

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 8, 2016

RESOLUTION

RESOLVED, That the American Bar Association urges the Department of Justice and the Federal Bureau of Prisons to amend their policies with respect to monitoring emails between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege.

REPORT

I. INTRODUCTION

Telecommunications are integral to human relationships in today’s society. For attorneys, email has supplanted other technologies as the primary medium for communicating with clients. Email has even become an important tool for attorneys to communicate with their incarcerated clients.

In 2005, the Federal Bureau of Prisons (“BOP”) launched a pilot program offering inmates¹ limited email access through the Trust Fund Limited Inmate Computer System (“TRULINCS”).² Today, all BOP facilities provide inmates email access through TRULINCS.³ However, to use TRULINCS, inmates must acknowledge that all of their emails, including emails between an inmate and his or her attorney (together, “Legal Email”), are monitored by the BOP, and consent to the monitoring.⁴

The compulsory acknowledgment and consent to monitoring of their Legal Email waives the attorney-client privilege with respect to inmates’ TRULINCS emails.⁵ There is no exception for attorney-client email communications as there is for traditional postal mail correspondence, unmonitored telephone calls, and in-person meetings. Relying on the privilege waiver, the United States Attorney’s Office in at least some federal districts require the BOP to turn over

* The New York County Lawyers Association would like to give a special thank you to Brandon Ruben, whose Note, *Should the Medium Affect The Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 Fordham L. Rev. 2131 (2015), provides an in-depth discussion of the ethical and constitutional implications of the BOP’s Legal Email monitoring policy, and was an invaluable resource to the authors of this report.

¹ For the purposes of this report, the terms “inmate” and “incarcerated client” refer to both pre-trial detainees and convicts.

² National Archives and Records Administration, Request for Records Disposition Authority, Trust Fund Limited Inmate Computer Communication System (TRULINCS) (Mar. 22, 2006), *available at* http://www.archives.gov/records-mgmt/rca/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008_sf115.pdf.

³ TRULINCS Locations, Federal Bureau of Prisons, *available at* <http://www.bop.gov/inmates/trulincs.jsp> (last visited July 19, 2015).

⁴ Inmate Agreement for Participation in TRULINCS Electronic Messaging Program, Federal Bureau of Prisons, *available at* http://www.bop.gov/policy/forms/BP_A0934.pdf (last visited July 19, 2015).

⁵ If an attorney-client communication is not kept confidential, then the privilege is waived. *Bower v. Weisman*, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (holding that the privilege did not apply to defendant’s letter to his attorney because it was left spread out on a table in an office’s waiting room). Further, even if a party intended the communication to be confidential, courts generally hold the privilege inapplicable if her actions undermine that intent. P.R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:24 (2d ed. 1999). Thus, when a party knowingly discloses privileged information in the presence of a third party, or fails to take reasonable precautions to prevent third parties from overhearing or reading a privileged communication, courts generally hold that the privilege was waived. *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (holding that statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged). Monitored telephone calls and emails are not privileged because the presence of a recording device is the “functional equivalent of a third party.” *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003). Thus, TRULINCS emails between inmates and their attorneys are not privileged because the automated waiver informs inmates that all of their emails are subject to monitoring. *Id.*

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copies of TRULINCS communications between criminal defendants and counsel, and prosecutors have been permitted to offer the emails in evidence against the defendants.⁶

Prison monitoring of inmates' email communications creates at least two significant problems. First, although defense lawyers must avoid making confidential disclosures and warn their clients against doing so, defendants sometimes discuss confidential information in TRULINCS emails. More troubling, the BOP's email monitoring policy deprives attorneys of the most effective means to promptly inform and consult with their inmate clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4,⁷ and frustrates their ability to provide meaningful Sixth Amendment representation. Moreover, by forcing inmates and their attorneys to rely on traditional media to communicate confidentially, the BOP's Legal Email monitoring policy causes significant administrative burdens and may thereby decrease prison security.

Additionally, because the BOP's Legal Email monitoring policy restricts inmates' ability to communicate with their attorneys, it is ripe for challenge on constitutional grounds. This report argues that the BOP's policy raises serious constitutional concerns and may be vulnerable to challenge on the grounds that it is not reasonably related to legitimate penological interests and unreasonably restricts pretrial detainees' Sixth Amendment right of access to counsel.

This report also explains that the BOP could provide a secure, unmonitored Legal Email system at a relatively low cost using existing email encryption technology.⁸ It concludes that a change in BOP policy, to permit attorneys and their incarcerated clients to communicate confidentially via email, would improve both the quality of representation of criminal defendants detained in BOP facilities and the reality of justice in the federal criminal justice system. The proposed Resolution urges the BOP to change its policy to allow confidential attorney-client email communications.

II. THE BOP'S EMAIL MONITORING POLICY UNDERMINES COMPETENT REPRESENTATION AND WASTES RESOURCES

The BOP's Legal Email policy imposes unnecessary and substantial administrative burdens on attorneys' ability to communicate with their inmate-clients. These burdens frustrate attorneys' ability to promptly inform and consult with their inmate-clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4,⁹ and, in the case of counsel representing pretrial detainees, also frustrates their ability to provide meaningful Sixth Amendment representation. The same burdens also undermine the efficiency of the lawyers representing federal convicts and raise the cost of that representation. This cost is largely borne by taxpayers, as each United States District Court is required to implement a plan to furnish

⁶ See Exhibit A to Defendant's Motion requesting protective order, U.S. v. Walia, No. 1:14-cr-00365-MKB (E.D.N.Y. July 10, 2014), ECF No. 9-1.

