

Rule 41-I. Interception of Wire or Oral Communications

(a) Authorization to Apply. When authorized in writing by the United States Attorney or by a designated assistant, any investigative or law enforcement officer may make application to the court for an order authorizing the interception of wire or oral communications or for an order of approval of a previous interception of any wire or oral communication qualifying under D.C. Code § 23-546 (b) (2012 Repl.). An application for an order of authorization or of approval may be authorized by the United States Attorney or by a designated assistant only when the interception may provide or has provided evidence of the commission of or a conspiracy to commit any of the offenses listed in D.C. Code § 23-546 (c) (2012 Repl.).

(b) Application; Form and Contents. Each application must be made in writing upon oath to a judge and must state the applicant's authority to make the application. The application must include:

(1) the identity of the investigative or law enforcement officer making the application and of the officer authorizing the application;

(2) a full and complete statement of facts and circumstances relied upon by the applicant to justify the applicant's belief that an order should be issued, including

(A) details as to the particular offense that has been, is being, or is about to be committed;

(B) a particular description of the nature and location of the facilities from which or the place where the communication is to be or was intercepted;

(C) a particular description of the type of communications sought to be or which were intercepted; and

(D) the identity of the person, if known, who committed, is committing, or is about to commit the offense and whose communications are to be or were intercepted;

(3) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous;

(4) a statement of the period of time for which the interception is or was required to be maintained or a particular description of facts establishing probable cause to believe that additional communications of the same type will or would occur thereafter so that the authorization will or would not automatically terminate;

(5) a full and complete statement of the facts concerning all previous applications, known to the individual authorizing or making the application, made to any judge involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and

(6) where the application is for an extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain results.

(c) Issuance. Upon application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the District of Columbia, if the judge determines on the basis of facts submitted that:

(1) there is or was probable cause for belief that a person whose communication is to be or was intercepted is or was committing, has committed, or is about to commit an offense listed in D.C. Code § 23-546 (c) (2012 Repl.);

(2) there is or was probable cause for belief that particular communications concerning that offense will or would be obtained through the interception;

(3) normal investigative procedures have or would have been tried and have or had failed or reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous; and

(4) there is or was probable cause for belief that the facilities from which, or the place where, the communications are to be or were intercepted were used, are being used, or are about to be used in connection with commission of such offense, or are or were leased to, listed in the name of, or commonly used by the person referred to in Rule 41-I(c)(1).

(d) Issuance in Specified Instances. If the facilities from which a wire communication is to be or was intercepted are or were being used by, are or were about to be used by, or are or were leased to, listed in the name of or commonly used by, a licensed physician, a licensed attorney, or practicing clergyman, or if the place where an oral communication is to be or was intercepted is or was a place used primarily for habitation by a husband and wife or primarily by a licensed physician, licensed attorney, or practicing clergyman for that person's own professional purposes, no order authorizing or approving such interception may be issued unless the judge, in addition to the matters provided in Rule 41-I(c), determines that:

(1) such facilities or place are or were being used or are or were about to be used in connection with conspiratorial activities characteristic of organized crime; and

(2) such interceptions will be so conducted as to minimize or eliminate the number of interceptions of privileged wire or oral communications between licensed physicians and patients, licensed attorneys and clients, practicing clergyman and confidants, and husbands and wives. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this rule shall lose its privileged character.

(e) Specifications in and Contents of the Order. Each order authorizing or approving the interception of any wire or oral communications must specify or contain:

(1) the identity of the person, if known, or otherwise a particular description of the person, if known, whose communications are to be or were intercepted;

(2) the nature and location of the communication facilities as to which, or the place where, authority to intercept or any approval of interception is or was granted;

(3) a particular description of the type of communication sought to be or which was intercepted, and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept or whose interception is approved, and of the person authorizing the application;

(5) the period of time during or for which the interception is authorized or approved, including a statement as to whether or not the interception will automatically terminate when the described communication has been first obtained; and

(6) a provision that the authorization to intercept must be executed as soon as practicable, must be conducted in such a way as to minimize or eliminate the interception of communications not otherwise subject by law to interception, and must terminate upon attainment of the authorized objective, or in any event in 30 days.

(f) Further Contents.

(1) By Direction of the Judge. An order issued pursuant to Rule 41-I(c) and, if applicable, Rule 41-I(d), may require reports to be made to the judge who issued the order showing what progress has been made toward the achievement of the authorized objective and the need for continued interception. Reports must be made at such intervals as the judge may require.

(2) Upon Request of the Applicant. Upon the request of the applicant, an order issued pursuant to Rule 41-I(c), and, if applicable, Rule 41-I(d), must direct that a communication common carrier, landlord, custodian, or other person must furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted.

(g) Extensions. An application for extension may be made in accordance with Rule 41-I(a), but no extension order may be granted on such application unless the judge makes the determinations listed in Rule 41-I(c) and, if applicable, the determinations listed in Rule 41-I(d).

