



August 29, 2023

Lisa O. Monaco  
Deputy Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530

Colette S. Peters  
Director  
Federal Bureau of Prisons  
320 First St., NW  
Washington, DC 20534

Re: Access to Counsel in BOP Pretrial and Other Facilities

Dear Deputy Attorney General Monaco and Director Peters:

Back on November 4, 2022, NACDL's then President Nellie L. King wrote to Director Peters to amplify the association's call for (1) permitting privileged and unmonitored email communications between attorneys and clients in both pretrial and post-conviction settings and (2) for a "help desk" to facilitate scheduling of privileged attorney-client telephone calls.

We have seen the DOJ Advisory Group's July 20, 2023, Report and Recommendations Concerning Access to Counsel at the Federal Bureau of Prisons' Pretrial Facilities ("the Report"). In general, we think many of the recommendations are sensible. But some of them are troubling.

For example, we do not agree that BOP should "explore the feasibility of a free, confidential e-mail system for attorney communication with detained clients." There is no reason for further study. The ongoing problem of monitored email communication with counsel is a direct interference with the Sixth Amendment right to counsel. Of course, we understand that such communications could be accessed by law enforcement if a search warrant was issued by a court, but otherwise lawyers should be able to freely communicate with their detained clients without worrying that their adversaries may be copied on their emails.

Further, the recommendation for a new Legal Access Adviser (LAA) position could be like the "help desk" we proposed, but we hope its staff will be more than one person as we predict they would be fielding numerous daily inquiries from all over the

country. As described below, the current situation is untenable and requires additional measures.

First, attorneys have experienced an inability to obtain legal calls with their clients for months at a time. While some facilities are responsive, many facilities do not answer the phone and fail to respond to email, meaning that attorneys are increasingly having to contact Deputy Regional Counsel to obtain a legal call. This, of course, increases the burden on BOP staff and causes detrimental delays in attorney-client communication, interfering with the right to counsel.

Second, even when attorneys can obtain a legal call, sometimes those calls are not confidential. If the legal call takes place in the counselor's or case manager's office, that person will remain in the room. Attorneys who ask for the BOP personnel to leave have been met with anger and resistance. Some legal calls are conducted in crowded hallways or on a phone outside of a staff office with the door open, so that what is said can be heard by anyone who walks by or is in the office.

Third, attorneys have had difficulty in scheduling confidential legal calls when there are non-attorney members involved. For example, if a lawyer would like a medical expert, paralegal, or certified law student to be on the call, some BOP facilities have taken the position that they are not entitled to confidential communication.

Fourth, attorneys have been denied legal calls or asked to prove an "imminent court deadline" before being allowed to speak with their clients, despite the fact that the CFR specifically states, "The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate." 28 CFR § 540.103.

The BOP's unmonitored legal-calls practices, as outlined above, are inconsistent with the agency's policies on Telephone Regulations and Legal Activities as well as guidance in the BOP's Legal Resource Guide.

We point out that the right to counsel continues through appeal and that many prisoners have counsel retained or assigned for appeals and for post-conviction litigation, including motions to vacate convictions pursuant to 28 U.S.C. § 2255 and compassionate release motions. It is critical for the BOP to provide access to attorneys for these clients as well as pretrial detainees. For example, appellate counsel must be able to consult with their clients concerning the facts and issues that may be raised on appeal. The Report acknowledges these concerns but calls for the Advisory Group to "consider and assess post-conviction access to counsel for individuals in custody." We think the need for robust access now is obvious.

We also see that the Report suggests that the Advisory Group should “expand its review” to include the many state and local facilities the USMS uses to house many of our clients. We know that many of these facilities do not provide adequate access to e-discovery in federal criminal cases, which is a serious problem for attorneys and their clients. We agree that BOP facilities holding pretrial inmates must provide better access to digital discovery, but that same obligation is manifest for the local jails at which many detained people are held.

We also disagree with the suggestion that there are major drawbacks to the policy of providing laptops to clients, which is a regular practice at MDC Brooklyn and is done at other facilities as well. The complaint that this is “staff-intensive” is just a complaint that it takes effort for the inmate to review the discovery. The same effort is needed for the inmate to review discovery on a BOP computer, and to load the data for review each time is a heavy burden given the needs of multiple defendants to access discovery and the lack of sufficient computers. The supposed issue of “exacerbating” the problem of limited time is a misplaced concern because detainees otherwise must compete for access to a limited number of machines. We do not know which “attorneys” have complained that the process is “extremely costly” but that is plainly wrong. We have learned that the federal defender and CJA Panel representative who were consulted by the Advisory Group did not say that. In any event, the vendor used by the CJA program in the Second Circuit routinely provides and recycles these machines at a reasonable cost in coordination with the Case Budgeting Attorney.

NACDL does appreciate Deputy Attorney General Monaco’s call for the review that resulted in the Report. While the Advisory Group consulted with federal defenders and some CJA panel attorneys, NACDL – whose members represent appointed and retained clients nationwide – should also have a voice in the Advisory Group’s future efforts. NACDL would also welcome any opportunity to meet with you and your staff to discuss these and other issues affecting our clients.

Sincerely,



Michael P. Heiskell  
President



Pat Cresta-Savage  
Chair, Corrections Committee