



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: November 16–17, 2017

Title	Agenda Item Type
Judicial Council–Sponsored Legislation (Criminal Procedure): Electronic Arrest and Search Warrants	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Pen. Code, §§ 817 and 1526	November 17, 2017
Recommended by	Date of Report
Policy Coordination and Liaison Committee Hon. Kenneth K. So, Chair Criminal Law Advisory Committee Hon. Tricia A. Bigelow, Chair	September 15, 2017
	Contact
	Tara Lundstrom, 415-865-7995 tara.lundstrom@jud.ca.gov Sharon Reilly, 916-323-3121 sharon.reilly@jud.ca.gov

Executive Summary

The Policy Coordination and Liaison Committee and Criminal Law Advisory Committee recommend amending Penal Code sections 817 and 1526 to make more efficient the process for electronically issuing arrest and search warrants, respectively. This recommendation would allow magistrates to issue arrest and search warrants electronically without communicating with the officer telephonically by eliminating the requirement of an oral statement under oath. It would also make amendments to align Penal Code section 817 with Penal Code section 1526.

Recommendation

The Policy Coordination and Liaison Committee and Criminal Law Advisory Committee recommend amending Penal Code sections 817 and 1526¹ to eliminate the requirement of an oral statement under oath and all telephonic conversations between the magistrate and the officer.

¹ All further references are to the Penal Code, unless otherwise indicated.

The committees also recommend amending section 817 to provide that the warrant signed by the magistrate and received by the officer be deemed the original warrant.

Previous Council Action

The Judicial Council previously sponsored and supported bills that make the warrant process more efficient. Two years ago, the council adopted a support position on Assembly Bill 39 (Medina; Stats. 2015, ch. 193), which amended Penal Code section 1526 to (1) eliminate all but one of the telephonic conversation requirements for electronic search warrants, and (2) provide that the completed search warrant be deemed the original warrant. The council reasoned that Assembly Bill 39 was “consistent with emerging technology that makes court operations more efficient.”

In 2013, the Judicial Council sponsored Assembly Bill 1004 (Gray; Stats. 2013, ch. 460), which streamlined the process for obtaining arrest warrants by (1) permitting their submission through computer servers, and (2) allowing magistrates to sign arrest warrants digitally or electronically. In 2010, the council supported AB 2505 (Strickland; Stats. 2010, ch. 98), which allowed (1) an oath by an affiant seeking a search warrant to be made using a telephone and computer server (in addition to a fax machine or e-mail), and (2) the affiant’s signature to be in the form of an electronic signature.

Rationale for Recommendation

Sections 817 and 1526 govern the electronic issuance of arrest and search warrants, respectively. Both allow the magistrate to take an officer’s oral statement under oath by phone and use e-mail, computer server, or facsimile equipment to receive and issue the warrant. (Pen. Code, §§ 817(c)(2), 1526(b)(2).)

Although the procedures set forth in these two provisions are similar, there are several differences resulting from recent amendments to section 1526. Whereas section 817 currently requires multiple telephonic conversations between the magistrate and the officer,² section 1526 requires only one.³ In addition, section 817 provides that the completed warrant, as signed by the magistrate, be deemed the original warrant and requires that the magistrate authorize the officer to write “duplicate original” on the copy of the completed warrant. (Pen. Code, § 817(c)(2)(C)–(D).) Section 1526 instead provides that “[t]he completed search warrant, as signed by the

² Under section 817, a magistrate must first take an officer’s oral statement under oath by phone before the officer electronically transmits a signed probable cause declaration, a proposed arrest warrant, and supporting documents to the magistrate. (Pen. Code, § 817(c)(2)(A).) After receiving the documents, the magistrate must telephonically confirm receipt and verify legibility and authenticity. (*Id.*, § 817(c)(2)(B).) If the magistrate decides to issue the warrant and electronically transmits a signed warrant to the officer, the officer must telephonically acknowledge receipt. (*Id.*, § 817(c)(2)(D).)

³ Under section 1526, the magistrate takes the oath telephonically after the officer signs the affidavit and transmits the proposed search warrant and supporting affidavit and other attachments. (Pen. Code, § 1526(b)(2)(A).)

magistrate and received by the affiant, shall be deemed to be the original warrant.” (*Id.*, § 1526(b)(2)(D).)

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 committee viewed it as no longer necessary to add procedural hurdles to serve as a check on the electronic process.

Lastly, this proposal would also make additional amendments to align section 817 with current section 1526. Section 817 would provide that the warrant signed by the magistrate and received by the officer be deemed the original warrant. It would also no longer require the magistrate to print the warrant.

