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Subject: [Occlapond] Warning about "Confidential" Legal Calls to Incarcerated Clients
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Hello all. Since COVID-19 has effectively cut us off from physically visiting our clients, many of us are understandably turning to the "confidential" legal phone calls or videos offered by various jails and prisons around the state. These calls claim to be confidential. From personal experience I am here to warn you that often, that is not the case.

Approximately 6 years ago, in a capital case prosecuted in the District of Oregon federal court, my "confidential" legal calls to/from my client at the Columbia County Jail ended up in discovery. I also attach an article from the Intercept discussing this exact problem: prison/jail phone systems claiming the legal phone calls were confidential and not recorded, when in fact, they were being recorded, reviewed, and disclosed to prosecutors.

Currently, I have a fed capital case right now in the E.D. of Michigan involving three defendants. We filed a joint discovery request asking that taped jail calls be disclosed to us monthly, so we could monitor (among other things) whether any legal calls were being recorded. The prosecutors responded to the discovery motion saying that they had decided NOT to collect ANY of the three defendants' post-arrest jail calls and therefore don't need to turn them over to us. Collecting jail phone calls in capital cases is standard prosecution practice. All three defense counsel believe the Government discovered that each of the three separate jails were, in fact, taping and reviewing the legal calls and were thus taking steps to stay out of any pending shit storm by staying away from all the recorded calls.

I am therefore concerned about any recommendation that counsel conduct "confidential" legal calls in lieu of in-person visits. Obviously, there is no good solution here, and we have to have some contact with

our clients during this COVID-19 pandemic. Based on my unfortunate experience I have some recommendations on how to best use these “confidential” legal calls when they are the only contact option available. Obviously, I don’t have all the answers, but these are things every defense attorney should consider for each case.

First, defense team members MUST start their calls by stating that this is a confidential legal call between attorney X and client Y, that no recordings should be made of the call, and that whoever is listening to it must stop listening.

Second, I have mostly used “confidential” legal calls to have “check-in” discussions with a client about non-confidential matters. It is important to maintain client connection, and sometimes a “check-in” phone call works wonders. By “check-in” I mean asking the client about info which the jail likely already knows, but you don’t. For example, I always ask about my client’s current jail functioning and any potential problems with staff or circumstances, because the jail already knows that stuff. I also ask who the client has been recently talking/writing to. I ask how those folks are doing and what was discussed. The jail already knows that stuff, but it gives your client the chance to chat/vent about those calls and gives you critical info about what the jail knows from your client’s discussions. It also gives you potential investigation leads for trial or sentencing. In addition, I give my clients updates on all non-confidential case information: discussions about pleadings already filed, scheduling issues and other record-based matters. Stuff that I don’t care if the police/prosecutors hear it, but that the client needs to know. I might also talk with the client about things generally known to be happening in the community that s/he might be interested in, or which might affect his/her case. Finally, if there is an issue which is technically confidential, but I don’t care if the government knows about it, I will discuss that issue with the client if I need to. Such a call, although limited, can still be very helpful to providing an adequate defense.

Based on my experience, I would never dream of discussing anything remotely important and confidential on those jail system calls. For

instance, in my Michigan case discussed above, all counsel have decided we simply cannot discuss certain important issues over the phone with our clients. Instead, while we are all doing client calls about “check-in” matters, we are discussing important and confidential issues through legal mail. Obviously, this is far less than ideal, but in our client’s situation legal mail is less likely to be copied, since legal mail has to be opened in the presence of the inmate. Although legal mail could make its way around the jail, if the letter discusses something important tell your client to flush the letter after responding to it. And, legal mail may not work if you have a client with poor reading/writing skills, or who requires an interpreter.

Finally, if you have no option other than discussing critical and important confidential case info over the jail phone, be prepared to aggressively investigate and litigate this issue concerning your local jail. Local defense counsel could jointly approach jail staff and county prosecutors showing the Intercept article and expressing concerns. Ask detailed questions about their jail communication systems, and request a written response for potential future court submission. That should get their attention. However, if law enforcement won’t answer or give insufficient answers, note all contacts and responses and be prepared to subpoena jail witnesses and records for a hearing whenever the courts re-open. Consider filing a discovery motion requesting disclosure of all your client’s jail calls by a certain date. If your client will be stuck in jail for awhile, ask for periodic discovery disclosures. Jail calls are, obviously, statements of the defendant and are discoverable. Prosecutors claim they have no control over the jail, but we have good case law on that. Obviously, in a particular case there may be reasons on balance not to file such a motion, but it should be considered in each case.

There might be other issues I have failed to consider or address. My main concern is to warn people not to let down their guard about this issue during this difficult time, and to give thoughtful consideration to what will be discussed in each “confidential” legal call.

Stay safe everyone!

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