

Approved by Criminal Justice Section Council 5.14.05

AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION

Report to the House of Delegates

Recommendation

RESOLVED, that the American Bar Association encourages federal, state, territorial and local governments, consistent with the constraints of sound correctional management, law enforcement and national security principles, to afford prison and jail inmates every reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

Report

Telecommunications services are integral to human interaction in today's society. Accessing these services is especially important to people who are incarcerated, separated from family, friends and legal counsel by the fact of incarceration. Telephone access is particularly important for the significant percentage of the incarcerated population with limited literacy skills.¹

Leaders in the corrections profession have long recognized the importance of extending telephone privileges to people in their custody as a means of fostering and strengthening ties with their families and their communities.² Telephone access can be a critical component of a prisoner's successful transition to a productive, law-abiding life after leaving prison.³ It can also

¹ Approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

² See, e.g., the October 1996 Resolution on Excessive Phone Tariffs adopted by the American Correctional Association (ACA); ACA's Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (adopted 24 January 2001); and ACA's related standards (*Standards for Adult Correctional Institutions* (3rd ed.); *Standards for Adult Local Detention Facilities* (3rd ed.); *Standards for Adult Community Residential Facilities* (4th ed.); *Standards for Adult Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Community Residential Facilities* (3rd ed.); *Standards for Juvenile Detention Facilities* (3rd ed.); *Standards for Juvenile Correctional Boot Camp Programs* (1st ed.); *Standards for Juvenile Training Schools* (3rd ed.); *Standards for Small Juvenile Detention Facilities* (1st ed.); and *Small Jail Facilities* (1st ed.)). See also, the National Sheriffs' Association Resolution of 14 June 1995; and USDOJ-BOP, Program Statement 5264.06, *Telephone Regulations for Inmates* (Jan. 31, 2002).

³ See, e.g., U.S. Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Ch. II, n.6 (Aug. 1999), available at <http://www.usdoj.gov/oig/special/9908/callsp2.htm> (last accessed 30 January 2005) ("telephone usage and other contacts with family contribute to inmate morale, better staff-inmate interactions, and more connection to the community, which in turn has made them less likely to return to prison...") and State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004).

contribute to safer prisons by reducing the number of disciplinary incidents.⁴ At the same time, we recognize that the desire to provide robust communications services to prisoners remains in tension with legitimate penological constraints of the correctional setting.⁵

Although recognizing the importance of providing expansive telephone privileges, many correctional systems engage in practices that make it difficult, if not impossible, for incarcerated people to use the telephone. First, many correctional facilities only permit prisoners to make collect calls. Second, charges for prisoner-initiated telephone calls are high as compared to rates offered in the residential and business markets and, in some cases, excessive.⁶ In some jurisdictions, escalating prices appear to be driven by “commissions” paid by service providers to correctional facilities for exclusive contracts, which hover in the 30% to 40% range, and can be as high as 65%, of all revenue generated. Third, many correctional systems require telephone service providers to block calls from prisoners to certain prohibited phone numbers for reasons of public safety and crime prevention. Some institutions, however, impose call-blocking requirements for inappropriate reasons, including a local carrier’s failure to enter into a billing agreement with the provider, or because the number called is a cell phone or is a remote call forwarding number. In the case of calls placed to cell phones, many telephone service subscribers are opting for cellular service instead of the more conventional land-line connection. Remote call forwarding is a technology that has been employed by some telephone service providers to compete for business by re-directing calls to customers at costs lower than would otherwise apply. In an age of increasing mobility, it will often be possible to reconcile legitimate security concerns with new technologies. Fourth, many prison systems and jails place unreasonable limits on the number of calls a prisoner is allowed to make or receive, or the aggregate amount of time a prisoner can spend on the telephone during a prescribed period.⁷

⁴ Bureau of Prisons Program Statement 5264.07, “Telephone Regulations for Inmates,” codified at 28 C.F.R. § 540.100 (“Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate’s personal development. . . . Contact with the public is a valuable tool in the overall correctional process.”); State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004), available at <http://www.corrections.state.la.us/Whats%20New/PDFs/TimeInPrison.pdf>.

