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### **Your Responsibility When Using the Information Provided Below:**

*When we wrote this informational material we did our best to give you useful and accurate information because we know people in prison often have difficulty obtaining legal information, and we cannot provide specific advice to all who request it. Laws change frequently and are subject to differing interpretations. We do not have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, hire a lawyer to address your specific problem. If you use this information, it is your responsibility to make sure the law has not changed and is applicable to your situation. Most materials you need should be available in your law library.*

### **SENDING LEGAL MAIL AND DOCUMENTS TO ATTORNEYS AND THE COURTS**

(updated August 11, 2017)

This office received your letter about Arizona Department of Corrections (“ADC”) policies on confidentiality, postage or copying for legal mail to lawyers or the courts. We cannot provide you with individual assistance, but hope the information provided in this letter will be useful to you.

### **Your Rights**

The U.S. Supreme Court has recognized that incarcerated people have a right to confidential legal mail during incarceration. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). “In American criminal law, the right to privately confer with counsel is nearly sacrosanct.” *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (“*Nordstrom I*”).<sup>1</sup> The U.S. Constitution, Arizona Constitution, Arizona Rules of Professional Conduct, and ADC Department Order (“DO”) 902 protect Arizona prisoners’ right to confidential mail.

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<sup>1</sup> Mr. Nordstrom filed a second appeal with the Ninth Circuit regarding his First Amendment right to confidential communications with his attorney, decided in 2017. *Nordstrom v. Ryan*, 856 F.3d 1264 (9th Cir. 2017). For ease of reference, the 2014 decision is referred to as *Nordstrom I*, and the 2017 decision as *Nordstrom II*. These two decisions challenged ADC’s policies and practices with regard to incoming and outgoing legal mail. (The United States Court of Appeals for the Ninth Circuit includes Arizona, and thus all Ninth Circuit decisions – regardless of whether they involve ADC or another prison system’s policies – are binding in Arizona.)

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Interference with prisoner legal mail can violate a prisoner's First Amendment right of free speech, the Sixth Amendment right to assistance of counsel, and the Fourteenth Amendment right to due process, which includes the right of access to the courts. *Nordstrom I*, 762 F.3d at 909. Interference with prisoners' communications with attorneys also violates the lawyers' First Amendment rights, as these are communications in which "the interests of both parties are inextricably meshed." *Procurier v. Martinez*, 416 U.S. 396, 408-09 (1974).

Moreover, Article 2, Section 24 of the Arizona Constitution guarantees a right to counsel. *State v. Warner*, 150 Ariz. 123, 127 (Ariz. 1986). The Arizona Rules of Professional Conduct require lawyers "not reveal information revealing to the representation of a client unless the client gives informed consent." Ariz. R. Prof'l Conduct Ethical R. ("E.R.") 1.6. DO 902 defines confidential mail and provides guidelines for how confidential mail should be handled by ADC staff and prisoners.

### **Confidential Mail Definition**

Pursuant to DO 902, ADC staff should not read mail to or from the following:

- Attorneys
- Judges
- Courts

The Constitution does not automatically protect all mail to or from governmental agencies, public officials, recognized civil rights groups, and news media as confidential mail. *Mann v. Adams*, 846 F.2d 589, 591 (9th Cir. 1988). Some states' laws and regulations (but not Arizona's) specifically include public agencies, officials, and civil rights groups as those that should be treated as confidential mail. That said, in *NAACP v. Button*, the U.S. Supreme Court held the NAACP's First Amendment freedoms of expression and association allow it to advise people of their legal rights and solicit clients. 371 U.S. 415, 429 (1963). The Supreme Court subsequently extended *Button* to apply to an attorney who solicited a potential litigant for representation by the ACLU, observing that "[f]or the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.'" *In re Primus*, 436 U.S. 412, 428 (1978) (quoting *Button*). Therefore, a mail policy that prevents civil rights groups from communicating with potential future clients is unconstitutional.<sup>2</sup>

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<sup>2</sup> The Prison Law Office, the American Civil Liberties Union ("ACLU") National Prison Project, and the ACLU of Arizona were appointed by the federal district court to represent a certified class of all Arizona state prisoners in *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2013), *aff'd* 754 F.3d 657 (9th Cir. 2014), a case involving health care and conditions of confinement in ADC. The Arizona Center for Disability Law ("ACDL") is the federally-designated protection and advocacy organization for Arizona, and is tasked under federal law with assisting prisoners with physical disabilities and mental illness. Thus, all communication with these groups is confidential.

