



2006-2007 SANTA CLARA COUNTY CIVIL GRAND JURY REPORT

ARE TELEPHONE CALLS BETWEEN ATTORNEYS AND INMATES REALLY PRIVILEGED?

Introduction

The 2006-2007 Santa Clara County Civil Grand Jury (Grand Jury) received a complaint alleging that multiple telephone calls between an inmate and a local attorney were being recorded at the Elmwood Correctional Complex (Elmwood) in violation of California Penal Code Section 636(a), which states as follows:

Every person who, without permission from all parties to the conversation, eavesdrops on or records, by means of an electronic device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and that person's attorney, religious adviser, or licensed physician, is guilty of a felony.

In addition, the complaint claimed that the prosecutor who requested the recorded messages used the unlawfully acquired information as evidence at the inmate's trial. This could have effectively diminished the inmate's ability to defend himself. Before scheduling interviews or taking any actions on the complaint, the Grand Jury learned that a formal claim had been filed with the County of Santa Clara (County). The filing of the claim removed this matter from the purview of the Grand Jury. However, the Grand Jury considered the broader issue of eavesdropping important because of the serious nature of the allegations, including the possible violation of inmates' rights under state and federal law to consult with an attorney in confidence. The Grand Jury decided it would focus on evaluating the Department of Correction's (DOC) policies and procedures concerning monitoring and/or recording of outgoing inmate privileged telephone calls. It would also review how the DOC interacts with the Office of the District Attorney (DA), Office of the Public Defender (PD), private attorneys, and other privileged individuals, including *in pro per* inmates (inmates who represent themselves) with respect to telephone recording. Privileged telephone calls are recognized as outgoing telephone calls to attorneys, medical professionals, religious advisors, and calls initiated by *in pro per* inmates.

The Grand Jury also decided to evaluate whether any current DOC policies and procedures might hinder an inmate's ability to understand that his or her calls are being monitored or recorded. *In pro per* inmates are permitted to make up to four free case-related telephone calls per week. Unless inmates are assigned to special housing, on lock-down, or their telephone calls are restricted for security reasons, there is no limit to

the number of other telephone calls they are allowed to make. It is an established rule that inmates are not allowed to receive incoming telephone calls.

The Grand Jury learned that the DOC telephone system consists of 312 telephone lines at the Elmwood Facility and 144 telephone lines at the Main Jail. The system is not designed with dedicated telephone lines for privileged calls or with separate lines for nonprivileged telephone calls. During its March 28, 2007, meeting with the DOC staff, the Grand Jury was told that to create such a system would be ill-advised and almost impossible.

Attorney-client privilege is not absolute, as shown by California Evidence Code Sections 956 and 956.5, which state:

Evidence Code Section 956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

Evidence Code Section 956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of or substantial bodily harm to an individual.

DOC estimates that there are on average 16,638 inmate telephone calls made systemwide on a daily basis, and the Department could not afford to hire the number of people necessary to screen or listen to every inmate's telephone calls. Since the system is not capable of separating privileged from nonprivileged telephone calls, this creates unavoidable circumstances where recordings of privileged telephone calls can inadvertently end up in the hands of prosecutors. When this occurs, the prosecutor has an ethical duty under the Rules of Professional Conduct to disclose this fact to the inmate's public defender, attorney, the court, and to *in pro per* inmates. Until recently, recordings requested by prosecutors were made available by the DOC without question and without informing the inmate or his/her attorney. However, DOC's newly established policy, dated January 16, 2007, restricts the release of any recording without a court order.

The Office of the DA has recently completed a "*Revised Policy and Procedure for Employee Obligations in Handling Jail-Recorded Telephone Calls Containing Attorney-Client Communications.*" This policy sets out procedures prosecutors should follow concerning privileged telephone recordings. The Grand Jury applauds these efforts. The Grand Jury also recommends that DOC's privileged database be kept up to date using the biannual California Bar Association's list of new local attorneys. Employees in DOC's classification unit should be trained how to include newly admitted local attorneys' phone numbers in the privileged database. Prominent signs should be posted in the visitors' sign-in area with instructions regarding the protection of privileged telephone numbers. This can also be accomplished with a separate sign-in sheet or with appropriate bold lettering on the sign-in sheets.

