Chapter DOC 309
APPENDIX

Note: DOC 309.03. Access to correctional institutions, staff, and inmates by the news media furthers several important public policy objectives. These objectives include the free exchange of information and ideas about correctional policy; the provision of information about correctional policy to the public; the development of public support for appropriate correctional objectives, including reintegration of offenders into the community; and the important values which inevitably flow from openness in public institutions and from the exercise of freedom of expression. See T. Emerson, *Toward A General Theory of the First Amendment* (1963); T. Emerson, *The System of Freedom of Expression* (1970).

It is through the exchange of information and ideas that an understanding by the public of the difficult correctional issues comes. Such understanding furthers the correctional process.

For these reasons and because of the fundamental nature of freedom of expression, DOC 309.03 permits media access to correctional institutions, inmates, and staff is permitted. This access is not unlimited, however. Sub. (2) identifies the circumstances in which this access is restricted. In weighing the necessity for such limitations, due consideration was given to other forms of access of inmates to the media. See DOC 309.05. It should be apparent that the limitations in sub. (2) are not substantial in the light of other means of access. *Houchins v. KQED.* 438 U.S. 1 (1978); *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974); *Procunier v. Martinez,* 416 U.S. 396 (1974).

The limitation of sub. (2) (a) 1 is to preserve order in the institution. There may be situations in which media access must be restricted because of an existing security problem that prevents safe access or because access may exacerbate or create such a problem. That such a limitation is proper is acknowledged in the *Pell* case, which also discusses the problems created by excessive media attention to inmates who become public figures and severe disciplinary problems. *Pell* at 831–32.

Subsection (2) (a) 2. permits the superintendent to limit access for the benefit of a particular inmate. An example of a situation in which such a limit may be appropriate is when an inmate has recently arrived at an institution and requires time to adjust, free of media attention about the crime for which he or she was convicted. If the inmate's trial received a great deal of attention, continued media interviews can create a strain on the inmate. The institution has an obligation to assist inmates under such pressure.

Subsection (2) (b) permits the clinical services unit supervisor to restrict interviews of the mentally ill. This is for the protection of the inmate and to enable treatment to proceed.

For 3 reasons, sub. (2) (c) limits interviews of those in segregation. First, a purpose of segregation is to permit the inmate to reflect on his or her problems without interruption. This is not furthered by media access. Second, it is a burden on limited resources to permit such interviews because of the security actions that must be undertaken when an inmate leaves the segregation area or when an outsider enters it. Finally, there is a danger that if an inmate who has disciplinary problems becomes notorious, others will follow his or her example. The way is left open however to such visits in extraordinary situations, for example, the furtherance of an investigation of charges of mishandling of persons in segregated status or some situation not arising from the action which resulted in segregation and which cannot await the person's return to general population status.

In promulgating these restrictions, the department of corrections is mindful of the fact that access to confined persons by the public should never be eliminated. Other rules, particularly those relating to visitation, mail, and access to legal services, do permit access of the public to all inmates.

Subsection (4) regulates the taking of photographs. It is intended to protect the privacy rights of inmates.

Visits and interviews are regulated as to duration, time, location, and equipment by sub. (5). *Pell,* 417 U.S. at 826.

This section is substantially consistent with existing policy and is substantially in accord with the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereinafter *"National Advisory Commission"*), standard 2.17, and complies with American Correctional Association's *Manual of Standards for Adult Correctional Institutions* (1977) (hereinafter "ACA"), standard 4024.

Note: DOC 309.05. DOC 309.05 regulates mail to and from inmates of correctional institutions. Subsection (1) identifies many of the values to the inmate, correspondents, and the public of the free exchange of information and ideas. Contact with family and others in the community is crucial to successful reintegration. Mail is one method of communication that can develop and strengthen family and community ties. Contact with those outside the institution helps motivate inmates and contributes to morale. This enhances inmates' involvement in correctional programs and the security of inmates and staff.

Of course, broader values are served by free expression. It contributes to individual self–fulfillment; it is a means of attaining the truth; it is a method of securing participation by members of society in social decision making; and it is a means of maintaining the necessary balance between stability and change in society. T. Emerson, *Toward a General Theory of The First Amendment* (1963).

Subsection (2) requires each inmate to consent in writing to receive mail through the institution mail service. Without this consent, the institution will return mail unopened to the sender as required in the U.S. Postal Service Domestic Mail Manual, ch. 115.97. Subsections (3), (4) and (5) reflect the view that no proper correctional purpose is served by institution staff reading the mail an inmate receives from any of the listed parties, for access to these government officials and other parties should not be unduly impeded by restrictions on correspondence. Accordingly, outgoing mail to the parties listed in subs. (3), (4) and (5), and incoming mail in connection with the inmate complaint review system (ICRS) or from a court, if addressed to an inmate in the general population, may not be opened at all by institution staff. Incoming mail from the parties listed in sub. (4) as well as incoming mail

from the parties listed in sub. (5) when address to an inmate in segregation may be opened in the presence of the inmate. The opened mail will be handed to the inmate who will be directed to remove the contents. The inmate will be directed to shake out the envelope and show the contents of the mail, page by page, to institution staff so that staff can determine whether the mail contains contraband. Institution staff are not permitted to read the mail, except that if the mail contains a rap sheet or similar document or a document of identification such as a social security card or driver's license, staff will be allowed to read the document but only to the extent necessary to determine who is the subject of it.

There is need for inspection of incoming mail under sub. (4) and mail from courts to inmates in segregation under sub. (5) because government officials and attorneys sometimes send checks directly to an inmate rather than to the inmate's account, and stationery from the listed offices and the courts may be obtained by unauthorized persons. Courts often secure documents with large metal fasteners that can be fashioned into weapons by inmates. If correspondence contains contraband that can be removed easily, such as checks or large metal fasteners, the item should be removed and the correspondence returned to the inmate. However, if the correspondence contains such contraband as drugs, the correspondence should be confiscated. Currency and confiscated correspondence should be processed in accordance with sub. (6) (e) (intro.) and 1, (f) and (g).

Subsection (5) identifies restrictions that are placed on correspondence. These restrictions are made because they are thought to further a substantial correctional interest. The effort is to draw them in a way that is not unnecessarily broad. Of course, the U. S. Supreme Court has indicated that correctional agencies have some latitude in making such restrictions and need not show with certainty that adverse consequences will flow from the failure to restrict. *Procunier,* 416 U.S. at 414–15. However, experience in corrections in Wisconsin teaches that the restrictions in sub. (5) are important. Some commentators urge that restrictions be specifically drawn. That is what is attempted here. See *ABA,* standard 6.1. Others urge that there be no restrictions. *National Advisory Commission,* standard 2.17.

Subsection (5) (a) permits inspection for contraband. The dangers created by contraband are great, and every reasonable effort must be made to control it. See the discussion of dangers in the note to DOC 303.48. Mail containing contraband is not delivered, and notification is provided for in (5). *Model Rules,* rules ID–1, IC–2.

Subsection (5) (c) states the other substantive criteria for restricting mail. While there may be overlap among categories, this is tolerable in the interest of clarity. Important correctional objectives are furthered by preventing inmate involvement in crime, whether as victims or as perpetrators. Among the objectives are maintaining a secure, crime–free environment which protects inmates and staff and permits programs to flourish and the development of attitudes that assist in reintegration. And, of course, the protection of the public is furthered by preventing inmates from committing crimes in which members of the public are involved. Preventing harassment of the public is another important objective. These are the objectives of the restrictions specified in sub. (4) (c) 1–5 and 9.