⁷ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

⁸ See *infra* Section IV.

⁹ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

adequate representation for indigent defendants under the Criminal Justice Act.¹⁰

A. The BOP's Policy Imposes Significant Burdens on Inmates' Attorneys

The BOP's Legal Email monitoring policy limits the means by which federal inmates can consult counsel, effectively allowing confidential correspondence only by traditional media: postal mail, pre-arranged unmonitored telephone calls, and in-person visits. As explained in greater detail in Sections III. and IV., communicating confidentially via these traditional channels is grossly inefficient and imposes substantial burdens on attorneys, especially compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email.

It can take two weeks or more for an inmate to receive postal mail sent from an attorney, and additional time to receive an inmate's response.¹¹ Most prisons do not accept expedited mail delivery. Similarly, unmonitored telephone calls are procedurally difficult and time-consuming to set up.¹² The process must ordinarily be initiated by the inmate, and can take up to a month to complete.¹³ In-person visits are especially burdensome, because attorneys often must wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security.¹⁴

In contrast, an unmonitored Legal Email system would allow attorneys and their inmate clients to send email communications regarding confidential matters at their convenience. Unlike traditional legal mail, emails are delivered to the recipient's inbox instantaneously. Moreover, unlike unmonitored telephone calls and in-person visits, inmates and their attorneys do not have to rely on BOP staff to coordinate a specific time and place for the emails to be sent. Lastly, an unmonitored Legal Email system would greatly reduce the number of in-person visits attorneys are required to make, saving attorneys countless hours traveling to and from prisons and waiting for their clients to be produced once they arrive at the prison.

Thus, traditional postal mail, unmonitored telephone calls, in-person visits are not adequate alternatives to unmonitored emails.

B. The BOP's Policy Frustrates the Ability of Attorneys to Promptly Communicate with Incarcerated Clients as Required Under Rule of Professional Conduct 1.4

The burdens imposed by the BOP's Legal Email monitoring policy substantially frustrate attorneys' ability to promptly communicate with incarcerated clients regarding important case matters, as required by Rule 1.4 of the ABA Model Rules of Professional Conduct,¹⁵ compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email. Rule

¹⁰ 18 U.S.C. § 3006A (2012).

¹¹ Transcript of Criminal Cause for Status Conference Before the Honorable Dora L. Irizarry at 16:14–16, United States v. Ahmed, No. 1:14-cr-00277 (E.D.N.Y. June 27, 2014) [hereinafter Tr. of Ahmed Conference]

¹² *Id.* at 16:5–13 (Defense counsel argued that unmonitored telephone calls were seemingly unavailable, as defense counsels' law firm was unable to coordinate an unmonitored telephone call with their client despite numerous telephone calls to the prison over the course of several days).

¹³ *Id.* at 19:14–17.

¹⁴ *Id.* at 19:5–11.

¹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

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1.4 states that:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.¹⁶

Comment 2 to Rule 1.4 explains that paragraph (a)(1) “requires that the lawyer promptly consult with and secure the client’s consent prior to taking action” regarding a decision that must be made by the client, such as a proffered plea bargain.¹⁷ Moreover, an attorney’s failure to communicate with a client may lead to discipline, even if the client’s legal interests are unaffected.¹⁸

C. The BOP’s Policy Frustrates the Ability of Attorneys to Provide Meaningful Sixth Amendment Representation and Wastes Resources

Most pretrial defendants detained in BOP facilities are “financially unable to obtain adequate representation.”¹⁹ The BOP’s Legal Email monitoring policy disproportionately impacts these indigent defendants and the already-overburdened lawyers who represent them: federal public defenders and private counsel appointed from the Criminal Justice Act Panel (“CJA Counsel”).²⁰ Federal defenders and CJA Counsel represent over 60% of federal criminal defendants nationwide.²¹

¹⁶ *Id.*

¹⁷ *Id.* at cmt. 2.

¹⁸ *See id.* at R. 8.4 cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct.”).

¹⁹ 18 U.S.C. § 3006A(a)(1) (2012).

²⁰ 18 U.S.C. § 3006A (2015).

²¹ *See* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2013, available at <http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of->

The Criminal Justice Act mandates that each United States District Court implement a plan for providing adequate representation to indigent defendants, and requires that counsel furnishing representation under the plan be selected from a panel of court-approved private attorneys (CJA Counsel), or a public defender organization, bar association, or legal aid agency.²² The Criminal Justice Act was passed in 1964, one year after the Supreme Court's landmark ruling in *Gideon v. Wainwright*, which guaranteed all criminal defendants the right to adequate counsel.²³ Five decades after that ruling, however, "the basic rights guaranteed under *Gideon* have yet to be fully realized."²⁴ Part of the reason, explained former United States Attorney General Eric H. Holder Jr., speaking at the 2012 American Bar Association's National Summit on Indigent Defense, is that "public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads and inadequate oversight."²⁵

Implementation of a confidential Legal Email system is a cost-effective solution for improving the representation of indigent criminal defendants in federal court. Most indigent federal defendants are detained before trial in BOP facilities. The BOP's Legal Email monitoring policy substantially interferes with pretrial detainees' ability to consult counsel by forcing them to use inefficient and costly traditional communication media. In the context of the Sixth Amendment right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right.²⁶ Implementation of a confidential Legal Email system would not only eliminate the burdensome costs and administrative tasks associated with traditional forms of communication, but as explained in Section IV., would also be relatively simple, quick and inexpensive to implement using existing email encryption technology.

