

**SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING**

Proposed Amendment of Pa.Rs.Crim.P. 203 and 513

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendments of Rule 203 (Requirements for Issuance.) and Rule 513 (Requirements for Issuance; Dissemination of Arrest Warrant Information) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **no later than Friday, February 24, 2017**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

January 4, 2017

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Charles A. Ehrlich
Chair*

RULE 203. REQUIREMENTS FOR ISSUANCE.

(A) In the discretion of the issuing authority, advanced communication technology may be used to submit a search warrant application and affidavit(s) and to issue a search warrant.

(B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

(C) Immediately prior to submitting a search warrant application and affidavit to an issuing authority using advanced communication technology, the affiant must personally communicate with the issuing authority **by telephone, or** by any device which, at a minimum, allows for simultaneous audio[- visual] communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant. **In any telephonic communication, if the issuing authority has a concern regarding the identity of the affiant, the issuing authority has the discretion to require the affiant to communicate by a device allowing for two-way simultaneous communication or may require the affiant to appear in person.**

(D) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).

(E) No search warrant shall authorize a nighttime search unless the affidavits show reasonable cause for such nighttime search.

(F) A search warrant may be issued in anticipation of a prospective event as long as the warrant is based upon an affidavit showing probable cause that at some future time, but not currently, certain evidence of a crime will be located at a specified place.

(G) When a search warrant is issued, the issuing authority shall provide the original search warrant to the affiant and the issuing authority shall retain a contemporaneously prepared copy.

COMMENT: Paragraph (A) recognizes that an issuing authority either may issue a search warrant using advanced communication technology or order that the law enforcement officer appear in person to apply for a search warrant.

Paragraph (B) does not preclude oral testimony before the issuing authority, but it requires that such testimony be reduced to an affidavit prior to issuance of a warrant. All affidavits in support of an application for a search warrant must be sworn to before the issuing authority prior to the issuance of the warrant. "Sworn" includes "affirmed." See Rule 103. The language "sworn to before the issuing authority" contemplates, when advanced communication technology is used, that the affiant would not be in the physical presence of the issuing authority. See paragraph (C).

Paragraph (D) changes the procedure discussed in *Commonwealth v. Crawley*, 209 Pa. Super. 70, 223 A.2d 885 (1966), *aff'd per curiam* 432 Pa. 627, 247 A.2d 226 (1968). See *Commonwealth v. Milliken*, 450 Pa. 310, 300 A.2d 78 (1973).

The requirement in paragraph (E) of a showing of reasonable cause for a nighttime search highlights the traditional doctrine that nighttime intrusion into a citizen's privacy requires greater justification than an intrusion during normal business hours.

An affiant seeking the issuance of a search warrant, when permitted by the issuing authority, may use advanced communication technology as defined in Rule 103.

When advanced communication technology is used, the issuing authority is required by this rule to (1) determine that the evidence contained in the affidavit(s) establishes probable cause, and (2) verify the identity of the affiant.

[The "visual" requirement in paragraph (C) must allow, at a minimum, the issuing authority to see the affiant at

the time the oath is administered and the information received.]

Verification methods include, but are not limited to: a "call back" system, in which the issuing authority would call the law enforcement agency or police department that the affiant indicates is the entity seeking the warrant; a "signature comparison" system whereby the issuing authority would keep a list of the signatures of the law enforcement officers whose departments have advanced communication technology systems in place, and compare the signature on the transmitted information with the signature on the list; or an established "password" system.

Paragraph (F) was added to the rule in 2005 to provide for anticipatory search warrants. The rule incorporates the definition of anticipatory search warrants set forth in *Commonwealth v. Glass*, 562 Pa. 187, 754 A.2d 655 (2000).

Paragraph (G) was added to clarify who must retain possession of the original of the search warrant. When the search warrant is issued using advanced communication technology, the version delivered to the police officer is considered the original for purposes of this rule.

NOTE: Rule 2003 adopted March 28, 1973, effective for warrants issued 60 days hence; renumbered Rule 203 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended October 19, 2005, effective February 1, 2006; amended October 22, 2013, effective January 1, 2014 **[.] ; amended , 2017, effective _____, 2017.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communications technology published with the Court's Order at 32 Pa.B. 2582 (May 25, 2002).

Final Report explaining the October 19, 2005 amendments regarding anticipatory search warrants published with the Court's Order at 35 Pa.B. 6087 (November 5, 2005).

Final Report explaining the October 22, 2013 amendments regarding the original search warrants published with the Court's Order at 43 Pa.B. 6649 (November 9, 2013).

