

<p><b>California Department of Justice DIVISION OF LAW ENFORCEMENT</b> <b>John D. Marsh, Chief</b></p> 	<b>INFORMATION BULLETIN</b>	
<p><i>Subject:</i> <b>Regarding the Prohibition on Eavesdropping and Recording Conversations Between Incarcerated People and Their Attorneys, Religious Advisors, and Physicians</b></p>	<p><i>No.</i> <b>2023-DLE-03</b></p>	<p><i>Contact for information:</i> <b>Client Services Program</b> <a href="mailto:dojcsp@doj.ca.gov">dojcsp@doj.ca.gov</a></p>

**TO: ALL CHIEFS OF POLICE, SHERIFFS, AND EXECUTIVES OF CALIFORNIA LAW ENFORCEMENT AGENCIES**

This bulletin serves as a reminder that all law enforcement must scrupulously protect an incarcerated person's right to consult with the counsel of their choice in private regardless of whether those conversations occur in person or by some other means. This includes ensuring that those conversations are not recorded, monitored, or otherwise overheard. In addition to protecting this constitutionally protected right, law enforcement must not electronically eavesdrop on conversations between incarcerated people and their licensed physicians or religious advisers without first obtaining the consent of all parties to the conversation.

This bulletin discusses the applicable constitutional and statutory laws protecting an incarcerated person's right to counsel, as well as their right to privately confer with a religious advisor or medical professional. This bulletin also provides information to help law enforcement ensure their practices, and those of commercial entities with whom they contract for the provision of incarcerated person telecommunication services, are consistent with these legal requirements.

The Department of Justice strongly urges all law enforcement agencies to adopt policies and practices consistent with these laws and to train their personnel accordingly. Please note that this bulletin is not intended, nor should it be construed, to articulate the rights applicable to all communications made by incarcerated people.

**LAWS GOVERNING AN INCARCERATED PERSON'S RIGHT TO COUNSEL AND OTHER PROTECTED CONVERSATIONS**

California law prohibits the electronic eavesdropping and recording of conversations between incarcerated people and their attorneys, religious advisors, and physicians without first obtaining the consent of all parties to the conversation. (Pen. Code, § 636, subd. (a).) California law also prohibits nonelectronic eavesdropping on conversations between those same individuals when the conversations "occur in a place, and under circumstances, where there exists a reasonable expectation of privacy, including a custody holding area, [other] holding area, or anteroom. This subdivision does not apply to conversations that are inadvertently overheard or that take place in a courtroom or other room used for adjudicatory proceedings." (Pen. Code, § 636, subd. (b).) Violation of this statute is a felony.

Furthermore, both the United States Constitution and the California Constitution protect "the right to communicate in absolute privacy with one's attorney." (*Barber v. Municipal Court (San Luis Obispo)* (1979)

24 Cal.3d 742, 751; U.S. Const., 6th Amend; Cal. Const. Art. 1, § 15.) According to the California Supreme Court, “[i]t is irrelevant to the reasons underlying the guarantee of privacy of communication between client and attorney that the state is intruding for one purpose rather than for another ... [because t]he chilling effect on full and free disclosure by a client would be the same, whatever the state’s asserted purpose for intruding.” (*Barber, supra*, at p. 753.) The right to counsel is violated when law enforcement is present during confidential attorney-client conferences or even when the operation of a custodial facility requires those conversations to take place under circumstances where the conversations can be overheard. (*Id.* at p. 752, citing *Ex Parte Qualls* (1943) 58 Cal.App.2d 330.) This raises the specter that a court could find a violation of the Sixth Amendment, the California Constitution, or the Penal Code even in a situation where law enforcement believes it has a legitimate reason for monitoring these conversations.

