
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

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Bill No: AB 2710 **Hearing Date:** June 26, 2018
Author: Obernolte
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Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Warrants*

HISTORY

Source: Judicial Council

Prior Legislation: AB 39 (Medina), Ch. 193, Stats. 2015
AB 1004 (Gray), Ch. 460, Stats. 2013

Support: California District Attorneys Association; California Judges Association

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to eliminate the requirement that a judge take the oath over the telephone when an officer makes an application for a search warrant or arrest warrant by fax, email, or computer server and to instead require an officer to sign a declaration in support of search or arrest warrant under penalty of perjury.

Existing law states a declaration of probable cause for arrest is made by a peace officer, as specified, the judge, if, and only if, satisfied from the declaration that there exists probable cause that the offense described in the declaration has been committed and that the defendant described therein has committed the offense, shall issue a warrant of probable cause for the arrest of the defendant. (Pen. Code, § 817, subd. (a)(1).)

Existing law specifies that the declaration in support of the warrant of probable cause for arrest shall be a sworn statement made in writing. (Pen. Code, § 817, subd. (b).)

Existing law provides that as an alternative to the written declaration, the judge may take an oral statement under oath under one of the following conditions:

- 1) The oath shall be taken under penalty of perjury and recorded and transcribed. The transcribed statement shall be deemed to be the declaration for the purposes of this section. The recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative, the sworn oral statement may be recorded by a certified court reporter who shall certify the

transcript of the statement, after which the magistrate receiving it shall certify the transcript, which shall be filed with the clerk of the court; or,

- 2) The oath is made using telephone and facsimile transmission equipment, or made using telephone and electronic mail, or telephone and computer server, under all of the following conditions:
 - a) The oath is made during a telephone conversation with the magistrate, after which the declarant shall sign his or her declaration in support of the warrant of probable cause for arrest. The proposed warrant and all supporting declarations and attachments shall then be transmitted to the magistrate utilizing facsimile transmission equipment, electronic mail, or computer server;
 - b) The magistrate shall confirm with the declarant the receipt of the warrant and the supporting declarations and attachments. The magistrate shall verify that all the pages sent have been received, that all pages are legible, and that the declarant's signature, digital signature, or electronic signature is acknowledged as genuine; and,
 - c) If the magistrate decides to issue the warrant, he or she shall:
 - i. Cause the warrant, supporting declarations, and attachments to be subsequently printed if those documents are received by electronic mail or computer server;
 - ii. Sign the warrant. The magistrate's signature may be in the form of a digital signature or electronic signature if electronic mail or computer server is used for transmission to the magistrate;
 - iii. Note on the warrant the exact date and time of the issuance of the warrant;
 - iv. Indicate on the warrant that the oath of the declarant was administered orally over the telephone; and,
 - v. The completed warrant, as signed by the magistrate, shall be deemed to be the original warrant.
 - d) The magistrate shall transmit via facsimile transmission equipment, electronic mail, or computer server, the signed warrant to the declarant who shall telephonically acknowledge its receipt. The magistrate shall then telephonically authorize the declarant to write the words "duplicate original" on the copy of the completed warrant transmitted to the declarant and this document shall be deemed to be a duplicate original warrant. (Pen. Code, § 817, subd. (c)(1)-(2).)

Existing law states that before issuing a warrant, the magistrate may examine under oath the person seeking the warrant and any witness the person may produce, take the written declaration of the person or witness, and cause the person or witness to subscribe the declaration. (Pen. Code, § 817, subd. (d).)

Existing law specifies that before issuing a search warrant, the judge may question under oath the person seeking the warrant and any witnesses the person may produce, and shall take his or her affidavit in writing. (Pen. Code, § 1526, subd. (a).)