## **Sending Confidential Mail**

“[Lawyer-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the [client] giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). For mail to lawyers, judges, or courts, you should write “Legal Mail” on the lower left-hand corner of the envelope. DO 902.11, §1.1. You should then present the mail *unsealed* to the mailroom. *Id.* §1.4.2.

Staff should inspect the mail for contraband only *in the prisoner’s presence*. *Nordstrom II*, 856 F.3d at 1271; DO 902.11 §1.4.2.2. The Ninth Circuit defines contraband as “dangerous or illegal items hidden in the legal mail that are not mail.” *Nordstrom II*, 856 F.3d at 1272. Staff may not read or censor the mail. DO 902.11 §1.4.2.2. Further, in *Nordstrom II*, the Ninth Circuit held that ADC staff violated a prisoner’s rights when “scanning” written material, because this impermissibly involved reading some words, and the Court held that ADC cannot conduct a “page-by-page inspection to determine if the contents actually concern legal matters.” 856 F.3d at 1271-73. “At most, a proper inspection entails looking at a letter to confirm that it does not include suspicious features such as maps . . . .” *Id.* at 1272.

If there are no issues with the inspection, staff will stamp and seal the envelope and create a record of the mail. DO 902.11 §§1.3, 1.4.2. If staff determines that the mail is not intended for an attorney, judge, or court, staff will return the mail to the prisoner. *Id.* §1.4.5. The prisoner may request that the prison’s Paralegal review the mail to determine if it is legal mail. *Id.* If staff suspects that a prisoner is abusing legal mail such as using confidential mail for personal correspondence, staff may advise the Warden or Deputy Warden, and the prisoner may be subject to disciplinary action for misuse of legal mail. *Id.* §1.6.

## **Receiving Confidential Mail**

Prisoners may wish to share the following information with the people they are corresponding with confidentially. A statement on the envelope that the mail is “Legal Mail” is a good idea. ADC rules require that staff look at the envelope and, to the best of their ability, determine whether the incoming mail is legal mail. *Id.* §1.5. “Staff shall not rely solely on the words ‘legal mail’ having been stamped on the envelope.” *Id.*

Staff will inspect incoming confidential mail from an attorney, judge, or court for contraband *in the prisoner’s presence*. *Wolff*, 418 U.S. at 576; *Nordstrom I*, 762 F.3d at 908-09;

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The judge in *Parsons* ordered ADC to ensure no retaliatory actions are taken against people who provide written or other information to the court, or to Plaintiffs’ counsel. *Parsons*, Doc. 2209 (July 25, 2017).

DO 902.11 §1.4.2.1. Staff may not read or censor incoming confidential mail. *Id.* Staff may remove the pages and shake them to check for contraband, but may not read any of the material. *Nordstrom I*, 762 F.3d at 908-09. Staff may not “scan” the material if it involves reading words. *Nordstrom II*, 856 F.3d at 1271. Staff should return legal mail to the sender only if the recipient is no longer a prisoner, releasee, or parolee. DO 902.11 §1.7.4. Prisons may not ban materials printed from the Internet mailed to a prisoner, unless they contain obscene or contraband information. *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1150 (9th Cir. 2004). Staff must log all incoming confidential mail. *Id.* §§1.3, 1.4.2. The Ninth Circuit has held that “even a single instance of improper reading of a prisoner’s mail can give rise to a constitutional violation.” *Mangiaracina v. Penzone*, 849 F.3d 1191, 1197 (9th Cir. 2017).<sup>3</sup>

## **Paying for Legal Mail Postage and Materials**

Indigent prisoners’ legal mail will be sent as first class mail regardless of ability to pay. DO 902.11 §1.4.3. A hold will be placed on your account. *Id.* §1.4.4.

