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*Testimony Neither for nor Against LD 1603 An Act to Implement the Recommendations of the  
Committee To Ensure Constitutionally Adequate Contact with Counsel*

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Lisa Marchese and I am a Deputy Attorney General, Chief of the Criminal Division in the Attorney General's office. I am here to testify neither for nor against LD 1603.

I was the Attorney General's designee to the Committee to Ensure Constitutionally Adequate Contact with Counsel. District Attorney Maeghan Maloney was the District Attorney's representative to the Committee and the Maine Prosecutor's Association joins in my testimony. We had many productive meetings under the leadership of Senator Carney and former Representative Thom Harnett. I am testifying neither for nor against this LD because while the Attorney General's Office and the Maine Prosecutor's Association supports several of the recommendations of the Committee that lead to this LD, we have concerns about some provisions of the bill, as drafted.

By way of background, as you no doubt are aware, the Attorney General's office is responsible in the State of Maine for the prosecution of all homicide cases. During the course of the investigations, law enforcement will listen to non-privileged jail calls for investigative purposes. These calls are provided to investigators through the County Jail system. A few years ago, the Attorney General's office became aware of limited instances where a prosecutor or a law enforcement officer received a privileged phone call from the county jail. This was troubling to everyone involved. Immediately, the Attorney General's office adopted an informal process whereby the listener – whether it was a prosecutor or law enforcement, would immediately cease listening and the prosecutor would notify defense counsel of what had occurred. We would then follow the lead of defense counsel on how he or she wished to handle the situation. In those instances where law enforcement or prosecutors were provided with privileged calls, I have been assured that nothing of substance was heard.

As we delved into how this could have happened, we learned that the reason we had been mistakenly provided with these privileged calls was the failure of defense attorneys' contact information to be registered with the jail so that the security system did not screen out the privileged calls. To be clear, prosecutors and law enforcement do not want privileged phone calls. We respect that we are not entitled to privileged calls and that all people charged with a crime have a constitutional right to confidential communications with their attorneys. In July of 2020, the Maine Prosecutor's Association sent a letter to

all Sheriffs and Jail administrators requesting they ensure that all attorney contact information be provided to the jail. This letter was also sent to John Pelletier, then Executive Director of the Maine Commission on Indigent Legal Services so he would remind attorneys to provide their contact numbers to the jails. Through training, the Attorney General's Office advised homicide detectives how to proceed in the event they were inadvertently provided privileged jail calls.

LD 1603 directs the Attorney General and District Attorney's offices to adopt a written policy to protect and ensure confidential attorney-client communications. It also requires the Attorney General's Office to develop a training program by January 1, 2024 for state, county and municipal law enforcement officers who, as part of a criminal investigation, inadvertently hear confidential attorney-client communications. This language codifies in statute what is informally being done which assures the public that prosecutors take the confidential attorney-client communications seriously. We see no problem codifying these recommendations of the committee.

I would ask this committee to reconsider the language in Section A-7 which reads that any person who accesses, monitors, records, copies, transmits or receives a copy of the communication is disqualified from participating in an investigation and from appearing as a witness in the proceeding if the jail or correctional facility had notice of the attorney's name. When this recommendation was made to the Committee, the vote was 7 in favor, 6 opposed and 3 members were absent. As you can see, there was not consensus in the Committee. This provision does not recognize the remedy that currently exists with the Courts in the form of a motion to exclude or motion to dismiss. Neither prosecution nor law enforcement want a detective or prosecutor to be compromised by being in possession of privileged information. When these situations have come up in the past, the response by prosecutors has been immediate and transparent. To automatically remove a homicide detective from a murder case as would be required by this language because he or she inadvertently received a privileged call from the jail and heard nothing of substance other than the attorneys name is a broad, blanket approach when there are Court remedies available that could consider each fact pattern on a case-by-case basis in order to tailor an appropriate response. As currently written, this statute could potentially put a serious case in jeopardy and punishes the detective and the State for using a permissible investigative technique and could ultimately mean that key evidence held by the detective, such as a confession, would not be permissible. Additionally, even defense counsel would be precluded from calling the officer and there are times when defense counsel wishes to call a police officer as a witness in their case. I would respectfully submit that it is the presiding justice who should decide if there is a constitutional violation and what the appropriate remedy should be.

I would also like to raise concerns about Section A-12 which requires a block of instruction at the basic law enforcement training program on attorney-client communications. If you look at Title 25, there are limited core curriculum requirements for the basic school. While attorney-client communication is very important, there is limited time for law enforcement instruction and the Board of Trustees and those intimately involved with the curriculum are in the best position to prioritize what is taught. The proposed language mandates training by the Attorney General's Office and District Attorney's offices for all law enforcement officers in the State who may

inadvertently hear confidential attorney-client communications as part of an investigation. Those officers who listen to jail calls will be subject to this training program designed by the Attorney General's office and District Attorney's Office as required under this LD. I would submit that this is the most effective point in time to train those officers.

Thank you for your time and consideration, and I am happy to answer any questions you may have.