Communication in code, by its nature, can create a danger. Its restriction was specifically approved by the United States Supreme Court. Restrictions imposed in sub. (4) (c) 1–5 and 9 have been approved, though, in more general language. *Procunier,* 416 U.S. at 412–13. The specific limits that are permissible is rarely addressed by commentators. Typically, the limits are phrased generally in terms of "security". See, e.g., *ABA,* standard 6.1. The effort in this section is to be more specific.

Restrictions on solicitation of gifts are necessary, primarily because such solicitation is often linked to a threat to another inmate who is related to or a friend of the person being solicited. General solicitation is undesirable because it impedes the development of independence and the willingness and ability to sustain oneself.

Subsection (5) (c) 8. restricts obscene communication. The development of appropriate attitudes towards oneself and others is an important correctional objective. To permit inmates to mail obscene letters to others is not only a violation of the law but also a possible source of harassment of others. To receive such correspondence does not develop feelings of self–respect and also involves illegal use of the mails. The *Miller* test is relied on to define obscenity. *Miller v. California,* 413 U.S. 15 (1972).

Subsection (5) (b) states the standard by which mail may be opened and read. Random opening and reading are not permissible. Reasonable grounds to believe that the substantive criteria are satisfied must exist before mail is open and read. Because of the possible danger of escape created by mail among inmates, it may systematically be opened and read. Some commentators urge that search warrants be obtained before inspection is permitted. Model Rules, rule IC–2; *ABA,* standard 6.1 (a). Such a requirement would unnecessarily use scarce resources which can be used in better ways.

Subsection (5) (d) provides for keeping of records of mail opened and read. This permits review of the practice should questions arise about it.

Subsection (5) (e) provides for a record of mail not delivered either because it contains contraband or because it violates sub. (5) (c). It also provides for notification of the people affected. Subsection (5) (f) permits appeal to the superintendent of the decision not to deliver. Subsection (5) (g) is to ensure that money that arrives by mail is handled properly.

Subsection (5) (h) permits monitoring of mail for a reasonable period if these rules are violated. This is to prevent further violations. Serious violation may lead to suspension of specific correspondence privileges.

Subsection (6) permits the inspection of incoming and outgoing parcels and packages. This is necessary to control contraband. Subsection (6) provides for the disposal of the contraband.

Subsections (8) – (10) provide for suspension of mail privileges. Because of the significance of mail, such a decision must be preceded by a full due process hearing if an inmate is alleged to have violated the rules or institution policies and procedures.

Such a hearing is not possible if a member of the public is alleged to have violated. Then, a thorough investigation must precede suspension. Appeals are also provided.

Note: DOC 309.06. DOC 309.06 regulates inmate access to publications. Such access furthers the same goals identified in the note to DOC 309.05. They need not be repeated here. Subsection (4) provides for institution subscriptions to facilitate access by inmates unable to buy their own.

Subsection (2) states the limits on inmate access to publications. Publications are mail and therefore the mail rules apply. *Gaugh v. Schmidt,* 498 F. 2d 10 (7th Cir. 1974). The attempt, as with mail, is to be specific and to limit access only in furtherance of important correctional objectives. *Procunier v. Martinez,* 416 U.S. 396 (1974): see the note to DOC 309.05.

The requirement that publications be received directly from the publisher or other commercial sources is to control contraband. To inspect every publication, which would be necessary if this limit did not exist, would be very costly. This restriction is not aimed at the substance of publications. *Bell v. Wolfish,* 441 U.S. 520 (1979). To mitigate the effect of this rule, institutions are encouraged to make publications available to inmates. Inmates may lend publications to others and receive books from libraries outside the institutions.

Subsection (3) is designed to inform the sender and inmate if a publication is not delivered and the reasons for it.

Subsection (2) (b) is to limit access to publications that create specific security risks. Advocating or teaching violence, criminal behavior, and the manufacture or use of things that are not permitted in an institution directly threaten inmates and staff. See the note to DOC 309.05 and the authorities cited therein for further reference.

Subsection (2) (c) is intended to comply with the requirements of *Cook v. Carballo,* No. 76–C825 (E.D. Wis. 1979).

Note: DOC 309.10. Visitation of inmates serves several important correctional objectives. Among these are the maintenance of family and community ties. Visits help the morale and motivation of inmates, which are important factors in successful correctional programs and institution security. There is evidence that the maintenance of family ties directly increases the chances for successful reintegration into the community. See Holt and Miller, *Explorations in Inmate–Family Relationships* (1972) 42–3. Finally, visitation increases the opportunities for the exchange of ideas and information. See the notes to DOC 309.03 and 309.05.

Note: DOC 309.11. DOC 309.11 requires visitors as well as inmates to obey visiting rules. If they fail to do so, visiting privileges may be suspended pursuant to DOC 309.17.

Subsection (2) regulates conduct during visits. Visitors and inmates often wish to display affection. This, of course, is appropriate. Excessive physical contact is not appropriate in a place for visiting. Visits are conducted in public, and proper conduct is essential to ensure that all people involved in visits enjoy themselves. Most people consider extended and continuing public displays of affection inappropriate, and discretion should be exercised to avoid embarrassment to others. In most cases, staff members should counsel inmates about misbehavior before considering disciplinary action.

Subsection (3) forbids items to be passed without authorization. Procedures are established at each institution to permit exchanges in an authorized manner.

Note: DOC 309.12. DOC 309.12 regulates visitation and the criteria for approval to visit. Each inmate is to have an approved visiting list. It may have only 12 people on it because institutions cannot accommodate unlimited numbers of visitors. The need for some limits has been acknowledged. *Model Rules,* rules IC–6 (1); *ABA,* standard 6.2, Commentary, p. 501. People who have not attained their 18th birthday who are the children of visitors or the inmate do not count against the 12. This is to enlarge the number of visitors and for the convenience of visitors.

Subsection (2) (c) permits spouses of immediate family to visit and not be counted against the limit of 12.

Subsection (2) (d) is to prevent hardship to inmates with large families. This exception to the limit of 12 requires that only family members be on the visiting list.

There is going to be objection to any method of limiting visitors. No system can satisfy everyone. A variety of methods for limiting the numbers of visitors was considered. One proposal was to limit visitors according to their relationship to the inmate. Under this proposal, there would be unlimited visiting for immediate family members and strict limits on nonfamily members. Such a system has the virtue of contributing to the preservation of family ties. On the other hand, inmates without large families object because their visitors are curtailed. There is also great difficulty in defining who is a family member. This creates administrative problems. Furthermore, it limits the choice of inmates as to who may visit.

Setting a limit by number has the virtue of permitting a substantial number of family visitors for those who desire them and of permitting people without a family to include a substantial number of friends. It is an easier system to administer and, on the whole, seems more fair. It leaves to the inmate the choice of who may visit.

Subsection (4) states the procedure for being added to the approved list and the criteria for approval. A written request and the completion of a questionnaire are required. The questionnaire is to elicit the information necessary to evaluate the application. Subsection (4) (e) states the criteria for approval. Because of the importance of maintaining family ties, immediate family are routinely approved.

Applicants may be disapproved only for the reasons stated under sub. (4) (e). Past attempts to bring contraband into the institution or a county jail may result in disapproval. That this is proper has been acknowledged by commentators, *Model Rules,* rule IC–6 (d). When the limit of visitors has been reached, future applicants will routinely be disapproved until there is an opening on the list.

Subsection (4) (e) 6. permits the exclusion of visitors if there are reasonable grounds to believe they pose a direct threat to the institution, inmates, and staff. Subsection (4) (e) 7. permits the disapproval of people who have influenced the inmate to commit crime. Sometimes such visitors must be forbidden from visiting to assist in the ultimate successful reintegration of the inmate.

