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To: Committee to Ensure Constitutionally Adequate Contact with Counsel
From: John F. Zink, Attorney At Law
Re: Comments on Counsel Contact with Incarcerated Clients

In response to the Committee's request for comments regarding defense counsel experiences in communications with incarcerated clients, particularly by telephone, I want to submit the following observations:

a. What has your experience been in speaking with clients over the phone when the client is incarcerated at a prison or jail? Does your experience differ from facility to facility?

Response: I note that it has been my experience that defense counsel are unable to telephone a client who is incarcerated, meaning that the attorney is unable to telephone a jail or state prison facility to have immediate or direct contact with a client. During the Covid-19 emergency, when personal attorney-client visits were impossible due to facility shut-downs, my experience was that county jails and state prisons would make good faith efforts at arranging for the defendant client to telephone the attorney. Prior to the Covid-19 emergency, incarcerated defendant clients had the option to make telephone calls from facilities, mostly using the "inmate" telephone services (usually at excessive cost to the call-recipient); during the Covid-19 emergency, it was my experience that facilities worked to enable no-cost but brief (15 minute limited) calls from inmate to the attorney.

Overall, it was my experience that the staffs at the Cumberland County Jail, York County Jail, Hancock County Jail, and Two Bridges Regional Jail were courteous and made efforts to arrange to telephone contact. I also note that the staff at the Maine State prison also made efforts to arrange to telephone contacts. (I want to add that jail and state prison staff assisted me in arranging for Zoom Meeting participation in hearings for incarcerated clients.)

However, I do think that the inmate telephone service, which requires that the recipient establish an account and pay an excessive rate, borders on a denial of attorney/client communication. In addition, the apparent "automatic" limitation of attorney/client telephone calls to no more than 15 minutes significantly limits the ability of the attorney to advise the incarcerated client.

Facility Differences: My experience is primarily in dealing with the County Jail staff at Cumberland and York Counties and the Two Bridges Regional Jail. I have had occasional contact with county jail staff at Lewiston-Auburn and Hancock jails. I have dealt with state facility staff on limited occasions. Overall, county jail staff have been helpful in arranging telephone contact with clients, and is addressing the inmate telephone system. I recognize that most (if not all) county jails have been experiencing staffing shortages, which limits the jail responsiveness. As for the Maine State prison system, I have experienced these facilities to be more “bureaucratic” but also willing to be of assistance.

b. Have you ever experienced a situation in which a conversation with a client was recorded, that you are aware of?

Response: No. However, as I am aware that jail facilities often (routinely?) record inmate telephone conversations, other than those with the inmate’s attorney, I found it necessary to always advise a client that telephone calls could be recorded, and as such I would limit the client’s conversation with me to avoid any client statements that would incriminate the client. As such, I had to arrange in-person attorney/client meetings. This presented difficulties during Covid-19 “lock downs”.

c. What has been your experience in getting your telephone number on the list of numbers exempt from phone surveillance at each facility?

Response: I do not recall ever being informed or finding any information about getting on an “exempt” list, although I do recall a staff person at the Cumberland County Jail informing me that the CCJ exempted attorney calls.

d. What has been your experience meeting with confidentially in jails or prisons?

Response: It is important to note that I, and I am certain other defense attorneys, recognize that county jails and state DOC facilities have staffing/personnel limitations that affect the ability and timing for attorney/client meetings at facilities. In jails that routinely did not allow “face-to-face” visits, requiring visits to be conducted using a “phone” and having the client and attorney separated by a thick glass barrier, these meetings were better than telephone “meetings”, but still hampered communication for proper representation. It is hard to review evidence, or even conduct a conversation regarding the case under such restrictions. Again, I understood some of the need for such denial of “face-to-face” attorney/client meetings due to security issues and jail staffing issues.

At the Cumberland County Jail, before Covid-19 restrictions, attorney/client meetings were held in individual meeting rooms. However, even in such “private” rooms, I cautioned the client to keep our voices as quiet as possible as these rooms are never “sound proof”

At the Two Rivers Regional Jail, when I did Lawyer of the Day arraignments, confidentiality was a significant problem as the LOD often had to meet with the defendants within “ear shot” of jail deputies in the same video room for the

arraignments and hearings on Motions. (I would also add that in LOD client meetings, defense counsel are not afforded sufficient time to review case information and advise the client, making such meetings a somewhat meaningless exercise.)

e. What has been your experience meeting with clients confidentially in courthouses?

