130th MAINE LEGISLATURE

SECOND REGULAR SESSION-2022

Legislative Document No. 1946

H.P. 1451

House of Representatives, January 26, 2022

An Act To Ensure Constitutionally Adequate Contact with Counsel

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.
Reference to the Committee on Judiciary suggested and ordered printed.

Presented by Representative HARNETT of Gardiner.
Cosponsored by Senator CARNEY of Cumberland and Representatives: DODGE of Belfast, GROHOSKI of Ellsworth, LOOKNER of Portland, MADIGAN of Waterville, MORIARTY of Cumberland, PEBWORTH of Blue Hill, PLUECKER of Warren, TALBOT ROSS of Portland.
Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 34-A MRSA §3015 is enacted to read:

§3015. Confidential communications

A chief administrative officer shall make available to a resident and the resident's counsel a means to engage in confidential communications as required by section 3031, subsection 11 and in accordance with this section.

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Commission" means the Maine Commission on Indigent Legal Services established by Title 5, section 12004-G, subsection 25-A.

B. "Facility" means a correctional facility or a detention facility.

C. "Resident" means a person who resides in a facility.

2. Access. A facility shall provide a means to engage in confidential communications between a resident and the resident's counsel in person in space within the facility or by telephone, video or other electronic means without charge to the resident or the resident's counsel.

3. Prohibited conduct. A facility may not intercept, record, monitor, disseminate or otherwise divulge any oral, written, telephone, video or electronic communication between a resident and the resident's counsel. The provisions of this subsection apply to any employee of a facility and to any agent, employee, contractor or vendor of communication services that provides services to a facility or works with the facility in any capacity. A violation of this subsection by an agent, employee, contractor or vendor of communication services that provides services to a facility or works with the facility in any capacity is deemed a violation by the facility.

4. Logs. A facility and any contractor or vendor that provides communication services subject to this section shall create and maintain for a minimum of 7 years logs of all confidential communications to or from the facility to which a resident is a party, including but not limited to the date and time of the telephone call or video or electronic communication, the telephone number or electronic address involved, the duration of the telephone call or video or electronic communication and the name of the resident. All logs of communications related to a resident and the resident's counsel must be released upon request within 30 days to the resident or the resident's authorized representative or counsel requesting the logs and to the commission.

5. Audit. Every 90 days, a facility shall audit its logs of telephone, video and electronic communications to or from telephone numbers and electronic addresses listed as belonging to counsel for a resident and shall, upon completion of the audit, provide that audit to the commission. If an audit concludes that a recording of a telephone call or video or electronic communication exists or that information was obtained or gathered in violation of this section, the chief administrative officer shall inform counsel, the resident and the commission within 3 business days.
6. **Policy.** A chief administrative officer shall adopt policies providing access to communications as required by this section and forbidding conduct prohibited by this section, shall review and update the policies annually and shall publish the policies on the facility's publicly accessible website and provide copies to the commission.

Sec. A-2. 34-A MRSA §3031, sub-§9, as amended by PL 2021, c. 263, §4, is further amended to read:

9. **Menstrual products.** Comprehensive access to menstrual products, including, but not limited to, sanitary pads and tampons, provided and available at all times and without inconvenience or charge to a person who menstruates who resides in a correctional or detention facility; and

Sec. A-3. 34-A MRSA §3031, sub-§10, as enacted by PL 2021, c. 263, §5, is amended to read:

10. **Gender affirmation.** Have the person's consistently held gender identity respected and acknowledged, irrespective of anatomy or physique. Housing placements and search practices must be consistent with the person's consistently held gender identity except when such placement or search would present significant management or security problems to the correctional or detention facility or threaten the health and safety of the person. A person must have access to commissary items, clothing, personal property, programming and educational materials that are consistent with the person's consistently held gender identity. Correctional or detention facility staff shall address a person in a manner that is consistent with the person's consistently held gender identity; and

Sec. A-4. 34-A MRSA §3031, sub-§11 is enacted to read:

11. **Confidential communications.** A means to engage in confidential communications as follows:

