

41.2 Intercepted Communications.

Applications to intercept wire, oral, or electronic communications under 18 U.S.C. § 2518, and related requests are subject to this rule.

(a) Assignment of Judge; General Procedures.

An application for authorization to intercept wire, oral, or electronic communications under 18 U.S.C. § 2518 and related requests must be submitted to the chief judge. If the chief judge is unavailable, an application and related requests may be submitted to the active district judge next senior in service who is available. A judge is not considered “unavailable” merely because the judge presides in Lincoln or Omaha and the government’s attorney or the affiant resides or works in another city. Unless the judge waives the requirement, all applications, supporting affidavits, proposed orders, and other documents must be provided in draft form for review by the judge at least 24 hours before the time set for consideration of the documents. Unless the judge waives the requirement, the government’s attorney and the law enforcement officer who serves as the affiant must personally appear before the judge at all proceedings related to the interception. Since consideration of interception applications and related matters are often conducted in chambers without a deputy clerk, the government’s attorney is responsible for insuring that all interception applications, orders, and other related documents and recordings are properly filed with, or submitted to, the clerk after being presented to or issued by the judge. Unless otherwise ordered, all interception applications, orders, and other related documents and recordings presented to or issued by the judge must be sealed.

(b) Handling of Recordings Upon Expiration of Order.

Unless the issuing judge directs otherwise, recordings of the contents of any wire, oral, or electronic communication that have been intercepted must be made available to the issuing judge immediately after the interception order expires, and the procedures stated below must be followed.

(1) Delivery.

The recordings must be delivered personally to the issuing judge and the clerk. Thereafter, the clerk must maintain custody of the recordings. In the presence of the issuing judge and the clerk, the recordings must be placed in a box or other container, and the box or other container must be sealed with tape or other sealant. The clerk must initial the tape or sealant and include the date and approximate time the box or other container was sealed. In addition,

the clerk must prepare a receipt reflecting the evidence received, and the receipt must be signed by the clerk receiving the evidence and the agent delivering the evidence.

(2) Sealing.

While in the clerk’s custody, the recordings must be kept in a secure facility in a manner that protects the recordings from editing or other alterations.

(c) Disclosure.

(1) In General.

Without relieving the government of its initial responsibility as described in Nebraska Criminal Rule 41.2(c)(2), the existence and contents of intercepted communications may be referred to and discussed in a party’s motions and briefs, exhibits offered and received in evidence, and in judicial opinions.

(2) Government’s Initial Responsibility.

If the government intends to disclose the substance of intercepted communications in briefs, exhibits, motions, or otherwise, it must comply with Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-2522, particularly 18 U.S.C. § 2517 and 18 U.S.C. § 2518(8)(b), or, in the case of conversations intercepted under a state court order, the Nebraska equivalent of the provisions of Title III. Applications for disclosure in a federal proceeding must be addressed to a federal judge even if the interception was authorized under state law. If federal and state law conflict, federal law governs federal court proceedings.

(d) Use at Trial.

Because the use of intercepted communications at trial presents special problems, the government’s attorney must try to stipulate with the opposing attorney at least 60 days before trial regarding the use of interceptions at trial. If a stipulation is reached, it must promptly be given to a judge for review. The judge may approve or reject all or part of the stipulation and enter appropriate orders. If a stipulation is not reached, then the government’s attorney must file, no later than 50 days before trial, a motion requesting an order instructing the parties regarding the use of intercepted communications at trial.