

May 17, 2013

Brian M. Callahan
Associate Attorney
New York State Commission of Correction
Alfred E. Smith State Office Building
80 S. Swan Street, 12th Floor
Albany, New York 12210
Brian.Callahan@scoc.ny.gov

RE: Comment on Proposed Rule Making – Inmate Access to Legal Reference Materials
I.D. No. CMC-14-13-00010-P

Dear Mr. Callahan:

The American Association of Law Libraries (AALL) appreciates the opportunity to respond to the proposed rule making on Inmate Access to Legal Reference Materials. This proposed rule would, if adopted, modify Section 7031.4 of Title 9 of the New York Codes, Rules and Regulations (NYCRR) to eliminate the requirement that law libraries be maintained within a local correctional facility. We oppose this rule because it would severely limit equitable access to legal materials and endanger the constitutional rights of inmates.

AALL was founded in 1906 to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. Today, the Association represents law librarians and related professionals whose work addresses the legal information needs of many constituents: legislators, judges, and other public officials at all levels of government; corporations and small businesses; law professors and students; attorneys; and members of the public. The Association represents more than 500 members in New York State. AALL's Social Responsibilities Special Interest Section maintains a Standing Committee on Library Service to Institution Residents that is active on prisoner issues.

AALL believes that this proposed regulatory rule to rely upon local public law library inter-library loan services and electronic legal research fails to meet even the basic standards of due process and fairness the Constitution ensures to all citizens, regardless of their past criminal activity. To provide meaningful access to the courts, AALL believes inmates must have access to both electronic and in-house print legal materials. The remainder of this comment will focus the following issues:

- The constitutional right to meaningful access to the courts;
- How eliminating print library collections will curtail meaningful access to the courts; and
- The unforeseen costs associated with moving to an electronic research platform.

I. The Constitutional Right to Meaningful Access to the Courts

The United States Supreme Court addressed the subject of prisoner access to law library services in Bounds v. Smith, 430 U.S. 817 (1977). In *Bounds*, the Court held that a fundamental federal constitutional right is infringed when states fail to “assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Id* at 828. The Court later revisited this decision in Lewis v. Casey, 518 U.S. 343 (1996). In *Lewis*, the Court clarified that the *Bounds* decision did not “create an abstract, free-standing right to a law library” but rather was recognition that inmates must have meaningful access to the courts. *Id* at 353. At a minimum, however, the Court held that *Bounds* requires that prisons provide the capability to file suit by making available access to legal materials so that inmates may challenge their convictions and the conditions of their confinement. *Id* at 356.

Inmates in local correctional facilities in New York State have been granted rights of access to legal reference materials that go beyond those guaranteed by the United States Constitution. Part 7031 of the Commission’s Minimum Standards provides that “[e]ach prisoner confined in a local correctional facility is entitled to legal services.” [9 NYCRR § 7031.1(a)(1)] Pursuant to the Commission’s Minimum Standards, every prisoner incarcerated in a local correctional facility is entitled access to legal reference materials as provided for in 9 NYCRR § 7031.4.

II. Eliminating Print Library Collections Will Curtail Meaningful Access to the Courts

The state prison print law library collections are being replaced in part by Premise Research Software, which provides information to users via CD-ROM technology. This shift to Premise is problematic for a number of reasons. Rather than providing more equitable access to the law, using the Premise Research Software or other electronic databases alone may hinder meaningful engagement with legal materials.¹

A. The Challenges of Providing Meaningful Access to Legal Material Using Only Electronic Sources

The Premise Research Platform is a specialized database that provides access to complex materials. Often lawyers struggle with the complexity and precision of electronic research. How will a layman in a prison with little exposure to computer research fare? Most inmates have little experience conducting in-depth research and many of them have very limited experience using computers let alone specialized research platforms. In fact, computer literacy is lower among inmates versus the general population.² Unless there is ongoing training on this database and plentiful onsite assistance, inmates will have trouble finding relevant legal materials and therefore will be denied meaningful access to the courts.

Print legal materials, on the other hand, are more accessible to those who have little experience with specialized research platforms like Premise. Conducting research in print allows researchers to browse treatises and case law digests which makes it more likely that they will conduct comprehensive research and identify potential issues that they may not have contemplated when they commenced their research.

¹ For reasons why law libraries continue to need print resources, see Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 Law Libr. J. 233 (2005), available at: http://www.aallnet.org/main-menu/Publications/llj/LLJ-Archives/Vol-97/pub_llj_v97n02/2005-14.pdf and Camilla Tubbs, *Electronic Research in State Prisons*, 25 Legal Reference Services Q. 13 (2006).