### **A. Qualified Legal Claims**

ADC policies provide that a prisoner with “qualified legal claims” will have access to copying of legal materials, notarizing documents, and mailing documents to courts. DO 902.05. Under DO 902.05, ADC considers the following to be “qualified legal claims”:

- In the direct appeal, any claim of error
- In the Post Conviction Relief proceeding, any non-precluded claim set forth in Ariz.R.Crim.P.32
- In federal court, any claim of error based on the violation of the federal constitution or law
- Notice of Appeal from the Superior Court (Ariz.R.Crim.P.31.2(a))
- Notice of Post-Conviction Relief
- Request for Preparation of Post-Conviction Relief Record
- Petition for Post-Conviction Relief (Ariz.R.Crim.P. 32)
- Petition for Review (Ariz.R.Crim.P. 32.9(c))
- Petition for Review (Ariz.R.Crim.P. 31.19 and 32.9(g))
- Petition for a Writ of Habeas Corpus in state or federal court
- Civil rights action or condition of confinement claim (42 U.S.C. § 1983)

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<sup>3</sup> Prisoners sometimes have problems with staff reading their legal mail during cell searches. Staff should not read legal mail during cell searches, and you should try to make sure that legal mail stored in your cells is in its original envelopes or otherwise identified clearly as legal mail, and not mixed in with your personal mail.

To request photocopies for qualified legal claims, you should (1) fill out the appropriate section of a Request/Authorization for Qualified Legal Claim Copying, Form 902-2; (2) fill out an Inmate Request for Withdrawal form; (3) attach the documents to be copied (including a copy of the pleading if the documents to be copied are meant to be an attachment to the pleading); and (4) turn the form and documents in to designated staff. DO 902.05 §1.1; DO 902.06 §1.3. Staff should sign and date the form and provide the prisoner with a copy of the request. DO 902.05 §1.2. Designated staff will then forward the request to the prison paralegal. *Id.* §1.3.

The paralegal may deny requests that are vague or do not include a qualified legal claim. *Id.* §1.1. The paralegal may not read or censor documents to or from a prisoner's attorney, a judge, or court. *Id.* §1.7.1.2. But the paralegal can read pleadings, briefs, motions, affidavits, copies of case law, and licenses to the extent required in order to check for contraband. *Id.* If the paralegal denies a request for copies, you may submit another request with sufficient documentation. *Id.* §1.1. If approved, you should receive your copies within six working days. *Id.* §§1.6, 1.7.1.

You must pay for copies of qualified legal claims if you have funds in your trust account. DO 902.06 §1.1. ADC will place a hold on your trust account (which will last until it is paid) if you do not have funds available. *Id.* Copies are \$0.10 per printed side. *Id.* §1.6. You may present concerns related to the copying of legal claims via a Form 916-1. DO 902.05 §1.9.

## **B. Court Forms**

You should ask staff if you need copies of any of the following court forms, which are supposed to be available in all institution law libraries pursuant to DO 902.02 §1.4. You may receive one free copy of the form requested and a second request *on the same pleading*. DO 902.06 §1.2.3. After that, you must pay for copies. DO 902.02 §1.4, 902.06 §§1.2.3, 1.3. Copies are \$0.10 per printed side. DO 902.06 §1.6.<sup>4</sup>

- Arizona State Courts – Self-Help Resources
- Federal Petition for Writ of Habeas Corpus by a Person in State Custody Packet
- Federal Section 1983 Forms Packet
- Mandatory Civil Cover Sheet (Maricopa County)
- Petition for Review, Ariz. Rules of Crim. Procedure, Rule 31.19(a)

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<sup>4</sup> The Prison Law Office has limited free copies available of the following forms and packets, and can send you **one** copy upon request: Arizona State Courts – Self Help Resources; Federal District Court of Arizona Handbook on Filing a Federal Section 1983 Case; Arizona Attorney General Office Agency Handbook on Suing State Agency; Arizona Board of Executive Clemency Pardon Application; Maricopa County Post-Conviction Relief Packet; Arizona Justice Project Intake Questionnaire for Claims of Factual Innocence. Please write us back (via Legal Mail) to request any of these handouts.

