



**House
Legislative
Analysis
Section**

Manufacturer's Bank Building, 12th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

ALLOW "FAXING" OF OATHS, WARRANTS

House Bills 4483-4486 as passed by the House
Second Analysis (2-14-90)

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Sponsor: Rep. William Van Regenmorter
Committee: Judiciary

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H.B. 4483-4486 (2-14-90)

THE APPARENT PROBLEM:

Evidence of blood alcohol content is pivotal in obtaining drunk driving convictions, but police officers often encounter difficulties in collecting this evidence. When an apparently inebriated driver refuses to submit to a breathalyzer test, the arresting officer must obtain a court order before a blood test can be required. This "court order" commonly takes the form of a search warrant. In rural areas, the officer may have to drive many miles to make the necessary affirmations to a judge and obtain the judge's signature on a warrant. Valuable time is lost, the level of alcohol in the blood changes, and evidence deteriorates.

The Ottawa County District Court has addressed this problem by approving the use of facsimile ("fax") machines to effect an exchange of signatures and warrant documents between officer and judge. Under this procedure, the officer contacts a judge by telephone and "faxes" a copy of the unsigned warrant documents to the judge. At the judge's instruction over the telephone, the officer raises his or her right hand and swears to the affidavit, then signs the affidavit and faxes a copy of the signed affidavit to the judge. The judge then signs the warrant and faxes a copy to the officer, who, upon instruction from the judge, stamps the judge's signature onto the original warrant form and adds his or her own initials.

The use of the Ottawa County procedure was challenged by a person arrested for operating a vehicle under the influence of liquor (OUIL). The person pled guilty to a third offense OUIL, but reserved his right to appeal based on his claim that his blood test results had been obtained illegally. After losing his appeal in circuit court, the defendant appealed to the court of appeals, which issued its decision on December 28, 1989 (People v. Snyder, Docket No. 116527). The court upheld the use of fax machines in the manner employed by the Ottawa County District Court (see Background Information for a quotation from the applicable portion of the decision).

Although the decision gave clear approval to the Ottawa OUIL procedures, it did not explicitly sanction the use of fax machines in other circumstances, such as issuing search warrants for other situations or issuing arrest warrants. Legislation has been proposed to authorize the use of fax machines in administering oaths and issuing warrants.

THE CONTENT OF THE BILL:

House Bills 4483 through 4486 constitute a package of bills to establish statutory procedures governing the use of facsimile machines and other "electronic or electromagnetic means of communication" in issuing warrants and administering oaths. The state court administrator would establish paper quality and durability standards for electronically or electromagnetically issued warrants.

House Bill 4483 would amend a section of the code of criminal procedure that deals with issuing arrest warrants. Under the bill, a complaint for an arrest warrant could be made by any electronic or electromagnetic means of communication if the prosecuting attorney authorized the warrant, the judge orally administered the necessary oath, and the applicant signed the complaint. The prosecutor's authorization and the applicant's signature could consist of "faxed" copies of the signed documents. Before executing a warrant, the person or department receiving a faxed warrant would have to have proof that the issuing judge had signed the warrant; that proof could consist of a faxed copy of the signed warrant. The bill could not take effect unless House Bill 4486 was enacted.

MCL 764.1

House Bill 4484 would amend a section of the code of criminal procedure that deals with issuing search warrants. An affidavit for a search warrant could be made by any electronic or electromagnetic means of communication if the judge orally administered the oath and the affiant signed the affidavit. Proof that the affiant signed the warrant could consist of a faxed copy of the signed affidavit. A judge could issue a written search warrant in person or by any electronic or electromagnetic means of communication. If the court order required to impose testing under the drunk driving law was issued as a search warrant, the faxed warrant could be issued by a judge or a district court magistrate. An oath orally administered by electronic or electromagnetic means of communication would be considered to be administered before the judge or district court magistrate. The bill could not take effect unless House Bill 4486 was enacted.

MCL 780.651

House Bill 4485 would amend a section of the Revised Judicature Act that deals generally with the administration of oaths other than oaths taken by witnesses or jurors in trials. Under the bill, an oath or affirmation administered by electronic means under House Bill 4483 or House Bill 4484 would be considered to be administered before the justice, judge, or district court magistrate. The bill could not take effect unless House Bills 4483, 4484, and 4486 were enacted.

MCL 600.1440

House Bill 4486 would amend a section of the Revised Judicature Act that deals with the mode of administering oaths. Under the bill, an oath or affirmation administered electronically under House Bill 4483 or House Bill 4484 would be considered to be administered before the justice, judge, or district court magistrate. The bill could not take effect unless House Bills 4483 and 4484 were enacted.