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal circulated for public comment this spring. Five commenters submitted comments on this proposal: two agreed with the proposal, one agreed with the proposal if modified, and two did not indicate a position.

The Superior Courts of San Bernardino and Los Angeles Counties recommended expanding the more modest circulated proposal—which would have retained the oral oath requirement and instead amended section 817 to align with current section 1526 to require one telephonic conversation between the magistrate and officer—to eliminate the oral oath requirement and forego telephonic conversations entirely.

The Superior Court of San Bernardino County explained that the requirement of a phone conversation significantly lengthens the amount of time required to review the warrant because “[f]requently, the arresting officer fails to answer at the phone number provided, and it requires multiple attempts for the judge to make telephonic contact with the officer.” The court further viewed this requirement as unnecessary because (1) the magistrate’s questioning of the officer would be irrelevant in litigating a facial challenge to the warrant; (2) an officer willing to lie in writing would not likely be deterred by a telephone conversation; and (3) the officer’s accountability is already ensured by the sworn affidavit or probable cause declaration. Lastly, the court reasoned that warrant requests submitted after hours are necessarily emergencies and that the requirement of a telephonic conversation often delays or results in the rejection of the warrant.

The Superior Court of Los Angeles County similarly requested that the committee expand the circulated proposal. The court recommended that magistrates retain the discretion to call officers requesting a warrant, but that a telephonic conversation should not be mandated by law for arrest and search warrants.

The committee agreed with the commenters over a divided vote, described below, and revised the proposal accordingly.

Alternatives considered

Although the committee initially considered the current, more expansive proposal, it opted instead to circulate for public comment a more limited proposal that would align section 817 with section 1526 by requiring one telephonic conversation between the magistrate and the officer.⁴ Two superior courts submitted comments recommending that the committee pursue the more expansive proposal.

⁴ The Invitation to Comment identified the current, more expansive proposal as an alternative considered by the committee.

The committee ultimately agreed with the commenters, but the vote was divided. Of the 14 members at the meeting, seven voted in favor of revising the proposal, five voted against revising the proposal, and two abstained. Some dissenting members preferred the added formality of the oral oath, which, from their experience, results in officers taking the process more seriously. Others welcomed creating the opportunity for magistrates to question officers and expressed concern that it would be more difficult to locate officers if a telephonic conversation were not required.

Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are expected. To the contrary, the committee anticipates that this proposal would increase efficiencies for magistrates and officers.

Attachments

1. Pen. Code, §§ 817 and 1526, at pages 6–9
2. Chart of comments, at pages 10–15

Penal Code sections 817 and 1526 would be amended, effective January 1, 2019, to read:

1 § 817.

2
3 (a)

4 (1) When a declaration of probable cause is made by a peace officer of this state,
5 in accordance with subdivision (b), ~~or (c)~~, or (d), the magistrate, if, and only
6 if, satisfied from the declaration that there exists probable cause that the
7 offense described in the declaration has been committed and that the
8 defendant described therein has committed the offense, shall issue a warrant
9 of probable cause for the arrest of the defendant.

10
11 (2) The warrant of probable cause for arrest shall not begin a complaint process
12 pursuant to Section 740 or 813. The warrant of probable cause for arrest shall
13 have the same authority for service as set forth in Section 840 and the same
14 time limitations as that of an arrest warrant issued pursuant to Section 813.

15
16 (b) The declaration in support of the warrant of probable cause for arrest shall be a
17 sworn statement made in writing. If the declarant transmits the proposed arrest
18 warrant and all supporting declarations and attachments to the magistrate using
19 facsimile transmission equipment, electronic mail, or computer server, the
20 conditions in subdivision (d) shall apply.

21
22 (c) In lieu of the written declaration required in subdivision (b), the magistrate may
23 take an oral statement under oath under ~~one of~~ the following conditions:

24
25 (1) The oath shall be taken under penalty of perjury and recorded and
26 transcribed. The transcribed statement shall be deemed to be the declaration
27 for the purposes of this section. The recording of the sworn oral statement
28 and the transcribed statement shall be certified by the magistrate receiving it
29 and shall be filed with the clerk of the court. In the alternative, the sworn oral
30 statement may be recorded by a certified court reporter who shall certify the
31 transcript of the statement, after which the magistrate receiving it shall certify
32 the transcript, which shall be filed with the clerk of the court.