Subsections (4) (e) 8. and (5) address specific issues that have arisen in the past. No useful purpose seems to be served by exclusion of the persons identified. See *Model Rules,* rule IC–6 (d).

Subsection (6) is to limit the administrative burden that results from frequent changes of visitors on the list.

Subsection (7) is for the protection of young men and women and because security problems are created when young people visit correctional institutions if they are not accompanied by an adult.

The purpose of sub. (8) is to make known to nonapproved visitors and inmates the reasons for disapproval and to permit review of the decision.

Subsection (9) provides for routine approval of immediate family for visiting. This means that upon verification of the relationship, visiting should be approved unless for some extraordinary reason an inquiry should be made regarding a restriction in visiting.

An example is the best way to illustrate what is contemplated under sub. (11). An inmate may have a relative in California who visits Wisconsin once a year. Such a person may be allowed to visit the inmate without being added to the inmate's visiting list.

Note: DOC 309.13. DOC 309.13 regulates some aspects of visiting by requiring institutions to make policies and procedures. Flexibility is needed in the rules relating to visitation because of the great differences among institutions. For example, at maximum security institutions with large populations, visitation can be during daytime, nighttime, and weekends, to accommodate the large numbers of visitors, the difficulty some visitors have getting to institutions except at night and on weekends, and the need to avoid unnecessary disruption of correctional programs.

On the other hand, some correctional centers are in remote areas of the state. The majority of inmates are working in the community during the day, and the camps are not heavily staffed. Therefore, visitation is feasible only on weekends and by special arrangement.

For the above reasons, the rules simply direct each institution to make policies and procedures and set some minimal requirements. In some cases, no change in present policy is necessary.

Subsection (2) requires institutions to permit visits on weekends or nights or both, because some visitors are unable to visit at other times.

Subsection (4) requires the opportunity for a minimum of nine hours of visitation per week per inmate of reasonable duration. This ensures adequate visitation. If an inmate has a visit of less than its allowable duration because of either a specific institution policy or procedure or the option of the visitor or inmate, nine hours of visiting may be precluded in that particular week since the inmate has a maximum number of weekly visits of a maximum duration each.

Subsection (5) requires visitors to provide identification. This identification must be adequate to verify that the visitors are who they claim to be.

Note: DOC 309.14. DOC 309.14 regulates visits by state officials, groups, attorneys, and clergy.

It is important that state officials and the public have access to correctional institutions. Such access develops an understanding of the correctional process, dispels misconceptions, and encourages the exchange of ideas and information among leaders and members of the public, inmates, and correctional staff. Such visits are not subject to the restrictions under DOC 309.13, but advance notice is necessary to accommodate groups. Such visitors should have virtually unlimited access to institutions, unless a security problem dictates that the visit be limited. Staff and visitors should also be sensitive to the inmates' desire for privacy and try to be as unobtrusive as possible.

Attorneys and clergy are permitted access to their clients any time during business hours. No attempt is made to define "clergy." Superintendents are now making the decision as to whom should be admitted based on the activity which ensues, not on the credentials of the leader of the activity. This same access is accorded law students and aides who have written authorization from their referring attorney. *Pell v. Procunier,* 417 U.S. 817 (1974). In emergencies, efforts should be made to allow lawyers and clergy to visit outside of business hours. Advance notice is desirable though not always possible. Of course, visits by attorneys, clergy, law students, and attorneys' aides do not count against allowable visitation hours.

This section is consistent with present policy and in substantial agreement with the *ABA,* standards 6.2 (d) and (f), and substantially satisfies *ACA,* standard 4306.

Note: DOC 309.15. DOC 309.15 provides for and regulates visits of one inmate to another if the inmates are related. Such a policy reflects the view that these visits are good for morale and motivation, help keep families together, and ultimately assist in successful reintegration.

Such visits do put a strain on staff resources. For this reason, the number of visits is limited, inmates must be in the general population to be permitted such visits, and staff approval is required.

Such visits are required to be permitted only at major institutions. Staff are not available at camps and the metro centers to permit interinstitution visits among family members in accordance with the rules.

It may be possible to permit such visits from the correctional centers. For example, if a staff member is transporting an inmate from McNaughton Center to the reformatory, another inmate might go along and visit a relative at the reformatory. This practice is to be encouraged. However, because resources are not available to ensure such visits, this section does not require them.

Note: DOC 309.16. DOC 309.16 permits visits to inmates in segregated status. Institutions differ in their capacity to permit such visits. Inmates in segregation for punishment are not accorded the same visiting privileges as inmates in the general population. Subsection (1) sets the minimum visitation periods. Because inmates are in controlled segregation for a maximum period of 72 hours, are usually acting in a disturbed manner, and are not easily calmed down, visits to such inmates are not permitted.

Subsection (2) limits visitors in some situations to 3 designated people. Large numbers of visits to those in segregation cannot be accommodated. However, since administrative confinement is a nonpunitive measure, inmates there must be allowed full visitation privileges consistent with this status and their behavior. People who have not attained their 18th birthday require the approval of the security director because such visitors are sometimes quite immature and are a greater security risk. Also a visit to a segregation area may affect the young, and this should be considered before permission is sought or granted. See *ABA,* standard 6.2 (b). An exception to this requirement is made for the children of the inmate.

Note: DOC 309.17. DOC 309.17 provides for the suspension and termination of the privilege to have a particular person visit. Such an action may be the result of violation of the administrative rules, federal or state law, or the institution policies and procedures by a visitor or inmate. Commentators agree that this is appropriate. *Model Rules,* rule IC–6 (d). If an alleged violation was by an inmate, it must be disposed of through the disciplinary process. Such suspension is provided for as a punishment under the departmental disciplinary rules.

If the alleged violation is by the visitor, the security director must investigate to be certain the violation occurred. Either the adjustment committee or the security director decides if suspension or termination of visiting is appropriate. Such findings may be appealed through the normal disciplinary process. The suspension may be appealed further pursuant to (2) (a) and (b).

Note: DOC 309.18. DOC 309.18 permits and regulates a range of public group activities. The capacity of each institution to have such activities varies, so each institution must regulate them as to time, place, size, and manner. This rule does not address inmate activity groups. Subsection (2) identifies the criteria to be used in regulating such activities. Although such activities may be beneficial, they may create security problems and a strain on resources.

The benefits have already been discussed. See the notes to DOC 309.03 and 309.05.

Note: DOC 309.25. It is important that the legal process be available to people in correctional institutions. *Bounds v. Smith,* 430 U.S. 817 (1977); *Younger v. Gilmore,* 404 U.S. 15 (1971); *Johnson v. Avery,* 393 U.S. 483 (1969); *Ex parte Hull,* 312 U.S. 546 (1941). Not only is such access guaranteed by the U.S. Constitution, but also it serves important substantive objectives.

Commentators have remarked as follows about the benefits of legal services to correctional inmates, institutions, and the system:

"Inmates and mental patients have great need for the assistance of legally trained persons. The need for legal assistance falls generally into three categories:

1. Legal assistance is needed relating to incarceration or commitment. This includes obvious remedies such as appeal, habeas corpus, and other postconviction review. It also includes less obvious matters such as sentence reduction, credit for time spent in jail awaiting trial or sentencing, and executive clemency.

2. Legal assistance is needed to help the inmates and their families deal with economic problems such as debts and support obligations, tax problems, social security and health benefits, licensing problems, or selective service. The objective of an adequate legal assistance program should be to enable the inmate to return to the community free of unnecessary legal complications that will make it difficult for him to adjust, and he will thus avoid being sent back to the institution. This is particularly true in the case of detainers which, if not resolved, make it impossible to develop a suitable plan for returning the inmate to the community. Assisting an inmate's reassimilation into the community is an important objective, whether one sees the purpose of incarceration as rehabilitation or punishment.

