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Testimony in Opposition to LD 2219,
An Act to Implement the Recommendations of the Maine Commission on Indigent Legal Service

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, my name is Ariel Piers-Gamble. I am an Assistant Attorney General and Chief of the Child Protection Division of the Office of the Maine Attorney General. I am here to speak neither for nor against specific provisions of LD 2219, "An Act to Implement the Recommendations of the Maine Commission on Indigent Legal Services." Rather, I would like to raise concerns regarding the detrimental impact this bill would have on child protective services within Maine.

First, this bill seeks to amend Title 22, Sections 4005 and 4006 relating to the appointment of appellate counsel for parents or custodians in child protection matters. L.D. 2219, §§ 15, 17. Currently, Section 4006 requires that trial counsel handle all appeals unless specifically relieved by the court. This arrangement has fidelity to the principle and legal requirement that these appeals are handled expeditiously so that children do not spend inordinate time in foster care. LD 2219 amends Section 4005 to require the court to appoint new counsel whenever an appeal from an order terminating parental rights (TPR) is filed so that new counsel can then evaluate whether prior counsel was ineffective. This would undermine the expeditious resolution of child protection matters and appeals.

It ignores the fact that for ineffective assistance of counsel to be fully evaluated in a child protection matter, analysis of ineffective assistance of counsel must occur not only after a TPR order issues, but also after a jeopardy order issues at a much earlier stage in the proceedings. In other words, to truly address ineffective assistance of counsel, new appellate counsel would also have to replace trial counsel when jeopardy is found against a parent. This would create a procedural problem because child protection matters are normally not stayed pending appeal. After a jeopardy order issues, the trial court matter moves forward while the appeal of that order is pending. This would mean that the new appellate attorney would have to handle the trial court litigation as well. If the trial court litigation moved forward to a TPR, that trial/appellate attorney would then have to withdraw and a new appellate attorney would need to be appointed to assess the effectiveness of the previous attorney. Thus, a parent would potentially have at least three attorneys during the life of their child protection case: the attorney who is appointed when the case is initiated; the appellate/trial attorney after jeopardy; and the appellate attorney after TPR. Assuming MCILS has the resources to assign multiple attorneys for the approximately 900 new

PC cases a year,[1] this begs the question of whether it benefits the client to have such fragmented representation. There are also the practical problems of transitioning voluminous files from attorney to attorney. Our division's appellate attorney is already receiving multiple requests to extend briefing deadlines because trial attorneys are not expeditiously tendering their files to appellate counsel.

Parents should absolutely be afforded competent representation at every stage of a child protection proceeding. However, the parent's rights must be balanced against their child's need for an efficient resolution of their case. "Once a child has been placed in foster care, a statutory clock begins ticking. In setting that clock, the Legislature has spoken in terms of days and months, rather than in years, as might better fit an adult's timeframe for permanent change." *In re Children of Jessica D.*, 2019 ME 70, ¶ 8, 208 A.3d 363 (quoting *In re B.P.*, 2015 ME 139, ¶ 19, 126 A.3d 713). Requiring the assignment of substitute attorneys, even when there is no suggestion that prior counsel was ineffective, fails to strike the appropriate balance and will inevitably result in undue delays in the resolution of child protection proceedings.

Second, the bill would prohibit certain professionals from making mandatory reports of child abuse, neglect, and suspicious child deaths by virtue of their working with attorneys representing parents. L.D. 2219, § 22. This would impair the ability of the Department of Health and Human Services (the "Department") to protect children by shielding a broad class of individuals from making reports that, in many cases, their professional licenses would require them to make. A parent's rights are not absolute. They must be balanced against the child's constitutional right to pursue safety and the State's parens patriae authority to protect those children. The State's child welfare program depends on receiving reports of suspected child abuse and neglect. Prohibiting certain individuals from making reports puts vulnerable children at risk.

In the same vein, this bill would extend the attorney-client privilege to professionals who are retained by attorneys representing parents in child protection matters. L.D. 2219, § 24. This will effectively block these individuals from sharing critical child safety information with the Department and guardians at litem and hamper our ability to obtain relevant records and testimony. In child protection proceedings, the state has the burden to show that state intervention for child safety is necessary, and probative evidence should not be unnecessarily excluded.

By reference to Maine Rule of Professional Conduct 1.6(b)(1), there is an exception allowing individuals to make disclosures when they "reasonably believe" disclosure is "necessary . . . to prevent reasonably certain substantial bodily harm or death." That threshold is far too high and would likely result in disclosures that are too little and too late. Rather, as required by current law, relevant individuals must be required to immediately make reports when they "know[] or ha[ve] reasonable cause to suspect that a child has been or is likely to be abused or neglected or that a suspicious child death has occurred." 22 M.R.S. § 4011-A.

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[1] Currently, there are cases that have been significantly delayed because trial counsel was allowed to withdraw without successor counsel being assigned and appellate counsel could not be located for the appellant parent. It is worth noting that the trial court's practice of allowing trial counsel to withdraw in these instances is in contravention of the following language from the Law Court: "[i]n child protective cases, where fundamental rights similar to the liberty interests in criminal cases are at stake, an order granting withdrawal should be conditioned on new counsel appearing or the party expressly waiving the right to counsel." *In re Child of Stephen E.*, 2018 ME 71, ¶ 7 n.4, 186 A.3d 134.

Thank you for your consideration of the impact of this bill on child protective services. I would be happy to answer any questions.