A. Confidential communications with counsel by telephone, video or electronic communication at a minimum twice a day and at all other necessary times by means that ensure that the communications are confidential to the person and the person's counsel and cannot be monitored, recorded or overheard by any other person;

B. Written notice that the person's counsel has contacted the facility to request that the person call or contact the person's counsel. The facility shall keep a written record of the contact by the person's counsel and the notice to the person from the facility. Failure of the facility to maintain a copy of the notice to the person is prima facie evidence that notice was not provided; and

C. An opportunity to receive from and review with counsel all documents sent to the person by counsel, including but not limited to letters, pleadings and discovery in any format or form, and to send documents to counsel without interception, monitoring, copying, redaction or other action or review by the facility or anyone acting on behalf of the facility or the State.

Sec. A-5. **Communications policy.** Within 90 days of the effective date of this Act, the chief administrative officer of each Department of Corrections correctional facility or detention facility shall adopt a policy providing each resident of the correctional facility or detention facility a means to engage in confidential communications as required by the Maine Revised Statutes, Title 34-A, section 3015 and section 3031, subsection 11 and shall
publish the policy on the facility’s publicly accessible website and provide a copy to the
Maine Commission on Indigent Legal Services established in Title 5, section 12004-G,
subsection 25-A.

PART B

Sec. B-1. 30-A MRSA §1566 is enacted to read:

§1566. Confidential communications

A person who is incarcerated in a jail has a right to a means to engage in confidential
communications with the person's counsel as required by section 1663 and in accordance
with this section.

1. Definitions. As used in this section, unless the context otherwise indicates, the
following terms have the following meanings.

A. "Commission" means the Maine Commission on Indigent Legal Services
established by Title 5, section 12004-G, subsection 25-A.

B. "Jail" means a jail or other county correctional facility or a regional correctional
facility operated pursuant to this chapter.

C. "Person" means a person who is incarcerated in a jail.

2. Access. A jail shall provide a means to engage in confidential communications
between a person and the person's counsel in person within the jail or by telephone,
video or electronic communication without charge to the person or that person's counsel.

3. Prohibited conduct. A jail may not intercept, record, monitor, disseminate or
otherwise divulge an oral, written, telephone, video or electronic communication between
a person and the person's counsel. The provisions of this subsection also apply to any
agent, employee, contractor or vendor of communication services that provides services to
a jail or works with a jail in any capacity. A violation of this subsection by an agent,
employee, contractor or vendor of communication services that provides services to a jail
or works with a jail in any capacity is deemed a violation by the jail.

4. Logs. A jail and any contractor or vendor that provides communication services
subject to this section shall create and maintain for a minimum of 7 years logs of all
confidential communications to or from the jail to which a person incarcerated in the jail is
a party, including but not limited to the date and time of the telephone call or video or
electronic communication, the telephone number or electronic address involved, the
duration of the telephone call or video or electronic communication and the name of the
person. All logs of confidential communications related to a person and the person's
counsel must be released upon request within 30 days to the person or that person's
authorized representative or counsel requesting the logs and to the commission.

5. Audit. Every 90 days, a jail shall audit its logs of telephone, video and electronic
communications to or from telephone numbers and electronic addresses listed as belonging
to counsel for a person and shall, upon completion of the audit, provide that audit to the
commission. If an audit concludes that a recording of a telephone call or video or electronic
communication exists or that information was obtained or gathered in violation of this
section, the administrator of the jail shall inform counsel, the person and the commission
within 3 business days.
6. Policy. The administrator of a jail shall adopt a policy providing a means to engage in confidential communications as required by this section, shall review and update the policy annually and shall publish the policy on a publicly accessible website and provide a copy to the commission.