3. Legal assistance is needed relating to conditions of confinement. In some instances an inmate may need assistance in using increasingly common administrative grievance procedures. More often he needs assistance in deciding whether to try to obtain judicial review of conditions of confinement.

The need for legal assistance is great whether that need is viewed from the perspective of the individual inmate or mental patient, from the perspective of the institutional program, or from the perspective of the criminal justice or mental health system generally.

1. Although almost all inmates and mental patients have need for legal assistance, most are incapable of defining what the needs for assistance are. Because of the experiences they have had with lawyers and because of the popular misconception of the role of the lawyer, the average inmate or mental patient thinks of the lawyer's role as confined to assisting a person in court proceedings, such as divorce. He does not perceive of the lawyer as a person able to help with family problems, debts, social security and health benefits, eligibility for various licenses including driver's licenses, selective service, educational benefits, and the like. As a consequence the inmate and the mental patient not only need help in dealing with known legal problems, but, even more importantly, they need assistance in defining problems which they have and in the resolution of which legal assistance can be helpful.

2. The institutional program is helped if inmates have an opportunity to raise issues whether those issues relate to their conviction or commitment, to civil law needs such as family problems or debts, or to conditions of the institution. The institution does not need inmates who should not legally be there or inmates whose institutional programs are thwarted by a detainer from another jurisdiction. No institution benefits by having an inmate worried about whether his family is getting welfare or is being hassled by creditors.

3. The criminal justice and mental health systems also benefit from an adequate institutional legal assistance program. The program can be to the systems what the pathologist is to the hospital. It affords an opportunity to view the program from the perspective of its results and, unlike the pathologist, it does so at a time that allows corrections to be made if the system misfired in the individual case. In this way, deficiencies in the criminal justice and mental health systems become apparent. Inmates and mental patients are typically confused as to what happened and often feel a sense of injustice because no one, including their own lawyers, explained to them what was happening or gave them an opportunity to adequately participate in the decisions that were being made. This is particularly true with respect to some practices such as plea bargaining. Other imperfections in the system become plainly apparent, such as wide disparity in sentences and lawyers' unawareness that involuntary mental health programs are not necessarily "beneficial" to the client who has been counseled into an institutional program that is underfinanced and understaffed."

Dickey and Remington, *Legal Assistance for Institutionalized Persons An Overlooked Need,* 1976 So. Ill. L.J. 175, 176–179.

For other analyses of the legal needs of the confined, see: Brakel, *Legal Problems of People In Mental and Penal Institutions: An Explanatory Study,* 1978 ABF Research Journal 565; Dickey, *The Lawyer and the Quality of Service to the Poor and Disadvantaged: Legal Services to the Institutionalized,* 1978 De Paul L. Rev. 407.

For a helpful discussion of these and other benefits from providing such access, see *ABA,* standard 2.2, Commentary.

These rules attempt to ensure that inmates have access to the legal system in an effective way. Of course, resources available to the department of corrections are limited. Priorities are constantly set and reevaluated so that the goals of the correctional system can be realized.

Wisconsin has pioneered in providing legal services to correctional inmates. Through a cooperative effort of the University of Wisconsin Law School and the department of corrections, a wide range of legal services are available to inmates and inmates' needs have been identified. This program and its objectives are described in Dickey and Remington, *supra,* and Dickey, *supra.*

The state public defender provides legal services to indigent inmates on postconviction criminal matters as well as in conditions of confinement cases. Corrections legal services is also funded by the department to provide legal services to parolees and probationers and to people in correctional institutions.

This section substantially complies with *ACA* standard, 4280; *Model Rules,* rule VII–16; *ABA,* standard 2.1; *National Advisory Commission,* standard 2.1. See 15 *Cal. Adm. Code* 3160 – 3165.

Note: DOC 309.26. DOC 309.26 regulates access to the judicial process. Subsection (1) reaffirms the policy of effective access. *Bounds v. Smith,* 430 U.S. 817 (1977).

Subsection (2) permits institutions to make policies regarding such access. Such policies might include rules providing for orderly access to legal materials and lawyers. For example, the present practice is to try to have every new inmate see a law student during the first four weeks of confinement. This is a reasonable procedure which relates to the general issue of access to the judi-

cial process. That such policies may be necessary is acknowledged by *ABA,* standard 2.1 (A). The principle that such policies do not unduly delay or adversely affect claims and defenses is not in need of further explanation, except to point out that there is delay in every person's access to the courts and, given limited resources, inmates cannot expect instantaneous access to the process.

Institutions also regulate law library hours. These regulations indirectly affect access to courts and are necessary if access is to be provided to all inmates, given the fact that resources are limited.

Subsections (3) and (4) are to ensure that inmates are not adversely affected by their involvement in the judicial process. The system must have integrity. To penalize people for their legal actions is not permissible.

See *ABA, standard 2.1; National Advisory Commission,* standard 2.1; *Model Rules,* rules VII–16; 15 *Cal. Adm. Code* 3160.

Note: DOC 309.27. An important element of effective access to the judicial process is access to an adequate law library. DOC 309.27 regulates such access.

Subsection (1) provides that legal materials should be reasonably available to inmates. Access involves more than books. It includes staff time to supervise the library and periods of availability that do not interfere with programs. This can be costly, and the hours the library is open must be left to each institution.

An inmate with a special need may require extraordinary access. By way of illustration, an inmate with a pending hearing in an action to terminate parental rights may have a great need for such access and would be permitted to be in the library as much as is necessary.

Subsection (2) requires each institution to have an adequate law library. What is minimally adequate is defined in sub. (3). This definition adopts *ABA* standard 2.3.

Subsection (2) also exempts each correctional center and the Wisconsin resource center from the requirements for an adequate library. The correctional center system and the Wisconsin resource center, however, must attempt to borrow materials requested by inmates from the Criminal Justice Reference and Information Center (CJRIC) at the University of Wisconsin Law School or from correctional institution law libraries. If materials are not available from the CJRIC, inmates may request copies of materials from correctional institution law libraries. While transfer may occasionally be necessary to provide adequate access at the inmate's request, it is unlikely that it will be frequent.

This section is in accord with *ABA* standard 2.3; *Model Rules,* rule VII–16; *National Advisory Commission* standard 2.1; and *ACA* standard 4283. See 15 *Cal Adm. Code* 3161.

Note: DOC 309.28. DOC 309.28 regulates legal services to inmates. The note to DOC 309.25 explains the importance of legal services to inmates. Wisconsin is fortunate to have a State Public Defender System, the Legal Assistance to Institutionalized Persons Program of the University of Wisconsin Law School, and Corrections Legal Services. These groups provide legal services on the full range of concerns an inmate may have and satisfy the requirements of these rules. Despite these services, inmate needs for legal help are not always fully met.

No effort is made to define what efforts the department of corrections must make nor to elaborate on what is adequate. Such matters are not susceptible to easy definition, nor are numbers and ratios necessarily helpful in evaluating the quality of services provided. Furthermore, the department is somewhat dependent upon the ability and willingness of other agencies to provide services. The financial resources and the services are presently available to satisfy many, but by no means all, legal needs. It is not expected that the resources to satisfy all needs will be available in the immediate future.

Subsection (2) provides that legal services on the full range of legal concerns should be available. Roughly, these fall into three categories.

(1) Matters relating to the fact or duration of confinement;

(2) Matters relating to civil matters, including economic and family problems;

(3) Matters relating to the conditions of confinement.