² Joanna Kling, Andrea Amodeo & Jin Ying, Department of Labor, *Preparing for Life Beyond Prison Walls - The Literacy of Incarcerated Adults Near Release*, Dec. 28, 2010, available at: http://wdr.doleta.gov/research/keyword.cfm?fuseaction=dsp_resultDetails&pub_id=2451&mp=y

Unlike a web-based electronic database, Premise is CD-ROM based, and is updated with CDs which must be shipped and integrated into the network in a manner that can be labor intensive. Therefore, it is likely to be no more current than a book. However, inmates may not be aware that there is a lag time in updates. Since Premise has the appearance of a standard electronic database, inmates may rely on outdated case law or other authority to their detriment.

Additionally, relying on electronic resources poses other risks. If a CD is damaged, the contents of that disc are lost and not available. In the event that there is a system failure and the law library is unable to provide access to the Premise Research Software, will having no print sources as a backup constitute a denial of access to the courts? ³

B. Availability of Inter-Library Loan Does Not Ensure Meaningful Access

Prisoners may not know what materials are available (or even if they exist) at public law libraries unless they are provided the means to browse through a print legal collection. This is impossible when a prison relies entirely upon electronic services or print collections housed outside of the prison. Furthermore, there are labor and shipping costs associated with inter-library loan services which will undoubtedly increase if a print legal collection is removed from local correctional facilities.

III. The Unforeseen Costs Associated With Moving to an Electronic Research Platform

It appears that one of the primary motivators for the elimination of the requirement for print law libraries is economic. However, the shift to an electronic-only research environment often incurs expenses that were unforeseen by decision makers. Firstly, there is no way to guarantee that vendors will offer electronic material at a low-cost in the long term. ⁴ Additionally, there are costs in maintaining the technology needed to provide regular and timely access to legal material. ⁵ CD-ROM technology is an older technology and will become less common over time, and will eventually be phased out. Maintaining and replacing the technology needed to read the discs may become more costly. What about repair and upkeep of the computers and the network? How often will the computers and network hardware need to be replaced? These costs can skyrocket over time.

As stated above, Premise Research Software is a specialized research platform that is not intuitive to use. Has the DOCCS properly accounted for ongoing training and onsite research assistance expenses that these systems will entail? Since the inmates' ability to access this information invokes a constitutional right to the courts, this need for effective and regularly available training and assistance is imperative.

Moving from a paper-based collection to an electronic one does not mean that the library will be paperless. The costs of printing electronic resources are often much higher than planners anticipate. According to the April 2011 white paper "Financial Management: A Slice of the Finance Pie" by the International Legal Technology Association, "The unintended, but very real, effect of the shift to electronic workflows is that more documents are printed out multiple times during their life cycle." This finding is supported by a recent law firm survey that found that with the rise of electronic information, printing costs increased for 46 percent of the respondents and stayed constant for 36 percent. ⁶

³ Tubbs, "Electronic Research in State Prisons" at 28.

⁴ Tubbs, "Electronic Research in State Prisons" at 27.

⁵ *Id.* at 28.

⁶ Debra Cassens Weiss, Law Firm Survey: It's Not Easy Being Green; Unimportant Docs Get Printed, Paper Costs Grow, ABA Bar Journal, Mar. 15, 2011, available at: http://www.abajournal.com/news/article/law_firm_survey_its_not_easy_being_green_70_say_at_least_half_their_printed/

Prisoner researchers undoubtedly will have the need for printing. Meaningful engagement with legal materials often means that the researcher has to frequently review multiple treatise sections, statutes, regulations and cases. There is scholarship on the challenges of absorbing and analyzing material while reading a computer screen.⁷ Even absent those issues, inmates will inevitably need to print out primary and secondary sources because access to the computers will be limited and they will want to review materials in their cells. A logical response to high printing costs is to limit the amount an inmate can print. Since there are constitutional rights involved in this process, such a printing quota might limit the inmate's meaningful access to the courts.

The proposed rule also raises the possibility of litigation concerning whether the removal of law libraries in local correctional facilities impairs the "meaningful" access to the courts that was reiterated by the Supreme Court's decision in Lewis v. Casey. If the state of New York believes that this proposed regulatory change will save money it must also consider the costs associated with potential litigation and the filing costs of prisoner grievances.

IV. Conclusion

As a professional association of law librarians, AALL is very familiar with the costs and benefits associated with print and electronic legal research. We believe that the abandonment of local correctional facility law libraries will curtail meaningful access to the courts by severely limiting access to legal materials for prisoners, especially those not adept at electronic legal research. We also believe that the switch to electronic-only access will impose significant unforeseen costs. We strongly urge the State Commission of Correction to reconsider the proposed rule.

Sincerely,



Jean M. Wenger
President
American Association of Law Libraries

⁷ For a description of this scholarship, see Ferris Jabr, "The Reading Brain in the Digital Age: The Science of Paper versus Screens," *Scientific American*, Apr. 11, 2013, available at: <http://www.scientificamerican.com/article.cfm?id=reading-paper-screens>.