- Petition for Review, Ariz. Rules of Crim. Procedure, Rule 31.19 & 32.9(g)
- Petition for Review, Ariz. Rules of Crim. Procedure, Rule 32.9(c)
- State and Federal Notice of Change of Address Forms
- State Certificate of Compulsory Arbitration
- State Court Complaint
- State Deferral or Waiver of Appellate Court Fees and Costs Forms
- State Deferral or Waiver of Court Fees and Costs (State) Forms
- State Notice of Appeal from Superior Court
- State Notice of Post-Conviction relief (Ariz. Rules of Crim. Procedure, Rule 32)
- State Petition for Post-Conviction Relief (Ariz. Rules of Crim. Procedure, Rule 32)
- State Request for Preparation of Post-Conviction Relief Record

### **C. Non-Qualified Legal Documents**

“Non-qualified legal claims” are any legal claims that do not fall under the definition of qualified legal claims. These include legal matters such as divorce, child custody, paternity, and name change.

All prisoners must have their own funds to pay for copying non-qualified legal documents. DO 902.07 §1.1. Prisoners who would like copies of non-qualified legal documents should fill out an Inmate Request for Withdrawal form and ask the assigned correctional officer to verify whether they have sufficient funds in their trust account. *Id.* §1.4. The CO will verify the availability of funds and sign and date the Inmate Request for Withdrawal form. *Id.* §1.5. Within two work days, prisoners should bring the Inmate Request for Withdrawal form, the Request for Non-Qualified/Non-Legal Copying, Form 902-7, and the documents to be copied to designated staff. *Id.* §1.6. Copies cost \$0.10 per printed side. *Id.* §1.12. Prisoners who attempt to have contraband documents copied may be subject to disciplinary action. *Id.* §1.8.

### **D. Notary Services**

Prisoners must pay \$1.00 per notarized document. DO 902.06 §§1.2.2, 1.7, 902.07 §1.16.

### **E. Legal Supplies**

Indigent prisoners may request legal supplies from the DO 902.09 §1.2. Upon request, indigent prisoners will receive:

- 1 (one) pen
- 2 (two) pencils
- 2 (two) legal pads/writing tablets (8 ½” x 11”)
- 5 (five) pre-stamped, regular envelopes (Marked with “LEGAL MAIL”)
- 5 (five) manila envelopes (Marked with “LEGAL MAIL”)

A hold will be placed on the indigent prisoner's trust account for the cost of the supplies. *Id.* In order for indigent prisoners to continue to receive monthly legal supplies, they must demonstrate that they are using the supplies for qualified legal purposes. *Id.* §1.7. Prisoners who have funds can purchase these supplies at the store price. *Id.* §1.3. The ADC does not provide supplies for personal use. *Id.* §1.6.

## **Steps for Resolving Problems Concerning Legal Mail**

A prisoner who is experiencing issues related to access to the courts should attempt to resolve the issue with designated staff before contacting the Legal Access Monitor, an ADC employee with paralegal training who is located in the Legal Services Unit at Central Office. DO 902.03 §1.5.3. If necessary, prisoners should file a grievance and pursue it to the highest level necessary. The Prison Law Office has handouts that explain the administrative appeal process and how to file a state habeas corpus petition or federal civil rights lawsuit; if you would like copies of these handouts, please write us. Below, we list some of the federal and state legal arguments that have been used in other cases challenging interference with confidential legal mail.

### **A. First Amendment Challenge**

Prisoners have a First Amendment right to send and receive mail, but prison rules may limit that right as long as the rules “are reasonably related to legitimate penological interests.” *Nordstrom II*, 856 F.3d at 1272. “Legitimate penological interests... include ‘the prevention of criminal activity and the maintenance of prison security.’” *Id.* (quoting *O’Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996)). A four-factor test from *Turner v. Safley* is used to see if the prison rule is constitutional: (1) whether there is a rational connection between the prison rule and the legitimate governmental interest put forward as the justification for the prison rule; (2) whether there are other ways for prisoners to exercise their constitutional right; (3) how accommodating the constitutional right would impact guards, other prisoners, and the prison’s resources in general; and (4) whether there is an absence of alternatives. *Id.* Further, “[w]hen a prison regulation affects outgoing mail as opposed to incoming mail, there must be a closer fit between the regulation and the purpose it serves.” *Id.* “This is because ‘outgoing personal correspondence from prisoners [does] not, by its very nature, pose a serious threat to prison order and security.’” *Id.* at 1273 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989)).