Discussion

As part of its evaluation of the policies and procedures concerning monitored and/or recorded telephone calls at Elmwood and the Main Jail, the Grand Jury met with staff members from the DA, PD, and DOC at Elmwood and Main Jail. The Grand Jury has agreed not to disclose the confidential sections of DOC's telephone policies and procedures for safety and security reasons.

On two occasions the Grand Jury observed and participated in test telephone calls between Elmwood and the Main Jail. The purpose of the visits was to physically investigate whether privileged calls were being exempted from monitoring and recording.

During the first meeting between the Grand Jury and members of Elmwood and the Main Jail senior staffs, it appeared that: (1) four test telephone calls between the two facilities had failed at both facilities, and (2) the telephone call tracking system did not function according to specifications. The Grand Jury was informed by DOC staff that the telephone vendor would be contacted immediately. Within a few days a member of the DOC informed the Grand Jury that an audit was done by the vendor, and it was determined that the system had responded accurately. This fact was confirmed during the Grand Jury's second visit to both facilities.

Another part of the Grand Jury's evaluation was to observe telephone calls made to two attorneys whose offices are at different locations in the County. When the first telephone number was dialed it was treated as a privileged telephone call without the warning, "*This call may be monitored or recorded.*" Conversely, when the second telephone number was dialed there was a forewarning, "*This call may be monitored or recorded,*" and the subsequent test proved that the telephone call was in fact recorded in its entirety. DOC staff explained that the different test results occurred because the first attorney's telephone number was programmed in the DOC's privileged telephone database, whereas the second attorney's phone number was not. The Grand Jury listened to the recorded message after returning to the Main Jail where the systemwide tracking database is maintained for both facilities. When asked how the telephone numbers are obtained for inclusion in the database, the DOC listed four options: (1) California Bar Association provides the information to the DOC; (2) the attorney can fill out one of the DOC's disclosure forms; (3) the attorney can mail or fax a letter to DOC advising that he or she is an attorney; or (4) the inmate can notify DOC authorities that he or she is being represented by an attorney. As a result of the telephone calls to the two attorneys, the DOC heard firsthand the difficulty one of the parties experienced in an attempt to receive from the DOC classification unit proper procedural information on how to have privileged numbers included in the DOC database.

Privileged individuals, including attorneys and/or their paralegals who visit the jail on behalf of their clients, are provided meeting booths where there are no telephones or recording devices. All privileged individuals are instructed to indicate their profession on the sign-in sheet when they visit the jails. Inmates are told to notify jail authorities when

they represent themselves, and there are booths set aside for their use that include telephones, but no recording devices.

Meeting with District Attorney

The purpose of the Grand Jury's meeting with members of the DA's office was to determine: (1) what steps are taken to prevent acquiring privileged telephone recordings; (2) if they are in agreement with the DOC's policy to restrict release of recorded telephone calls without a court order; (3) what types of disciplinary actions would be imposed if the Office of the DA were to discover that a prosecutor had purposely and surreptitiously listened to recordings and used the evidence at trial without properly notifying the court, attorney, and/or the public defender; and (4) what training exists for prosecutors regarding intercepting privileged telephone calls. The staff of the Office of the DA advised that, in spite of their taking every precaution to avoid listening to privileged telephone calls, there are occasional mishaps because of the sequential order in which the recordings are made. However, once it is discovered that the prosecutor has unknowingly come into possession of privileged recordings, the inmate's attorney and/or public defender are notified, and the telephone recordings are immediately lodged with the court. The Grand Jury was assured by members of the Office of the DA that any prosecutor who knowingly violates the laws which they are in a position to protect will face serious disciplinary consequences, and such behavior will never be tolerated.