Existing law allows the judge to take an oral statement in support of a search warrant, under oath, under one of the following conditions:

- 3) The oath shall be made under penalty of perjury and recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for a search warrant. In these cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in these cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court;
- 4) The oath is made using telephone and facsimile transmission equipment, telephone and email, or telephone and computer server, as follows:
 - a) The oath is made during a telephone conversation with the magistrate, after the affiant has signed his or her affidavit in support of the application for the search warrant and transmitted the proposed search warrant and all supporting affidavits and documents to the magistrate. The affiant's signature may be in the form of a digital signature or electronic signature if email or computer server is used for transmission to the magistrate;
 - b) The magistrate shall confirm with the affiant the receipt of the search warrant and the supporting affidavits and attachments. The magistrate shall verify that all the pages sent have been received, that all pages are legible, and that the affiant's signature, digital signature, or electronic signature is acknowledged as genuine; and,
 - c) If the magistrate decides to issue the search warrant, he or she shall:
 - i. Sign the warrant. The magistrate's signature may be in the form of a digital signature or electronic signature if email or computer server is used for transmission by the magistrate;
 - ii. Note on the warrant the exact date and time of the issuance of the warrant; and,
 - iii. Indicate on the warrant that the oath of the affiant was administered orally over the telephone. (Pen. Code, § 1526, subd. (a).)

Existing law requires the judge to transmit via facsimile transmission equipment, email, or computer server, the signed search warrant to the affiant. The completed search warrant, as signed by the magistrate and received by the affiant, shall be deemed to be the original warrant. (Pen. Code, § 1526, subd. (b)(2)(D).)

This bill eliminates the requirement that a judge take the oath over the telephone when an officer makes an application for an arrest warrant or a search warrant by fax, email, or computer server.

This bill deletes the requirement that the judge confirm with the declarant the receipt of the warrant and the supporting declarations and attachments, when the application is made by fax, email, or computer server.

This bill requires if the declarant transmits the proposed arrest warrant or search warrant and all affidavits and supporting documents to the magistrate using facsimile transmission equipment, email, or computer server, the declarant to sign under penalty of perjury his or her declaration in support of the warrant of probable cause for arrest or for issuance of a search warrant and the magistrate to verify that all the pages sent have been received, that all the pages are legible, and that the declarant's signature, digital signature, or electronic signature is genuine.

This bill states that the warrant, signed by the magistrate and received by the declarant, shall be deemed the original warrant.

This bill makes other conforming changes.

COMMENTS

1. Need for this Bill

According to the author of this bill:

This proposal would amend sections 817 and 1526 to allow magistrates to issue arrest and search warrants electronically without a telephonic conversation between the officer and the magistrate by eliminating the requirement of an oral oath. This amendment is intended to promote procedural efficiencies by streamlining and modernizing the warrant process.

The officer's electronic signature under penalty of perjury on the affidavit or probable cause declaration has the same legal effect as the oral oath. The primary difference is that the formality of an oral oath before a judge adds some solemnity to the occasion that might cause an officer to be more careful when preparing the affidavit or probable cause declaration. The committee reasoned that the benefits did not outweigh the costs of retaining the oral oath requirement.

Although the telephonic conversation provides an opportunity for the magistrate to question the officer to clarify any ambiguity in the affidavit or declaration, the conversation is not recorded and would not be admissible in support of the warrant. At best, it might prompt the officer to revise and resubmit the affidavit or probable cause declaration. Yet, this proposal would not preclude this result; a magistrate would be free to contact the officer with any questions or concerns.

The costs associated with telephonic conversations between officers and magistrates for arrest and search warrants can be considerable, especially for courts in larger counties that experience a greater volume of applications. It is not uncommon for magistrates to wait—often late in the night or early morning—for the officer to return their call because the officer has been called away on another assignment or is otherwise unavailable. The affidavits and probable cause declarations for the offenses more commonly committed at this hour, such as driving under the influence, are frequently submitted on a standardized form containing check boxes, with the result that fewer ambiguities and questions arise.

Eliminating the requirement of an oral oath would also align electronic and paper processes. The statutes currently do not require an oral statement under oath if the officer

submits written affidavits and probable cause declarations in paper form. (Pen. Code, §§ 817(b), 1526(a).) They do allow, but not require, the magistrate to examine the person seeking the warrant under oath. (Id., §§ 817(d), 1526(a).) With advances in technology and the public's growing comfort with using technology to conduct business, the [Judicial Council Advisory] committee viewed it as no longer necessary to add procedural hurdles to serve as a check on the electronic process.