Five decades after the Supreme Court affirmed that adequate legal representation is a basic right for every person accused of a crime, the BOP's Legal Email monitoring policy is undermining this fundamental promise. By implementing a confidential Legal Email system, the BOP could facilitate bringing this fundamental promise closer to reality.

steep-federal-budget-cuts.html?_r=0. (Federal defenders alone represent approximately 60% of federal defendants nationwide).

²² 18 U.S.C. § 3006A (2015).

²³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁴ Mark Walsh, *Fifty years after Gideon, lawyers still struggle to provide counsel to the indigent*, A.B.A. J. (Mar. 1, 2013 11:10 AM CST), available at http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel.

²⁵ *Id.*

²⁶ *Benjamin v. Frasier*, 264 F.3d 175, 185 (2d. Cir 2001); *see also* *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir.1978), *rev'd on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979) (prison regulations restricting pretrial detainees' contact with their attorneys are unconstitutional where they "unreasonably burdened the inmate's opportunity to consult with his attorney and to prepare his defense").

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III. THE BOP'S EMAIL MONITORING POLICY RAISES SERIOUS CONSTITUTIONAL CONCERNS

Prison policies that impact inmates' constitutional rights, such as the Sixth Amendment right to counsel, "must be evaluated in light of the central objective of prison administration, safeguarding institutional security."²⁷ Providing a confidential Legal Email system would enhance prison security by reducing the opportunities for drugs and contraband to be smuggled into BOP facilities with outside mail and would also ease the burden on prison staff by relieving them of the responsibility of coordinating unmonitored attorney calls and in-person visits. Thus, the BOP cannot justify its Legal Email monitoring policy, or the lack of a confidential email system, as reasonably necessary to safeguard prison security.

In *Turner v. Safley*,²⁸ the Supreme Court enunciated the standard that generally governs in cases assessing the constitutionality of prison policies that implicate inmates' constitutional rights. In *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."²⁹ The Court held that four factors are particularly relevant in determining the reasonableness of prison regulations: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) consideration of alternative forms of expression available to the inmate; (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate; and (4) consideration of the existence of less restrictive alternatives that might satisfy the governmental interest.³⁰ The Court further held that, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."³¹

Turner, however, is inapplicable to claims challenging prison policies that implicate the constitutional rights of pretrial detainees, and specifically to claims that implicate pretrial detainees' Sixth Amendment right to adequate defense counsel.³² As explained in *Bell v. Wolfish*, the Fourteenth Amendment prohibits any "punishment" of pretrial detainees,³³ and thus prison policies restricting a specific constitutional right of pretrial detainees are held to a stricter standard than those affecting only the rights of convicted prisoners.³⁴ Under *Bell*, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment," and thus

²⁷ *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

²⁸ 482 U.S. 78 (1987).

²⁹ *Id.* at 89.

³⁰ *Id.* at 89–90.

³¹ *Turner v. Safley*, 482 U.S. 78, 91 (1987).

³² Brandon P. Ruben, Note, *Should the Medium Affect The Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 *Fordham L. Rev.* 2131, 2150 fn 164 (2015).

³³ *Bell*, 441 U.S. at 538 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Demery v. Arpaio*, 378 F.3d 1020, 1028–29 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

³⁴ *See, e.g., Benjamin v. Frasier*, 264 F.3d 175, 178 n. 10 (2d. Cir 2001) ("We need not decide this issue, however, as we believe the policies and practices at issue here would not survive scrutiny under *Turner*, if in fact that standard is applicable.").

unconstitutional.³⁵ Additionally, under *Bell*, even if a condition is not punitive, it may be unconstitutional if a court finds that it “appears excessive in relation” to the government’s proffered alternative purpose.³⁶ In contrast, prison regulations restricting convicts’ access to counsel must be “reasonably related to legitimate penological interests”³⁷ and are unconstitutional if they “unjustifiably obstruct the availability of professional representation.”³⁸

The BOP’s Legal Email monitoring policy affects both convicted prisoners’ right of access to the courts and pretrial detainees’ Sixth Amendment right to counsel. As explained below, that policy raises serious constitutional concerns and is vulnerable to challenge under the four-factor *Turner* test, and therefore even more vulnerable under the more demanding *Bell* formulation as applied to pretrial detainees.

A. The BOP Lacks a Legitimate Interest in Monitoring Inmates’ Legal Email

The BOP lacks a legitimate interest in monitoring inmates’ Legal Email because doing so is excessive in relation to the government’s interest in safeguarding institutional security. Moreover, the BOP cannot justify its policy on the basis of reducing administrative burdens and costs, because an unmonitored Legal Email system would reduce administrative burdens and costs. In fact, the BOP’s current Legal Email monitoring policy diminishes prison security and increases administrative burdens and costs as compared to an unmonitored Legal Email system because it increases the amount of traditional letter mail, unmonitored attorney telephone calls, and in-person attorney visits. Thus, the BOP cannot justify its Legal Email monitoring policy on the basis of maintenance of institutional security or reduction of administrative burdens and costs.