Report explaining the proposed amendments regarding electronic technology for swearing affidavits published for comment at 47 Pa.B. _____ (_____, 2017).

RULE 513. REQUIREMENTS FOR ISSUANCE; DISSEMINATION OF
ARREST WARRANT INFORMATION.

(A) For purposes of this rule, “arrest warrant information” is defined as the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.

(B) ISSUANCE OF ARREST WARRANT

(1) In the discretion of the issuing authority, advanced communication technology may be used to submit a complaint and affidavit(s) for an arrest warrant and to issue an arrest warrant.

(2) No arrest warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

(3) Immediately prior to submitting a complaint and affidavit to an issuing authority using advanced communication technology, the affiant must personally communicate with the issuing authority **by telephone , or** by any device which, at a minimum, allows for simultaneous audio[**-visual**] communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant. **In any telephonic communication, if the issuing authority has a concern regarding the identity of the affiant, the issuing authority has the discretion to require the affiant to communicate by a device allowing for two-way simultaneous communication or may require the affiant to appear in person.**

(4) At any hearing on a motion challenging an arrest warrant, no evidence shall be admissible to establish probable cause for the arrest warrant other than the affidavits provided for in paragraph (B)(2).

(C) DELAY IN DISSEMINATION OF ARREST WARRANT INFORMATION

The affiant or the attorney for the Commonwealth may request that the availability of the arrest warrant information for inspection and dissemination be delayed. The arrest warrant affidavit shall include the facts and circumstances that are alleged to establish good cause for delay in inspection and dissemination.

(1) Upon a finding of good cause, the issuing authority shall grant the request and order that the availability of the arrest warrant information for inspection and dissemination be delayed for a period of 72 hours or until receipt of notice by the issuing authority that the warrant has been executed, whichever occurs first. The 72-hour period of delay may be preceded by an initial delay period of not more than 24 hours, when additional time is required to complete the administrative processing of the arrest warrant information before the arrest warrant is issued. The issuing authority shall complete the administrative processing of the arrest warrant information prior to the expiration of the initial 24-hour period.

(2) Upon the issuance of the warrant, the 72-hour period of delay provided in paragraph (C)(1) begins.

(3) In those counties in which the attorney for the Commonwealth requires that complaints and arrest warrant affidavits be approved prior to filing as provided in Rule 507, only the attorney for the Commonwealth may request a delay in the inspection and dissemination of the arrest warrant information.

COMMENT: This rule was amended in 2013 to add provisions concerning the delay in inspection and dissemination of arrest warrant information. Paragraph (A) provides a definition of the term “arrest warrant information” that is used throughout the rule. Paragraph (B) retains the existing requirements for the issuance of arrest warrants. Paragraph (C) establishes the procedures for a temporary delay in the inspection and dissemination of arrest warrant information prior to the execution of the warrant.

ISSUANCE OF ARREST WARRANTS

Paragraph (B)(1) recognizes that an issuing authority either may issue an arrest warrant using advanced communication technology or order that the law enforcement officer appear in person to apply for an arrest warrant.

This rule does not preclude oral testimony before the issuing authority, but it requires that such testimony be reduced to an affidavit prior to issuance of a warrant. All affidavits in support of an application for an arrest warrant must be sworn to before the issuing authority prior to the issuance of the warrant. The language “sworn to before the issuing authority” contemplates, when advanced communication technology is used, that the affiant would not be in the physical presence of the issuing authority. See paragraph

(B)(3).

This rule carries over to the arrest warrant the requirement that the evidence presented to the issuing authority be reduced to writing and sworn to, and that only the writing is subsequently admissible to establish that there was probable cause. In these respects, the procedure is similar to that applicable to search warrants. See Rule 203. For a discussion of the requirement of probable cause for the issuance of an arrest warrant, see *Commonwealth v. Flowers*, [24 Pa.Super. 198,] 369 A.2d 362 (Pa. Super. 1976).

The affidavit requirements of this rule are not intended to apply when an arrest warrant is to be issued for noncompliance with a citation, with a summons, or with a court order.

An affiant seeking the issuance of an arrest warrant, when permitted by the issuing authority, may use advanced communication technology as defined in Rule 103.

When advanced communication technology is used, the issuing authority is required by this rule to (1) determine that the evidence contained in the affidavit(s) establishes probable cause, and (2) verify the identity of the affiant.

[The “visual” requirement in paragraph (B)(3) must allow, at a minimum, the issuing authority to see the affiant at the time the oath is administered and the information received.]

