MAINE COMMISSION ON INDIGENT LEGAL SERVICES

February 25, 2022

Senator Anne Carney
Representative Thom Harnett
Committee on Judiciary
100 State House Station, Room 438
Augusta, ME 04333

Re: **LD 1946 – *An Act to Ensure Constitutionally Adequate Contact with Counsel***

Dear Senator Carney, Representative Harnett, and Members of the Committee on Judiciary:

LD 1946, *An Act to Ensure Constitutionally Adequate Contact with Counsel*, is necessary to ensure that consumers of indigent legal services in Maine receive the protection of the Sixth Amendment right to counsel. I urge the committee to find that the bill ought to pass and implore the legislature as a whole to enact these important protections.

Since September when the draft language behind this bill began to circulate, I have been part of many discussions about its need and scope. I have heard many objections from many quarters, including most recently through the Criminal Law Advisory Commission and in the written testimony submitted by the Maine Prosecutors' Association (MPA). I am troubled by the response. An objection to the protections provided by this bill are fundamentally objections to safeguarding the rights of defendants. There may be room to discuss alternative mechanisms to ensure that defendants have adequate access to counsel, but that has not been the nature of the dialogue so far. Instead, the objections are focused on the inconvenience and cost to the State of upholding defendants' rights. The tenor of the conversation suggests that it would be unfair to the State to hold it to its obligations. The reality is that people charged by the State with crimes have the categorical right to adequate and effective contact with counsel, while the State has no countervailing rights. There are many ways in which the State can meet its obligations to defendants, without compromising its law enforcement goals, and yet those protective mechanisms have not been implemented. LD 1946 is necessary so that it becomes more inconvenient and expensive for the State to fail to meet its obligations than it would be to attend to those obligations.

154 State House Station, Augusta, Maine 04333
(207) 287-3257 • (207) 287-3293 Fax
www.maine.gov/mcils

As many of you know, I practiced criminal law for many years before becoming the Executive Director at MCILS. While I was practicing, I had clients whose calls were recorded by jails and disseminated to prosecutors. At that time, there was no way to take a system level view of the issues, and so I believed wrongly that the issue was limited in scope. In 2015, I received a call from the prosecutor in one of my cases informing me that he had received a copy of a recorded call my client had made to my office from a jail. Soon thereafter I became aware of another client in the same jail who had had one or more calls recorded. We addressed these issues through the Court. That jail identified the lapse that had caused the issues, and I believed what had been a singular issue had been resolved. I was wrong.

Later in 2015, I was assigned to represent a client who had been held in a different jail. I was successor counsel in that case. While reviewing the discovery for that client, we found that the jail staff had not only recorded privileged calls but had identified 79 specific privileged calls and had burned those calls to a separate CD-ROM, and then provided that disc to the prosecution. This was not a lapse. This was purposeful conduct by a jail staff person. 79 calls cannot be identified, segregated, copied, and distributed accidentally.

By mid-2020, I became aware that what my clients had experienced was part of a much larger, system-wide problem. Former Executive Director Pelletier contacted me to discuss my clients' experiences as part of his effort to address the issue. I believed the issue had been addressed. I was wrong.

After joining MCILS in January 2021, I learned what had happened in response to the efforts the Commission made at that time. In June 2020, Director Pelletier made FOAA requests to every jail in Maine for information related to recordings of privileged calls. The vast majority of jails simply refused to provide him with the information he requested, despite his formal invocation of FOAA. As currently constituted, MCILS does not have the independent prerogative to pursue FOAA litigation; to seek any form of injunctive relief; or, to intervene on behalf of any defendant. As a result, this bill is the only mechanism available that will allow MCILS to perform its necessary oversight role in ensuring that defendants' rights are vindicated.

Fortunately, where MCILS could not proceed effectively in 2020, an investigative journalist was able to make headway. The results of that investigation are staggering. The journalist documented almost 1,000 calls between clients and attorney offices that were recorded by only 4 of 15 jails, during only one year. Every one of these calls was made by an incarcerated person to an attorney's office. None of these calls implicated any form of circumventing the jail's telephone system in a way that might have reasonably rendered the calls subject to recording. 1,000 calls. Four jails. One year. This must stop.

