Mail Regulation in the Jail

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Handling mail to and from inmates is a challenge for jail administrators. Of course they want to enable inmates to handle their legitimate business (including pending legal matters) and maintain family and community ties. On the other hand, they must be on guard against contraband or inappropriate materials coming into the jail, or inmates participating in crimes or planning an escape from within. Inmates have a constitutional right to communicate with others and to access the courts, but those rights are limited by the jail's obligation to preserve security, good order, and discipline. This post collects some of the basic legal principles that should be incorporated into the jail's policy on mail regulation. By state administrative regulation, every jail must have a written policy on handling inmate mail.

A starting point in the analysis of how a jail should handle inmate mail is identifying what sort of mail it is. There are two broad categories: privileged mail and general mail. As you might imagine, privileged mail is entitled to greater protection than general mail in terms of the inmate's rights to privacy and prompt delivery.

What inmate mail is privileged? Without question, mail between the inmate and his or her attorney is privileged. That status extends beyond the inmate's personal lawyer to other persons working for the lawyer, such as investigators, law clerks, and paralegals. In general, mail to the court system, judges, consular officials, and other government officials, like the attorney general or the Post-Release Supervision and Parole Commission, should also be considered privileged. (Note, however, that the North Carolina Department of Public Safety explicitly excludes the governor, the president, and members of the General Assembly and Congress from its privileged mail category.) It is not clear in North Carolina whether mail addressed to members of the news media should be considered privileged; many courts say that it is not, but the safer practice is probably to assume that it is. Mail related to medical issues is not privileged in the same way that legal mail is, but jail officials should be mindful of the inmate's privacy and the jail's obligation to provide adequate medical care. Mail that does not fall into the privileged category may be treated under the heading of general mail.

Handling privileged mail. Incoming privileged mail may be opened and inspected for contraband *only in the presence of the inmate*. *It may not be read*. Wolff v. McDonnell, 418 U.S. 539 (1974). A jail could have an exception to this rule for mail that has clear signs of contamination or other indications of danger. Outgoing privileged mail should be sent *unopened and unread* by jail staff.

Identifying privileged mail. In general, mail need not be considered privileged unless the outside of the envelope gives some indication of its status, such as LEGAL MAIL or ATTORNEY MAIL. But no particular words are required. For example, if the return address on a letter suggests it is from a lawyer, law firm, or the court system, jail officials should treat it as privileged and err on the side of inspecting it only in the presence of the inmate. If jailers suspect that mail marked as privileged is from a nonprivileged source, they may make a prompt investigation of its source. The delay should not extend beyond 48 hours.

Occasionally a jail will open and inspect privileged mail outside of an inmate's presence by mistake. So long as the intrusion is the product of an honest mistake and not indicative of any pattern or practice, it will not rise to the level of a constitutional violation. *See, e.g.*, Bryant v. Winston, 750 F. Supp. 733 (E.D. Va. 1990). The best practice in those situations is to hand-deliver the opened mail to the inmate and acknowledge the mistake. Any effort to hide it promotes

mistrust and invites litigation.

Handling general mail. Jail officials may open and inspect incoming general mail outside of the presence of inmates. They may also read it—although many jail administration experts recommend doing so only when there is some reason to believe that it contains information relevant to institutional security. As a practical matter, jailers are unlikely to have time to read all incoming mail, and doing so rarely uncovers genuine threats to security. Some jails briefly scan incoming mail and then read further if they notice anything troubling. Others have a policy of random inspection, which is also permissible.

As for outgoing general mail, jail staff may inspect and read it outside of an inmate's presence. Altizer v. Deeds, 191 F.3d 540 (4th Cir. 1999). Even if that is constitutionally permissible, though, many jail administration experts recommend against reading outgoing mail, given the broader demands on officers' time and the small likelihood of uncovering legitimate security concerns.