33
34 ~~(d)(2) The oath is made using telephone and facsimile transmission equipment, or made~~
35 ~~using telephone and electronic mail, or telephone and computer server, under all of~~
36 ~~the following conditions:~~

37
38 ~~(A)(1) The oath is made during a telephone conversation with the magistrate, after~~
39 ~~which~~ The declarant shall sign under penalty of perjury his or her declaration
40 in support of the warrant of probable cause for arrest. The declarant's
41 signature shall be in the form of a digital signature or electronic signature if
42 electronic mail or computer server is used for transmission to the magistrate.
43 The proposed warrant and all supporting declarations and attachments shall

1 then be transmitted to the magistrate utilizing facsimile transmission
2 equipment, electronic mail, or computer server.

3
4 ~~(B)~~ The magistrate shall confirm with the declarant the receipt of the warrant and
5 the supporting declarations and attachments. The magistrate shall verify that
6 all the pages sent have been received, that all pages are legible, and that the
7 declarant's signature, digital signature, or electronic signature is
8 acknowledged as genuine.

9
10 ~~(C)~~(2) If the magistrate decides to issue the warrant, he or she shall:

11
12 (i) ~~Cause the warrant, supporting declarations, and attachments to be~~
13 ~~subsequently printed if those documents are received by electronic mail~~
14 ~~or computer server.~~

15
16 ~~(ii)~~(A) Sign the warrant. The magistrate's signature may be in the form of a
17 digital signature or electronic signature if electronic mail or computer
18 server is used for transmission to the magistrate.

19
20 ~~(iii)~~(B) Note on the warrant the exact date and time of the issuance of the
21 warrant.

22
23 ~~(iv)~~ Indicate on the warrant that the oath of the declarant was administered
24 orally over the telephone.

25
26 ~~The completed warrant, as signed by the magistrate, shall be deemed to be~~
27 ~~the original warrant.~~

28
29 ~~(D)~~(3) The magistrate shall transmit via facsimile transmission
30 equipment, electronic mail, or computer server, the signed warrant to the
31 declarant who shall telephonically acknowledge its receipt. The magistrate
32 shall then telephonically authorize the declarant to write the words "duplicate
33 original" on the copy of the completed warrant transmitted to the declarant
34 and this document shall be deemed to be a duplicate original warrant. The
35 completed warrant, as signed by the magistrate and received by the declarant,
36 shall be deemed to be the original warrant.

37
38 ~~(d)~~(e) Before issuing a warrant, the magistrate may examine under oath the person
39 seeking the warrant and any witness the person may produce, take the written
40 declaration of the person or witness, and cause the person or witness to subscribe
41 the declaration.
42

1 ~~(e)~~(f) A warrant of probable cause for arrest shall contain the information required
2 pursuant to Sections 815 and 815a.

3
4 ~~(f)~~(g) A warrant of probable cause for arrest may be in substantially the following form:

5
6 * * *

7
8 ~~(g)~~(h) An original warrant of probable cause for arrest or the duplicate original warrant of
9 probable cause for arrest shall be sufficient for booking a defendant into custody.

10
11 ~~(h)~~(i) Once the defendant named in the warrant of probable cause for arrest has been
12 taken into custody, the agency that obtained the warrant shall file a “certificate of
13 service” with the clerk of the issuing court. The certificate of service shall contain
14 all of the following:

- 15
- 16 (1) The date and time of service.
- 17
- 18 (2) The name of the defendant arrested.
- 19
- 20 (3) The location of the arrest.
- 21
- 22 (4) The location where the defendant was incarcerated.
- 23

24 **§ 1526.**

25
26 (a) The magistrate, before issuing the warrant, may examine on oath the person
27 seeking the warrant and any witnesses the person may produce, and shall take his
28 or her affidavit or their affidavits in writing, and cause the affidavit or affidavits to
29 be subscribed by the party or parties making them. If the affiant transmits the
30 proposed search warrant and all affidavits and supporting documents to the
31 magistrate using facsimile transmission equipment, email, or computer server, the
32 conditions in subdivision (c) shall apply.

33
34 (b) In lieu of the written affidavit required in subdivision (a), the magistrate may take
35 an oral statement under oath under ~~one of~~ the following conditions:

- 36
- 37 (1) The oath shall be made under penalty of perjury and recorded and
38 transcribed. The transcribed statement shall be deemed to be an affidavit for
39 the purposes of this chapter. In these cases, the recording of the sworn oral
40 statement and the transcribed statement shall be certified by the magistrate
41 receiving it and shall be filed with the clerk of the court. In the alternative in
42 these cases, the sworn oral statement shall be recorded by a certified court
43 reporter and the transcript of the statement shall be certified by the reporter,

1 after which the magistrate receiving it shall certify the transcript which shall
2 be filed with the clerk of the court.

