



OFFICE OF THE STATE PUBLIC DEFENDER

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STATE PUBLIC DEFENDER



Office of the Alternate Defense Counsel

Lindy Frolich, Director

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Dear Chief Judges,

We have become aware that, in the past few weeks, some judges have declared conflicts in criminal cases where Public Defender clients have raised concerns about PD representation and these judges have, regardless of the subject of the dispute, declared a conflict based on the belief that there is a blanket policy that Public Defenders will not visit clients in the jail. We have since communicated at the agency level about these issues and we want to make sure you have the necessary information to share with your judges directly from the heads of both the OSPD and OADC.

While in-person meetings with clients in safe and confidential settings are the ideal, *see* ABA Criminal Justice Standards, Standard 4-3.3(b) ("Defense counsel should make every reasonable effort to meet in person with the client."), phone consultation and other means of consultation are necessary and under most circumstances adequate. That has been the case during the COVID-19 pandemic. *See e.g., United States v. Pena*, No. 18-CR-640 (RA), at *1 (S.D.N.Y. Apr. 6, 2020)(right to speak to counsel by phone is a "suitable alternative at this time in light of the generally-accepted nationwide mandate against in-person meetings").

Because of the uncontrolled community spread of COVID-19 and repeated outbreaks in jails and prisons and in reliance upon its ethical duty to not do harm to the vulnerable populations it serves, the leadership at OSPD has communicated to its staff that visits in detention facilities are strongly discouraged. We have resisted, despite the seeming appropriateness in light of the current resurgence of infection, to make a blanket policy that applies to every jurisdiction, jail, or case. Rather, we have continued to assess in cooperation with the local OSPD leadership factors such as: the prevalence of COVID in the local community, the safety precautions or lack thereof in individual detention facilities, the facility infrastructure, the case-specific and client-specific needs, the changing science around transmission, and individual staff members' risk factors. In most circumstances that has resulted in a determination to not enter the jail, and Defenders have shared that determination when pressed by courts.

As an agency that engages independent contractors, the OADC has a different relationship with its contractors than the OSPD has with its employees. The OADC cannot control how

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contractors handle their cases and does not inquire prior to assigning cases whether the attorney is or is not entering jails during the COVID-19 pandemic. Many OADC contractors, like the Public Defenders, are not entering detention facilities at this time because of COVID-related safety concerns. The OADC has – similar to the OSPD – strongly discouraged its contractors from entering these facilities. Thus, a judge appointing OADC to represent the accused in any given case does not necessarily mean an appointment of an attorney who will make an in-person visit to the jail during the pandemic and, in fact, in some of the cases referenced in the first paragraph, the OADC lawyer appointed to the case is also not going into the jail.

It was clear from the beginning of the pandemic that jails and prisons were going to be breeding grounds for the virus. We know you are aware of the most recent detention outbreaks – inmates and staff have been infected and sickened in large numbers at the El Paso County Jail, the Fremont Correctional Facility, the Colorado Mental Health Institute and many facilities housing children through the Division of Youth Services, just to name a few. An inmate at Fremont recently died from COVID, the fourth Department of Corrections inmate death as a result of COVID. Several metro jails have been outbreak sites continuously since the state started tracking and sharing such information. With the recent uptick in cases, some jails are once again refusing to take new detainees and working to reduce the number of people they are housing.

Many OSPD offices and OADC contractors have worked collaboratively and successfully with local sheriffs and jails to find meaningful ways for attorneys to communicate with clients and share discovery, including setting up additional phone lines, utilizing iPads and computers provided by either the detention facility or the lawyer, and generally working to make remote, confidential communication possible. Some jails have taken steps to create larger meeting rooms with adequate ventilation that would allow the PD and ADC to have client meetings with the required physical distancing. In jurisdictions where the Chief Judge and other judicial officers have provided leadership and engaged with the jails to work on these issues, we have seen greater success in setting up these accommodations, have found our ability to communicate with clients much the same as in non-pandemic times, and have been more efficient in our ability to handle our cases.

Other jails are not making their facilities sufficiently safe and instead invite criminal defense staff to visit in-person with clients in rooms that are too small for physical distancing, in rooms with no or inadequate ventilation, in rooms that are not cleaned between uses, where staff and clients are not consistently wearing masks, and without providing hand sanitizer or some other way to practice good hygiene. Several facilities have not been transparent in sharing reliable information about COVID cases and have not done enough testing to truly know the state of COVID within their walls. The OSPD engaged an epidemiologist to go into several metro-area facilities in full protective gear to assess COVID safety but, so far, he has not been allowed into those facilities.

Both the OSPD and the OADC believe that, if the issue raised is that the lawyer has not been able to visit the client in person at the jail, that alone will not be a conflict. To effectively support the efforts of defense attorneys and avoid costly and inefficient litigation over the propriety of a conflict, we ask that the courts engage in efforts to support improved confidential remote communication and safe practices at the jails. This will require at times judges providing

additional time for lawyer-client communication and it may require that judges order jails to provide remote, confidential communication or safe, confidential meeting spaces that have been reviewed by an epidemiologist. This is true for both OSPD and OADC attorneys. But, on its own, remote client visits do not create a conflict that requires the appointment of OADC in place of the OSPD.

Consequently, OADC will continue to decline appointment in these cases. If judges continue to appoint OADC under these circumstances, OADC will be required to litigate that issue, as not only is OADC not funded to represent clients in cases in which there is no conflict with the OSPD, but also such representation violates its statutory mandate. § 21-2-103(1.5), C.R.S.

Throughout the pandemic, we have sought to have open communication and productive, collaborative discussions with the bench. We would be happy to discuss this issue further with you. We ask that you please discuss and share this letter with your judges so that we can hopefully prevent needless future litigation in cases where the OADC declines appointment and both agencies agree there is no conflict.

Sincerely,



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cc: Chief Justice Nathan Coats
Steven Vasconcellos, State Court Administrator
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