Subsection (3) provides that the lawyer–client privilege applies to the service provider–inmate relationship. If legal services are to keep their integrity, the relationship between the providers and inmates must be treated in the manner in a prison as any lawyer–client relationship would be in the private sector. To do less would confuse the clients and inhibit assistance to them by legally trained people.

Subsection (4) requires written authorization for nonlawyers before they are admitted to institutions.

This section is in substantial accord with *ACA,* standard 4283; *ABA,* standard 2.2; *Model Rules,* rule VII–16; *National Advisory Commission,* standard 2.1.

Note: DOC 309.29. DOC 309.29 permits inmates to assist other inmates by providing legal services. So–called "jailhouse lawyers" have been approved by the United States Supreme Court. *Johnson v. Avery,* 393 U.S. 483 (1969). This is a common practice in many states, though not nearly so prevalent in Wisconsin. An inmate may be more comfortable with and trust another inmate more than a lawyer who is viewed as an outsider. And a "jailhouse lawyer" may sometimes be the only source of legal services available.

Institutions must regulate jailhouse lawyering, and sub. (2) provides the authority for this. Policies will vary from institution to institution.

Subsection (3) forbids compensation for legal services by one inmate to another. This is consistent with the disciplinary rule forbidding enterprises by inmates. Permitting compensation can create security problems, in that it may permit one inmate to take advantage of another. Making the provision of services voluntary is an attempt to avoid such a problem. This section is similar in principle to 15 *Cal. Adm. Code* 3163 and is consistent with *ABA,* standard 2.2 (d).

Note: DOC 309.35. DOC 309.35 provides authority for inmates to have personal property in correctional institutions.

Personal property can give inmates a sense of their own individuality and self–esteem. All people enjoy having personal property, and in correctional institutions it can be a welcome link to one's family, friends, and community.

Personal property, however, creates three major problems. First, administratively, it may be difficult to clean and keep track of such property. Second, such property can create security problems. These problems may be direct, e.g., the item may be fashioned into a weapon, or indirect, e.g., the item may be bartered, sold, or stolen. Third, each institution has a different capacity to store and keep records of property, as well as distinct security and program requirements. For example, personal clothing is easier to keep track of in a camp with a population of thirty than in a maxi-

mum security institution with a population of one thousand. Furthermore, an inmate in a camp who goes into the community daily on study release cannot appropriately do so in khakis issued by the institution. This would create unnecessary problems in school.

For these and other reasons, each institution is required to make policies regarding personal property. This permits the desired flexibility; however the list of permitted property and other regulations must be approved by the administrator of the division of adult institutions. This centralization of authority is to avoid unnecessary differences among the policies.

Subsection (3) identifies some of the methods by which property may come into the institution. Institutions are free to use other methods. Subsection (4) (a) permits institutions to choose methods appropriate for that institution.

Subsection (4) (b) is to ensure that property is not lost or exchanged. Subsection (4) (c) acknowledges that institutions have varying capacities to store property. Some property may have to be sent to an inmate's home upon transfer to an institution with limited storage capacity.

Subsection (4) (d) gives institutions authority to regulate the specifications and number of items. Such policies, e.g., as to size of television, are already in effect and will be continued.

Subsection (5) restates the disciplinary rule regarding contraband.

This section substantially satisfies the *ACA,* standard 4365.7. See 15 *Cal Adm. Code* 3190–3192 for similar rules.

Note: DOC 309.36. DOC 309.36 regulates leisure time activities. They are important to all of us and provide a necessary break from daily routine and an opportunity to enrich our lives. In institutions, where there is often a great deal of regimentation, breaks from the routine are especially important. Involvement in such activities serves important correctional objectives, in that it is intellectually enriching, develops self–discipline and a sense of cooperation, contributes to self–development, and is a release for energy and anxiety. Activities also help people avoid the problems that often accompany idleness. therefore, the department encourages such activities and tries to make available a variety of them to permit individual development and to take into account different interests.

Subsection (2) sets a minimum of 4 hours per week activity outside the cell. This takes into account the variety of institutions and their resources, as well as the possibility to permit more activity in spring, summer, and fall than in winter. Institutions are encouraged to permit more activities, and in fact are now doing so. Of course, this should not interfere with work and other programs.

This substantially satisfies *ACA,* standard 4419. See 15 *Cal. Adm. Code* 3220–3223.

Note: DOC 309.37. DOC 309.37 regulates the diet of inmates. The policy of the department is to provide nutritious and quality food to inmates. It must be noted that this must be done on a limited budget. The preparation of food for large numbers of people always presents problems. And, because tastes vary, there will always be different views of the adequacy of diet. However, food must be nutritious and prepared under sanitary conditions. Sub. (1) requires this.

Subsection (2) requires each institution to regulate eating outside the dining room and permits institutions to forbid eating certain foods in the living quarters. Institutions differ, and size alone sometimes creates sanitation problems.

The purpose of sub. (3) is to give inmates notice of what is to be served so that they may supplement their diet if they so choose.

Subsection (4) provides for a special diet for medical or religious reasons. Providing such a diet requires the cooperation of the division of health, department of health and social services. No inmate should be denied a special diet because of security status.

Subsection (5) permits abstention and provides for substitution if available. This is typically done on religious occasions like Ramadan or for medical reason.

Note: DOC 309.38. DOC 309.38 regulates personal hygiene. Good hygiene is important not only for the individual, but also for the whole inmate population and staff. The danger of the spread of disease in a correctional institution must be minimized by healthy living conditions.

Subsection (2) states minimum bathing standards. Several institutions can provide more showers and do so.

Grooming regulations are controversial. Subsection (3) establishes a flexible code for grooming which attempts to provide for the variety of tastes that exist, the need for hygiene, and the need to be able to identify inmates whose appearance may change dramatically over the course of several weeks. *ABA,* standard 6.7.

Note: DOC 309.39. The population of correctional institutions is largely beyond the control of the department of corrections. Commission of crimes, court disposition of criminal cases, and discretionary parole decisions are the major factors determining correctional institution populations.

Wisconsin currently (early 1982) has more inmates than its institutions were designed to accommodate. This will likely continue for some time. An unfortunate situation, it must be confronted as humanely and imaginatively as possible. This section is meant to alleviate some of the tensions resulting from overcrowding.

The department of corrections wants to remain within the design level for occupancy of living quarters. Subsection (3) implements this goal by requiring single occupancy of single cells or rooms unless emergency conditions exist. Emergency conditions are defined under sub. (1).

Subsection (2) requires a declaration of housing emergency by the secretary following notification by the administrator that population in any institution exceeds the limits established by the legislature. Population reports will be monitored weekly to determine whether emergency conditions exist. Conversely, when the reports indicate that populations at all five institutions have fallen below the established limits, the secretary will be notified and the emergency will be canceled.

Ideally, maximum security institutions house one inmate to each cell with no dormitories or double–up. In other institutions, group living occurs only in quarters designed for it. When an emergency is declared under sub. (1), the institution may resort to dormitories and doubling–up in rooms not designed for such use.

It is difficult to decide which inmates to place in dormitories or to double–up. Subsection (4) contains guidelines for making this decision. Inmates who volunteer should be chosen if otherwise appropriate.

Subsection (4) (e) requires humane conditions for inmates who are assigned to multiple occupancy. For example, additional time out of cell could relieve some discomfort or tension that may occur when 2 or more people share a small living space. The largest and best equipped cells are usually better places to house inmates who

are double–celled. Where feasible, additional equipment such as chairs, lamps, and tables should be added. It is easier for an inmate to endure double–celling if the inmate has a program or job assignment and is occupied during the day.

