
SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair
2019 - 2020 Regular Session

AB 3043 (Jones-Sawyer) - Corrections: confidential calls

Version: August 4, 2020

Policy Vote: PUB. S. 7 - 0

Urgency: No

Mandate: No

Hearing Date: August 13, 2020

Consultant: Shaun Naidu

Bill Summary: AB 3043 would require the Department of Corrections and Rehabilitation (CDCR) to approve an attorney's request to make confidential calls with an incarcerated client, as specified.

Fiscal Impact: Unknown costs ranging from minor and absorbable to the hundreds of thousands of dollars, depending on if this measure prompts increased demand for confidential calls and if there currently exists sufficient infrastructure, resources, and personnel to meet the demand. (General Fund)

Background: According to the analysis of this bill by the Senate Committee on Public Safety:

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.

Specifically, CDCR regulations require requests must be in writing, on the attorney's office letterhead, and delivered by the U.S. Postal Service or facsimile to an institution's litigation coordinator or designee. In order to obtain approval, attorneys must furnish specific personal and professional information (e.g., name, date of birth, proof of status as a lawyer in good standing). Once the request is approved, the attorney is contacted to schedule the confidential telephone call with the specified inmate. Pursuant to department regulations, approval of a confidential call is within the discretion of the institution head, or their designee. As long as the attorney-client communication privilege is not violated, a confidential call may be denied where the institution head, or their designee, determines that normal legal mail or attorney visits are an appropriate means of communication and were not reasonably used by the client or attorney. Additionally, when demand for confidential calls seriously burdens institutional operations, the institution head, or their designee, is allowed to prioritize confidential calls. (Cal. Code Regs., tit. 15, § 3282.)

Proposed Law: This bill would require CDCR to approve an attorney's request to have a confidential call with an incarcerated person that they represent. The approved confidential call must be at least 30 minutes once per month, per incarcerated person, per case, unless the client or attorney requests less time.

Staff Comments: Currently, CDCR does not bear the financial cost of confidential calls. Department regulation provides that a confidential call from an incarcerated person is to be placed as a collect call or by providing for the toll to be deducted from the incarcerated person's trust account and made from a prison telephone or, with appropriate authentication of the caller, may be received from an attorney. AB 3043 would not require CDCR to bear the financial expense for confidential calls. Accordingly, CDCR would expect a similar process to what exists now, with financial responsibility for the expense of such calls resting with the incarcerated individual.

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