

Date of Hearing: May 19, 2020
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 3043 (Jones-Sawyer) – As Amended May 11, 2020

SUMMARY: Requires the Department of Corrections and Rehabilitation (CDCR) to approve an inmate's request to make a confidential call to their attorney if the attorney's place of work is more than 75 miles from the institution, and requires CDCR to provide the inmate at least 30 minutes per month to make such calls.

EXISTING STATE LAW:

- 1) Provides that in a criminal case the defendant has the right to the assistance of counsel or the defendant's defense. (Cal. Const. Art. I, Sec. 15.)
- 2) Provides, generally, that no person has a privilege to refuse to be a witness or to refuse to disclose any matter or to refuse to procedure any writing, object or other thing. (Evid. Code, § 911.)
- 3) Provides that communications made in the context of an attorney-client relationship are privileged, entitling the holder of the privilege to refuse to disclose, and to prevent another from disclosing, the communication. (Evid. Code, § 954.)
- 4) Provides that the right of any person to claim the attorney-client privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evid. Code, § 912, subd. (a).)
- 5) Provides that a person sentenced to imprisonment in a state prison or to imprisonment in county jail for a felony offense may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests. (Pen. Code § 2600.)
- 6) Provides that prisoners have the right to correspond, confidentially, with any member of the State Bar or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband. (Pen. Code § 2601, subd. (b).)
- 7) Provides that the Director of CDCR may prescribe and amend rules and regulations for the administration of the prisons and requires the Director to maintain, publish and make available to the general public, a compendium of such rules and regulations. (Pen. Code § 5058, subds. (a) and (b).)
- 8) Provides that inmates may not use institution telephones or public coin operated telephones located on institution property except as specifically authorized by CDCR. (Cal. Code Regs.

Tit. 15, § 3018.)

- 9) Defines a “confidential call” as a telephone call between an inmate and his/her attorney which both parties intend to be private. ((Cal. Code Regs. Tit. 15, § 3282, subd. (a)(2).)
- 10) Provides that “confidential calls” may be approved on a case-by-case basis by the institution head or designee, upon written request from an attorney on the attorney's office letterhead stationery. (Cal. Code Regs. Tit. 15, § 3282, subd. (g)(1).)
- 11) Requires an attorney who wishes to conduct a confidential call with their client to make a written request in which the attorney provides in writing the following personal and professional information:
 - a) Name;
 - b) Mailing address;
 - c) Date of Birth;
 - d) Valid driver's license or state-issued identification card number;
 - e) Proof of current registry and good standing with a governing bar association; and,
 - f) Indication of the jurisdiction(s) licensed to practice law. (*Ibid.*)
- 12) Requires requesting attorneys to report any prior felony convictions or pending arrest dispositions, describe and explain any prior suspension or exclusion from a correctional facility, and declare under penalty of perjury one or more of the following:
 - a) They are the named inmate's attorney either by appointment by the court or at the inmate's request;
 - b) They have been requested by a judge to interview a named inmate for purposes of possible appointment as counsel by the same court;
 - c) They are requesting to call a named inmate who may be a witness directly relevant to a legal process, purpose, or proceeding;
 - d) They are seeking to interview a named inmate, at the request of the inmate, for the purpose of representation of the inmate in a legal process, for a legal purpose or in a legal proceeding; and,
 - e) They have been requested by a third party to consult with the named inmate when the inmate cannot do so because of a medical condition, disability or other circumstance. (Cal. Code Regs. Tit. 15, § 3282, subd. (g)(2).)
- 13) Provides that any false statement or deliberate misrepresentation of facts specific to the information required above shall be grounds for denying the request or cause for subsequent suspension or exclusion from all institutions/facilities administered by the department. (Cal.

Code Regs. Tit. 15, § 3282, subd. (g)(3).)