This section is in substantial conformity with *ACA,* standard 4142, which considers one person to each cell "important" but not "essential." It also conforms to *ABA,* standard 6.12; *Corrections,* standard 2.5; *Bell v. Wolfish,* 99 S. Ct. 1861 (1979); *Burks v. Teasdale,* 603 F.2d 59 (8th Cir. 1979); *Rhodes v. Chapman,* No. 80–332 (U.S. June 15, 1981).

Note: DOC 309.40. The division must ensure that adequate and appropriate clothing is provided to inmates. Inmates must maintain it and keep it clean and neat. The sizes of institutions and living units, the amount of storage space, the type of programs available, laundry resources, and differing security requirements dictate that each institution have its own policies relating to personal clothing. In camps, where inmates often have contact with the community, it is desirable to permit the wearing of personal clothing.

Note: DOC 309.45. The objectives of DOC 309.45–309.52 are to meet the security needs of the institution, encourage responsible money management on the part of the inmate, preserve money for the inmate's use upon release, and to enable the inmate to make purchases while in the institution. These broad objectives may sometimes seem inconsistent. Management of funds in a way that meets all the objectives is difficult. If there is a conflict, the requirement in DOC 309.48 (6) that reasons be given for decisions is important.

The differences among inmate needs and obligations explain why the objectives are broad. Family needs and, therefore, the demand on an inmate's funds vary from person to person. For example, one inmate may have a spouse with no income and several children. They may be receiving aid for dependent children. Another inmate may be single, have no family obligations, and receive money from home. The management of funds in these two cases must be in accordance with the needs of the family and the inmate.

The objectives set forth in this section are factors to consider in weighing the different demands on and amount of inmate funds. The objectives for management of these funds are not listed in priority order, and one should not be given undue emphasis over the other. Rather, they should all be considered in light of the specific circumstances surrounding each inmate's financial position.

Note: DOC 309.46. This section implements ss. 46.07 and 301.32, Stats., relating to the deposit of money. There is no statutory authority to regulate all money that an inmate controls. For example, a savings account in existence before incarceration is not within the scope of DOC 309.45–309.52.

In an institutional setting it is desirable to have all money kept in an account for the benefit of the inmate, rather than to allow inmates to carry money. This eliminates problems with exchange of contraband and victimization that could result if the inmates carried money. While these problems may be present without money, this section prevents use of money as a means of illegal exchange.

Note: DOC 309.465. DOC 309.465 implements the crime victim and witness assistance surcharge established by s. 973.045, Stats. The statute requires that if an inmate in a state prison has not paid the surcharge, the department is required to assess and collect the amount owed from the inmate's wages or other moneys and transmit the amount collected to the state treasurer.

Note: DOC 309.466. DOC 309.466 requires the department to establish a release account for each inmate. It recognizes that a release account will promote inmate savings and ensure that inmates have funds available upon release to help with their transition back into society pursuant to DOC 309.45 (1). The deduction will come out of all inmate funds coming into the institution or earned by the inmate at the institution, including hobby income and inmate wages, except income from work release and funds received for study release, but will not start until the crime victim and witness surcharge is paid in full. The specific percentage of the deduction and the total amount that may be deducted will be determined by internal management procedures of the department. The release fund is untouchable for any purpose until release from prison except that when a release date is established an inmate may ask that funds be disbursed to pay for release clothing and arrange for out–of–state transportation. Following release, disbursements are monitored by the inmate's parole agent. Funds will be needed upon release to pay for housing, security deposits, food and transportation until employment is found, especially since allowances for gate money and release clothing are eliminated effective July 1, 1986.

Note: DOC 309.47. This section requires the department to give the inmate a receipt of all transactions in his or her account. This is good accounting practice. It is in accord with *ACA,* standard 4368.

The requirement that the inmate receive a periodic statement from a savings account serves 2 important objectives: (1) provides notification to the inmate of the current state of the account and (2) provides an accounting check on possible mistakes. For example, if a sum were wrongly credited, it may be noticed by the inmate who could notify the institution business manager to correct the error.

Note: DOC 309.48. DOC 309.48 requires each institution to write its procedure pertaining to inmate requests for disbursement of funds. The written procedure must contain all the information under sub. (1)–(8) and be otherwise consistent with DOC 309.45–309.52. The procedure for submitting requests and approval is not necessarily the same for all institutions. This section outlines common information each institutional procedure must contain.

Note: DOC 309.49. DOC 309.49 governs the use of general account funds. Subsection (1) acknowledges the institution business manager's discretion to allow or forbid spending of inmate funds for any reason that is consistent with meeting the objectives of DOC 309.45.

Subsection (2) recognizes that an inmate can request to have funds spent for any reason. Obviously the request should be for something consistent with the purpose of DOC 309.45 or the appropriate authority will not approve the expenditure. For example, if an inmate has less than $500 in an institution controlled account, that inmate will have less latitude to spend freely unless some other purpose under DOC 309.45 is considered to be overriding in the discretion of the superintendent.

Subsection (4) specifies some uses of funds, in excess of the canteen limit, that may be consistent with DOC 309.45. This is intended as a guideline. Again, as discussed in the note to DOC 309.45, whether an expenditure is consistent with the objectives of that section depends upon the financial situation of the individual inmate making the request.

Disbursements in excess of $25 to one close family member or to persons other than close family members require written per-

mission of the superintendent. This subsection was adopted to eliminate illegal activities. It should not be used as a bar to disbursements in excess of $25 to one close family member, for example, if it can be established that the money is to be used for a lawful purpose. Subsection (4) (b) recognizes that disbursement of $25 or less to a close family member of the inmate once every 30 days may be desirable. This kind of disbursement relates to the objective in DOC 309.45 (3) concerning the development of a sense of responsibility on the part of inmates for payment of family obligations. The definition of close family member is contained in DOC 309.02 (2).

Sub. (4) (c) and (d) specify that the inmate may deposit money in an interest bearing account or purchase U.S. savings bonds. This is desirable as a means of meeting the objectives of DOC 309.45 (1) and (4). *ACA,* standard 4370 considers the provision for accrual of interest to the inmate to be an essential element of any written policy on inmate funds.

Subsection (4) (e) relates to the objective of DOC 309.45 (3) regarding the payment of an inmate's debts.

Note: DOC 309.50. The segregated account is used primarily for administration of the funds handled by the work and study release programs. The handling of these funds is governed under ch. DOC 324.

Subsection (3) requires funds received by inmates from outside sources due to enrollment in institution programs and funded by institution funds to be deposited in a segregated account. These funds are to be used for tuition and books. Although these programs are made available to all inmates, regardless of ability to pay, inmates who receive funds should be required to use the money to help pay for the costs of education. Past department policy was to prohibit using these funds for tuition and books. Examples of the sources of such funds are veterans administration, social security, and railroad retirement funds.

The underlying concern under the old policy was that it was unfair to require those inmates who receive money from outside sources to pay for tuition and books when these costs would be paid from institution funds for inmates who received no outside money. The department has the responsibility to provide these kinds of educational programs regardless of ability to pay.

The present policy reflects the view that, when inmates receive outside money by virtue of their enrollment in an institutional educational program, that money should be used to pay for the costs of that program. This policy frees resources to help the department better fulfill its responsibility to provide educational programs.

Note: DOC 309.51. This section authorizes loans to inmates for expenses related to legal correspondence. The funds are not intended for actual legal services but to pay for postage, paper and photocopying.

