

Possible Recommendations For Voting at November 1 Meeting Committee to Ensure Constitutionally Adequate Access to Counsel

The committee recommends that the following actions be taken to protect from monitoring and recording confidential attorney-client in-person, telephone and electronic communications.

- *Note – the committee took straw votes on October 5 on initial draft language on items 5 to 8. Unless otherwise noted, the vote was unanimous among members present in favor of the recommendation.*

Policies and procedures to protect confidential attorney-client communications (straw vote 4-4)

5. Amend Title 25, Section 2802 to require that the Board of Trustees of the Maine Criminal Justice Academy be increased from 18 to 19 by adding a seat that is designated for an attorney who represents defendants in criminal cases. **Statutory law.**

System for registering telephone and other contact information (straw votes unanimous among members present and voting)

6. Direct the [*choose from Maine Commission on Indigent Legal Services or a state agency*] to develop and maintain a registry of the telephone numbers and other contact information given to them by attorneys providing legal services to persons who are incarcerated. The [*identified state entity*] must [*promptly or on a quarterly basis?*] provide the registry information to all contractors providing telephone and electronic communications services used by incarcerated persons. Designate the registry attorney names and phone numbers and contact information as confidential for purposes of the public records law.

Statutory law.

[Question: If registration of a phone number is mandatory, should the Board of Bar Overseers attorney registration include a statement that the attorney has registered their contact information? Note: There is concern from the chairs regarding the feasibility of this proposition.]

6a. *Direct the Department of Corrections and jails to develop and maintain systems for registering the names, telephone numbers and contact information for attorneys who provide legal services to persons who are incarcerated in order to protect the confidentiality of attorney-client communications. (This issue was added to the list at the request of the chairs on October 28.)* **Statutory law.**

7. Direct the Department of Corrections to adopt rules requiring correctional facilities to confirm on a timely basis the registration of attorney telephone numbers and other contact information protected from monitoring for attorney-client confidentiality purposes. **Statutory law.**

8. Direct the Department of Corrections to amend the standards for jails requiring jails to confirm on a timely basis the registration of attorney telephone numbers and other contact information protected from monitoring for attorney-client confidentiality purposes. **Statutory law.**

Issues set aside for later consideration (no straw votes taken)

9. ~~Direct that the Maine Judicial Branch work to ensure that space is available in public areas of courthouses and in secure holding areas of courthouses [*that are controlled by transport or correctional officer staff*] for confidential attorney-client communications, including the review of written, video and~~

~~audio materials related to the criminal case.~~ (Replaced at the request of the chairs on October 28 by the following language.)

*Sec. ? Direct the Maine Judicial Branch to report by January 1, 2024, to the Joint Standing Committee on Criminal Justice and Public Safety and the Joint Standing Committee on Judiciary on the availability of space in public areas of courthouses and in secure holding areas of courthouses for confidential attorney-client communications, including the review of written, video and audio materials related to the criminal case. The report must include an assessment of each courthouse and, to the extent that space is inadequate for confidential attorney-client communications, a plan for the development of adequate space. **Unallocated language.***

10. Provide penalties for a breach of attorney-client confidentiality through monitoring or recording attorney-client telephone calls or other means of communication.

Ideas for recommendations

1. From LD 1946:

A. Prohibit use in court. Prohibit the use of an illegally obtained document or information in any court proceeding. Prohibit use of the doctrines of inevitable discovery and exigency and claims of inadvertence, negligence, reckless or mistake to render the document or information admissible. Enact 15 MRS §458, sub-§2

B. Prohibit a person from participating. Prohibit a person who has accessed or received an illegally obtained document or information from participating in an investigation, prosecution, mental health or child protective proceeding or other proceeding unless a court has issued findings and ruled on the scope and exclusivity of testimony and the person has exclusive ability to provide relevant factual information. Enact 15 MRS §458, sub-§3.

C. New basis for post-conviction review. Additional post-conviction review for up to 2 years after notification of interception. Enact 15 MRS §458, sub-§4.

D. New civil remedy. Civil remedy: action against a person who eavesdrops, records or transmits, penalty of up to \$10,000/occurrence payable to MCILS. Enact 15 MRS §458, sub-§5.

E. New private cause of action. Private cause of action for actual damages, restitution, attorney's fees and costs against a person who eavesdrops, records or transmits. Enact 15 MRS §458.

F. New Class C crime. Class C crime (maximum fine \$5000, maximum incarceration 5 years) for unauthorized eavesdropping. Enact 17-A MRS §761.

2. Other ideas: Strengthen the prohibitions against intercepting, recording and uses of confidential attorney-client communications in Title 15, chapter 102.

- *By amending section 712, subsections 2 and 3 to protect attorney-client communications.*
- *By amending section 710 to create new Class C crime of intercepting attorney-client communications from a jail or correctional facility, and crime of disclosing or attempting to disclose and crime of using or attempting to use an intercepted attorney-client communication.*
- *By excluding form evidence testimony regarding an illegal interception, and all information and materials obtained directly or indirectly as a result of the interception.*
- *By prohibiting from participating in an investigation, prosecution or criminal, child welfare or mental health proceeding against a person whose attorney-client communications have been intercepted (with some exceptions) the following persons: a person who illegally intercepted an attorney-client communication and a person who reviewed an illegally intercepted attorney-client communication.*