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### **Your Responsibility**

#### **When Using the Information Provided Below:**

*When we wrote this informational material we did our best to give you useful and accurate information because we know people in prison often have difficulty obtaining legal information and we cannot provide specific advice to all who request it. Laws change frequently and are subject to differing interpretations. We do not have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, hire a lawyer to address your specific problem. If you use this information it is your responsibility to make sure the law has not changed and is applicable to your situation. Most materials you need should be available in your law library.*

### **SENDING LEGAL MAIL AND DOCUMENTS TO ATTORNEYS AND THE COURTS**

(updated August 10, 2017)

This office received your letter about California Department of Corrections and Rehabilitation (CDCR) policies on confidentiality, postage or copying for legal mail to lawyers or the courts. We cannot provide you with individual assistance, but hope the information in this letter will be useful to you.

### **Your Rights**

The United States Supreme Court has recognized that prisoners have a right to confidential legal mail during incarceration. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). “In American criminal law, the right to privately confer with counsel is nearly sacrosanct.” *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (“*Nordstrom I*”).<sup>1</sup> The U.S. Constitution, California statutes, and Title 15 regulations all protect California prisoners’ right to confidential mail.

Interference with prisoner legal mail can violate the First Amendment right of free speech, the Sixth Amendment right to assistance of counsel, and the Fourteenth Amendment right to due

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<sup>1</sup> Mr. Nordstrom filed a second appeal with the Ninth Circuit regarding his First Amendment right to confidential legal communications with his attorney, that was decided in 2017. *Nordstrom v. Ryan*, 856 F.3d 1264 (9th Cir. 2017). For ease of reference, the 2014 decision is referred to as *Nordstrom I*, and the 2017 decision as *Nordstrom II*.

process, which includes the right of access to the courts. *Nordstrom I*, 762 F.3d at 909. Interference with prisoners' communications with attorneys also violates the lawyers' First Amendment rights, as these are communications in which "the interests of both parties are inextricably meshed." *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974).

Moreover, state law protects prisoners' right "[t]o 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." Cal. Penal Code § 2601(b) (2017). The California Evidence Code also protects confidential mail between a client and her lawyer and requires that the information only be disclosed to "those who are present to further the interest of the client... or to those whom disclosure is reasonably necessary for the transmission of the information." Cal. Evid. Code §§ 952, 954 (2017). California's Title 15 regulations define confidential mail and provide rules for how confidential mail should be handled by CDCR staff and prisoners. CAL. CODE REGS. tit. 15, §§ 3141-3145.

### **Confidential Mail Definition**

Title 15, § 3141(c) protects confidential correspondence with any of the following:

- All state and federal elected officials
- All state and federal officials appointed by the governor or the president
- All city, county, state, and federal officials responsible for the prisoner's present, prior, or anticipated custody, parole, or probation
- County agencies regarding child custody proceedings
- All state and federal judges and courts
- An attorney at law, on active status or otherwise eligible to practice law, listed with a state bar association
- All officials of a foreign consulate
- The Secretary, Undersecretary, Chief Deputy Secretaries, Executive Director, Assistant Secretaries, Division Directors, Deputy Directors, Associate Directors, the Chief, Inmate Appeals, and the Lead Ombudsman's Office of the Department
- A legitimate legal service organization that consists of an established group of attorneys involved in the representation of prisoners in judicial proceedings including, but not limited to:
  - The Prison Law Office
  - The ACLU
  - California Appellate Project
  - The Young Lawyers Section of the American Bar Association
  - The National Association of Criminal Defense Lawyers

## **Sending Confidential Mail**

“[Lawyer-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the [client] giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Prisoners may send confidential mail to those listed above. CAL. CODE REGS. tit. 15, § 3142(a). When sending mail to an attorney, you should try and make sure that the address listed on the envelope matches the address the attorney has listed with the state bar. *Id.* You should write “Confidential” clearly on the front of the envelope. *Id.* § 3142(c).