The department recognizes that inmates have a right of access to the legal system regardless of financial status. For a discussion of the importance of the legal process to people in correctional institutions, see DOC 309.25 and note. However, the right of access to the courts is not unconditional. Rather, inmates have the right of *meaningful* access to the courts. *Campbell v. Miller,* 787 F.2d 217 (7th Cir. 1986). Therefore, inmates do not have a right to an unlimited number of free photocopies, even for legal purposes. *Harrell v. Keohane,* 621 F.2d 1059, 1061 (10th Cir. 1980) (per curiam); *Kendrick v. Bland,* 585 F. Supp. 1536, 1553 (W.D.Ky. 1984). *See also, Gibson v. McEvers,* 631 F.2d 95, 98 (7th Cir. 1980) and *Gaines v. Lane,* [790 F.2d 1299 (7th Cir. 1986).

Note: DOC 309.52. Canteen expenditures are consistent with the purposes of DOC 309.45 since they allow the inmate to manage funds for personal needs. DOC 309.35 governs the approval of personal property. Approved property for personal needs, for example, shaving, dental hygiene, or tobacco, may be purchased by inmates from the canteen up to the canteen limit established by the division of adult institutions. Subsection (1) (b) was written to permit flexibility in setting the maximum limit on property that may be purchased at the canteen. It should be adjusted to reflect current economic conditions.

Subsection (1) (d) requires the institutions to permit the purchase of approved personal property not carried in the canteen. The procedures developed must allow a reasonable selection. Therefore, purchases should not be limited to a small number of businesses. Allowing inmates to choose from a large number of businesses encourages inmates to compare prices, and this is important in developing responsible money management habits.

Subsection (2) is consistent with the objective of DOC 309.45 (2) since it prohibits use of money as the means of exchange at the canteen. An identification and bookkeeping procedure to ensure the proper account is charged when a purchase is made reduces the possibility of problems with victimization or exchange of contraband, which are addressed in the note to DOC 309.48.

Note: DOC 309.55. Subsection (4) (e) 1 provides for compensation for inmates who were receiving pay before placement in voluntary confinement and requested placement in voluntary confinement upon the recommendation or approval of the security director for the purpose of ensuring the inmates' safety. These inmates receive the minimum pay under sub. (7) (a) while in voluntary confinement. Subsection (4) (e) 2 and 3 provides for compensation for inmates who are in administrative confinement or observation either because they were receiving pay prior to this placement or because they are able to participate in approved work or program assignments while under administrative confinement or observation. Payment of compensation to inmates in administrative confinement and observation is appropriate because these are nonpunitive statuses and it is important to encourage participation in work and program assignments when that participation is consistent with the inmate's status and behavior.

Subsection (5) requires each institution to rank its work assignments according to the degree of skill and responsibility demanded by each. This ranking should be uniform within an institution to ensure fair treatment of all inmates. However, the subsection does allow for paying inmates in comparable assignments at different rates if their performances differ (sub. (5) (e)).

Each institution may determine the number of positions assigned to each pay range as long as the institution does not exceed its total allocation of work assignment funds. Table 309.55 indicates how the total amount of work assignment funds will be allocated to each institution. The table does not limit the number of positions an institution may have in each pay range.

In addition to the compensation provided under sub. (7) (b) for inmates with injuries sustained in job–related accidents, s. 56.21, Stats., provides for further compensation at the time of parole or final discharge to inmates who have become permanently incapacitated or have materially reduced earning power as a result of the injury, as determined by the Department of Industry, Labor and Human Relations.

The statuses in sub. (8) are short–term, temporary in nature, usually pending further investigation or examination after which the inmate may return to the former assignment. The inmate should not lose pay during this period.

Subsection (9) is derived from the security rules, ch. DOC 306.

Note: DOC 309.56. Telephone calls are a desirable means for inmates to maintain meaningful contacts with persons outside correctional facilities. Although calls are desirable, the number must be limited due to the lack of resources available. But, subs. (1) and (3) make it clear that allowing more than one call per month is encouraged as sound correctional policy. The use of telephones is a privilege. The inmate is responsible for the use of telephones. Subsection (1) makes it clear that the inmate is to use the telephone in a lawful manner for the purpose of maintaining appropriate contact with persons outside correctional facilities.

Subsections (2) and (3) require the department to permit at least one telephone call per month to someone on the approved visiting list, close family members, and others. Each institution is encouraged to allow more calls, but it is not required because some institutions do not have resources to accommodate larger numbers of calls. This reasoning also applies to the six–minute time limit under sub. (5).

Subsection (4) requires all calls to be collect unless payment from the inmate's account is approved. Allowing the inmate to pay for his or her own calls was left to the discretion of each institution because not all institutions allow it.

The resource problems associated with telephone calls in a correctional setting are numerous. Individual institution resources, institution programs, and phone configuration are some resource problems which impact on inmate telephone calls. Inmates must be supervised to some extent by staff while they are making calls and while they are being moved to an area where the calls are made. The large number of inmates in high security institutions requires a substantial commitment just to permit each inmate to make one telephone call each month. Inmates in institutions with lower security may not need close supervision, but these institutions also do not have the same level of staff.

Prohibiting third party billing or electronic transfer to a third party will minimize inmate telephone abuses. [See Note sub. (6).] Referring an incident of unlawful telephone use by an inmate to the appropriate law enforcement authority carries out the law enforcement role of the warden.

Subsection (6). Abuses by inmates of their telephone privileges have led to the rule in sub. (6) to monitor and record telephone calls. Inmates have abused their telephone privileges by soliciting credit card numbers from the public, establishing outlets for their fraudulent purchases, and establishing and carrying out illegal drug activity, both inside and outside of prison. Inmates' acts have resulted in telephone fraud, credit card fraud, and drug trafficking.

Subsection (6) allows inmates' telephone calls to be monitored and recorded. A correctional officer or supervisor may not under any circumstance knowingly monitor or record a phone call placed to an attorney. Subsection (6) (a) defines an "attorney" as the inmate's lawyer of record or an attorney with whom the inmate has a client–attorney relationship or an attorney with whom the inmate seeks to establish client–attorney relationship.

This rule is viewed as necessary to protect the security of institutions. Further this policy provides for the systematic interception and recording of inmate telephone calls.

There is a general prohibition in federal and Wisconsin law prohibiting the interception of telephone calls absent a court order. One exception to this prohibition is where a person to the communication has given prior consent to the interception. Consent to interception of a telephone call may be inferred from knowledge that the telephone call is being monitored. See *U.S. v. Gomez*, 900 F.2d 43 (5th Cir. 1990).

Notice is an important element of implied consent. In *U.S. v. Amen*, 831 F.2d 373 (2nd Cir. 1987), the court relied upon the fact that notice of the monitoring policy was published in the Code of Federal Regulations and inmates were informed of the monitoring and recording policy on admission to the penitentiary and after absences of 9 or more months.

By receiving notice of the inmate telephone call monitoring and recording policy at the time of reception by signing a receipt of notice, an inmate has no reasonable expectation of privacy in the inmate's telephone call. Since a correctional officer or supervisor is not to knowingly monitor or record an inmate telephone call to an attorney, an inmate has a reasonable expectation of privacy in a telephone call to the inmate's attorney. To ensure that any unknowing recording of a confidential inmate–attorney communication does not prejudice the inmate in any way the rule specifies that it is a privileged communication and entitled to protection under the attorney–client privilege and the open records law.

Under both state and federal law, law enforcement officers may use telephone devices in the ordinary course of their business without engaging in illegal interceptions. See 18 U.S.C. s. 2510 (5) (a) (ii) and s. 968.27 (7) (1) (a) 2, Stats. Even those courts which have questioned the monitoring of inmate telephone calls on an implied consent theory, have upheld monitoring under these provisions when conducted by prison authorities as part of an institutionalized, ongoing policy at the prison. See *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989); and *United States v. Sababu*, 891 F.2d 1308 (7th Cir. 1989). Routine monitoring of inmate telephone calls provides prison authorities with an additional tool for insuring security within the institution and protecting the safety of the institution's inmates and employees and the public. See *In the Interest of JAL*, 162 Wis. 2d 940, 971 n. 8, 471 N.W. 2d 260 (Ct. App. 1990).

