

Section 5.01(b)(iii)1a)



## Article V EMPLOYEE OBLIGATIONS

### Section 5.01(b)(iii)1a) Handling Jail-Recorded Telephone Calls Containing Attorney-Client Communications

#### Background

The Santa Clara County Department of Correction has the ability to monitor and record inmate telephone calls from its detention facilities. These facilities contain signs indicating that telephone calls may be monitored and recorded. A similar warning is made at the beginning of the telephone call. Law enforcement recording of an inmate's *unprivileged* conversations in jail does not violate the Fourth Amendment because persons held in jail prior to trial have no expectation of privacy. (*People v. Davis* (2005) 36 Cal.4th 510, 527-528.) The "routine prison monitoring of inmates' telephone calls as a prison security measure meets the law enforcement exemption" to Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. §§ 2510-2520). (*Bunnell v. Superior Court* (1994) 21 Cal.App.4th 1811, 1821.) The Department of Correction provides interview rooms where the attorney and client may meet in private. Also, the Department of Correction will block the monitoring and recording of an inmate's *direct* telephone call to his or her attorney where the attorney has previously requested the block and provided the telephone number(s).

However, there may be occasions where the jail-recorded telephone call includes conversations between an attorney and client. This policy statement addresses that situation.

#### Ethical Obligation

The defendant's right to counsel includes the right to confer privately with an attorney. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751.) The right to counsel is violated when a state agent is present at confidential attorney-client conferences. (*Barber*, at 24 Cal.3d 752.) "[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton* (1985) 474 U.S. 159, 88 L.Ed.2d 481, 493.)

#### Policy and Law

It is a felony under Penal Code § 636(a) for any person to eavesdrop on or record a conversation between a person in the physical custody of a law enforcement agency and his or her attorney without the permission of all parties to the conversation. But there are practical limitations upon the scope of Penal Code § 636(a). (*In re Arias* (1986) 42 Cal.3d 667, 681 (superseded on other grounds) —"Accordingly, the most reasonable construction is that section 636 prohibits monitoring of conversations between a[n inmate] and his [attorney] in locations traditionally used for that purpose.")

Employees of the District Attorney's Office shall not knowingly listen to attorney-client communications, whether or not privileged, contained in jail-recorded telephone calls. If an employee suspects that a jail-recorded telephone call may contain an attorney-client communication, then the employee shall immediately notify the District Attorney's Office Ethics Advisor. The Ethics Advisor shall examine only so much of the jail-recorded telephone call as is essential to ascertain if it contains an attorney-client communication. If the Ethics Advisor determines that the telephone call contains an attorney-client communication, then he or she will immediately notify the defendant's attorney, the assigned prosecutor, and the assigned prosecutor's supervisor that the Ethics Advisor possesses material that appears to contain an attorney-client communication. The Ethics Advisor and the employee who brought the jail-recorded telephone call to his or her attention shall not disseminate any part of the attorney-client communication, but rather shall hold such information in strict confidence. The defendant's attorney and the assigned prosecutor may resolve the situation by agreement, e.g., a stipulated protective order, or resort to judicial intervention as may be justified. (See generally, *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644—describing an attorney's duty upon receipt of inadvertently disclosed privileged information.)

Last Updated on Thursday, 10 May 2007 09:35