⁵ The “correctional setting” refers to facilities where people are detained or incarcerated, irrespective of their actual status as pretrial, civilly committed, adjudicated, or sentenced. Thus, the Recommendation encompasses jails and other detention facilities, prisons, training schools, residential facilities, and correctional facilities of all types.

⁶ “[C]orrectional agencies should discourage profiteering on tariffs placed on phone calls which are far in excess of the actual cost of the call, and which could discourage or hinder family or community contacts.” ACA’s October 1996 Resolution on Excessive Phone Tariffs.

⁷ In Texas prisons, inmate access to telephones is quite limited. “Offenders who demonstrate good behavior can earn one 5-minute collect phone call every 90 days. . . .” Texas Department of Criminal Justice, Correctional Institutions Divisions, Frequently Asked Questions (<http://www.tdcj.state.tx.us/faq/faq-cid.htm#telephone>) (last accessed 16 January 2005).

By comparison, the Federal Bureau of Prisons (BOP) policy is generous. BOP Program Statement 5264.07 entitled, “Telephone Regulations for Inmates,” which was codified at 28 C.F.R. § 540.100 *et seq.*, states that inmates are generally permitted privileges to contact up to a maximum of 30 individuals on an approved telephone list for up to 300 minutes per month. P.S. 5264.07, §§ 10.a. (30 numbers), and 10.d.(1)(300 minutes). Although advocating that then-unlimited telephone access be restricted, the Office of the Inspector General found the 300-minute limitation to be “arbitrary.” *Criminal Calls, supra n. 3*, Ch. VIII, § I. ¶ 1. (Aug. 1999), available at: <http://www.usdoj.gov/oig/special/9908/callsp7.htm#Punishments> (last accessed 30 January 2005). Indeed, for

Finally, correctional institutions monitor and record inmate telephone calls routinely, but policies that permit monitoring client-attorney communications in the correctional setting or that unreasonably limit the availability of permissible unmonitored calls threaten fundamental rights regarding the effective assistance of counsel and access to the courts.⁸ Such policies are presumptively unconstitutional.⁹

As the billed parties for inmate collect calls, the family and friends of incarcerated people regularly shoulder the high cost of prison telephone services. A call recipient is often confronted with a choice of paying exorbitant rates for a collect call from a jail or prison, or refusing it. Many families cannot afford the inflated rates.¹⁰ One damaging result is that children are frequently unable to maintain contact with parents who are confined. Arbitrarily blocked calls only exacerbate the situation.

Individually and collectively, the foregoing practices also make it more difficult for incarcerated people to communicate with their lawyers. Telephone calls are an efficient means for attorneys to communicate with incarcerated clients, particularly when literacy or English-speaking skills are a factor. It is regularly less burdensome for an attorney to speak with a client over the telephone than to travel to the facility and conduct a meeting or personal interview. The high cost of prisoner phone calls makes it difficult or impossible for many prisoners' lawyers to accept their calls. The vast majority of incarcerated people are represented by public defenders or court-appointed attorneys who operate with extremely limited budgets.¹¹ This has serious implications given the constitutional protections surrounding a prisoner's ability to communicate with counsel.¹² When attorneys are able to accept prisoner calls, the high cost of the calls cuts

several consecutive years, the BOP has permitted inmates 400 minutes of telephone access during the months of November and December.

⁸ The U.S. Attorney General signed a directive on 31 October 2001 authorizing correctional officials to monitor inmate-client/attorney communications under certain circumstances. AG Order No. 2529-2001, 66 FR 55062. That directive was subsequently codified at 28 C.F.R. 501.3 (31 Oct. 2001).

⁹ *See infra*, n. 14.

¹⁰ *See, e.g., In the Matter of: Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Comments of the Ad Hoc Coalition for the Right to Communicate Regarding Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, and accompanying declarations, FCC Docket No. 96-128 (filed 10 March 2004).