In the 2017 *Nordstrom* decision, the Court held that “ADC’s outgoing legal mail policy unreasonably intrude[d] on [plaintiff prisoner’s] First Amendment rights.” *Nordstrom II*, 856 F.3d at 1274. ADC staff were conducting page-by-page inspections of outgoing mail to determine if the contents concerned legal matters. *Id.* at 1273. The Court found that the *Turner* factors weighed in favor of the prisoner. *Id.* at 1274. First, the Court agreed that prison security was a legitimate governmental interest but highlighted that the ADC failed to provide any evidence that outgoing legal mail has facilitated criminal activity. *Id.* The Court distinguished between “the

risks of incoming and outgoing mail.” *Id.* Restrictions on outgoing mail must have “a closer fit between the regulation and the purpose it serves.” *Id.* Second, the Court concluded that prisoners have other methods of communication available but that “alternative means do not entirely make up for the infringement on [the right to confidential legal mail].” *Id.* at 1274. Third, because ADC failed to present evidence showing that prisoners have abused outgoing legal mail, the Court decided “there [wa]s no reason to conclude that a more limited inspection of outgoing mail would have an adverse effect.” *Id.* at 1273. Fourth, the Court determined that an “obvious, easy alternative” was available: ADC could use procedures to ensure that outgoing legal mail is truly being sent to a licensed attorney. *Id.*

### **B. Sixth Amendment Challenge**

Criminal defendants have a Sixth Amendment right to assistance of counsel. *Nordstrom II*, 865 F.3d at 1271. “The right to counsel is violated when (1) ‘the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel,’ and (2) the interference ‘substantially prejudices the criminal defendant.’” *Id.* (quoting *Nordstrom I*, 762 F.3d at 910).

In addition to the First Amendment violation, the 2017 *Nordstrom* opinion held that the ADC policy regarding outgoing legal mail violated the Sixth Amendment. *Id.* at 1272. The policy consisted of staff reading some words in outgoing legal mail to check for contraband, but the ADC had defined “contraband” to include any non-legal correspondence. *Id.* at 1271. In the 2014 *Nordstrom* opinion, the Ninth Circuit found that even though Mr. Nordstrom was not currently facing criminal charges, and was instead making a post-conviction legal challenge to his sentence, his Sixth Amendment rights were affected. The Ninth Circuit noted that harm alleged “[wa]s not that tainted evidence was used against him but that his right to privately confer with counsel [was] chilled.” *Nordstrom I*, 762 F.3d at 911.

### **C. Fourteenth Amendment Challenge**

A prison has violated a prisoner’s Fourteenth Amendment right to due process, which includes the right of access to the courts “where the prisoner shows that he was actually injured, that is, he was actually hindered in his efforts to pursue a legal claim. An actual injury is shown only where a nonfrivolous, arguable claim is lost....” *Jordan v. Cicchi*, 617 F. App’x. 153, 157 (3d Cir. 2015). A prisoner must prove that the tampering with her legal mail *substantially* burdened her access to the courts. *Wolff*, 418 U.S. at 576.

In the Third Circuit, a prisoner was unsuccessful with his Fourteenth Amendment claim that defendant correctional officials interfered with his legal mail because he could not prove that the mail was sent to the prison or that the defendants personally handled his mail. *Baker v. Williamson*, 453 F. App’x. 230, 234 (3d Cir. 2011). In *Doe v. Selsky*, a federal court in New York rejected the prisoner’s claim that prison staff violated his Fourteenth Amendment rights by



tampering with his legal mail in order to prevent the prisoner from exhausting his administrative remedies. 973 F. Supp. 2d 300, 303-04 (W.D.N.Y. 2013). The Court concluded that the prisoner failed to show that staff's actions "resulted in actual injury" since the prisoner was able to exhaust his administrative remedies. *Id.* On the other hand, the Supreme Court found that a regulation that only allowed members of the bar and licensed private investigators to conduct attorney-client interviews "imposed a substantial burden on the right of access to the courts." *Procunier*, 416 U.S. at 420.