Any information discovered during a proper inspection of incoming or outgoing general mail is fair game for a subsequent criminal prosecution. For example, a correctional officer did not violate an inmate's rights when he forwarded an incoming letter to police after seeing the words "twenty gauge shotgun loaded" at the top of one of the pages during his inspection for contraband. State v. Kennedy, 58 N.C. App. 810 (1982). Likewise, a deputy did no wrong when he gave to investigators a copy of a letter from an inmate to his father that included information suggesting the inmate was attempting to manufacture an alibi. The letter was not marked "legal mail," the inmate knew that nonlegal mail was inspected, and thus the inmate had no reasonable expectation of privacy in the letter's contents. State v. Wiley, 355 N.C. 592 (2002).

Censorship. In general, jail officials should not censor incoming or outgoing mail. Content-based restrictions on speech raise some of the most challenging questions under the First Amendment, and they can be a recipe for liability. That said, jail officials may censor or reject content that presents a legitimate threat to security or inmate rehabilitation. Procunier v. Martinez, 416 U.S. 396 (1974). For example, a jailer may permissibly reject mail that is written in code, makes a direct threat to someone, or includes things like escape plans or instructions on how to make a weapon. Thornburgh v. Abbott, 490 U.S. 401 (1989).

Unfortunately, those are the easy issues. Censorship of things like sexually explicit, religious, or racially-sensitive content are of course much more difficult, as they involve personal experiences, perceptions, and biases. Mere insults to jail staff (sometimes directed at the "nosy" officers whose job it is to inspect the mail) should not be censored. Ultimately, the touchstone of permissible censorship is whether the content presents a genuine threat to security. When a letter is censored or rejected, the jail must give notice to the sender and the inmate, and provide the sender an opportunity to protest the ruling before an official other than the one who made the initial decision. The jail should create a standard form for such notifications.

Postage and writing materials. Indigent inmates who cannot afford writing materials or stamps must be provided a reasonable supply of materials at state expense whenever they wish to send mail to their lawyers or the courts. Bounds v. Smith, 430 U.S. 817 (1977). That rule should probably also extend to other privileged correspondents. As for general mail, an inmate does not have a right to unlimited free postage, but most experts recommend providing a small number of stamps and writing materials at facility expense. A jail might consider providing postage for a certain number of letters each week, with a process to request more with administrator approval. For comparison, the state prison system allows for 10 free stamps per month, while the Federal Bureau of Prisons allows for five each month.

Postcard-only policies. Some jails have considered or adopted a policy of allowing inmates to send and receive general mail only by postcard. The policy has some appeal, as it virtually eliminates the possibility of contraband being sent through the mail, and also allows for a quick inspection of the content of the correspondence. Nevertheless, some courts in other jurisdictions have concluded that postcard-only policies violate inmates' First Amendment rights. In Prison Legal News v. Columbia County, 942 F. Supp. 2d 1068 (D. Or. 2013), for example, a federal judge in Oregon

concluded that the jail's postcard-only policy was not related to a legitimate penological interest. The policy placed too great a barrier between inmates and their unincarcerated correspondents by preventing the sharing of "photographs, children's report cards, and drawings," and the small space available on a postcard "creates a hurdle to thoughtful, personal, and constructive written communication." Meanwhile, the policy did not respond to a documented problem, and less severe measures (simply opening envelopes and visually inspecting their contents) were effective and did not take much more time than inspecting a postcard. Other courts have upheld such policies. *See, e.g.,* Prison Legal News v. Chapman, 44 F. Supp. 3d 1289 (M.D. Ga. 2014). The issue is being actively litigated around the country, but there is not yet any controlling case law in North Carolina.

Conclusion. As with many matters of jail administration, mail regulation involves a balance between the jail's institutional interests and inmates' general well-being and constitutional rights. The discussion above provides a basic framework for a written policy on mail management, but is by no means comprehensive. Sheriffs and jail administrators should consult with legal counsel to create or update a lawful policy tailored to the needs of their particular facility.

Today's post is based on an article I wrote for the North Carolina Jail Administrators' Association Newsletter.