(h) Additional Procedures on Certain Orders of Approval.

(1) Organized Crime Emergencies. Notwithstanding any other paragraph of this rule, any investigative or law enforcement officer, specially designated by the United States Attorney for the District of Columbia or a designated assistant, who reasonably determines that

(A) an emergency situation exists with respect to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing the interception can with due diligence be obtained; and

(B) there are grounds upon which an order could be entered under Rule 41-I(c) and (d) to authorize interception, may intercept the communication if an application for an order approving the interception is initiated within 12 hours and is completed within 72 hours after the interception has occurred, or begins to occur. Such application must be treated under Rule 41-I(c) and (d).

(2) Other than Authorized Offenses. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized under Rule 41-I(c), (d), or (h)(1), intercepts wire or oral communications relating to offenses other than those so authorized, the officer must make as soon as practicable an application to a judge for approval for disclosure and use of the information intercepted. Such application must be treated under Rule 41-I(c) and (d).

(i) Maintenance and Custody of Records.

(1) Contents of Interceptions. The contents of any intercepted oral or wire communication must, if possible, be recorded on tape or wire or other comparable device. Immediately upon the expiration of the period of the order, or extensions thereof, the recordings must be made available to the judge issuing the order and sealed under the judge's directions. Custody of the recordings must be wherever the judge orders. They must not be destroyed except upon an order of the issuing or denying judge and in any event must be kept for 10 years.

(2) Contents of Applications Made and Orders Granted. Applications made and orders granted under this rule must be sealed by the judge. Custody of the applications

and orders shall be wherever the judge directs. Except as otherwise provided in Rule 41-I(k) the applications and orders may be disclosed only upon a showing of good cause before a judge of competent jurisdiction and must not be destroyed except on order of the issuing or denying judge, and in any event must be kept for 10 years.

(j) Inventory.

(1) Recipients; Time of Inventory. Within a reasonable time not to exceed 90 days after the filing of an application for an order of approval under Rule 41-I(h) which is denied, or the termination of the period of any order or extensions thereof, the issuing or denying judge must cause an inventory to be served on the persons named in the order or the application and such other parties to intercepted communications as the court may determine are necessary in the interest of justice. On an ex parte showing of good cause to a judge, the serving of the inventory may be postponed.

(2) Contents of the Inventory. The inventory described in Rule 41-I(j)(1) must include notice of

(A) the fact of the entry of the order or the application for an order of approval which was denied;

(B) the date of the entry of the order or the denial of the application for an order of approval;

(C) the period of authorized, approved, or disapproved interception; and

(D) whether during the period wire or oral communications were intercepted.

(3) Inspection. The judge, upon the filing of a motion, may make available to the person or the person's counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice.

(k) Use of Intercepted Communications.

(1) In General. Any communication intercepted in conformity with this rule, or evidence derived therefrom, may be disclosed or used by any person who has lawfully obtained knowledge of its contents while giving testimony under oath in any criminal trial, hearing, or proceeding before any grand jury or court. Any other disclosure or use must be in conformity with law.

(2) Exceptions. The presence of a seal as provided under Rule 41-I(i) or the satisfactory explanation for the absence thereof is a prerequisite for such disclosure or use. A further prerequisite for disclosure or use is the service not less than 10 days before trial, hearing or other proceeding:

(A) of the inventory provided in Rule 41-I(j) and

(B) of the parties to the action with a copy of the order and accompanying application under which the interception was authorized or approved.

The 10-day period may be waived by court order when the court finds it was not possible to furnish the information and the party will not be prejudiced by the delay in receiving the information.

(l) Motion to Suppress.

(1) By Whom. Any aggrieved person in any trial, hearing or other proceeding before any court, department, officer, agency, regulatory body, or other authority of the United States or District of Columbia may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom.

(2) Grounds. A motion made under Rule 41-I(l)(1) may be based on the grounds that:

- (A) the communication was unlawfully intercepted;
- (B) the order of authorization or approval under which it was intercepted is insufficient on its face;
- (C) the interception was not made in conformity with the order of authorization or approval;
- (D) service was not made as provided in Rule 41-I(k); or
- (E) the seal prescribed by Rule 41-I(i) is not present and there is no satisfactory explanation for its absence.

(3) Time of Making Motion. The motion must be made before trial, hearing, or other proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion.

(4) Disposition. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom shall not be received in evidence in the trial, hearing, or proceeding.

(5) Inspection. Upon the filing of the motion by the aggrieved person, the judge may make available to the aggrieved person or the person's counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the judge determines to be in the interest of justice.

COMMENT TO 2016 AMENDMENTS

This rule, retained from the former rule, has no federal counterpart. It details the procedure involved in the interception of wire or oral communications. See D.C. Code § 23-546 et seq. (2012 Repl.). Minor stylistic changes have been made to maintain consistency throughout the rules.