For more than 40 years, courts have held that prison officials are prohibited from reading attorney-client letter mail.³⁹ However, they can and do “inspect” legal mail to ensure it does not contain drugs or other physical contraband.⁴⁰ Unlike letter mail, email communications cannot contain drugs or other contraband.⁴¹ One of the BOP’s stated reasons for implementing TRULINCS was to “reduce the opportunities for illegal drugs or contraband to be introduced into Bureau facilities through inmate mail.”⁴² Thus, the BOP cannot justify monitoring emails between inmates and their attorneys on the basis of preventing the introduction of illegal drugs and contraband.

³⁵ *Bell*, 441 U.S. at 539.

³⁶ *Id.* at 538–39.

³⁷ *Turner*, 482 U.S. at 91; *see also Benjamin*, 264 F.3d at 178 n. 10 (explaining that *Turner* only applies in the case of convicts, not pretrial detainees, because “the standard [*Turner*] promulgated depends on ‘penological interests.’ Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc... of persons convicted of crimes.”).

³⁸ *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

³⁹ *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

⁴⁰ *See, e.g., Al-Amin v. Smith*, 511 F.3d 1317, 1325–26 (11th Cir. 2008).

⁴¹ TRULINCS does not support file attachments like pictures or videos, so TRULINCS emails could not contain digital contraband either.

⁴² U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS (2009), *available at* http://www.bop.gov/policy/progstat/5265_013.pdf.

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While an unmonitored Legal Email system would present several apparent security concerns, traditional forms of unmonitored legal communication present the same concerns and actually pose a greater security threat. First, unmonitored Legal Email could contain contraband information, such as escape plans. Similarly, unmonitored Legal Email raise concerns regarding verification that the communication was actually sent to or from inmates' attorneys. However, traditional legal mail can also contain escape plans or be fraudulently sent by other individuals using an attorney's return mailing address. Moreover, detecting such contraband information or fraud can be difficult in the case of traditional legal mail because it cannot lawfully be read by prison officials, and because prisoners can permanently destroy the contraband or fraudulent mail. As discussed in Section VI., an unmonitored Legal Email system would be more secure than traditional legal mail because: (1) the email system would preserve a permanent electronic record of each email, which could be retrieved and read under the right circumstances; and (2) unlike traditional legal mail, a Legal Email system can ensure the authenticity of the information's origin and that the information has not been tampered with by using digital signatures, which are nearly impossible to counterfeit and attest to both the contents of the information and the identity of the signer.⁴³

Moreover, as detailed in Section III. C., lack of a confidential Legal Email system increases prisons' administrative burdens because it increases the amount of more-burdensome traditional communications. Traditional legal mail burdens prison staff because each piece of mail must be collected, inspected—*but not read*—and distributed to inmates. Further, prison officials must be trained on how to properly “inspect” traditional legal mail without reading it. Each unmonitored attorney telephone call and in-person-attorney-visit must be scheduled by prison administrators. Then, at the specified date and time, prison staff must transport the inmate from her cellblock to the room where the call or visit is scheduled to occur. Transporting inmates from their cellblocks to other areas of the prison increases security problems in numerous ways. First, it facilitates the transmission of illegal drugs and contraband around the prison. Second, in the event of a security breach resulting in a prison lockdown while the inmate is outside of her cellblock, locating the inmate and transporting her back to her cellblock poses serious administrative challenges and security threats.⁴⁴ Thus, providing an unmonitored Legal Email system will decrease the number of unmonitored telephone calls and in-person visits, and correspondingly promote prison security.

Thus, reconfiguring TRULINCS to support unmonitored attorney-client communications would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while promoting security and reducing burdens imposed on prison staff by other forms of confidential attorney-inmate communication.

⁴³ *Introduction to Cryptography: How PGP Works*, THE INTERNATIONAL PGP HOME PAGE, <http://www.pgpi.org/doc/pgpintro/> (last visited July 19, 2015).

⁴⁴ Tr. of Ahmed Conference, *supra* note 12, at 19:5-11 (Judge Irizarry comments on her work to reduce attorney wait times, and notes that “heaven forbid there should be any security problem at the time, they may never get to see their client that day.”).

B. Alternative Means of Confidential Communication are Inadequate

Unlike all existing alternatives—traditional legal mail, unmonitored telephone calls, and in-person attorney visits—an unmonitored Legal Email system would allow inmates and their attorneys to efficiently communicate in confidence.

As detailed in Section II. A., unmonitored telephone calls are procedurally difficult and time-consuming to set up;⁴⁵ traditional postal legal mail can take two or more weeks for an inmate to receive because most prisons do not accept expedited mail delivery;⁴⁶ and in-person visits are especially burdensome, because attorneys are often forced to wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security.⁴⁷ Additionally, an unmonitored Legal Email system would be more secure than traditional legal mail and “unmonitored” telephone calls. Traditional legal mail can be accidentally read by prison guards during inspection, and a recent report by *The Intercept* revealed that one company that provides telephone services to prisons across the country has recorded and stored at least tens of thousands of telephone conversations between inmates and attorneys that were supposed to be unmonitored.⁴⁸

Thus, neither unmonitored telephone calls, traditional postal mail, nor in-person visits are adequate alternatives to the ease and speed of unmonitored email communications.