#### **D. State Right to Counsel**

In addition to the Sixth Amendment, art. 2 § 24 of the Arizona Constitution guarantees the right to counsel. *State v. Warner*, 150 Ariz. 123, 127 (Ariz. 1986). "A defendant's right to counsel includes the protection against improper intrusions by the prosecutor or other government agents into the confidential relationship between a defendant and his attorney . . . ." *Id.* "Both Arizona case law and the Rules of Criminal Procedure state that the right to counsel includes the right to consult in private with an attorney. *State v. Holland*, 147 Ariz. 453, 455 . . . (Ariz. 1985); Rule 6.1(a), Ariz.R.Crim.P., 17 A.R.S." *Id.*

In *Warner*, jail personnel seized the defendant's personal papers and his attorney's work product and turned the papers over to the County Attorney for inspection. *Id.* The Court held, "We cannot tolerate impermissible interferences with the right to the assistance of counsel and deplore any government action which intrudes on the attorney-client relationship." *Id.* at 128. The Court remanded the case with the guidance that a dismissal may be necessary if the state's intrusion prejudiced the defendant. *Id.* at 128-29.

"The prisoner mailbox rule . . . is 'that a *pro se* prisoner is deemed to have filed his notice of appeal at the time it is delivered, properly addressed, to the proper prison authorities to be forwarded to the clerk of the superior court.'" *State v. Goracke*, 210 Ariz. 20, 22 (Ariz. Ct. App. 2005) (quoting *Mayer v. State*, 184 Ariz. 242, 245 (Ariz. Ct. App. 1995)). In *State v. Trujillo*, a prisoner successfully appealed the dismissal of his *pro se*, of-right notice of post-conviction relief. No. 2: CA-CR 2011-0377-PR, 2012 WL 1580432, at \*1 (Ariz. Ct. App. May 3, 2012). The lower court had dismissed the notice because it arrived four days late. *Id.* The prisoner provided the Court of Appeals with the Inmate Request for Withdrawal form as evidence that he had given his notice to the ADC for mailing within the appropriate timeframe. *Id.* The form was dated within the 90 days allowed by Arizona Rules. *Id.*

#### **E. Arizona Rules of Professional Conduct**

The Arizona Rules of Professional Conduct require that lawyers "not reveal information revealing to the representation of a client unless the client gives informed consent." E.R. 1.6(a). They also require that lawyers "act with reasonable diligence and promptness in representing a client." E.R. 1.3.

The State Bar of Arizona issued an opinion in 1987 regarding the ethical obligations of lawyers who had learned that their confidential meetings with incarcerated children were being monitored by juvenile detention facility staff. State Bar of Ariz. Ethics Op. No. 87-19 (1987), *available at* [http://www.azbar.org/Media/\\_Ethics/87-19.pdf](http://www.azbar.org/Media/_Ethics/87-19.pdf). When the lawyers learned about the violation of lawyer-client privilege, the lawyers notified the Presiding Judge of the Juvenile Court and discontinued their meetings with clients. *Id.* at 1. The question that the opinion focused on was whether the lawyers had “any further ethical duties beyond notifying the Presiding Judge of the monitoring and discontinuing client conferences until privacy [wa]s assured.” *Id.*

The State Bar concluded that in light of the Arizona Rules, the lawyers had an “affirmative duty to push the Presiding Judge and the Detention Facility personnel for a truly confidential area to confer with clients.” *Id.* at 2. Otherwise, the lawyers would be either violating E.R. 1.6 or E.R. 1.3. *Id.* The lawyers would either be ensuring confidentiality by stopping communication but violating E.R. 1.3 by not providing diligent representation. *Id.* On the other hand, the lawyers would be providing diligent representation but violating E.R. 1.6 by sacrificing confidentiality. *Id.* Lawyers who cannot ensure mail with incarcerated clients is kept confidential face a similar bind.