2. Applications for Arrest and Search Warrants

With the increasing use of technologies such as email and the ability to electronically transmit data, courts are increasingly relying on such mediums to manage their documents. The Legislature has passed a number of bills to provide the courts more latitude to handle applications for arrest and search warrants by electronic means.

SB 1970 (Schiff) Chapter 692 in 1998 authorized an application for a search warrant to be made by electronic mail including that the affiant's signature in support of the affidavit for the warrant can be made by digital signature. This was updated in 2010 with AB 2505 (A. Strickland) to allow a magistrate to return a search warrant by electronic signature.

AB 1004 (Gray), Chapter 460, Statutes of 2013, specified that the declaration in support of probable cause for an arrest warrant may be by telephone and computer server and that the signature may be an electronic signature.

AB 39 (Medina), Chapter 193, Statutes of 2015, required an affiant to first sign his or her affidavit and send the proposed search warrant and all supporting affidavits and attachments to the magistrate, after which the affiant would make his or her oath during a telephone conversation with the magistrate.

Existing law allows applications for search and arrest warrants to be made by an officer in person, or made by an officer remotely by means of, telephone and fax, telephone and electronic mail, or telephone and computer server. If the officer is using a remote application for an arrest warrant, the judge is required to administer the oath to the officer during a telephone conversation after which the officer signs the declaration in support of the warrant of probable cause for arrest. The proposed arrest warrant and all supporting declarations and attachments are then transmitted to the judge using a fax machine, electronic mail, or computer server. The judge is required to confirm with the officer the receipt of the warrant and the supporting declarations and attachments. The judge must verify that all the pages sent have been received, that all pages are legible, and that the declarant's signature, digital signature, or electronic signature is acknowledged as genuine. Once the judge sends the signed arrest warrant to the officer by fax, email, or computer server, the officer must acknowledge receipt of the arrest warrant over the telephone.

The process for obtaining a search warrant by fax, email, or computer server is similar, but has some differences. When applying for a search warrant remotely, the oath is made during a telephone conversation with the magistrate, after the officer has signed his or her affidavit in support of the application for the search warrant and transmitted the proposed search warrant and all supporting affidavits and documents to the judge. After the judge sends the signed search warrant to the officer, there is no requirement that the officer acknowledge receipt of the warrant over the telephone.

This bill conforms the procedure required to seek arrest and search warrants by fax, email, or computer server by requiring the declarant to sign under penalty of perjury his or her affidavit in support of probable cause to support the warrant. This bill also makes the warrant signed by the magistrate and received by the declarant the original warrant. This bill also eliminates the current the requirement that a judge take the oath over the telephone when an officer makes an application for a search warrant or arrest warrant remotely, but provides that the judge may examine under oath the person seeking the warrant and any witness the person may produce before issuing the warrant.

3. Argument in Support

According to Judicial Council of California, the sponsor of this bill:

Under current law, although the procedures set forth in sections 817 and 1526 are similar, there are several differences resulting from recent amendments to section 1526 (AB 39, ch. 193, Stats. 2015). Whereas, section 817 currently requires multiple telephonic conversations between the magistrate and the officer, section 1526 requires only one. In addition, section 817 provides the complete warrant, as signed by the magistrate, is deemed the original warrant and requires that the magistrate authorize the officer to write “duplicate original” on the copy of the completed warrant. (§ 817(c)(2)(C)-(D).) Section 1526 instead provides that “[t]he completed search warrant, as signed by the magistrate and received by the affiant, shall be deemed to be the original warrant.” (§ 1526(b)(2)(D).) AB 2710 aligns section 817 with section 1526 by deeming the warrant signed by the magistrate and received by the officer as the original warrant and no longer requiring the magistrate to print the warrant.

In addition, AB 2710 amends sections 817 and 1526 to allow magistrates to issue arrest and search warrants electronically without a telephonic conversation between the officer and the magistrate by eliminating the requirement of an oral oath, while retaining the written oath requirement under existing law. AB 2710 provides the magistrate with discretion to question telephonically the officer about any concerns and to clarify any ambiguity in the affidavit or declaration. The council believes this bill make the warrant procedure more efficient because the magistrate will no longer have to wait hours for the officer to return their phone call.

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