C. Providing an Unmonitored Legal Email System Would Positively Impact Prison Staff, Inmates, and Allocation of Scarce Prison Resources

Providing confidential email access to inmates and their attorneys would positively impact prison staff, inmates, and allocation of scarce prison resources by reducing the amount of more-burdensome traditional legal mail, unmonitored attorney phone calls and in-person attorney visits. Additionally, as described in Section III. A., confidential email would enhance the “central objective of prison administration, safeguarding institutional security.”⁴⁹ Lastly, while implementation of a confidential Legal Email system would require in initial investment, the reduction in more burdensome traditional communications would quickly lead to significant cost-savings for the BOP.

First, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with unmonitored telephone calls and in-person visits. Each unmonitored telephone call and in-person visit must be arranged and scheduled by prison administrators. Prison staff must also transport inmates from their cells to the secure meeting room for each unmonitored call or in-person visit. Thus, unmonitored Legal Email would greatly reduce administrative burdens on prison staff associated with unmonitored telephone calls and in-person visits between inmates and their attorneys.

⁴⁵ *Id.* at 16:5–13.

⁴⁶ *Id.* at 16:14–16.

⁴⁷ *Id.* at 19:5–11.

⁴⁸ Micah Lee and Jordan Smith, *NOT SO SECURUS*, *The Intercept* (Nov. 11, 2015), available at <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/>.

⁴⁹ *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

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Second, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with delivery and inspection of legal mail. Every letter sent or received by an inmate must be delivered and, in most prisons, inspected by a guard in the presence of the inmate. Further, each officer must be trained on how to properly inspect inmates' mail to ensure that it remains unread. An unmonitored Legal Email system would reduce the amount of letter mail that must be delivered and inspected, freeing guards to focus on matters that promote prison safety.

Lastly, an unmonitored Legal Email system would preserve limited prison resources. While reconfiguring TRULINCS would require an initial investment, the long-term cost savings would be substantial. For example, if the unmonitored Legal Email system led to a reduction of one unmonitored telephone call or in-person attorney visit per inmate per month, each requiring approximately one hour of administrative work by prison staff, then the 743-inmate Manhattan Correctional Center (MCC)⁵⁰ would save 8,916 man-hours per year. If the average MCC guard makes \$22 per hour,⁵¹ then an unmonitored email system would save MCC approximately \$194,853 per year.

IV. RECONFIGURING TRULINCS TO PROVIDE FOR SECURE, UNMONITORED LEGAL EMAIL WOULD BE RELATIVELY SIMPLE AND INEXPENSIVE

Reconfiguring TRULINCS to provide for unmonitored Legal Emails would be relatively simple and inexpensive. For example, from a programming perspective, reconfiguring TRULINCS to support an email encryption program similar to Pretty Good Privacy (PGP), or other popular email encryption programs, would not be difficult or expensive. Software developers have estimated that, based on publicly-available information about the system, TRULINCS could be reconfigured in a matter of months at a cost of less than \$100,000.⁵²

PGP is a data encryption and decryption program that provides cryptographic privacy and authentication for data communication.⁵³ PGP encryption is an asymmetric scheme that uses a pair of “keys” for encryption: a “public key” that encrypts plaintext⁵⁴ to ciphertext,⁵⁵ and a corresponding “private key” for decryption.⁵⁶ Each user has unique public and private keys, which are simply a series of random numbers and letters.⁵⁷ Anyone with a copy of a user's public key can encrypt information that can only be decrypted with that user's private key. However, the term “public key” is a misnomer, as users' public keys are not automatically known or

⁵⁰ Federal Bureau of Prisons: MCC New York Home Page, <http://www.bop.gov/locations/institutions/nym/> (last visited Mar. 6, 2015).

⁵¹ Glassdoor, *Federal Bureau of Prisons Correctional Officer Salary*, http://www.glassdoor.com/Salary/Federal-Bureau-of-Prisons-Correctional-Officer-Salaries-E41290_D_KO26,46.htm (last visited Mar. 5, 2014).

⁵² Telephone Interview with Mike Wrather, CTO/Managing Partner at Athletez.com (February 22, 2015); Telephone Interview with Dustin Houck, BAS Senior Consultant at Grant Thornton (March 8, 2015).

⁵³ *Introduction to Cryptography*, *supra* note 44.

⁵⁴ *Id.* Data that can be read and understood without any special measures is called plaintext.

⁵⁵ *Id.* Encrypting plaintext results in unreadable gibberish called ciphertext.