3
4 ~~(2)(c)~~ The oath is made using telephone and facsimile transmission equipment, telephone
5 and email, or telephone and computer server, as follows

6
7 (1) ~~The oath is made during a telephone conversation with the magistrate, after~~
8 ~~the affiant has signed his or her affidavit in support of the application for the~~
9 ~~search warrant and transmitted the proposed search warrant and all~~
10 ~~supporting affidavits and documents to the magistrate. The affiant's signature~~
11 ~~may be in the form of a digital signature or electronic signature if email or~~
12 ~~computer server is used for transmission to the magistrate.~~

13
14 ~~(B) The magistrate shall confirm with the affiant the receipt of the search warrant~~
15 ~~and the supporting affidavits and attachments. The magistrate shall verify that~~
16 ~~all the pages sent have been received, that all pages are legible, and that the~~
17 ~~affiant's signature, digital signature, or electronic signature is acknowledged~~
18 ~~as genuine.~~

19
20 ~~(C)~~(2) If the magistrate decides to issue the search warrant, he or she shall:

21
22 (A) Sign the warrant. The magistrate's signature may be in the form of a
23 digital signature or electronic signature if email or computer server is
24 used for transmission by the magistrate.

25
26 (B) Note on the warrant the exact date and time of the issuance of the
27 warrant.

28
29 ~~(iii) Indicate on the warrant that the oath of the affiant was administered~~
30 ~~orally over the telephone.~~

31
32 ~~(D)~~(3) The magistrate shall transmit via facsimile transmission equipment, email,
33 or computer server, the signed search warrant to the affiant. The completed
34 search warrant, as signed by the magistrate and received by the affiant, shall
35 be deemed to be the original warrant. The original warrant and any affidavits
36 or attachments in support thereof shall be returned as provided in Section
37 1534.

LEG17-04

Proposed Legislation (Criminal Procedure): Electronic Arrest Warrants

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Albert De La Isla Principal Administrative Analyst Superior Court of California, Orange County	N/I	<p>No impact to operations procedures. Will require a change to the magistrate procedures through Legal Research.</p> <p><input type="checkbox"/> Does the proposal appropriately address the stated purpose? Response: Yes</p> <p><input type="checkbox"/> Would the proposal provide cost savings? If so please quantify. Response: No.</p> <p><input type="checkbox"/> What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Response: Updating of magistrate procedures and drafting information for judicial officers.</p> <p><input type="checkbox"/> Would 12 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Response: Yes</p> <p><input type="checkbox"/> How well would this proposal work in courts of different sizes? Response: Unknown.</p>	<p>The committee appreciates Mr. De La Isla’s input.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
2.	Orange County Bar Association By: Michael L. Baroni President	A	Currently, Penal Code § 817 requires up to three telephonic conversations between a magistrate and an officer for an arrest warrant issued through e-mail, computer server, or facsimile equipment. By contrast, Penal Code §1526, electronic search	The committee appreciates the input of the Orange County Bar Association.

LEG17-04**Proposed Legislation (Criminal Procedure): Electronic Arrest Warrants**

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	Commentator	Position	Comment	Committee Response
			<p>warrant issuance, requires only one telephone conversation. In order to promote consistency, proposed §817 would require only one telephonic conversation between the officer and the magistrate to issue an arrest warrant electronically. The conversation would occur after the officer has electronically transmitted the proposed arrest warrant and all supporting declarations and documents to the magistrate. During that conversation, the magistrate would (1) take the officer's oral oath, (2) confirm receipt of the proposed arrest warrant and all supporting declarations and attachments, (3) verify the receipt and legibility of all pages, and (4) verify the authenticity of the officer's signature.</p> <p>The proposal adequately addresses the stated purpose.</p>	<p>No response required.</p>
3.	<p>Superior Court of California, County of Los Angeles By: Sandra Pigati-Pizano Management Analyst</p>	AM	<p>This proposal should be modified so that a magistrate does not have to make telephonic contact with an officer who submits an electronic request for a warrant. Penal code sections 817 (arrest warrants) and section 1526 (search warrants) should be amended so that any requirement that a magistrate make telephonic contact with an officer who submits an electronic request for a warrant is eliminated from the applicable Penal code sections. Magistrates should still have the discretion to call officers requesting a warrant, should he or she find it necessary, but telephonic contact with an officer should not be mandatory under California law.</p>	<p>The committee appreciates the court's input. It agrees with the court's suggestion and has revised the proposal accordingly.</p>

LEG17-04**Proposed Legislation (Criminal Procedure): Electronic Arrest Warrants**

