



March 19, 2015

Sheriff Dale Radcliff
York County Corrections Department
510 N. Lincoln Ave.
York NE 68467

Re: Attorney phone call confidentiality

Dear Sheriff Radcliff:

I write in response to complaints my office has received about the York County Corrections Department phone policy.

We have heard from attorneys and detainees concerned that the county is monitoring confidential attorney – client calls. I write today to request you review this matter personally to ensure all of your staff is aware that attorney calls, visits and mail are to be confidential and not subjected to monitoring.

The law in this area is very clear. The US Supreme Court has repeatedly said that the right to confidential contact with an attorney is protected by the Constitution and may not be interfered with. “Confidential disclosures by a client to an attorney made in order to obtain legal advice are privileged.” *Fisher v. United States*, 425 U.S. 391, 425 (1976). In addition to the US Supreme Court, the 8th Circuit (the federal court system which covers Nebraska) has specifically ruled on the right of private unmonitored communication between attorneys and clients behind bars.

In the case *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), pretrial detainees filed suit because they were forced to talk to their attorneys on phones out in the open where other inmates and guards could hear everything that was said. The 8th Circuit ruled against the jail. The 8th Circuit put it this way:

“Pre-trial detainees have a substantial due process interest in effective communication with their counsel...when this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised... It is clear that ready access to the courts is one of, perhaps, *the* fundamental constitutional right. All other rights of an inmate are illusory without it.” *Id.* at 1051 (citations omitted)

Given the importance of the right at stake, the 8th Circuit pointed to previous cases also ruling for the right of private consultation with an attorney:

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“Detainees’ right to counsel and due process can also be compromised by a lack of privacy in consultation with counsel...Detainees might be hesitant to disclose the names and information relevant to the attorney’s investigation and necessary to the advice sought. Often pleas are changed in the months before trial based on counsel’s assessment of the strength of each side’s case. The right to an attorney would mean little if it did not effectively attach until the hushed whispers at the defense table the morning of trial, after counsel has selected her strategy and witnesses...It is clear that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him...Such conditions impede the detainee’s ability to prepare for trial, jeopardize the confidentiality of their attorney-client communications and invade their right to privacy.” *Id.* at 1052-53 (citations omitted)

If York County Corrections is recording, listening in or otherwise monitoring phone calls between detainees and their attorneys, then the county is in clear violation of the Constitution. This is true whether the calls are between a pre-trial detainee or an inmate serving his sentence—while the legal test is the same, courts are even more protective of a pre-trial detainee because they are still presumed innocent and the state has no right to punish them. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

Please review this matter with your staff and instruct them that attorney – client communications must be given absolute confidential and privacy. I would appreciate a written response from you indicating that you have addressed our concerns. If I receive such an assurance, we will close our file.

I must warn you that if you do not take appropriate steps to instruct all staff about the privacy rights of attorney-client contact, you will expose the county and yourself to liability. A civil rights lawsuit could be filed on behalf of both attorneys and jail detainees and given the clearly established nature of the constitutional right, the county would be exposed to significant punitive monetary damages as well as paying the attorney fees and costs. It is not necessary to get to that juncture, however, if you will take immediate remedial steps.

I look forward to hearing from you.


Amy A. Miller
Legal Director