¹¹ According to the U.S. Department of Justice, 82% of felony defendants in state cases in the 75 largest counties in the country in 1996, and 66% of felony defendants in federal cases in 1998 were represented by court-appointed attorneys. Department of Justice, Bureau of Justice Statistics, Defense Counsel in Criminal Cases, Nov. 2000. Both public defenders and other court-appointed counsel are paid by the same governments (state and federal) whose monies are used to fund the correctional systems from which inmate telephone calls originate. Given the current fiscal crisis in governments at all levels, exorbitant rates for inmate-generated telephone calls seem particularly pernicious.

¹² *Compare Alabama v. Shelton*, 535 U.S. 654 (2002) and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent's constitutional right to counsel in criminal cases) with *Lewis v. Casey*, 518 U.S. 343 (1996) and *Bounds v. Smith*, 430 U.S. 817 (1977)(prisoners' right of access to the courts with regard to certain civil and post-conviction matters).

into the attorneys' budgets, making it difficult for them to afford other items necessary to their clients' defense.

Correctional administrators struggle with the perennial problem of stretching limited financial resources to meet institutional needs. The lure of telecommunications contracts that promise a return of as much as 65% of all revenue can appear irresistible in the absence of alternative sources of revenue. But entering into such an arrangement creates an ethical quagmire of both real and perceived conflicts which compromise both the professional integrity of correctional officials and the public's perception. Given the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world, the monetary advantages are not worth the human costs.¹³

Although some courts have recognized the constitutional problems inherent in correctional policies that make it impossible for prisoners to contact lawyers and others,¹⁴ neither the courts¹⁵ nor regulatory agencies¹⁶ have yet required correctional authorities to abandon sole-

¹³ The Nebraska Department of Correctional Services does not accept commissions on inmate telephone charges. Instead, rates are set by the Nebraska Public Service Commission. Nebraska Department of Correctional Services, Frequently Asked Questions, available at: http://www.corrections.state.ne.us/frequent_questions/telephone-index.html (last accessed 30 January 2005).

¹⁴ Courts have long recognized that the ability to communicate privately with an attorney by telephone is essential to the exercise of the constitutional rights to counsel and to access to the courts. *Murphy v. Waller*, 51 F.3d 714, 718 & n.7 (7th Cir. 1995) ("Restrictions on a detainee's telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. . . . In certain limited circumstances, unreasonable restrictions on a detainee's access to a telephone may also violate the Fourteenth Amendment."); *Tucker v. Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991) (denying a pre-trial detainee telephone access to his lawyer for four days would implicate the Sixth Amendment); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (holding that inmates' challenge to restrictions on the number and time of telephone calls stated a claim for violation of their rights to counsel); *Miller v. Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd & modified on other grounds*, 563 F.2d 741 (5th Cir. 1977) (granting a permanent injunction precluding the monitoring and denial of inmates' telephone calls to their attorneys). See also Dana Beyerle, *Making Telephone Calls From Jail Can Be Costly*, Times Montgomery Bureau (Sept. 22, 2002) (Etowah, Alabama county jail under court order to provide phones to people incarcerated in the jail based in part on complaints they could not talk to lawyers). They have accordingly held that, when prisons' collect call-only policies interfere with the ability of incarcerated people to communicate with their lawyers, they may violate these rights. See, e.g., *Lynch v. Leis*, Docket No. C-1-00-274 (S.D. Ohio Feb. 19, 2002) (holding that where public defender's office and many private attorneys refused most collect calls, a prison's collect call-only policy was unconstitutional) (unpublished decision on file with the Brennan Center); *In re Ron Grimes*, 208 Cal. App. 3d 1175, 1178 (1989) (holding that switch by Humboldt County (California) Jail from coin operated to collect-only calls violated the constitutional rights of people incarcerated there because the public defender's office, other county departments, and some private attorneys did not accept collect calls).