Verification methods include, but are not limited to: a "call back" system, in which the issuing authority would call the law enforcement agency or police department that the affiant indicates is the entity seeking the warrant; a "signature comparison" system whereby the issuing authority would keep a list of the signatures of the law enforcement officers whose departments have advanced communication technology systems in place, and compare the signature on the transmitted information with the signature on the list; or an established "password" system.

Under Rule 540, the defendant receives a copy of the warrant

and supporting affidavit at the time of the preliminary arraignment.

DELAY IN DISSEMINATION OF ARREST WARRANT INFORMATION

Paragraph (C) was added in 2013 to address the potential dangers to law enforcement and the general public and the risk of flight when arrest warrant information is disseminated prior to the execution of the arrest warrant. The paragraph provides that the affiant or the attorney for the Commonwealth may request, for good cause shown, the delay in the inspection and dissemination of the arrest warrant information for 72 hours or until receipt of notice by the issuing authority that the warrant has been executed, whichever occurs first. Upon a finding of good cause, the issuing authority must delay the inspection and dissemination.

The request for delay in inspection and dissemination is intended to provide a very limited delay in public access to arrest warrant information in those cases in which there is concern that pre-execution disclosure of the existence of the arrest warrant will endanger those serving the warrant or will impel the subject of the warrant to flee. This request is intended to be an expedited procedure with the request submitted to an issuing authority.

A request for the delay in dissemination of arrest warrant information made in accordance with this rule is not subject to the requirements of Rule 576.

Once the issuing authority receives notice that the arrest warrant is executed, or when 72 hours have elapsed from the issuance of the warrant and the warrant has not been executed, whichever occurs first, the information must be available for inspection or dissemination unless the information is sealed pursuant to Rule 513.1.

The provision in paragraph (C)(2) that provides up to 24 hours in the delay of dissemination and inspection prior to the issuance of the arrest warrant recognizes that, in some

cases, there may be administrative processing of the arrest warrant request that results in a delay between when the request for the 72-hour period of delay permitted in paragraph (C)(1) is approved and when the warrant is issued. In no case may this additional period of delay exceed 24 hours and the issuing authority must issue the arrest warrant within the 24-hour period.

When determining whether good cause exists to delay inspection and dissemination of the arrest warrant information, the issuing authority must consider whether the presumption of openness is rebutted by other interests that include, but are not limited to, whether revealing the information would allow or enable flight or resistance, the need to protect the safety of police officers executing the warrant, the necessity of preserving the integrity of ongoing criminal investigations, and the availability of reasonable alternative means to protect the interest threatened by disclosure.

Nothing in this rule is intended to limit the dissemination of arrest warrant information to court personnel as needed to perform their duties. Nothing in this rule is intended to limit the dissemination of arrest warrant information to or by law enforcement as needed to perform their duties.

Pursuant to paragraph (C)(3), in those counties in which the district attorney's approval is required only for certain, specified offenses or grades of offenses, the approval of the district attorney is required for a request to delay inspection and dissemination only for cases involving those specified offenses.

NOTE: Rule 119 adopted April 26, 1979, effective as to arrest warrants issued on or after July 1, 1979; *Comment* revised August 9, 1994, effective January 1, 1995; renumbered Rule 513 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended December 23, 2013, effective March 1, 2014 **[.] ; amended _____, 2017, effective , 2107.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 9, 1994 Comment revisions published at 22 Pa.B. 6 (January 4, 1992); Final Report published with the Court's Order at 24 Pa.B. 4342 (August 27, 1994).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 Pa.B. 2582 (May 25, 2002).

Final Report explaining the December 23, 2013 amendments providing procedures for delay in dissemination and sealing of arrest warrant information published with the Court's Order at 41 Pa.B. (, 2013).

Report explaining the proposed amendments regarding electronic technology for swearing affidavits published for comment at 47 Pa.B. (, 2017).

REPORT

Proposed Amendments of Pa.Rs.Crim.P. 203 and 513

FACE-TO-FACE REQUIREMENT FOR VERIFICATION OF AFFIDAVITS

The Committee has recently received a suggestion to amend the provisions of Rule 203 concerning the use of advanced communications technology for submitting search warrant affidavits. The suggestion was to eliminate the “face-to-face” requirement for the swearing of an affidavit in support of a search warrant application and permit the swearing to be done telephonically. Rule 203(C) provides:

(C) Immediately prior to submitting a search warrant application and affidavit to an issuing authority using advanced communication technology, the affiant must personally communicate with the issuing authority by any device which, at a minimum, allows for simultaneous audio-visual communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant.

