home. Had the agents been seeking search warrants, the magistrate judge could have received their application and ruled on it telephonically or electronically.

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