



MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Senator Anne Carney, Chair
Representative Amy Kuhn, Chair
Joint Committee on Judiciary
5 State House Station, Room 438
Augusta, ME 04333

RE: LD 1825: An Act to Implement the Recommendations of the Maine Commission on Public Defense Services Regarding the Confidentiality of Attorney-Client Communications in Jails and Correctional Facilities

Dear Senator Carney, Representative Kuhn, and Honorable Members of the Judiciary Committee:

The Maine Association of Criminal Defense Lawyers is a non-profit organization that has nearly 300 member attorneys who practice criminal defense across the state. Since 1992, MACDL has advocated for its members and the people we are fortunate to represent in courtrooms throughout Maine and at the State House.

MACDL presents this testimony **in support of** LD 1825.

Access to effective counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment obligations to states under due process clause of Fourteenth Amendment). Access to effective counsel includes the right to have confidential conversations with one's attorney without the government overhearing what is said. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.")

For too many people in Maine, access to private conversations with their defense attorney is treated as a privilege for the few instead of a constitutional right guaranteed for all by the Sixth Amendment.

By way of background and context, we recommend that this Committee weigh the testimony before the 130th Legislature in 2022 from [then-Executive Director of the Maine Commission on Indigent Legal Services, Justin Andrus](#), about the very real and pressing need for such legislation. For those who are newer to the Committee, this history may be shocking. With regularity—amazing regularity—attorney-client phone calls were being recorded in jails and prisons across the State and ending up in the possession of prosecutors. For reasons Attorney Andrus outlined then, legislation addressing these issues was, and remains, absolutely necessary.

The purposes of this bill are quite simple:

- (1) to protect confidential communications between incarcerated clients and their attorneys;
- (2) to prohibit charging clients or their attorneys the costs for such communications; and,
- (3) to create monetary penalties for those jails, correctional facilities, third-party contractors (like Securus), sheriffs' offices, and the Department of Corrections who fail to comply with the laws created by this statute.

This proposed law is important for several reasons:

First, it is clear that, notwithstanding the United States Constitution and decades of Supreme Court jurisprudence interpreting defendants' right to private communication with counsel, jails in Maine and the for-profit phone companies they contract with are not obeying the constitution. A clarification in statute is appropriate in this situation.

Second, for the attorney-client privilege to protect client-attorney conversations, it is important that clients have a reasonable expectation of privacy during conversations with their lawyer. Where clients do not have a reasonable expectation that their conversations are private, they can be found to have waived their attorney-client privilege. *See, e.g., United States v. Mejia*, 655 F.3d 126 (2d Cir. 2011) (defendant waived attorney-client privilege where he was aware calls could be recorded). This law will clearly establish the expectation that calls with attorneys from jails and prisons are private and not being monitored by the government.

Third, the law, in addition to prohibiting the use of any intercepted communications between the client and their attorney in any court proceeding, creates clear lines to remove people who have received confidential information from investigating or prosecuting a criminal case. Rather than leaving it up to the prosecutors themselves to decide whether a prosecutor should be removed from a case, the law creates a bright, easy-to-follow line: if a person—an attorney or law enforcement officer—receives information the constitution (and now state law) say they ought not have, they cannot participate in the defendant's prosecution—they cannot participate further in the investigation of the case or be called as a witness against the accused. This would improve the perception and actual fairness of our judicial system.

We do not believe that the protection of attorney-client communications—particularly for our incarcerated clients, who have no other way of contacting us apart from the telephone—should be controversial. We also do not believe that making all such communications free for the clients—the overwhelming majority of whom are indigent—and their counsel should be controversial. No one should have to pay money to assert their Constitutional right to counsel.

As for the proposed penalties—the original bill in 2022 advocated for criminal penalties to apply for violations of the proposed statutes. Fines are a big step down from that, and we are not in support of the creation of new crimes, particularly felonies, in our already overwhelming criminal code, but these fines are also necessary to ensure an enforcement mechanism for these entities upon whom we

depend to follow the law. Absent any remedy whatsoever, there is nothing to guarantee that our clients' rights—and their communications to us—are being protected. The additional requirement that a jail or correctional facility send an email to each attorney for whom they have contact information that their client calls will be protected and free is also reasonable—as is the proposed \$250 civil penalty for violation of this provision.

For these reasons, we urge this Committee to vote **ought to pass** on LD 1825.

Thank you for your consideration, for your attention to this important matter, and for allowing me to present this testimony on this bill to you all today.

Sincerely,

A handwritten signature in blue ink, reading "Tina Heather Nadeau". The signature is fluid and cursive, with a large loop at the end.

Tina Heather Nadeau, Esq.
MACDL Executive Director