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	Commentator	Position	Comment	Committee Response
4.	<p>Superior Court of California, County of San Bernardino By: Honorable Raymond L. Haight III Presiding Judge</p> <p>Hon. Vander Feer Assistant Presiding Judge</p> <p>Hon. Robert Glenn Yabuno Chair, Criminal Committee</p>	N/I	<p>The Criminal Law Advisory Committee has proposed amending Penal Code section 817 to “eliminate several telephonic confirmation requirements between the magistrate and officer for arrest warrants issued electronically.” The amendment would align the requirements governing electronically issued arrest warrants with electronically issued search warrants.</p> <p>The proposed amendment is worth pursuing, but will only address a relatively small portion of the issues created by the requirement of telephonic contact with the requesting officer as part of the process of reviewing and issuing arrest and search warrants. Arrest warrants are only a small portion of the warrants issued after hours. Search warrants comprise the vast majority of electronic warrants issued by judges after hours. Reducing the number of phone calls required will certainly help streamline the processing of electronic warrants, but the primary problem is with the telephone requirement itself. The requirement often transforms a ten minute warrant review process into one that can take many times longer. Frequently, the arresting officer fails to answer at the phone number provided, and it requires multiple attempts for the judge to make telephonic contact with the requesting officer.</p> <p>We believe that Penal Code sections 817 (governing arrest warrants) and 1526 (governing search warrants) should be amended to eliminate the requirement that a magistrate make telephone contact with an officer who submits an electronic request for a warrant. The Criminal Law Advisory</p>	<p>The committee appreciates the court’s input.</p> <p>No response required.</p> <p>The committee agrees with the court’s suggestion and has revised the proposal accordingly.</p>

LEG17-04

Proposed Legislation (Criminal Procedure): Electronic Arrest Warrants

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p>Committee considered that alternative, but rejected it for three reasons: “to facilitate the magistrate’s questioning of the officer, ensure accountability, and confirm the reliability of the technology used to transmit the documents. None of those stated reasons withstand scrutiny.</p> <p>First, there is no need to question an officer regarding the contents of the affidavit offered in support of a warrant. The California Supreme Court has identified two types of challenges to the sufficiency of the warrant. A facial challenge to the warrant asserts “that the statements that appear in the warrant and affidavit when taken together do not amount to a showing of probable cause.” (<i>People v. Hobbs</i> (1994) 7 Cal.4th 948, 985, fn.6.) Nothing the officer says when questioned would be relevant in litigating such a challenge. Furthermore, although a “subfacial challenge” may also be raised, which alleges “that the affiant intentionally or recklessly lied in the warrant or affidavit” (<i>id.</i>), it seems highly unlikely that an affiant willing to lie in writing would be deterred by a telephone conversation.</p> <p>Second, for the same reasons, the phone conversation with the affiant will not ensure accountability. Again, the affiant has already submitted a sworn declaration. Any need for accountability is fully satisfied by the affiant’s identification and signature.</p> <p>Third, a phone call does nothing to confirm the reliability of the technology used to transmit warrants. Notably, the Committee’s proposed amendment would eliminate the need to call the</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

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	Commentator	Position	Comment	Committee Response
			<p>officer to confirm the warrant has been received. The Committee correctly sees that step as unnecessary, given the state of the technology used to transmit documents.</p> <p>Requiring a phone call to officers exacts a real cost to the administration of justice. After-hours warrants are, by nature of the fact that they are submitted after hours, emergencies. The need to make a phone call can delay issuing a warrant significantly. If, for example, the officer submits a warrant, then is unavailable to answer a phone call due to unforeseen circumstances, then the warrant cannot issue. If a judge calls and receives no answer, then the warrant will presumably be rejected. Yes, the warrant can be resubmitted, but with significant delay and consumption of resources.</p> <p>Magistrates should still have the ability to call officers requesting a warrant, should they wish to do so. But, maintaining that requirement in the Penal Code as a mandatory prerequisite to issuing a warrant preserves an anachronism. Important documents are transmitted electronically every day, not just by courts, but by banks, hospitals and countless others. Our technology is sufficient to ensure accountability and reliability. California law should be revised to recognize that fact.</p> <p>There is simply no reason to require telephonic contact if the judge receives an affidavit which is in good order and ready for approval.</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

LEG17-04**Proposed Legislation (Criminal Procedure): Electronic Arrest Warrants**

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	Commentator	Position	Comment	Committee Response
5.	Superior Court of California, County of San Diego By: Mike Roddy Executive Officer	A		The committee appreciates the court's support.