Once the envelope is addressed, prisoners should present the mail *unsealed* to designated staff. *Id.* § 3142(d). *In the prisoner’s presence*, staff will remove the contents of the envelope upside down so staff is unable to read the contents. *Nordstrom II*, 856 F.3d at 1271; CAL. CODE REGS. tit. 15, § 3142(d). Staff may remove pages and shake them to check for prohibited material. CAL. CODE REGS. tit. 15, § 3142(d). If no prohibited material is found, staff must put the contents back in the envelope, seal the envelope, and sign it. *Id.* If prohibited material is found, staff will confiscate the prohibited material and either give the letter back to the prisoner or mail it. *Id.* § 3142(e). Staff may refer the violation to the district attorney for criminal prosecution and/or bring disciplinary action against the prisoner. *Id.*

Prisoners who need to submit a CDC Form 193, Inmate Trust Withdrawal (Rev. 1/88), to pay for filing fees or other costs may either (1) submit the mail and form in an unsealed envelope or (2) attach a stamped, appropriately addressed envelope to the confidential mail so that the check can be enclosed later. *Id.* § 3133(c). A prisoner may be subject to disciplinary action if staff believes that a prisoner is using confidential mail for personal correspondence, contraband, or to reach someone not listed in Title 15, Section 3141(c).

## **Receiving Confidential Mail**

Prisoners may wish to share the following CDCR rules with the people they are corresponding with confidentially. In order for incoming mail to be considered confidential, the envelope must include the name, title, return address, and the office of the person or organization. *Id.* §§ 3141(d), 3143. An attorney’s return address must match the address listed with the State Bar. *Id.* § 3143. A statement on the envelope that the mail is “Confidential” or “Legal Mail” is not required but is generally a good idea. *Id.*

Staff can only open confidential mail in the prisoner’s presence. *Wolff*, 418 U.S. at 576; CAL. CODE REGS. tit. 15, § 3143(a). Staff may remove the pages and shake them to check for contraband, but staff may not read any of the material. *Nordstrom I*, 762 F.3d at 908-09; CAL. CODE REGS. tit. 15, § 3143(a). Staff may not “scan” the material if that involves reading some words. *Nordstrom II*, 856 F.3d at 1271. “[E]ven a single instance of improper reading of a

prisoner's mail can give rise to a constitutional violation.” *Mangiaracina v. Penzone*, 849 F.3d 1191, 1197 (9th Cir. 2017).<sup>2</sup>

Staff may inspect confidential mail further only if there is “cause.” CAL. CODE REGS. tit. 15, § 3144. Cause may include a reasonable belief that the letter is not being sent to or being received from a lawyer, legal services organization, judge, court, or elected official, or that the envelope contains contraband. *Id.* § 3144(a). California prisons may not ban materials printed from the internet. *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1150 (9th Cir. 2004). If the mail includes an enclosure, a prisoner may either consent to or refuse an examination of the enclosure. *Id.* § 3145. If a prisoner consents to an examination and staff determines the enclosure can be safely admitted into the facility, the prisoner will be allowed to have the enclosure. *Id.* § 3145(a). If a prisoner refuses an examination, staff will allow the prisoner to either mail the enclosure back to the sender or throw it away, *Id.* § 3145(b).

If staff determines that the envelope contains contraband or there is a misrepresentation of the sender or receiver’s identity, staff may examine and read the letter and any enclosures. CAL. CODE REGS. tit. 15, § 3144(c). If the material indicates a violation of the law or a plan to violate the law, staff may refer the matter to the appropriate criminal authorities for possible prosecution. *Id.* § 3144(c)(1).

CDCR rules require prisoners sign a logbook when they receive confidential mail. *Id.* § 3143(b).

### **Paying for Legal Mail Postage and Materials**

Indigent prisoners (prisoners who have had \$1 or less in their inmate trust account for 30 straight days) can request writing paper, envelopes, a writing implement, and the postage required for five 1-ounce First-Class letters each week from prison staff. *Id.* §§ 3133(a)(5), 3138(a). Indigent prisoners may also send free, unlimited mail to any court or Attorney General’s Office, which usually represents the opposing parties in criminal appeal and habeas cases and in prison conditions lawsuits. *Id.* § 3138(h).

If a prisoner is in disciplinary detention, a prisoner may request pencil and paper in order to correspond with an attorney or prepare legal documents. *Id.* § 3164(b). A prisoner may request other legal material if the prisoner had initiated a lawsuit before being placed in disciplinary detention and court deadlines are coming up. *Id.* § 3164(b).

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<sup>2</sup> Prisoners sometimes have problems with staff reading their legal mail during cell searches. Staff should not read legal mail during cell searches, and you should try to make sure that legal mail stored in your cells is in its original envelopes or otherwise identified clearly as legal mail, and not mixed in with your personal mail.

