Report and Recommendations Concerning Access to Counsel at the Federal Bureau of Prisons' Pretrial Facilities

July 20, 2023

Advisory Group of DOJ Components

Use of this Report

This Report was drafted to provide an overview of the Department's approach to ensuring access to counsel in Federal Bureau of Prisons pretrial facilities and to propose recommendations to further promote such access. The Report is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this Report, including the policy recommendations, should be construed to impair or otherwise affect the authority granted by law to a department or agency, or the head thereof, or the functions of government officials relating to budgetary, administrative, or legislative proposals. Recommendations will be implemented only as consistent with applicable law and subject to the availability of appropriations. Both implementation and application of policy recommendations involve the exercise of judgment of relevant Department officials.[1]

[1] Efforts to address complaints discussed in the Report that follows should not be construed as confirmations or rejections of the merits or veracity of those complaints.

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INTRODUCTION

On March 2, 2023, Deputy Attorney General Lisa O. Monaco launched a comprehensive, 100-day review of current practices and policies related to access to counsel in Bureau of Prisons ("BOP") pretrial facilities. The Deputy Attorney General announced this review as part of the Department's commemoration of the 60th anniversary of the Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Constitution requires states to provide counsel to every indigent criminal defendant facing a felony charge.[2]

As the Deputy Attorney General recognized in announcing this review, the right to counsel is critical for protecting fairness and accuracy in the criminal justice system, and the BOP plays an important role in advancing this right. For the right to counsel to be meaningful, clients detained pretrial need access to counsel through in-person visits, phone calls, and correspondence, as well as the opportunity to meaningfully review discovery. The BOP has long worked to promote access to counsel, but structural and procedural challenges, including delays and impediments to legal visits, calls, and discovery, can create barriers to accessing counsel.

> *"Twenty-five years ago today, former Attorney General Janet Reno… recognized that rigorous application of the* Gideon *decision secures the 'fundamental fairness and accuracy of every criminal proceeding.' Those words ring equally true today, as we strive to enhance access to counsel throughout the Bureau of Prisons and recognize the extraordinary contributions of hard-working public defenders and panel attorneys across this country."*
>
> -Deputy Attorney General Lisa Monaco, commemorating the 60th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*

The Deputy Attorney General asked BOP to partner with the Department's Office for Access to Justice (ATJ) to lead this review, including to elevate best practices, identify resource needs and barriers to improving access, and make a set of immediate and practical recommendations to promote access to counsel. In consultation with the Office of the Deputy Attorney General ("ODAG"), BOP and ATJ convened an Advisory Group ("Advisory Group" or "Group") to conduct the review, consisting of representatives from ATJ, BOP, the National Institute of Corrections ("NIC"), and the United States Marshals Service ("USMS"). The Advisory Group reviewed BOP's efforts to ensure accessibility and confidentiality in legal communications for pretrial detainees—including investments in technology and other updates, adaptations, and innovations resulting from the COVID-19 pandemic—and sought to identify gaps or areas for further improvement.

The Advisory Group focused on the 10 BOP standalone pretrial facilities, which include: Metropolitan Correctional Center ("MCC") Chicago; MCC San Diego; Metropolitan Detention Center ("MDC") Brooklyn; MDC Guaynabo; MDC Los Angeles; Federal Detention Center

[2] Twenty-five years earlier, the Supreme Court held that the Sixth Amendment required access to counsel in federal proceedings. *See Johnson v. Zerbst*, 304 U.S. 458 (1938).

("FDC") Honolulu; FDC Houston; FDC Miami; FDC Philadelphia; and FDC SeaTac.[3] Over the course of the review, the Group reviewed relevant polices and literature, met with representatives from all 10 facilities and conducted site visits to several of these facilities. The Advisory Group also engaged extensively with federal public defenders, Criminal Justice Act ("CJA") panel attorneys, and other stakeholders, including the leadership of Federal Defender Organizations ("FDO") in 12 districts, who collectively have clients in all 10 pretrial facilities. The Advisory Group also heard directly from individuals who were formerly incarcerated at these pretrial facilities.

The Group focused its review on seven pillars of legal access for incarcerated individuals: (1) communication and compliance with policies; (2) legal visits; (3) legal phone calls; (4) legal correspondence; (5) access to discovery and client records; (6) legal access in emergent situations; and (7) access for populations with specific needs that cut across multiple pillars.

The review identified areas of strength across BOP's pretrial facilities, including the facilities' dedicated legal staff, who work daily to promote access to counsel for individuals detained pretrial. Defense counsel almost unanimously agreed that the legal staff at each BOP pretrial facility were responsive and professional, even when unable to resolve concerns. Many BOP pretrial facilities are actively working to address legal access needs, including by implementing innovative solutions to address recurring challenges. This report spotlights several promising pilot projects and encourages BOP to explore replicating best practices nationwide.