MCL 600.1432

BACKGROUND INFORMATION:

In People v. Snyder, the Michigan Court of Appeals said:

"We discern no constitutional or statutory impediment to evidence obtained pursuant to the warrant or the manner in which the warrant was obtained. Therefore, we hold that the telephone/fax procedure used in this case to obtain a search warrant requires no suppression of evidence. In so holding, we note the numerous safeguards built into the procedure adopted by the district court — transmittal of the affidavit to the judge by fax, the administration of an oath over the telephone, the judge's actual signature on the fax form and transmittal of the same to the officer, and the judge's direction to the officer to sign the judge's name to the original warrant form. We do not decide whether a less stringent procedure would have been adequate. We further note the time constraints placed on the police in gathering a blood sample in view of the well-known fact that the accuracy of a blood-alcohol content test erodes with delay. In these instances, requiring that the officer meet with a magistrate in person would be detrimental to the integrity of the evidence, and, in some instances, completely impractical."

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills have no fiscal implications. (2-12-90)

ARGUMENTS:

For:

The bills would give statutory recognition to the communications advances of recent years. Fax machines can transmit written documents and signatures in minutes, and when used in conjunction with ordinary telephones to administer oaths, can meet the procedural demands of issuing warrants. Such procedures can save hours, especially in rural areas where an officer might otherwise have to drive long distances in order to obtain the necessary authorization(s). The bills thus would be especially useful in circumstances where evidence rapidly deteriorates, as in drunk driving arrests, or where developments rapidly unfold, as in drug deal situations. The bills would authorize the use of fax machines and other electronic or electromagnetic means of communications in issuing arrest and search warrants, and would clearly spell out the minimum requirements that would have to be met for such devices to be used. The bills are consistent with and complement the Snyder decision and a proposed court rule that contemplates the use of telephones to administer oaths and fax machines to file motions, affidavits, and orders. The bills would promote more efficient and effective police work without loss of procedural safeguards.

Against:

The need for the bills is debatable. The Snyder decision approved the use of fax machines in obtaining court orders for blood tests in OUIL arrests, and its reasoning can be extended to apply to other situations. According to some reports, courts are already using fax machines in issuing arrest warrants. The supreme court is moving on the issue through amendment to court rules, and it may be that the matter, being one of court procedure, is something that would be better left to court rule. Further, it is not certain that the bills provide adequate safeguards against abuse of the technology or the careless use of it. It may be possible for an extra copy of a warrant to be used mistakenly to arrest someone or search a house a second time. In

addition, the technology itself may make it too easy for a warrant to be issued by making it more difficult for a judge or magistrate to thoroughly question an applicant on the circumstances of a case and the need for the warrant. The bills should be carefully reviewed to ensure that they meet constitutional demands regarding separation of powers and due process of law.

Response: The bills likely would meet constitutional challenges. They are no more determinative of court procedure than current law, and they retain requirements for a written record supported by signatures and orally-administered oaths that can be verified, if need be, under oath in court. With the telephone contact needed to administer the oath, the judge or magistrate would be able to ask the officer the necessary questions to confirm the appropriateness of the warrant. Rather than erode due process protections, the bills could in fact bolster them by making it more difficult for officers to claim exigent circumstances in making warrantless entries.

Against:

Under the Revised Judicature Act, a district court magistrate has the power to issue arrest and search warrants when authorized to do so by the district court judge. Large judicial districts, especially multicounty districts, rely heavily on magistrates in distant parts of the district to issue warrants. This reliance is expected to intensify once new court rules requiring round-the-clock arraignments go into effect; the increased demands on judges will increase reliance on magistrates. The bills, however, give magistrates the authority to use the fax procedures only when search warrants are sought to conduct OUIL blood tests. Barring magistrates from using the more efficient procedures greatly diminishes the potential benefits of the bills.

Response: The bills are properly cautious in their approval of what may be considered experimental procedures. For now at least, it would be best to limit the use of these procedures to elected judges, with the one exception of "faxing" search warrants for OUIL testing. Court-ordered OUIL blood testing is a relatively routine occurrence where time is an especially important factor; it makes sense to allow magistrates to first use the fax procedures in OUIL situations.

POSITIONS:

The Michigan Sheriffs Association supports the bills. (2-12-90)

Mothers Against Drunk Driving (MADD) supports the bills. (2-12-90)

The Prosecuting Attorneys Association of Michigan supports the bills. (2-13-90)

The State Bar of Michigan supports the bills. (2-13-90)

The Department of State Police supports the concept of the bills. (2-13-90)

The Michigan Association of Counties supports the concept of the bills. (2-14-90)

The Michigan District Judges Association supports the bills, but finds provisions regarding the authority of magistrates to issue "faxed" warrants to be unclear, and urges that the bills more explicitly allow district court magistrates to issue arrest and search warrants using facsimile machines. (2-14-90)

The State Appellate Defender's Office opposes the bills. (2-13-90)