## Mail to Courts or Opposing Parties in a Lawsuit

The Fourteenth Amendment guarantees the right to due process, which includes the right of access to the courts. Accordingly, CDCR rules provide that the state will provide free, unlimited mail to any court or Attorney General's Office to indigent prisoners. *Id.* § 3138(h).

Under Title 15, Section 3162(d), a prisoner without money or attorney representation files a lawsuit, the state must provide free copying of the following:

- Petition for a writ of habeas corpus
- Traverse, Reply Pleading, and other documents in support of a petition for writ of habeas corpus
- Appeal from the denial of a writ of habeas corpus
- Summons and Complaint for a civil action
- Documents in support of a civil action
- Petition for a hearing in an appellate court
- Appellant's Brief, Reply Brief, and other documents in support of an appeal
- Petition for writ of certiorari to the Supreme Court
- Motion to proceed in forma pauperis (as an indigent person)
- Additional documents that are necessary for a lawsuit. Prisoners need to explain why the additional documents are necessary to a case.

Generally, the prison law library will not copy any document exceeding 50 pages (including all attachments and exhibits). *Id.* § 3162(c). A prisoner who wants to have a longer document copied must submit a written explanation of why the full document is necessary to the case. *Id.*

A prisoner who has money in a trust account must pay for the copying and postage needed to file a lawsuit. *Id.* §§ 3162(b), 3165(b). A prisoner who is filing a state civil lawsuit (not including habeas corpus) also has to pay a \$3 filing fee to CDCR. *Id.* § 3160. This fee is waived for indigent prisoners. *Id.* The CDCR rules state that notarization of legal documents is not normally required by the courts and that *all prisoners* must pay a fee if they want documents to be notarized. *Id.* § 3165(c).

## Steps for Resolving Problems Concerning Legal Mail

A prisoner who believes that prison officials have violated his or her rights to confidential mail or access to the courts should file a 602 administrative appeal and pursue it to the highest level necessary. *Id.* § 3137. If the administrative appeal does not resolve the problem, prisoners may wish to consider filing a state petition for writ of habeas corpus or a federal civil rights ("§ 1983") lawsuit. The Prison Law Office has handouts that explain the administrative appeal process and how to file a state habeas corpus petition or federal civil rights lawsuit; if you would

like copies of these handouts, please write us. Below, we list some state and federal legal arguments that have been used in other cases challenging interference with confidential legal mail.

### **A. First Amendment Challenge**

Prisoners have a First Amendment right to send and receive mail, but prison rules may limit that right as long as the rules “are reasonably related to legitimate penological interests.” *Nordstrom II*, 856 F.3d at 1272. “Legitimate penological interests... include ‘the prevention of criminal activity and the maintenance of prison security.’” *Id.* (quoting *O’Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996)). A four-factor test from *Turner v. Safley* is used to see if the prison rule is constitutional: (1) whether there is a rational connection between the prison rule and the legitimate governmental interest put forward as the justification for the prison rule; (2) whether there are other ways for prisoners to exercise their constitutional right; (3) how accommodating the constitutional right would impact guards, other prisoners, and the prison’s resources in general; and (4) whether there is an absence of alternatives. *Id.* Further, “[w]hen a prison regulation affects outgoing mail as opposed to incoming mail, there must be a closer fit between the regulation and the purpose it serves.” *Id.* “This is because ‘outgoing personal correspondence from prisoners [does] not, by its very nature, pose a serious threat to prison order and security.’” *Id.* at 1273 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989)).

In the 2017 *Nordstrom* decision, the Court held that the “[Arizona Department of Correction’s] outgoing legal mail policy unreasonably intrude[d] on [plaintiff prisoner’s] First Amendment rights.” *Nordstrom II*, 856 F.3d at 1274. ADC staff were conducting page-by-page inspections of outgoing mail to determine if the contents concerned legal matters. *Id.* at 1273. The Court found that the *Turner* factors weighed in favor of the prisoner. *Id.* at 1274. First, the Court agreed that prison security was a legitimate governmental interest but highlighted that the ADC failed to provide any evidence that outgoing legal mail has facilitated criminal activity. *Id.* The Court distinguished between “the risks of incoming and outgoing mail.” *Id.* Restrictions on outgoing mail must have “a closer fit between the regulation and the purpose it serves.” *Id.* Second, the Court concluded that prisoners have other methods of communication available but that “alternative means do not entirely make up for the infringement on [the right to confidential legal mail].” *Id.* at 1274. Third, because ADC failed to present evidence showing that prisoners have abused outgoing legal mail, the Court decided “there [wa]s no reason to conclude that a more limited inspection of outgoing mail would have an adverse effect.” *Id.* at 1273. Fourth, the Court determined that an “obvious, easy alternative” was available: ADC could use procedures to ensure that outgoing legal mail is truly being sent to a licensed attorney. *Id.*

