
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 3043 **Hearing Date:** July 31, 2020
Author: Jones-Sawyer
Version: June 30, 2020
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Corrections: Confidential Calls*

HISTORY

Source: Conference of California Bar Associations

Prior Legislation: None

Support: Alliance for Boys and Men of Color; Asian Americans Advancing Justice-California; California Innocence Project; California Public Defenders Association; Californians for Safety and Justice; Ella Baker Center for Human Rights; Initiate Justice; Loyola Project for the Innocent; National Association of Social Workers, California Chapter; National Lawyers Guild, San Francisco Bay Area Chapter; Northern California Innocence Project; Prison Law Office; Re:Store Justice; San Francisco Public Defender's Office; Uncommon Law; Young Women's Freedom Center

Opposition: None known

Assembly Floor Vote: 76 - 0

PURPOSE

The purpose of this bill is to require the Department of Corrections and Rehabilitation (CDCR) to approve an inmate's or attorney's request to make confidential calls, as specified.

Existing law provides that in a defendant in a criminal case has the right to the assistance of counsel for the defendant's defense. (Cal. Const., art. I, § 15.)

Existing law 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.)

Existing law 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).)

Existing law 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.)

Existing law provides that inmates 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).)

Existing law 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).)

Existing law provides that inmates may not use institution phones or payphones located on institution property except as specifically authorized by CDCR. (Cal. Code Regs., tit. 15, § 3018.)

Existing law defines a “confidential call” as a phone call between an inmate and the inmate’s attorney which both parties intend to be private. (Cal. Code Regs., tit. 15, § 3282, subd. (a)(2).)

Existing law 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).)

Existing law 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: name; mailing address; date of birth; valid driver’s license or state-issued identification card number; proof of current registry and good standing with a governing bar association; and, indication of the jurisdiction(s) licensed to practice law. (Cal. Code Regs., tit. 15, § 3282, subd. (g)(1).)

Existing law 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:

- They are the named inmate’s attorney either by appointment by the court or at the inmate’s request;
- They have been requested by a judge to interview a named inmate for purposes of possible appointment as counsel by the same court;
- They are requesting to call a named inmate who may be a witness directly relevant to a legal process, purpose, or proceeding;
- 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,
- 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).)

Existing law 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).)

Existing law 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)(5).)

Existing law 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).)

Existing law requires that an attorney visit, defined as a private consultation between an inmate and the inmate's attorney or attorney representative, be conducted in a confidential area specified by the institution/facility. Provides that attorney visiting shall normally be accommodated during the institution/facility regularly scheduled visiting days and hours. Delineates the process by which an attorney obtain approval to conduct attorney visits with inmate-clients. (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.)

This bill requires CDCR to approve an inmate's or attorney's request, whoever the institution designates to make the request, to make a confidential call. Requires that the approved confidential call be at least 30 minutes once per month, per inmate, per case unless the inmate or attorney requests less time.

This bill defines confidential call as "a telephone call between an inmate and their attorney that both the inmate and attorney intend to be private."

COMMENTS

1. Need for This Bill

According to the author:

Few, if any, state facilities provide confidential telecommunication between inmates and their legal representation. The same conversations are considered confidential when occurring in person. For equity and inmate safety, it is important that there are mechanisms in place to ensure confidential contact with one's attorney.

2. Attorney Visits and Confidential Calls

The U.S. Constitution and the state 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 for the attorney to provide adequate representation. For these

reasons, denying an inmate access to use the phone to call his or her attorney is unconstitutional in many circumstances. (See e.g. *Tucker v. Randall* (1991) 948 F.3d 388, 391.)

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 U.S. 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. Although Penal Code section 2601 specifically provides for confidential correspondence between an inmate and the inmate’s attorney, the statute makes no reference to phone calls. Per CDCR regulations, an attorney who wishes to make a confidential phone call to an inmate-client must request approval to do so. CDCR retains the authority to approve or deny confidential calls on a case-by-case basis.

3. Effect of This Bill

According to the sponsor of this bill, there are certain CDCR facilities that categorically reject confidential phone calls, requiring attorneys to either use mail for correspondence, visit in-person, or speak on the phone while being monitored by CDCR staff. Prior to the COVID-19 crisis, these options were not always ideal for attorneys and their clients. First, the use slow pace and one-sided nature of communication by mail is likely to prove inadequate for proper legal representation. Second, due to the remote location of many CDCR facilities, traveling to a 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 client is located. Finally, conducting a monitored phone call is likely to destroy the attorney-client privilege (Evid. Code, § 912, subd. (a); *Charbourne, supra.*), reducing the “broader public interests in the observance of law and the administration of justice” that the privilege is designed to protect. (*Upjohn, supra.*)

Although attorney visits have not been suspended during the pandemic, many attorneys are electing to utilize confidential calls in light of the recent COVID-19 outbreaks in the state’s prisons. Due to the pandemic, now may be a particularly appropriate time to consider expanding the use of confidential phone calls

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