

Wiretap Protocol

March 2018

(Updated April 5, 2019)



Terminology:

Assistant District Attorney: the third-in-command of the District Attorney's Office.

Case Agent: Investigative officer who is the affiant for the wiretap.

CEO: The Chief Executive Officer of the Case Agent's police agency, or the officer so designated to review the application by the Chief Executive Officer

Chief Assistant: the second-in-command of the District Attorney's Office.

"EICOS" Check: Inquiry through the Electronic Interceptions System to "de-conflict" wiretaps. Required under Penal Code section 629.50(a)(6).

"EICOS" Post-Order Report: Report to the California Attorney General that a wiretap order has been issued. Required to be sent within ten days of the order under Penal Code section 629.61.

First Chair: Prosecutor assigned to the Task Force responsible for supervising the authoring of the affidavit during the initial planning, writing, and investigative phase.

Judge: The judge designated by the presiding judge to review and authorize wiretap applications.

"Line Sheets": These are the daily monitoring logs created by monitors at the time of interception.

Second Chair: Prosecutor assigned to handle the case(s) filed as a result of the wiretap and for maintaining a binder of the wire investigation to include: the application, all subsequent orders, the line sheets, the 10 day reports, the sealing order, the unsealing order, the consumer notices, the transcripts and all discs once received. The binder will be maintained so that it remains current and available for review by the District Attorney throughout the pendency of the wire investigation.

Supervising Attorney: the attorney supervising the unit to which the second chair is assigned.

Task Force Supervisor: The officer assigned to the Task Force responsible for the overall supervision of the wire. This position also supervises all Task Force operations and is responsible for approving all operation decisions and the utilization of all Task Force personnel and resources.

Procedures:

1. Pre-Wiretap Activity:

- a. When the Task Force Supervisor anticipates that the Task Force will be commencing a wiretap, he will notify the First Chair.
- b. The First Chair will contact the responsible Assistant District Attorney and appropriate Supervising Attorney, to alert him/her about the anticipated wiretap.
- c. If the wiretap is gang related, the Supervising Attorney for the Community Violence Reduction Unit/Gang Unit, in consultation with the Assistant District Attorney, will select a prosecutor from his/her unit to serve as Second Chair. If the wiretap's focus is not gang related, the Assistant District Attorney will select the appropriate unit, and the Second Chair in consultation with the Unit Supervisor.
 - i. Because wiretap investigations can be time intensive, it is expected that the Second Chair will be able to devote the required time to the operation (i.e., will not be starting a protracted trial, etc.)
- d. Once a Second Chair is selected, he/she and the First Chair will confer with the Task Force Supervisor and the case agent, to set forth an informal understanding about the nature of the wire, the operational needs, and any issues that need to be addressed prior to commencing the wiretap. It is expected that the Second Chair will confer regularly with the Task Force Supervisor First Chair and the Case Agent, in order to keep informed about developments.
- e. The First Chair will contact the Judge to alert him/her of the upcoming wiretap.

2. Preparation of Wiretap Application:

- a. The First Chair, the Second Chair, and the Case Agent will prepare the affidavit in support of the District Attorney's application for the wiretap.
- b. The First Chair and the Second Chair will prepare the other related documents (application, order, CEO Review/Designation Form, Interpreter Form)
- c. It is the responsibility of the First Chair to ensure that all technical requirements are met in the affidavit and any other related documents.
- d. It is the responsibility of the Case Agent, in consultation with the First Chair, to ensure that an "EICOS" (de-confliction) check is done, as required by law.
- e. Prior to the affidavit being reviewed by the Judge, the District Attorney, or the CEO, the First Chair will review it for substance and technical compliance.
- f. Once the affidavit has been reviewed by the First Chair, it will be sent to the Chief Assistant and the responsible Assistant District Attorney. If there are any time constraints (e.g., scheduling needs of case agent, Judge, etc.) or other exigencies (e.g., gang wire in response recent spate of violence), those issues will be communicated to the Chief Assistant and responsible Assistant District Attorney.
- g. Once the Chief Assistant and Assistant District Attorney have reviewed the affidavit and approved it, they will forward the affidavit to the District Attorney, and will advise the First Chair that they have done so.

- i. The above procedures do not preclude the Supervising Attorney receiving the affidavit, in order to be kept aware of the case. However, the above procedures are the **only** levels of review required before the District Attorney is to receive the affidavit.
 - h. Once the First Chair has been advised that the District Attorney is now reviewing the wiretap affidavit, the First Chair will provide the Judge and the CEO with the affidavit.
 - i. The First Chair will be responsible for providing the CEO with the necessary form(s).
 - j. The First Chair will be responsible for coordinating with the Judge about whether the affidavit is sufficient.
 - k. Once the Judge advises the First Chair that the affidavit meets with his/her approval, the First Chair and the Second Chair will coordinate to have all necessary documents signed.
3. Operation of the Wiretap:
 - a. During the operation of the wiretap, it is expected that the First Chair and Second Chair will maintain regular contact with each other, the case agent, and the Task Force Supervisor.
 - b. The First Chair and the Second Chair will also confer with each other about the tasks set forth below. In particular, it is expected that the Second Chair will not only be aware of the progress of the wiretap, but will be present to learn the proper procedures.
 - c. Minimization Instructions: When it is anticipated that the wiretap operation will commence, the Second Chair will prepare written Minimization Instructions for the assigned agents.
 - d. Post-Order "EICOS" Report: It is the responsibility of the Case Agent, in consultation with the First Chair, to verify that a post-order "EICOS" Report was made.
 - e. Line Sheets: The case agent or a Task Force Agent will provide daily emails with the line sheets to the First Chair(s), Second Chair, and the Task Force Supervisor, as well as to any other person whom the Task Force Supervisor identifies as needing to receive those emails.
 - f. Ten Day Reports:
 - i. The First Chair will be responsible for making sure that Ten Day Reports are filed with the Judge as required by law.
 - ii. The Second Chair will be responsible for initial preparation of the Ten-Day Reports.
 - iii. Once the Reports are drafted, the First Chair will review them prior to their being provided to the Judge. Either the First Chair or the Second Chair will be responsible for providing them to the Judge. However, the prosecutor who provides the reports to the Judge should be prepared to answer questions from the Judge about the information in the reports.