## **B. Sixth Amendment Challenge**

Criminal defendants have a Sixth Amendment right to assistance of counsel. *Nordstrom II*, 865 F.3d at 1271. “The right to counsel is violated when (1) ‘the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel,’ and (2) the interference ‘substantially prejudices the criminal defendant.’” *Id.* (quoting *Nordstrom I*, 762 F.3d at 910).

In addition to the First Amendment violation, the 2017 *Nordstrom* opinion held that the ADC policy regarding outgoing legal mail violated the Sixth Amendment. *Id.* at 1272. The policy consisted of staff reading some words in outgoing legal mail to check for contraband, but the ADC had defined “contraband” to include any non-legal correspondence. *Id.* at 1271. In the 2014 *Nordstrom* opinion, the Ninth Circuit found that even though Mr. Nordstrom was not currently facing criminal charges, and was instead making a post-conviction legal challenge to his sentence, his Sixth Amendment rights were affected. The Ninth Circuit noted that harm alleged “[wa]s not that tainted evidence was used against him but that his right to privately confer with counsel [was] chilled.” *Nordstrom I*, 762 F.3d at 911.

## **C. Fourteenth Amendment Challenge**

A prison has violated a prisoner’s Fourteenth Amendment right to due process, which includes the right of access to the courts “where the prisoner shows that he was actually injured, that is, he was actually hindered in his efforts to pursue a legal claim. An actual injury is shown only where a nonfrivolous, arguable claim is lost....” *Jordan v. Cicchi*, 617 F. App’x. 153, 157 (3d Cir. 2015). A prisoner must prove that the tampering with her legal mail *substantially* burdened her access to the courts. *Wolff*, 418 U.S. at 576.

In the Third Circuit, a prisoner was unsuccessful with his Fourteenth Amendment claim that defendant correctional officials interfered with his legal mail because he could not prove that the mail was sent to the prison or that the defendants personally handled his mail. *Baker v. Williamson*, 453 F. App’x. 230, 234 (3d Cir. 2011). In *Doe v. Selsky*, a federal court in New York rejected the prisoner’s claim that prison staff violated his Fourteenth Amendment rights by tampering with his legal mail in order to prevent the prisoner from exhausting his administrative remedies. 973 F. Supp. 2d 300, 303-04 (W.D.N.Y. 2013). The Court concluded that the prisoner failed to show that staff’s actions “resulted in actual injury” since the prisoner was able to exhaust his administrative remedies. *Id.* On the other hand, the Supreme Court found that a regulation that only allowed members of the bar and licensed private investigators to conduct attorney-client interviews “imposed a substantial burden on the right of access to the courts.” *Procunier v. Martinez*, 416 U.S. 396, 420 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

## **D. State Law Challenge**

“Prison authorities may not read a written communication which an attorney mails to his incarcerated client. This rule finds its justification in two separate statutory sources. The primary source is Penal Code section 2601, subdivision (b) . . . . The secondary source is Evid. Code. §§ 950-962 . . . .” 145 Cal. App. 3d 574, 577-78 (Cal. Ct. App. 1983). The California Penal Code protects prisoners’ right “[t]o 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.” Cal. Penal Code § 2601(b) (West 2017). The California Evidence Code also protects confidential mail between a client and her lawyer and requires that the information only be disclosed to “those who are present to further the interest of the client . . . or to those whom disclosure is reasonably necessary for the transmission of the information.” Cal. Evid. Code §§ 952, 954 (West 2017).

In *People v. Poe*, prison authorities opened a prisoner’s legal mail outside of the prisoner’s presence. *Id.* at 576. The Court concluded that prison authorities had not violated Cal. Penal Code § 2601 or Cal. Evid. Code. §§ 950-962 because authorities *inadvertently or negligently* opened the mail. *Id.* at 579. Further, the prisoner failed to provide evidence that prison authorities read prisoner’s legal mail. *Id.* at 580. The Court acknowledged that authorities had violated CAL. CODE REGS. tit. 15, § 3144, but determined that there was no evidence that this violation was prejudicial for the prisoner. *Id.*