Additionally, the *Comment* states that “[t]he ‘visual’ requirement in paragraph (C) must allow, at a minimum, the issuing authority to see the affiant at the time the oath is administered and the information received.”

It was suggested that the face-to-face requirement of the rule can present significant impediments to using advance communication technology to obtain search warrants. This is especially critical when time is of the essence, such as in DUI cases, where ethanol or other intoxicants dissipate quickly. Officers who seek to obtain search warrants face significant obstacles if they must travel to a site with audio-visual conferencing equipment or to an issuing authority’s office to have a face-to-face appearance. These obstacles are more onerous at nighttime and in the more remote parts of the Commonwealth. Furthermore, it was noted that the federal courts have permitted telephonic submissions for many years. See Federal Rules of Criminal Procedure 4.1 and 41.

The current “face-to-face” requirement was added as part of the 2002 rule changes that first permitted the use of advanced communications technology (ACT) in the application process for search and arrest warrants. At that time, the Committee explained this change as follows:

In devising the new ACT procedures, the Committee agreed that the rules should continue to require the ‘written’ affidavits, yet allow for the writing to be submitted using ACT equipment. In addition, we agreed that an important concept for the new procedure would be to require the issuing authority to verify the identity of the affiant, and to maintain the requirement that the issuing authority administer an oath to the affiant. Under the new procedure, the issuing authority and the affiant may communicate from separate locations, and the issuing authority will be able to use ACT to verify the identity of the affiant and administer the oath before the required documentation is transmitted...Unlike the provisions in Federal Rule 41 that permit oral requests for warrants without the requirement of a "face-to-face" encounter, Rules 203 (Requirements for Issuance) and 513 (Requirements for Issuance) do not permit a warrant to issue based on oral testimony alone, and require that the issuing authority using ACT must be able to see the affiant when the oath is administered. 32 Pa.B. 2591 (May 25, 2002).

The Committee noted that when the original proposal was developed, the Committee had published a version of this proposal that included telephonic administration of the oath. See 29 Pa.B 4426 (August 21, 1999). At that time, the Committee did not distinguish between telephonic and two-way simultaneous audio-visual communication for warrant affidavit verification but rather discussed the issue in terms of advance communications technology that includes both. The Committee was satisfied that any form of ACT was sufficient for the constitutional requirements of warrant issuance. Subsequently, the face-to-face requirement was incorporated into the amendments approved in 2002. The face-to-face requirement appears to have been added as a means of guaranteeing the identity of the affiant. Since this provision was added at the time that ACT first was going to be permitted, there may have been unease with the new technology without this additional guarantee of the affiant’s identity.

In examining this issue, the Committee studied federal practice in this area at some length. As noted above, the federal system has permitted the use of “reliable electronic means” for search applications for some time. Originally formulated as part of F.R.Crim.P. 41, the procedures for the use of this type of technology currently are contained in F.R.Crim.P. 41. The Notes to F.R.Crim.P. 41 from the time when these provisions were added discuss the concept of “reliable electronic means”:

The term “electronic” is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of “electronic means.”

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be “reliable.” While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Pennsylvania has had over a decade of experience with remote submission of warrant applications with little problem, easing some of the apprehension that may have existed when use of this technology was first introduced in 2002. The Committee also noted that telephonic verification appears to have worked with little problem in the federal system. While there is potential for telephonic submissions to be abused, the Committee has concluded that this potential problem could be addressed by means other than requiring video-conferencing in every case. The Committee is therefore proposing an amendment to Rule 213 similar to that proposed in 1999 that would permit telephonic verification.

Although the rule already provides for issuing authority discretion in using ACT at all, the Committee concluded that a direct statement regarding telephonic verification would be helpful. Therefore, an additional provision would be added to paragraph (C) that would permit an issuing authority to refuse a telephonic application if there is a question regarding the applicant's identity. This would be consistent with the federal system that permits such assurance as a "local matter."

Although the original suggestion related only to search warrant applications, the Committee's 1999 proposal included arrest warrant submissions and would have permitted telephonic submission there as well. As with Rule 203, Rule 513 (Requirements for Issuance; Dissemination of Arrest Warrant Information) contains similar language regarding face-to-face verification of the affidavit of probable cause. The Committee concluded that the same concerns and rationale applied to arrest warrant applications as well. Therefore similar amendments are being proposed for Rule 513.