¹⁵ See, e.g., *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2000). Illinois granted one phone company the exclusive right to provide telephone services to inmates in return for 50 percent of the revenues generated. Prisoners and members of their families challenged the practice as a violation of their free speech rights, as a discriminatory denial of equal protection of the laws, and as a violation of federal anti-trust laws. In the *Arsberry* case, the United States Court of Appeals for the Seventh Circuit concluded that the practice did not violate the constitution or any federal law. See, also, *Daleure v. Kentucky*, 119 F. Supp. 2d 683 (W.D. Kentucky 2000) (The court found defendants' actions did not violate the Constitution); *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001) (Plaintiff's Federal Telecommunications Act claims fell within the primary jurisdiction of the Federal Communications Commission and were dismissed).

source contracts and open the prison environment to competition that could result in a broader range of calling options at the lowest possible rates.

The resolution encourages federal, state, territorial and local governments to ensure that incarcerated people are afforded a reasonable opportunity to maintain telephonic communication with family and friends in the free community, consistent with the imperatives of correctional management, law enforcement and national security. While the resolution does not go further to specify particular measures correctional authorities must take to ensure the “reasonable opportunity” that is urged, there are a number of basic steps that have been identified as deserving of serious consideration. First, correctional authorities should encourage service providers to offer a board range of calling options, consistent with sound correctional practices. Toll-free calling, debit calling, and collect calling are options that offer different advantages at varying costs. To the extent that existing technology does not permit full access to toll-free numbers for security reasons, correctional authorities should work proactively with telephone service providers to develop and refine technology that extends security features to toll-free calls. Although correctional authorities must be mindful of security concerns when determining what calling options to offer, some telecommunications experts and numerous correctional systems have found that alternatives to collect call-only policies – such as the debit-calling option presently in place in a significant number of facilities – can satisfy legitimate security concerns.¹⁷

Second, telephone services in the correctional setting should be offered at the lowest possible rates. wide range of calling options and fair competition in the marketplace will help control excessive costs. Non-exclusive contracts, contracts with multiple vendors, the provision of debit cards through multiple vendors, and unrestricted vendor access to correctional telephone networks are all measures that promote fair competition which will lead to reasonably priced telephone services for prisoners and their families. Greater oversight of the terms and conditions – particularly the site commissions – of service contracts will enable service providers to lower their cost of service and pass those savings on to consumers.

Third, telephone service contracts should expressly forbid call-blocking for any reason other than legitimate law enforcement and national security concerns, requests initiated by the customer, or failure to pay legitimately invoiced charges.

¹⁶ See, e.g., *In the Matter of Wright Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, CC Docket 96-128 (Federal Communications Commission)(decision pending); *In re: Petition of Outside Connection, Inc.*, DA 03-874 (Federal Communications Commission); *Voluntary Remand of Inmate Telephone Services Issues*. CC Docket No. 96-128 (Federal Communications Commission); and North Carolina Utilities Commission, Docket No. P-100, Sub 84; Docket No. P-55, Sub 1005; and Docket No. P-100, Sub 126, These cases were matters in which prisoner advocates filed briefs, appeared at oral argument, and engaged in discussions with commission personnel, all without success.

¹⁷ See *In the Matter of Wright Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, FCC Docket 96-128, Affidavit of Douglas Dawson. The federal Bureau of Prisons permits prisoners to place calls using debit cards, demonstrating that collect call-only policies are not necessary to maintain prison security. See U.S. Department of Justice, Federal Bureau of Prisons, Memorandum For All Institution Controllers All Trust Fund Supervisors, from Michael A. Atwood, Chief, Trust Fund Branch, Trust Fund Message Number 18-02 (Feb. 8, 2002) at 2.

Finally, if correctional authorities conclude that limits must be placed on the number of calls a prisoner makes, or on the aggregate amount of telephone time allotted a prisoner in a given period, those limits should be as flexible and generous as possible in light of the many benefits of maintaining ties between incarcerated people, their families, and their communities.