Sec. B-2. 30-A MRSA §1663 is enacted to read:

§1663. Confidential communications

The administrator of a jail as defined in section 1566, subsection 1, paragraph B shall provide the following means to engage in confidential communications for a person who is incarcerated in the jail:

1. Access. Confidential communications with counsel by telephone, video or electronic communication at a minimum twice a day and at all other necessary times by means that ensure that the communications are confidential to the person and the person's counsel and cannot be monitored, recorded or overheard by any other person;

2. Written notice of request. Written notice that the person's counsel has contacted the jail to request that the person call or contact the person's counsel. The jail shall keep a written record of the contact by the person's counsel and the notice to the person from the jail. Failure of the jail to maintain a copy of the notice to the person is prima facie evidence that notice was not provided; and

3. Document review. An opportunity to receive from and review with counsel all documents sent to the person by counsel, including but not limited to letters, pleadings and discovery in any format or form, and to send documents to counsel without interception, monitoring, copying, redaction or other action or review by the jail or anyone acting on behalf of the jail or the State.

Sec. B-3. Communications policy. Within 90 days of the effective date of this Act, the administrator of each county jail or other county correctional facility shall adopt a policy providing access to communications as required by the Maine Revised Statutes, Title 30-A, sections 1566 and 1663 and shall publish the policy on a publicly accessible website and provide a copy to the Maine Commission on Indigent Legal Services established in Title 5, section 12004-G, subsection 25-A.

PART C

Sec. C-1. 15 MRSA §458 is enacted to read:

§458. Confidential communications between client and counsel

The following provisions apply with regard to confidential communications between a person summoned or arrested for, charged with, indicted for or convicted of a crime and the counsel for that person that are protected pursuant to Title 30-A, section 1566 and Title 34-A, section 3015.

1. Opportunity for confidential communications. A person summoned or arrested for, charged with, indicted for or convicted of a crime has a right to an opportunity for confidential communications with the person's counsel in person and by telephone, video or electronic communication in preparation for a court appearance, before and during arraignment and while appearing in court, including confidential communications that are not overheard or monitored by another person.
2. Prohibited use of documents and information in court. With respect to a document or information of any kind and in any format or form that was obtained in violation of Title 30-A, section 1566, subsection 3 or Title 34-A, section 3015, subsection 3, all information and materials derived from the document or information are inadmissible in any court proceeding. The doctrines of inevitable discovery and exigency do not apply to evidence that is inadmissible in court pursuant to this subsection. A claim of inadvertence, negligence, recklessness or mistake does not render admissible a document or information that is inadmissible under this subsection.

3. Prohibited participation in court. Except as provided in this subsection, a person who has accessed or received any document, recording or information of any type in violation of Title 30-A, section 1566 or Title 34-A, section 3015, whether or not the person has reviewed the substance of the document, recording or information, may not participate in any investigation, prosecution, mental health or child protective proceeding or any other matter before a court in this State, including through formal or informal communications. A person is not prohibited from participation under this subsection if the person has the exclusive ability to provide relevant factual information and a judicial officer other than the presiding officer has reviewed the facts regarding the participation of the person and has issued findings and a ruling on the scope and exclusivity of the testimony that the person may provide.

4. Additional post-conviction review. In addition to any other post-conviction remedy provided to a person convicted of a crime in this State pursuant to chapter 305-A, a person whose confidential communications with counsel have been intercepted in violation of Title 30-A, section 1566 or Title 34-A, section 3015 or in any other way by the State, a prosecutor or a law enforcement agency may file a petition for post-conviction review up to 2 years from the date that the person is notified by the person's counsel of the interception of the communication.

5. Civil remedies. A person who, without permission from all parties to a conversation or oral communication, knowingly eavesdrops on, records or transmits the conversation or oral communication or any portion thereof between a person who is in the physical custody of a law enforcement officer or other public officer and the person's counsel or between a person who is on the property of a law enforcement agency or other public agency and the person's counsel is subject to a civil action in Superior Court and a civil penalty of not more than $10,000 per occurrence, payable to the Maine Commission on Indigent Legal Services, established in Title 5, section 12004-G, subsection 25-A, to be applied by the commission to noncounsel costs associated with promoting effective representation of indigent clients.