Response: In a word, awful. First, I think that the “in-custody” Lawyer of the Day format for the initial appearance of defendants borders on a denial of due process. My experience as LOD was before the Courts for Cumberland County and the courts housing inmates at the Two Rivers Regional Jail. In Cumberland County, the LOD would not have access to the Discovery materials (including Complaint or Indictment) until mid-morning on the day of the 1:00 p.m. court session. Inmates would be brought to the Courthouse around 11:30 a.m. to Noon, allowing the LOD very little time to review (sometimes) extensive Discovery materials, then meet with the defendant. LODs had to meet with the defendants in the small holding cell, always in the presence of other defendants. There was simply no reasonable opportunity to discuss plea offers or possible defenses, or bail arguments. Under Covid-19 restrictions and the use of Zoom Meeting video arraignments, this process became even less meaningful. Constitutionally meaningful representation, even at the initial appearance stage handled by the Lawyer of the Day, requires an opportunity to confidentially meet with the defendant, adequate time to review the Discovery, and an opportunity to confidentially discuss bail and possible plea offers with the Assistant District Attorney. Before the Portland UDC for the initial appearance as LOD, I do not think the LODs are afforded time and an environment to do the job.

In Portland, if the defendant was in custody, defense counsel had no place for a confidential attorney/client meeting. In addition, due to “transport” issues and timing, defense counsel are not given sufficient time to meet with the client.

My other experience was in serving as LOD at the Two Rivers Regional Jail. In my opinion, this was a denial of sufficient opportunity to review Discovery, discuss plea options and offers, confidentiality, and with no opportunity to discuss bail or plea offers with the DA representative. I would also note that in the Two Rivers Regional Jail LOD sessions, the various DA Offices would post the Discovery in bits and pieces on a “secure” web-link, during the morning and often just before the start of court; this prevented the LOD from adequately reviewing Discovery. (When I attempted to inform one of the Judges of these problems, he said “If you don’t like it, just quit”, so I did!)

I recall also doing the initial arraignment LOD sessions at the York County Jail on a few occasions. This was several years ago, so my not be the current practice. In one session, I was able to meet with defendants in a visitation room, in another session, I had to meet with defendants in a storage closet!

In instances when the client defendant was not incarcerated, the Cumberland County Courthouse does have a limited number of “conference” rooms, allowing for adequate attorney/client meetings.

f. *What recommendations do you have for this Committee?*

1. Lawyer of the Day: I think that the Courts place an undue burden on the attorneys serving as the Lawyer of the Day to meet the constitutional burden of due process. First, LODs are expected to pick-up and review Discovery materials (for “walk-ins”[defendants not in custody], LODs may obtain most of the Discovery the day before, for “in-custody” LODs were to pick-up the Discovery from the DA office after 10:00 a.m. despite the fact that it was regularly not complete). The LODs have to then review the often lengthy Discovery materials, then have sufficient time to meet with the defendants in a small, cramped, and very uncomfortable courthouse “holding cell”, lacking in any confidentiality. As the Sheriff deputies would often be late, LODs were regularly able to just spend a few minutes with each defendant before the Judge started court. *I think that it should be the Court’s responsibility to assure that the defendants are afforded due process, and not place that responsibility on the LODs!*

My recommendation, particularly for “in-custody” arraignments/initial appearances: (1) require that the DA Offices provide all Discovery 24 hours before the arraignment/initial appearance, (2) require that the LODs are provided a secure, individual conference room allowing for confidential meetings with individual defendants, and (3) require that the LODs have sufficient time for each defendant, allowing for time for bail and possible plea discussion with a DA authorized to make definitive decisions.

2. Telephone and In-Person Meetings: This pertains mostly to cases where the defendant is incarcerated and particularly with court-appointed cases. I recommend that all telephone calls from the incarcerated defendant and the appointed attorney be free of costs, AND that the attorney not be required to work through the “inmate telephone system” to set-up an account or to otherwise assure that access is enabled. (I have personally spent many hours just to attempt to set-up such contact, often without success). It should be the responsibility of the Court, through the Clerk’s office, that the court-appointed defense attorney has this access. (If it is too hard or burdensome for the Court Clerk office, then why it is burden placed on the attorney?)

As for in-person meetings at a jail or other facility, such facilities should be required to provide secure, confidential meeting rooms to allow for face-to-face meetings between the attorney and the defendant. Talking through a thick glass window on a poorly working hand phone is not adequate. In addition, the times for allowing attorney/client(defendant) meetings should be as great as possible during the business day (8:00 a.m. to 5:00 p.m.).

I am highly supportive of facility security, and do not oppose reasonable security efforts in any facility visit. However, such security should NOT allow for any facility to monitor attorney/client conversations or correspondence.

At courthouses, there should be a requirement that an adequate number of confidential conference rooms exist for attorney/client meetings

It should be the responsibility of the Court to assure that the defense attorney has the physical facilities at the courthouse to provide constitutionally adequate

initial and subsequent representation. The Court should also be responsible to require both the Court Clerks and the District Attorneys to provide full and timely Discovery materials and access to files. Defense attorneys should not have to carry the burden of protecting the defendant's constitutional rights, while also assuring the criminal justice system (prosecutors and court clerks) do their jobs to make the criminal justice system work.

Sincerely,

John F. Zink