## **LAW ENFORCEMENT’S RIGHT TO MONITOR NON-PROTECTED CONVERSATIONS BETWEEN INCARCERATED PEOPLE AND OTHERS**

Law enforcement is not, however, prohibited from engaging in otherwise lawful monitoring of conversations, such as with the valid consent of all parties. Thus, with the exception of conversations protected by California law (e.g., those between an incarcerated person and his religious advisor, licensed physician, or attorney) or the United States and California constitutions (e.g., those between an incarcerated person and her attorney), law enforcement may rely on valid consent to monitor conversations. “[N]o prisoner should reasonably expect privacy in his outbound telephone calls.” (*United States v. Van Poyck* (9th Cir. 1996) 77 F.3d 285, 290–291.) An incarcerated person’s consent may be explicit or implied and can be given by, for example, signing a form or reading clearly placed signs. (*Id.* at pp. 287, 292.)

Although California law requires that both parties to a telephone conversation give consent to it being recorded, that consent may be obtained by using a pre-recorded warning. Such a warning should “inform[] all parties to the conversation that the conversation is being recorded. If, after being so advised, another party does not wish to participate in the conversation, he or she simply may decline to continue the communication.” (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 118, fn. omitted.)

## **BEST PRACTICES FOR PROTECTING THE PRIVACY OF CONVERSATIONS BETWEEN INCARCERATED PEOPLE AND THEIR ATTORNEYS, RELIGIOUS ADVISORS, AND PHYSICIANS**

The following list of best practices recommendations is not exhaustive. It is intended to suggest ways in which law enforcement in California can protect the rights of incarcerated people while safeguarding the integrity of prosecutions. To that end, law enforcement should consider the following:

### **I. Best Practices for Telecommunications Services**

1. Maintain an ongoing do-not-record list. Collect defense attorney phone numbers at the time of a defendant’s first appearance and implement a procedure by which those phone numbers are entered into do-not-record lists. This information can be collected from the court, from defense counsel, or from the incarcerated person and can be verified using the state bar website. Note, however, that defense counsel frequently use cell phones; adding a main business number to do-

not-record lists has not been sufficient to prevent recording all attorney-client calls.

2. Require incarcerated people to use physically separate, dedicated, and unrecorded telephones to place confidential calls to their attorneys, religious advisors, and physicians. Before being permitted to use these telephones, incarcerated people may be required to comply with a procedure by which defense attorneys, religious advisors, and physicians receive approval or clearance for confidential calls with incarcerated people. Once such approval is received, incarcerated people can make calls to their attorney, religious advisor, or physician on a physically separate, dedicated, and unrecorded telephone line. Incarcerated people can also receive calls from their attorneys, religious advisors, and physicians (subject to the discretion of the institution).
3. Post a conspicuous notice in English, Spanish, and any other predominant languages in your jurisdiction, at each telephone capable of recording and monitoring. All signs should be written in readable and accessible text. Such a notice may take the following form:

“All numbers dialed and conversations on this telephone may be recorded and may be monitored without any further notice. By using this telephone, you agree to the monitoring and recording. Phone calls with attorneys, physicians, and religious advisors will not be monitored or recorded when placed on other designated telephones.”

4. Documenting that an incarcerated person has been advised of the procedures that must be followed to place unmonitored calls to attorneys, religious advisors, and physicians, and that the incarcerated person has been warned, and consents, that all other calls, including improperly placed calls, will be recorded.
5. Requiring that parties receiving a recorded call from an incarcerated person press a button if they are an attorney, physician, or religious advisor, and do not consent to a recording of the phone call.
6. Developing and implementing minimization protocols (as is done with wiretaps) for the review of recorded phone conversations.
7. Obtaining from the State Bar of California, and the Medical Board of California on a continuing basis the business phone number of every attorney or physician in the state and including those numbers on do-not-record lists.

## **II. Best Practices for In-Person Conversations**

1. Provide a closed-door space for incarcerated people to meet with their attorneys, physicians, and religious advisors.
2. Provide incarcerated people with sufficient space between themselves and other persons when meeting with their attorney, physician, and religious advisor to minimize the risk of eavesdropping or overhearing.

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