6. Private cause of action. A person who is aggrieved by the action of another individual who, without permission from all parties to a conversation or oral communication, knowingly eavesdrops on, records or transmits the conversation or oral communication or any portion thereof between a person who is in the physical custody of a law enforcement officer or other public officer and the person's counsel or between a person who is on the property of a law enforcement agency or other public agency and that person's counsel has a private cause of action against that individual in Superior Court for which the aggrieved person may be awarded by the court actual damages, restitution, attorney's fees and costs and such other equitable relief as the court determines to be necessary and proper.
Sec. C-2. Policy statement. Within 90 days of the effective date of this Act, the district attorneys for each prosecutorial district and the Attorney General shall adopt and post to their publicly accessible websites and shall provide to the Maine Commission on Indigent Legal Services established in the Maine Revised Statutes, Title 5, section 12004-G, subsection 25-A policies that provide assurance of compliance with Title 15, section 458, subsection 1; Title 30-A, section 1566, subsections 2 and 3; and Title 34-A, section 3015, subsections 2 and 3.

PART D

Sec. D-1. 17-A MRSA §761 is enacted to read:

§761. Unauthorized eavesdropping

1. A person is guilty of unauthorized eavesdropping if that person, without permission from all parties to a conversation or oral communication, knowingly eavesdrops on, records or transmits the conversation or oral communication or any portion thereof between a person who is in the physical custody of a law enforcement officer or other public officer and the person’s counsel or between a person who is on the property of a law enforcement agency or other public agency and the person’s counsel.

2. Unauthorized eavesdropping is a Class C crime.

PART E

Sec. E-1. Retrospective review and audit. The Maine Commission on Indigent Legal Services established in the Maine Revised Statutes, Title 5, section 12004-G, subsection 25-A, the Department of Corrections and the county jails and other county correctional facilities shall engage in a process of retrospective review and audit. Within 90 days of the effective date of this Act, the commission shall identify and compile a list of telephone numbers and electronic addresses of attorneys to which incarcerated persons have placed telephone calls or sent electronic communications in the previous 6 years and shall notify each correctional facility or detention facility and each jail or county correctional facility. Within 180 days of the effective date of this Act, each correctional facility and detention facility and each county jail or other county correctional facility shall audit its records of telephone calls and electronic communications to determine whether any telephone calls or electronic communications on the list provided by the commission may have been recorded and, with regard to any telephone call or electronic communication that may have been recorded, shall provide to the commission sufficient detail on each telephone call or electronic communication to allow the commission to identify the attorney telephone number or electronic address involved in the telephone call or electronic communication, the affected client and the date, time and duration of the telephone call or electronic communication. After receipt of the detail of the telephone call or electronic communication required by this section, the commission shall inform each listed attorney, who shall inform each affected client.

SUMMARY

This bill ensures constitutionally adequate contact with counsel for residents of Department of Corrections correctional and detention facilities, for persons who are incarcerated in county jails and other county correctional facilities and for clients and their counsel in court facilities. The bill addresses telephone, video and electronic forms of
communication and person-to-person contact. The bill prohibits intercepting, recording, monitoring, disseminating or otherwise divulging any oral, written, telephone, video or electronic communication between clients and their counsel. The bill requires facilities to maintain logs of telephone calls and communications between clients and their counsel and requires periodic auditing of logs. The bill requires a facility to provide written notice to a client when the client's counsel contacts the facility and asks for the client to contact counsel. The bill requires a facility to provide an opportunity to review documents with counsel. The bill requires periodic audits and requires the adoption of policies that are published publicly and submitted to the Maine Commission on Indigent Legal Services. For violations of the law, the bill establishes civil penalties, a private cause of action and post-conviction review in addition to review provided pursuant to the Maine Revised Statutes, Title 15, chapter 305-A. The bill prohibits use of illegally obtained information in court and prohibits participation in court by a person who has accessed or received a document, recording or information in violation of the law. The bill creates a new Class C crime of unauthorized eavesdropping. The bill requires the Maine Commission on Indigent Legal Services, the Department of Corrections and the county jails and other county correctional facilities to conduct a retrospective review of telephone calls and electronic communications between clients and their counsel, who are required to provide notice to their clients affected by prohibited recordings.