Subsection (8). Subsection (8) requires institution staff to inform inmates during their assessment and evaluation process that all telephone calls other than to attorneys will be monitored and recorded. In addition, it is expected that the inmate handbooks will inform the inmate that all telephone calls except attorney calls are monitored and recorded. The notice is to be in both English and Spanish. Notice to accommodate non–English or non–Spanish speaking inmates will be provided on a case–by–case basis.

Subsection (9). See discussion in subsection (6) Note. The rule on monitoring and recording telephone calls substantially conform to *U.S. v. Amen*, 831 F. 2d 373 (2nd Cir. 1987).

Note: DOC 309.57. A telephone call to an attorney can be necessary if the mail is inadequate and an inmate must contact an attorney with reference to a case. Telephone contact with attorneys furthers access to the judicial process, legal services, and legal materials, and access to the legal process is guaranteed by the U.S. Constitution. DOC 309.25 and the note following that section contain a discussion of the benefits of such a policy. The policy of effective access is articulated in *Bounds v. Smith*, 430 U.S. 817 (1977), and DOC 309.25 & 309.29.

Several commentators have supported a policy that assists inmates in making confidential contact with attorneys via the tele-

phone. See *ACA*, standard 4282; National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973), standard 2.2; *Krantz*, et al., *Model Rules and Regulations on Prisoners' Rights and Responsibilities* (1973), rule IC–5; and American Bar Association's *Tentative Draft of Standards Relating to the Legal Status of Prisoners* (1977), part VI, standard 6.1 (c).

The requirement that calls be made with permission of appropriate staff recognizes that some formal arrangements may be necessary for security or other reasons before an inmate has access to a telephone and it may take time for such arrangements to be made. Unnecessary telephone calls may thus be prevented. Although an inmate may call an attorney only with permission of staff, that permission may not be unreasonably withheld if a need exists under sub. (4).

A more difficult problem is created if attorneys indicate to institutional staff that they do not wish to receive calls from particular inmates or if they repeatedly refuse to accept calls. Staff want to permit inmates access to the legal process, yet must respect the wishes of lawyers who do not want to be contacted by telephone.

Staff must exercise sound judgment in such situations. Frequently, the best course to follow is to have the inmate contact one of the legal service programs that serves inmates. This enables the inmate to talk to a lawyer who either can be of direct help or who can bring about contact with another lawyer.

Note: DOC 309.58. Subsection (1) requires that staff ask for messages from incoming callers and that the messages be delivered to the inmate. Reaching inmates for each incoming call would be impracticable. The policy under sub. (1) permits staff to plan for inmate telephone calls. This preserves order and fosters more efficient use of staff time.

If an inmate is easily accessible, staff may allow an inmate to answer the call. An inmate might be allowed to take an incoming call in an emergency.

Subsection (2) permits an inmate to make emergency telephone calls regardless of the number of calls the inmate has already made that month or the inmate's institution status. Serious illness or death in the family are recognized as bases for granting leave under ch. DOC 326 and temporary release under ch. DOC 325. However, there may be other reasons for emergency telephone calls so the rule is not limited to those situations.

Note: DOC 309.59. Permitting telephone calls between spouses and parents and children committed to Wisconsin correctional or mental health institutions fosters the correctional goal of maintenance of family ties. However, such calls involve two institutions and, thus may require additional arrangements to ensure security at both institutions. Therefore, a separate rule was adopted specifying that the prior arrangements be made.

Note: DOC 309.60. Subsection (1) requires each institution to establish written procedures for telephone calls. Since each institution has unique physical structure, resources, security concerns, and staffing patterns, separate procedures are needed. In some minimum security institutions, for example, the superintendent may establish a policy which allows more liberal use of the telephone by inmates. In all cases, however, those procedures must incorporate the policy established in this chapter.

Subsection (2) allows the superintendent to grant permission for an inmate to place a telephone call regardless of any other limitation in this chapter. This is consistent with the policy of DOC 309.56 (1) because the superintendent may find that communication by a telephone call is necessary and desirable even when other provisions of this chapter would prohibit it.

Note: DOC 309.61. DOC 309.61 prohibits discrimination against an inmate based on the inmate's religious beliefs, but regulates an inmate's ability to practice his or her religion. Inmates do not lose their constitutional right under the first amendment to hold whatever religious beliefs they wish or to hold no religious beliefs. See *U.S. v. Reynolds,* 98 U.S. 145 (1878). However, the extent to which an inmate may practice his or her religion may be curtailed in a correctional setting because consideration must be given in these settings to security, order and fiscal limitations. Although the beliefs of each inmate must be respected, it would be impossible to provide a regular service or ritual for every denomination or sect represented in the general population. The limits on religious practice included in the section are consistent with ACA, Standards for Adult Correctional Institutions, standard 2–4468 (2d ed. 1985) (hereinafter ACA) and the Proposed Standards of the American Bar Association's Joint Committee on the Legal Status of Prisoners amended and approved by the American Bar Association's House of Delegates (1981), standard 6.5 (b) (hereinafter ABA).

Subsection (1) (c) establishes that in addition to an inmate's right to hold religious beliefs, an inmate has the right to be free from pressure to participate in religious practices. Records concerning inmate religious preferences may be kept only for administrative purposes such as issuance of passes to participate in religious activities, dietary restrictions or approval of special religious visits. See ABA standard 6.5 (d) and (e).

Subsection (2) describes the procedure for requesting permission to participate in religious practices. The superintendent must make an initial determination that the request is based upon a religious belief and is not a subterfuge for obtaining special privileges. The superintendent should consult with the chaplain or designated staff person with appropriate religious training prior to making his or her determination. A test for what constitutes a religion is difficult to devise. The listed considerations and prohibited concerns are taken from the National Advisory Commission on Criminal Justice Standards and Goals, Corrections Standard 2.6 (6) (1973) and ACA standard 2–4468. If the superintendent determines the request has a religious basis, he or she must determine whether to allow the practice. Inmates should be granted permission to pursue religious practices which do not threaten security or order and do not unreasonably burden the institution.

Subsection (4) describes the alternatives that institutions may employ to meet the religious needs of inmates. A chaplain or designated staff person with appropriate training should coordinate religious services and community resources. It is the responsibility of the institution's chaplain or designated staff person to identify the religious needs of the institution's inmate population and to recommend to the superintendent the most appropriate means to meet those needs. The chaplain or designated staff person should have a positive regard for the contributions that all religions make to the inmates involved with them. Due to the changing preferences and diversity of religious beliefs in correctional institutions, resources from outside the institution can fulfill a need in the delivery of religious services. The chaplain or designated staff person should attempt to develop volunteer services. However, if necessary to supplement the volunteer services, institutions may pay religious providers from outside the institution. See ACA standards 2–4463 and 2–4471. The chaplain or designated staff

person should be responsible for the recruitment, selection, training and supervision of volunteers providing religious services. He or she should make recommendations to the superintendent concerning scheduling of religious activities, allocation of resources and propriety of requested religious activities.

Subsection (5) states the standard by which religious literature may be withheld from inmates. The standard is consistent with ABA standards 6.1 (b) and (c).

Subsection (6) establishes special protections for religious symbols and attire. See ABA standard 6.5 (f).

Subsection (7) allows for the special religious diets required by many religious groups. Within the constraints of budget and security, inmates should be provided with a diet sufficient to sustain them in good health without violating religious dietary laws. See ABA standard 6.5 (c).