⁵⁶ *Id.*

⁵⁷ Danny Yadron, *Moxie Marlinspike: The Coder Who Encrypted Your Texts*, WALL ST. J., (July 9, 2015, 7:57 p.m. ET), available at <http://www.wsj.com/articles/moxie-marlinspike-the-coder-who-encrypted-your-texts-1436486274>.

available to the public at large, but instead must “published” or sent to each person wishing to send the user an encrypted message. Each user also has a “private key” that only the user knows. The same plaintext encrypts to different ciphertext using different public keys, and only the recipient’s private key can decrypt messages encrypted with the user’s corresponding public key.⁵⁸

PGP can also ensure the authenticity of the information’s origin by using digital signatures.⁵⁹ The sender digitally signs the message with his private key, so when the recipient verifies the message with her own public key, she can confirm that the message was sent from the person in question.⁶⁰ This ensures that the message was sent by a specific person and has not been tampered with. A digital signature serves the same purpose as a handwritten signature. However, a digital signature is superior to a handwritten signature in that it is nearly impossible to counterfeit, plus it attests to the contents of the information as well as to the identity of the signer.⁶¹

In layman’s terms, to use PGP encryption, users must install PGP software on their computer, and then swap their “public keys” with anyone they wish to communicate with using encrypted email. In the case of inmates and their attorneys using TRULINCS, for added security the “public key” and “private key” can be assigned by an independent third party such as the court or a third party administrator. Sending an encrypted message would simply require several clicks, a password, and sometimes, copying and pasting. Moreover, because the public and private keys would be issued by a third party, if the origins of a purported attorney email were ever in question, prosecutors could petition the court to have the content of the message reviewed.

From the government’s perspective, providing confidential Legal Emails and preventing their review unless a court grants authorization to do so should be preferable to unmonitored phone calls or in-person visits because the email is preserved and can be retrieved and read under the right circumstances. Thus, reconfiguring TRULINCS to support PGP encryption, or a similar encryption or filtering program, would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while substantially reducing burdens imposed on institutional staff by other forms of confidential attorney-inmate communication.

V. THE BOP SHOULD VOLUNTARILY CHANGE ITS LEGAL EMAIL MONITORING POLICY AND IMPLEMENT A CONFIDENTIAL LEGAL EMAIL SYSTEM BECAUSE DOING SO WOULD IMPROVE THE QUALITY OF JUSTICE, BENEFIT THE BOP AND AVOID A CONSTITUTIONAL CHALLENGE

In recent years, the total number of federal inmates and the proportion of inmates to BOP staff have greatly increased. These population changes have greatly increased the burden on BOP staff, which in turn increases the barriers that attorneys face when trying to communicate

⁵⁸ *Id.*

⁵⁹ *Introduction to Cryptography, supra* notes 44 and 53.

⁶⁰ *Id.*

⁶¹ *Id.*

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efficiently with their incarcerated clients. Implementing an unmonitored Legal Email system would significantly decrease the burdens on prison staff, thereby conserving BOP resources while protecting the fundamental right of all pretrial detainee defendants to adequate defense counsel.

Between 1995 and 2010, the annual number of disposed criminal cases⁶² in federal district court increased by 120%, from 45,635 to 100,622.⁶³ During that same time period, the annual number of federal defendants detained pretrial increased by 184%, from 27,004 to 76,589.⁶⁴ In other words, the percentage of defendants detained prior to case disposition increased from 59% in 1995 to 76% in 2010.⁶⁵ Additionally, during the same period, the ratio of inmates to BOP staff members increased from 3.6 inmates per BOP staff member in 1995 to 5.75 inmates per BOP staff member in 2010.⁶⁶

These changes in the total inmate population and the ratio of inmates to BOP staff further increase the administrative burdens imposed by the BOP's current email system, and undermine the right of every federal pretrial detainee to meaningful Sixth Amendment representation. Traditional communication media is burdensome for both BOP staff and defense counsel because each confidential communication requires that BOP staff facilitate each specific communication. This is inefficient compared to a wholly confidential Legal Email system, which would not require BOP staff to schedule a specific date, time and place for the communication to occur (as compared to unmonitored telephone calls and in-person visits) or to deliver and inspect the communication (as compared to traditional legal mail).

The BOP should voluntarily implement a confidential Legal Email system. Such a system would not only benefit the BOP by increasing prison safety, preserving resources, and reducing administrative burdens, but would also ensure that the BOP is not unreasonably interfering with the right of pretrial detainee defendants to receive adequate Sixth Amendment representation.

⁶² A disposition is the act of terminating a federal criminal prosecution through a guilty plea or trial conviction, dismissal, or acquittal. The defendant is no longer under supervision of the federal pretrial authority after disposition.

⁶³ THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/pdmfcdc9510.pdf> (providing number of pretrial detainees in 2010); see also THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/prmfcdc0810.pdf> (providing average length of stay for pretrial detainees in 2010).

⁶⁴ PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 4.

⁶⁵ *Id.*

⁶⁶ U.S. DEPT. OF JUSTICE, FED. PRISON SYS., FY 2013 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION 3 (2013), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/28/fy13-bop-se-justification.pdf> (chart entitled “Total BOP Inmate and Staff Levels” demonstrates that between 1997 and 2013, the number of BOP staff increased from approximately 30,000 to approximately 40,000, while the number of inmates increased from approximately 110,000 to approximately 230,000).

