

A SHORT COMMENTARY ON NORDSTROM v. RYAN;
THE READING OF LEGAL MAIL BY PRISON STAFF

by Gardner, September 16, 2014

The APWA seeks 'essays' about personal experiences; a recent Ninth Circuit case reminds me about prison mail improprieties in a related very unpleasant experience. I write to point out what the judges DIDN'T think about in their decision, hoping that my opinion might be pointed out in some future opportunity.

The case is Nordstrom v. Ryan, 2014 DJDAR 10613¹, a federal 1983 (civil rights) case on review from the District of Arizona. The District court had dismissed Nordstrom's complaint, with prejudice (i.e., cannot refile). The circumstances were that Nordstrom, an inmate on death row, presented a piece of "legal mail" (which by now probably all inmates know must be checked for contraband on mailing, but NOT read) to an officer for 'processing'. The letter was to Nordstrom's appellate attorney, properly addressed. The officer stood at the cell door and read through the letter, and, in response to Nordstrom's objections, finished the read and was quite rude in insisting that he had the right to read it. Nordstrom filed internal grievances, to which the authorities returned agreement with the officer's position.

The Court upheld the principle that the mail may be inspected, but not read, and Nordstrom's case was retrieved from the oblivion of dismissal. One judge (and you may hope he's never on a case of interest to you) dissented on the grounds, basically, that a single occurrence contrary to the principle does not merit scrutiny.

In my own experience, an officer once read a piece of mail I had sent to a court, and wrote me a 115 (a 'rules violation report') which could have resulted in significant punishment. Here, it was a paper destined for filing to a court, and so would have soon been public anyway -- the point was the officer's suspicion that I had mailed the paper for someone else (true enough; in those days we thought that legal papers must be "served" by someone not a party to the case). Fortunately, I did the necessary research and 'beat the rap', not only for myself but also for my cellie (the actual party-in-interest). The California regulations were quite clear on the matter (even clearer than those in Arizona under which Nordstrom's mail was wrongly read).

Unfortunately, the dissenting judge, even after diminishing the importance of a single infraction, seemed to agree that it was in fact proper to read outgoing legal material to make sure the inmate was not hatching escape plots or organizing other illicit activity. But, even reading for that purpose is not allowed, and there's a very defensible reason that it SHOULD NOT BE ALLOWED, and is not even necessary. It's because the prison staff should not be privy to the contents, and they are not the inhibitors of such activities in legal mail. That job belongs to the recipients, who (to be eligible as addressees of an inmate's legal mail) must be COURTS, licensed practicing ATTORNEYS, or certain ORGANIZATIONS, or responsible PUBLIC OFFICIALS, with whom the inmate has legal business.

If an inmate makes improper solicitations to any of these people, it is THEIR job, in EVERY case, to report those improprieties themselves -- i.e., to police their own interaction with inmates. The court's clerk would certainly not let improper material go unnoticed and unreported; every attorney is a sworn "officer of the court, and would be required to report such conduct (otherwise they become

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jointly liable with the inmate, subject to disbarment and worse); no organization, like the ACLU, or the Prison Law Office (a prisoner-advocate group in California), would put up with any improper solicitations that might jeopardize their standing in the community or with the courts; and no public official would for even one second entertain any accommodation of improper requests from prisoners.

Are there any exceptions among the court clerks and organizations? Very unlikely. Are there any exceptions among the attorneys or public officials? Perhaps. We've heard of attorneys smuggling cell phones and drugs, and of public officials returning favors, for example, for inmate labor on the their property. But, as a rule of thumb, never. Certainly far less than the opportunities for an officer to read an inmate's legal mail and so "chill" his ability to communicate effectively in his own defense. All the officer must do, made plain even in the Arizona regulation, is to verify that the matter contains no CONTRABAND -- this is something physical, like white powder, or razor blades, or pornographic images. They don't need to read words to see if any 'virtual' contraband is being sent, like shift schedules, or escape plans, or requests to smuggle drugs or phones, or other improper solicitations. The reason is that for these kinds of improper communications, an inmate to an attorney especially (what inmate, not insane, would send such to a court clerk), are policed by the recipients, and that by law.

Neither the majority nor the dissenter in the cited case got this idea. The majority at least got it right that the principle carries a lot of 'sacrosanctity', somewhat akin to the principle of avoiding the incarceration of innocents. Against the dissenting judge's feeling that a single occurrence of improper reading is of little import, I hold up a famous Supreme Court Justice's remark that it would be better that a hundred guilty men went free than that a single innocent would be wrongly convicted.

Hurray, Mr. Nordstrom, and thank you for helping people understand how important is this right, that a prisoner has literal freedom under the Constitution to write whatever is needed and wanted to his attorney, without fear that something he says might reach general circulation because of a nosy and chatty guard.

1. August 11, 2014. This citation is to the first publication of the case in the Daily Appellate Report, published by the Los Angeles Daily Journal, 915 East First Street, Los Angeles, CA 90012. A more permanent (and 'normal') number will be assigned when the case is published in the federal reporter.