And yet, despite every jail having been put on notice by MCILS in June 2020, the recordings have not stopped. The MPA touts its letter of July 2020 to jails as part of a solution, and yet the recordings have not stopped. As recently as August 2021, MCILS became aware that a jail had recorded privileged, substantive client-attorney communications, and provided those communications to the State in a child protective action. In that case, the State distributed those calls to all the parties to that action through discovery. Counsel, and through counsel the client, became aware of the issue only through that discovery. No one caught the issue before distribution. No one advised counsel of the issue before distribution.

Today, I have no ability to report to you how many calls have been recorded since August 2021, because no one – not MCILS; not a client; not an attorney – has the ability to extract the necessary information from the jails.

Still serious issues persist. In each specific case in which a call is recorded, a defendant is at risk that the disclosure of privileged information will lead to that person's detriment. Should that happen then that person cannot receive due process. At a system level, the problem is even more serious. Clients and attorneys are afraid to communicate by phone. Jails are limiting or prohibiting in person contact due to the pandemic. Defendants are being deprived of counsel. This cannot be permitted to continue.

Defendants are also being deprived of adequate access to counsel in other parts of the judicial system. In the Lawyer of the Day system, for example, defendants are frequently not able to speak with counsel in private in jails and courthouses. There is frequently no way for counsel and a client to have a private conversation to discuss an offer or the comments that might be made by the Court. In many instances, there is no way for a lawyer who must appear remotely to provide counsel for an incarcerated person to have any contact at all with the person before the moment of the appearance. All of this deprives defendants of actual counsel.

These defendants have the absolute right to adequate privileged contact with counsel. The State has demonstrated that it will not uphold that right unless motivated to do so. This bill provides that motivation.

In its written testimony, the MPA argues that while it is "supportive" of the "goal" of honoring privileged communications, this bill would have a detrimental effect on the prosecution of criminal cases. *MPA testimony of February 23, 2022.* That mere preamble illustrates the need for this bill. Even if it were true that this bill would have some hostile effect on legitimate prosecution – a proposition that is wholly unfounded – the State has no interest in a prosecution that can stand against a defendant's absolute constitutional right. Still the State objects without suggesting an alternative mechanism that might both vindicate the rights of defendants and meet its internal approval.

The MPA argues that it would be unfair to the State to disqualify prosecutors who receive privileged information because that person might have worked hard to prepare a case. While it might be inconvenient to replace a prosecutor, that inconvenience pales in comparison to the impossibility of effective client-attorney communication under the threat of disclosure. There is nothing a client or attorney can do to ameliorate that threat. The State, however, can eliminate its own concern by developing and implementing effective policies and controls to ensure that a prosecutor does not receive improper information. It is entirely within the State's ability to ensure that the disqualification of counsel need never occur.

Later, the MPA argues that the bill is unnecessary because there are existing remedies for aggrieved defendants. The sheer volume of recorded client-attorney calls belies this proposition. There can be no reasonable argument that whatever existing penalties there may be actually deter the State from recording privileged calls. In just one year, in just four jails, that proposition was disproven almost 1,000 times. Further, the MPA suggestion that the remedies of the exclusion of evidence or a Bar Grievance against a prosecutor are adequate deterrents entirely ignores the problem of law enforcement acting directly on information it improperly obtains.

Finally, the MPA points out that there would be a conflict between the existing law exempting law enforcement and jail personnel, and a new statute criminalizing recording client-attorney communication. Eliminating any such exemption for intentional conduct is the intent of the bill. The existing exemption provides a safe harbor for continued incursions into the client-attorney relationship.

In its conclusion, the MPA raises the specter that this bill would impair the State's ability to protect victims and prevent future crimes, especially in cases of domestic violence. There is absolutely no reason that this should be the case, unless the State chooses to not implement policies that work. It is beyond the scope of this testimony to brainstorm every possible solution but here's one that would work: if a jail set up two phones and two phone administration systems, then one system could be limited to properly vetted attorney calls, and never recorded. The other would be for all other calls and thus might be amenable to recording. That way, there would never be the threat of an improper recording, and there would also never be the threat of unmonitored illegal conduct by phone. There may be other solutions, but this one alone demonstrates that there is no practical impediment to implementing the protections of this bill in a manner that does not prejudice the State in any way. All that is lacking is sufficient motivation.

This bill does nothing more than ensure that a defendant's existing constitutional right to unmonitored contact with counsel is protected. The need to protect that right is well documented. The ability to avoid the sanctions provided by the bill is entirely within the control of the State.

I urge you to support LD 1946.

Sincerely,

/s/ Justin W. Andrus

Executive Director
MCILS