- 14) Provides that the date, time, duration, and place where the inmate will make or receive the call, and manner of the call are within the discretion of the institution head, except as specified. (Cal. Code Regs. Tit. 15, § 3282, subd. (g)(3).)
- 15) Provides that it is within the discretion of the institution head to approve or deny a confidential call and that as long as the attorney/client communication privilege is not violated, a confidential call may be denied where the institution head determines that normal legal mail or attorney visits were appropriate means of communication and were not reasonably utilized by the inmate or attorney. (Cal. Code Regs. Tit. 15, § 3282, subd. (g)(6).)
- 16) Provides that attorney visits shall be conducted in a confidential area specified by the institution/facility and that attorney visiting shall normally be accommodated during the institution/facility regularly scheduled visiting days and hours. (Cal. Code Regs. Tit. 15, § 3178, subd. (b).)

EXISTING FEDERAL LAW: Provides that in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense. (U.S. Const. 6th Amend.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Access to confidential conversations with an attorney is critical to the health and safety of inmates. A private conversation with one's counsel may be the only way those incarcerated are able to report instances of abuse or mistreatment. While in-person communication is ideal, that cannot always be arranged. This bill will protect access to meaningful legal representation when attorneys are unable to appear in person. With all of the changes in operation of state facilities following the COVID-19 pandemic effective and protected communication with legal counsel is of the utmost importance."
- 2) **Background:** The United States Constitution and the California Constitution guarantee the right to the assistance of an attorney for persons who are the subject of criminal prosecutions. The right to an attorney applies at the trial stage of a criminal proceeding and also during appeal. (*See e.g. Anders v. California* (1967) 386 U.S. 738, 741.) Communication with counsel is critical to the attorney-client relationship and necessary in order to provide adequate representation. For these reasons, denying an inmate access to use the telephone to call his or her attorney is unconstitutional in many circumstances. (*See e.g. Tucker v. Randall* (1991) 948 F.3d 388, 391.)

In general, a person who is subject to a legal proceeding must disclose any matter or produce any writing, object or other thing requested of the person. There are exceptions which include the constitutional right not to incriminate oneself (U.S. Const., 5th Amend.; Pen. Code, §§ 930, 940) and confidential communications between persons with certain professional relationships, such as communications made between a lawyer and his or her client. The privileged communication between attorney and client is one of the oldest recognized privileges for confidential communications. (*See Swidler & Berlin v. United States* (1998)

524 U.S. 399, 403.) The purpose of the privilege is “intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” (*Ibid.*, quoting *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.) The privilege is such an intrinsic part of the legal system that the United States Supreme Court has ruled that the privilege continues to apply even after the death of the client. (*Id.* at 410-11.) Despite the legal significance of the attorney-client privilege, it has limitations. Most importantly for the purposes of this bill, the privilege is considered waived if a third party is present to hear the communication between attorney and client. (Evid. Code, § 912, subd. (a); *D.I. Charbourne, Inc. v. Super. Court of San Francisco* (1964) 60 Cal. 2d 723, 735.)

Existing law provides inmates the right to communicate confidentially with a member of the California State Bar. Penal Code Section 2601 specifically provides for such confidential communication. However, it appears that this statute is not also considered applicable to telephone calls. Per CDCR regulations, an inmate who wishes to conduct a confidential telephone call with an attorney must navigate the application process by which an attorney must be approved in order to conduct a confidential call with his or her client. Once that application is completed and approved, CDCR retains the authority to approve or deny confidential calls on a case-by-case basis. According to the proponent of this bill, there are certain facilities that categorically reject confidential telephone calls, requiring attorneys to either use mail for correspondence, visit in-person, or speak on the telephone while being monitored by CDCR staff. These options may not be ideal for attorneys and their clients. The use slow pace and on-sided nature of communication by mail is likely to prove inadequate for proper legal representation. Traveling to the facility for an in-person visit may range from inconvenient to impossible, depending on the distance to be traveled, the number of clients the attorney has, and where each one is located. Many CDCR facilities are located in remote parts of the State. (*See* CDCR Website Facility Locator Map: <https://www.cdc.ca.gov/facility-locator/>). Finally, conducting a monitored telephone call is likely to destroy the attorney-client privilege (Evid. Code, § 912, subd. (a); *Charbourne, supra.*), thereby reducing the “broader public interests in the observance of law and the administration of justice” that the privilege is designed to protect. (*Upjohn, supra.*)