VI. CONCLUSION

One decade ago, the BOP launched TRULINCS as a pilot program.⁶⁷ The purpose of TRULINCS is to allow inmates to “send electronic messages to securely, efficiently and economically maintain contact with persons in the community.”⁶⁸ As currently configured, TRULINCS serves this purpose well for inmates’ families, friends, and other contacts, but not for their most important contacts of all: their attorneys. In effect, therefore, TRULINCS provides inmates a secure, efficient, and cost effective method for communicating with all “persons in the community” other than the one person with whom they have a fundamental right to communicate. This raises Sixth Amendment concerns, as described above, since an unreasonable interference with a defendant’s ability to consult counsel is itself an impairment of the right.⁶⁹

Regardless of whether the categorical refusal to permit confidential attorney-client email communication violates the Sixth Amendment, the BOP’s monitoring of communications between inmates and their attorneys is simply wrong. The BOP cannot read inmates’ legal mail or eavesdrop on their unmonitored attorney phone calls and in-person attorney visits—and they should not be able to monitor their Legal Emails either. The BOP’s monitoring policy interferes with lawyers’ ability to provide efficient and ethical representation, and thereby degrades the quality of justice meted out to federal inmates, especially indigent pretrial detainees. In today’s world, traditional communication media are clearly inadequate as compared to the efficiency and cost effectiveness of email communications. Thus, the BOP should provide inmates and their attorneys the ability to communicate confidentially via email.

To date, the BOP’s Legal Email monitoring policy has not been directly challenged in court. However, at least six federal district courts have addressed the issue of federal prosecutors reading emails between pretrial detainees and their attorneys.⁷⁰ Because of the automated privilege waiver, each court held that attorney-client privilege does not apply to TRULINCS emails between inmates and their attorneys.⁷¹

Nevertheless, two district judges were so troubled by the government’s actions that they prohibited prosecutors from reviewing TRULINCS emails between attorneys and their clients in

⁶⁷ FEDERAL BUREAU OF PRISONS, REQUEST FOR RECORDS DISPOSITION AUTHORITY, TRUST FUND LIMITED INMATE COMPUTER COMMUNICATION SYSTEM (TRULINCS) (Mar. 22, 2006), *available at* http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008_sf115.pdf.

⁶⁸ U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS 1 (2009), *available at* http://www.bop.gov/policy/progstat/5265_013.pdf.

⁶⁹ Benjamin, 264 F.3d at 185; *see also* Wolfish, 573 F.2d at 133 (prison regulations restricting pretrial detainees’ contact with their attorneys are unconstitutional where they “unreasonably burdened the inmate’s opportunity to consult with his attorney and to prepare his defense”).

⁷⁰ *See*, Memorandum and Order re 25 Motion in Limine As to Tushar Walia at 28–29, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 25, 2014); *FTC v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294, 2014 WL 3893796, at *1 (N.D. Ga. May 14, 2014); *United States v. Fumo*, 655 F.3d 288, 294 (3d Cir. 2011); Transcript of Conference, *United States v. Saade*, No. 11-CR-111, 7:11-14 (NRB) (S.D.N.Y. September 26, 2011); Opinion and Order at 2–3, *United States v. Asaro*, No. 1:14-cr-0026 (E.D.N.Y. July 17, 2014); Tr. of Ahmed Conference.

⁷¹ Saade and Ahmed.

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those cases.⁷² In one, in response to the prosecutor's defense of the government's policy, the Court opined that attorney-client TRULINCS emails are subject to the same Sixth Amendment protections as traditional communications:

You don't have the right to eavesdrop on an attorney-client meeting in a prison or out of a prison, and it seems to me that you don't have the right to open up mail between counsel and an inmate or an inmate and counsel ... I don't see why it should make a difference whether the mode of communication is more modern or more traditional.⁷³

In the other, after ordering the government to employ taint teams to remove all attorney-client TRULINCS emails before producing the remainder of defendant's emails to the prosecuting U.S. Attorney, the district judge articulated a strong policy argument for why the BOP should reconfigure TRULINCS to provide for unmonitored attorney-client emails:

[F]rankly, I don't understand why the BOP would not be willing to look into a technological fix that eliminates the need for them to have to go through the hassle of sorting e-mails, why the government, why the Department of Justice wouldn't be interested in a technological fix that eliminates the cost of taint teams on every single case. Talk about penny-wise and pound-foolish. I couldn't see a clearer example of it.⁷⁴

Until the BOP accepts responsibility for providing inmates and their attorneys the ability to communicate confidentially via email, its Legal Email monitoring policy will continue to diminish the quality of legal proceedings in criminal cases in federal court, cause financial and administrative burdens for the BOP and defense attorneys, and impair the reputation and reality of justice in the federal criminal justice system.

Carol A. Sigmond
President
New York County Lawyers Association
February 2016

⁷² See Tr. of Ahmed Conference at 19–21; Transcript of Conference, United States v. Saade, No. 11-CR-111, 10:8-12 (NRB) (S.D.N.Y. September 26, 2011).

⁷³ Tr. of Saade Conference at 10:8-12.

⁷⁴ Tr. of Ahmed Conference. at 20:18–25.

GENERAL INFORMATION FORM

Submitting Entity: New York County Lawyers Association (“NYCLA”).

Submitted By: Carol A. Sigmond, NYCLA President.

1. Summary of Resolution(s)

The Resolution urges the Federal Bureau of Prisons to change its policy regarding the monitoring and reading of email communications between attorneys and their incarcerated clients. The Resolution relies on the assertion that emails between attorneys and their incarcerated clients are not meaningfully different from traditional letter mail between attorneys and their incarcerated clients, which has long been protected by the attorney-client privilege. This Report argues that email communications actually pose less of a security risk than traditional letter mail, because unlike letter mail, emails cannot secrete contraband such as illegal drugs. If the Federal Bureau of Prisons were to reconfigure their email system by using popular encryption software, authenticating the identity of the sender would be more reliable than traditional letter mail. Additionally, the software can be programmed to preserve a permanent copy of all emails, which can be retrieved and reviewed by the court under proper circumstances. Thus, the Resolution provides strong policy and constitutional arguments for providing emails between attorneys and their incarcerated clients the same confidentiality protections as traditional letter mail.