g. Public Safety (“Tarasoff”) Procedure:

- i. If, during the course of the wiretap operation, the investigative team becomes aware of an imminent threat to an identified person, that threat will be immediately communicated to the Case Agent, Task Force Supervisor, the First Chair, and the Second Chair.
- ii. The Task Force Supervisor, the Case Agent, the First Chair, and the Second Chair, as time permits, will confer on the appropriate response in order to comply with law enforcement’s legal and ethical requirements towards the threatened person.
 1. If the situation emerges rapidly, such that an immediate response is required, the Case Agent will confer with the Task Force Supervisor about taking immediate action (e.g., immediately notifying the person, placing the person in protective custody, etc.). The Case Agent will, when possible, then notify the First Chair and the Second Chair.
 2. If the investigative team learns of a threat but determines that no action is required, the Case Agent will promptly notify the Task Force Supervisor, the First Chair, and the Second Chair.
 - a. This notification will include (1) the nature of the potential threat, and (2) the reason why no action was taken.

h. Termination of the Wiretap:

- i. When it appears that the wiretap operation will be terminated, the First Chair, the Second Chair, and the Case Agent will confer as to the steps needed for that process.
 1. **Discovery:**
 - a. The First Chair will be responsible for preparing a “discovery packet” that complies with the requirements of Penal Code section 629.70.¹
 - i. If the wiretap affidavit contains a sealed “Hobbs” portion, the First Chair will prepare a “discovery packet” that is redacted to exclude the sealed portion.
 - ii. During the wiretap, the First Chair and Second Chair will be identifying wiretap calls that need to

¹ Under this section, in order to use either wiretap evidence or evidence derived from a wiretap, the People must provide (1) the application (which includes the affidavit and other supporting documents), (2) the line sheets, (3) the calls, and (4) transcripts of those calls. These materials must be provided at least **ten** days prior to the hearing in which the evidence is to be used. Failure to provide the above will lead to suppression of the evidence.

be transcribed, and will confer as to having those calls downloaded and transcribed.

2. **Sealing:**

- a. The First Chair will be responsible for ensuring that the wiretap recordings are properly sealed, immediately upon the termination of the wiretap.
 - i. As part of this duty, the First Chair will confer with the appropriate Task Force Agent about obtaining the original recording media from its source, and the time constraints surrounding that process
 - ii. In addition, the First Chair shall be responsible for coordinating with the Judge about the sealing, and shall prepare the sealing order and other sealing materials.

4. **Post-Wiretap:**

- a. Once the case is ready to be filed the Second Chair and the Case Agent shall present the case to the Second Chair's Supervising Attorney.
- b. When the wiretap operation has concluded, the Second Chair will assume the responsibility for the filed case.
 - i. Prior to cases being filed, the First Chair and Second Chair will confer to ensure that all of the following has occurred:
 1. The Second Chair has the necessary discovery. This includes not only the discovery mandated under Penal Code section 629.70, but also any other required discovery (Penal Code section 1054.1, *Brady*, etc.)
 - a. It will be the responsibility of the Case Agent and the Task Force Supervisor to ensure that investigative reports have been prepared and provided in the filing.
 2. The Second Chair is thoroughly familiar with the case, in terms of not only the evidence obtained through the investigation, but also any anticipated legal issues.
 - ii. If, at the time of filing, there are concerns about the number of cases, defendants, etc., such that it appears that the Second Chair could not realistically absorb all the filed cases, the Task Force Supervisor, the First Chair, and the Supervising Attorney shall confer about ensuring that the case is assigned appropriately.
 - iii. Once the wire charges are filed, the Second Chair is responsible for obtaining the order to unseal the wire.
- c. **Wiretap Litigation:** It is common for defendants to seek to suppress evidence from wiretaps. It is expected that the First Chair will assist the Second Chair, but that

the Second Chair will be responsible for replying to any such motions and litigating them.

- d. Notice: It is the responsibility of the Second Chair to confer with the Case Agent about providing required notice to intercepted parties under Penal Code section 629.68(a). If an extension is required, the Second Chair shall seek such an extension from the Judge. The First Chair will assist in this process.
- e. Records: The District Attorney's Office (specifically the Task Force off-site) will maintain and store the wire investigation binder(s) per Penal Code sections 629.64 and 629.66.
- f. Wiretap Annual Reporting: Under Penal Code section 629.62, the Attorney General is to receive annual reporting on certain statistical information from each county. The California Department of Justice maintains an EICOS portal, by which we report this information at the beginning of each calendar year.²
 - i. It is the responsibility of the First Chair and SSTF Supervisor or designee to collect the necessary information.

² DDA Satish Jallepalli and DDA Barry Grove have been designated by CAL DOJ as the wiretap coordinators, and have provided user access to the portal.