Federal regulations appear to provide for more robust confidential communications between inmates and their attorneys than does the State of California. Federal regulations specifically provide that “Staff may not monitor an inmate’s properly placed call to an attorney.” (United States Bureau of Prisons Program Statement, *Telephone Regulations for Inmates*, at p. 16, Feb. 4, 2002, available at: https://www.bop.gov/policy/progstat/5264_007.pdf [as of May 13, 2020].) Federal regulations further dictate that “The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate.” (*Id.* at p. 17.)

This bill would require CDCR to provide inmates with confidential calls with their attorneys if the attorney’s place of work is more than 75 miles away. The bill would also require that an inmate be given at least 30 minutes of confidential call time in those circumstances.

- 3) **COVID-19 Concerns:** COVID-19 poses a heightened danger to persons involved the criminal justice system as well as attorneys and staff. Jails and prisons make disease mitigation and prevention efforts virtually impossible when detention facilities are at or near capacity. Social distancing and sanitary practices are difficult in close quarters particularly when they lack a ready supply of personal protective equipment and rationed access to sanitary facilities. By their nature, detention facilities are generally designed in a manner to pack a large number of people into the smallest space possible to make them easy to secure and monitor. The spread of COVID-19 in jails and prisons poses a health risk to all Californians, starting first with the employees of jails and prisons, people who are incarcerated, their family members and others who visit them. The impacts reverberate through secondary institutions including law enforcement agencies and the judicial system.

COVID-19 has exacerbated the state's already existing concerns with prison and jail overcrowding. In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that the California Department of Corrections and Rehabilitation (CDCR) was unable to provide inmates with constitutionally adequate healthcare. The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons.

Due to the COVID-19 pandemic, now may be a particularly appropriate time to consider expanding the use of confidential telephone calls. Doing so may reduce the number of people going into and out of CDCR facilities since attorneys who are located more than 75 miles away from the facility can call in rather than visiting in person. Furthermore, prisoners who are not being provided adequate access to healthcare, or who are being isolated for extended periods of time in an attempt to control the spread of COVID-19 may not feel comfortable disclosing the details of their situation on a monitored call. This bill may provide such inmates with the ability to address instances of neglect or abuse.

- 4) **Argument in Support:** According to the *California Public Defenders Association*, "Under current law, state prison inmates have a constitutional right to communicate privately with their attorneys. However, because many inmates are not housed in their home county, they are frequently held in prisons located hundreds of miles from their attorney's actual office, making in-person visitation difficult, if not impossible.

"Even if an attorney is able to travel to a prison far away from their place of business, the current system places a burden on both the attorney (who must spend an entire day travelling for a single thirty minute interview) and on prison staff (who must spend time screening the attorney before entry to the prison). The need to reform the existing limitations on the attorney-client communication process in state prison is particularly evident given the current pandemic, because in-person visitation places attorneys, inmates, and staff at risk of infection.

"AB 3043 addresses this problem by simply requiring prisons to permit short calls between inmates and their attorneys, provided that the attorney works more than 75 miles from the prison in which the inmate is housed."

5) **Argument in Opposition:** According to >

6) **Prior Legislation:**

- a) SB 331 (Jackson) Chapter 178, Statutes of 2017, expanded the definition of a “domestic violence victim services organization” for purposes of the domestic violence victim-counselor evidentiary privilege.
- b) SB 2040 (Morgan), Chapter 854, Statutes of 1986, established the domestic violence victim-counselor privilege.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association

Opposition

None

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