2. Approval by Submitting Entities

The NYCLA Civil Rights & Liberties Committee approved the Resolution with Report on December 5, 2014. The NYCLA Board of Directors approved the Resolution with Report on March 9, 2015. The NYCLA Executive Committee approved the final Resolution with Report on July 23, 2015, pursuant to authority granted to it by the Board.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The Resolution is consistent with and builds upon the cybersecurity principles previously developed by the ABA’s Cybersecurity Legal Task Force and adopted by the Board of Governors in November 2012, especially Principle 3—“[l]egal and policy environments must be modernized to stay ahead of or, at a minimum, keep pace with technological advancements”—and Principle 4—“[p]rivacy and civil liberties must remain a priority when developing cybersecurity law and policy.”⁷⁵ The Resolution is also consistent with ABA Model Rule of Professional Conduct 1.6 (“Confidentiality of Information”), which prohibits lawyers from

⁷⁵ AM. BAR ASS’N CYBERSECURITY LEGAL TASK FORCE, REPORT TO THE BOARD OF GOVERNORS, (Nov. 2012), available at http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf.

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revealing confidential client information unless the client gives informed consent or one or more narrow exceptions apply. In addition, the Resolution is generally consistent with and would build upon other existing ABA policies (1) supporting the attorney-client privilege and the work product doctrine and opposing governmental policies, practices, or procedures that would erode those protections,⁷⁶ and (2) opposing new federal agency regulations on lawyers engaged in the practice of law where the effect would be to undermine the confidential lawyer-client relationship, the attorney-client privilege, or traditional state court regulation of lawyers. Lastly, the Resolution is also consistent with ABA Model Rule of Professional Conduct 1.4, which requires attorneys to promptly communicate with incarcerated clients regarding important case matters, such as whether to accept or reject proffered plea bargains, which can only be made by the client.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable).

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

In consultation with the ABA Governmental Affairs Office, the NYCLA Civil Rights & Liberties Committee leaders would prepare communications to the Federal Bureau of Prisons and/or comment letters to relevant federal agencies, and may meet with agency staff to urge adoption of regulations consistent with the Resolution. Task Force leaders may also reach out to law firms, bar associations, other legal groups, and the courts in order to educate them about the growing problem of the Federal Bureau of Prisons and prosecutors monitoring and reading emails between attorneys and their incarcerated clients.

8. Cost to the Association. (Both direct and indirect costs).

None.

9. Disclosure of Interest. (If applicable).

Not applicable.

⁷⁶ AM. BAR ASS'N TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE BOARD OF GOVERNORS (Aug. 2005), available at http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf

10. Referrals.

The proposed Resolution with Report is being co-sponsored by the ABA Criminal Justice Section. The proposed Resolution with Report was sent to the Chairs and staff liaisons of the ABA Criminal Justice Section and Civil Rights Litigation Committee for input. NYCLA received and incorporated comments from the ABA Criminal Justice Section on the Resolution with Report. NYCLA also sent the Resolution with Report to the ABA Standing Committee on Ethics and Professional Responsibility and the Judicial Division.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and email address).

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and email address).

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution encourages the Federal Bureau of Prisons (“BOP”) to voluntarily end its policy and practice of monitoring all email communications between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email.

2. Summary of the Issue that the Resolution Addresses

The BOP provides all inmates with email access through the Trust Fund Limited Communication Systems (“TRULINCS”). Inmates naturally communicate with their attorneys via email. The BOP, however, maintains a policy of monitoring all emails, including emails between attorneys and their inmate clients. Further, the BOP does not provide any alternative form of unmonitored email communication for attorneys to communicate with their incarcerated clients. There is no meaningful difference between email and traditional letter mail. Letter mail between attorneys and their incarcerated clients has been provided constitutional protection for decades, preventing prison officials and prosecutors from reading such communications. Because there is no meaningful difference between emails and traditional letter mail, and because the benefits of unmonitored emails to inmates, their attorneys, and the BOP is substantial, the BOP’s policy obstructs inmates’ access to counsel and is ripe for constitutional challenge.

3. Please Explain How the Proposed Policy Position will Address the Issue

By adopting the proposed Resolution, the ABA will play a leading role in urging the United States government and other governmental bodies to amend or supplement existing policies in order to prevent the monitoring and reading of emails between attorneys and their incarcerated clients, which should be provided the same constitutional protection as traditional letter mail.

4. Summary of Minority Views

The minority view is that since attorneys and their incarcerated clients are forced to sign an acknowledgment that their email communications are subject to monitoring prior to using TRULINCS, attorneys and their incarcerated clients waive any claim that their email communications are protected by the attorney-client privilege. Since such mandatory waivers have been upheld in the context of telephone calls between attorneys and their incarcerated clients, the minority argues that such mandatory waivers are constitutional in the context of emails between attorneys and their inmate-clients as well.