On May 15, 2007, the Grand Jury received a copy of the DA's *"Revised Policy and Procedure for Employee Obligations in Handling Jail-Recorded Telephone Calls Containing Attorney-Client Communications."* The District Attorney's interest in "reform" was covered in a February 14, 2007 *San Jose Mercury News* article, *"DA Fills Ethics Adviser Position,"* which concerned the DA's appointment of a "22-year veteran of the DA's office."

As to the January 16, 2007 newly implemented DOC policy, the DA staff members indicated that they disagree with the policy. Prosecutors have already experienced a negative impact on their ability to prosecute criminals due to the extra time involved in obtaining a court order. This is especially a concern for nonprivileged telephone calls where there is a need to act without delay in the interest of safety and security. The two Departments continue to collaborate regarding this issue. Both staffs agree with DOC's assessment that thousands of taxpayer dollars are wasted due to prosecutors' failure to pick up or use requested inmate nonprivileged telephone calls after they have been laboriously extracted and saved for the prosecutors' use.

The Grand Jury asked about training regarding expectations of proper conduct, fair and just investigations, and protection of the constitutional rights of inmates, public defenders, and attorneys with respect to privileged telephone calls. The DA staff members responded that prosecutors receive education on a continual basis in relation to proper conduct, ethics, and new and amended laws. The DA staff reiterated their conviction, as stated in the February 14, 2007 *San Jose Mercury News* article, *"to put*

justice ahead of courtroom victories.” In addition, the Grand Jury was told that when the DA staff is made aware of alleged mistaken, unethical, or illegal conduct by prosecutors, such action serves as a reminder to retrain staff in an effort to avoid repeated violations.

Meeting with Public Defender

The purpose of the Grand Jury’s meeting with the PD staff was: (1) to find out what actions are taken when it is discovered that recorded telephone calls have been illegally acquired and listened to by prosecutors; (2) what proactive measures are taken by PD staff to avoid the undisclosed use of recorded inmate telephone calls by prosecutors; (3) what preventive measures are taken to reduce the possibility of recurrences of violations of Penal Code Section 636(a); (4) whether they were in agreement with the DOC’s new policy to restrict release of all telephone recordings without a court order; and (5) what training is provided for public defenders to enable them to identify evidence used at trial that had obviously been obtained through illegally disclosed telephone calls.

The PD staff had heard of at least one case where an inmate’s privileged telephone calls were illegally used as evidence at trial; however, it had not determined to what extent the allegations were true. If it were determined that there had been illegal eavesdropping, the PD staff would immediately notify County Counsel and the Office of the DA. The PD staff indicated that their resolve would be to investigate any violation of Penal Code Section 636(a), and then promptly follow up with a request for dismissal of the case. They indicated that, if discovered, these types of violations could be so egregious that the only way for an inmate to receive a fair trial would be to turn the entire matter over to the Office of the State Attorney General. The concern of the PD staff is that this type of violation should never go without consequences. The far-reaching ramifications of such behavior can be devastating, not only to the PD and its client, but to the County as a whole.

The PD staff informed the Grand Jury that their telephone system cannot be easily accessed by unauthorized persons. Frequent audits of their telephone lines ensure that all telephone calls are identified at the DOC as privileged calls.

The PD staff expressed support for the new DOC policy to restrict release of all telephone recordings without a court order. The PD staff feels that it is best that everyone is protected from the possibility of recordings of privileged telephone calls being intercepted by prosecutors. They added that until DOC comes up with a system to guarantee the protection of privileged telephone calls the present policy should be maintained.

As in the case of the DA, the PD undergoes frequent training of its entire staff regarding proper conduct, ethics, new laws, and procedures to follow with respect to matters that protect the rights of inmates. As defense attorneys, the Office of the PD receives extensive training on State and Federal constitutional rights and on the California Penal Code.

Conclusions

The Offices of the DA and PD are adamant that neither would tolerate deliberate violations of California Penal Code Section 636(a), or violations of the constitutional rights of inmates. To this end, the Office of the DA's recently revised policy on attorney-client communications addresses the procedures prosecutors should follow. The Grand Jury applauds all three Departments for their efforts to prevent conduct which will ultimately prevent class action suits and blemishes on the County's justice system, such as those currently inflicting Riverside County (see, *Medina v. Riverside County, November 20, 2006*). The Grand Jury concludes that Santa Clara County is best served by prohibiting deliberate illegal procedural violations. This will result in freeing the County from having to defend itself against possible litigation involving avoidable violations of inmates' rights, or worse, the possibility of having to release convicted criminals.

Findings

The following findings were reviewed with the subject agencies:

Department of Correction:

- F1:** Some DOC classification unit staff members are not adequately trained to handle contacts by privileged individuals regarding procedures for adding their phone numbers to the privileged call database.
- F2:** There are no visible signs in the visitor sign-in area advising individuals on how to add their phone numbers to the privileged call database.
- F3:** The privileged call database is not kept up to date.

Offices of the District Attorney, Public Defender and Department of Correction:

- F4:** Safeguards are lacking to ensure, on a consistent basis, that privileged telephone calls are not released to prosecutors. Also lacking are procedures to ensure that court-ordered production of DOC telephone recordings are complied with promptly.

Recommendations

The 2006-2007 Civil Grand Jury recommends the following actions:

Department of Correction:

- R1:** All employees in the classification unit should be fully trained to understand DOC's procedures regarding the database for privileged individuals.
- R2:** A sign should be prominently posted with instructions regarding procedures for including telephone numbers in the privileged call database. This can also be accomplished with a separate sign-in sheet or with appropriate bold lettering on the sign-in sheets.
- R3:** The DOC should use the biannual California Bar Association's list of new attorneys to update its privileged database to include phone numbers of newly admitted local attorneys.

Offices of the District Attorney, Department of Correction, and Public Defender:

- R4:** The DOC, DA, and PD should coordinate their efforts to establish, and stringently follow, procedures to ensure that privileged telephone calls are consistently not released to prosecutors, and that court-ordered production of DOC telephone recordings are promptly complied with.

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Coalition Comments Regarding Eavesdropping on Confidential Attorney-Client Communications American Civil Liberties Union, American Immigration Lawyers Association Arab American Institute, Asian American Legal Defense Education Fund Center for Democracy & Technology, DC Prisoners' Legal Services Project, Electronic Privacy Information Center, Equal Justice Program, Howard University School of Law, Friends Committee on National Legislation, Lawyers Committee for Human Rights, Legal Action Center Legal Aid Society of New York, Libertarian Party, The Multiracial Activist, National Association for the Advancement of Colored People, National Black Police Association, Unitarian Universalist Association of Congregations, Washington Council of Lawyers, World Organization Against Torture. <http://jameslandrith.com/content/view/687/40> (accessed May 1, 2007).

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Interviews

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| March 28, 2007 | Interviewed officials of the Santa Clara County Department of Correction at the Elmwood and Main Jail facilities and observed operation of telephone system. |
| April 11, 2007 | Interviewed officials of the Santa Clara County Department of Correction at the Elmwood and Main Jail facilities and participated in operation of telephone system. |
| April 20, 2007 | Interviewed officials of the Office of the Santa Clara County District Attorney. |
| April 20, 2007 | Interviewed staff of the Office of the Santa Clara County Public Defender. |

Acronyms and Abbreviations

County	County of Santa Clara
DA	Office of the District Attorney
DOC	Department of Correction
Elmwood	Elmwood Correctional Complex
Grand Jury	Santa Clara County Civil Grand Jury
PD	Office of the Public Defender

PASSED and **ADOPTED** by the Santa Clara County Civil Grand Jury on this 22nd day of May 2007.

Ronald R. Layman
Foreperson

David M. Burnham
Foreperson Pro tem

Kathryn C. Philp
Secretary