At the same time, the review revealed areas of concern that warrant immediate attention. The Advisory Group acknowledges that BOP is working to address systemic barriers—including staffing shortages—that impact the agency's ability to promote access to counsel. The Advisory Group nevertheless identified reforms that can make an immediate difference in promoting access to counsel, as well as opportunities for long-term change.

In the report that follows, the Advisory Group presents the results of the 100-day review, including areas of strength, areas of concern, and recommended next steps.

[3] BOP runs 10 facilities with a pretrial detention mission. It also operates dozens of other carceral facilities. As stated in the body of this report, the Advisory Group review exclusively focused on those facilities with a pretrial detention mission.

EXECUTIVE SUMMARY

The Advisory Group was charged with conducting an in-depth review of the Department's efforts to ensure timely and meaningful access to counsel in BOP's 10 standalone pretrial facilities and preparing a report with recommendations for enhancing these efforts.

Over the course of its review, the Advisory Group: (1) conducted a literature review of case law, articles, and reports related to access to counsel in pretrial facilities; (2) collected and reviewed federal regulations and BOP policies related to access to counsel in BOP facilities; (3) conducted surveys, listening sessions, and structured interviews to solicit direct input from a variety of stakeholders—including defense counsel, BOP Wardens and on-site staff, organizations with expertise on legal access, and formerly incarcerated individuals; and (4) visited three representative BOP pretrial facilities, where the Group observed firsthand the on-the-ground complexities, infrastructure challenges, and resource constraints that affect legal access.

Following that review, the Advisory Group recommends the following steps to further safeguard the right to counsel in BOP pretrial facilities:

1. ***BOP should enhance communication related to legal access, as well as compliance with policies and practices.*** BOP frequently had strong national and local policies in place to promote access to legal counsel. To make those policies more effective, BOP should explore ways to better communicate them to staff and stakeholders, as well as set up mechanisms to monitor and promote compliance. To that end, the Advisory Group recommends that BOP and ATJ partner to establish a new Legal Access Adviser (LAA) position within the BOP's Office of General Counsel (OGC), who will serve as the agency's central point of contact for issues related to access to counsel. Likewise, BOP should partner with ATJ to establish points of contact at the local level, with full-time responsibility for safeguarding and enhancing access to counsel in federal pretrial facilities. Once in place, these positions will help spearhead implementation of the recommendations that follow.

2. ***BOP should enhance access to in-person legal visits and provide guidance for consistent protocols at all pretrial facilities.*** Legal visits are the most fundamental way to enable clients to form meaningful connections with their counsel. All BOP pretrial facilities now provide legal visiting hours seven days a week. Defense counsel in multiple locations, however, reported experiencing significant challenges with wait times and inconsistent processes for in-person appointments, including instances where attorneys were denied access to legal visits due to inconsistent or incorrect application of the facility's dress code. These barriers delayed—and in some instances prevented—visits with their clients. Individuals in custody likewise explained that unpredictability and delays in visits can complicate the attorney-client relationship and discourage individuals detained pretrial from seeking in-person visits with their counsel. To address these issues, BOP should update its national policy to permit walk-in legal visits at all pretrial facilities; explore opportunities for providing scheduled in-person legal visits; maintain consistent enforcement of dress code policy; and consider additional protocols to minimize delays when attorneys are waiting for the limited

private meeting spaces available for legal visits. In addition, BOP should issue guidance to standardize rules for legal visits involving non-attorney staff and expand the availability of virtual meetings to supplement in-person legal visits.

3. ***BOP should enhance access to confidential legal calls.*** BOP pretrial facilities should provide individuals in detention with reliable, confidential mechanisms to access counsel outside of in-person legal meetings. This alternative form of access is critical when time-sensitive legal issues arise, or when attorneys are geographically distant from where their clients are detained. Numerous BOP pretrial facilities provide direct, unmonitored telephone lines to Federal Defenders Organizations, and the Advisory Group recommends adopting this model nationwide, as well as expanding direct, unmonitored telephone access to include other defense counsel, in a manner consistent with security concerns. BOP should also evaluate FDC SeaTac's pilot program of enclosing attorney phones in a confidential booth setting and replicate this model if successful. Finally, BOP should consider procuring and implementing scheduling software that would facilitate the arrangement of reliable call times with minimal staff resources.

4. ***BOP should enhance access to written correspondence***. During the review, the Advisory Group heard concerns about the confidentiality of written and electronic legal mail. BOP should adopt a national policy to help resolve disputes related to the proper handling of legal mail, which should include protocols for photocopying suspicious or improperly labeled mail, rather than simply opening it outside the presence of the addressee, discarding it, or returning it to sender. BOP should also continue to explore the feasibility of a free, confidential e-mail system for attorney communication with detained clients**.** At the same time, BOP and ATJ should identify intermediate steps that BOP can take to improve the confidentiality of attorney-client electronic communications.

5. ***BOP should enhance access to discovery and client records.*** To mount an effective defense, a defendant should have a meaningful opportunity to review the discovery produced in his or her case. The Advisory Group, however, heard repeated concerns about whether individuals in BOP pretrial facilities had reliable or sufficient access to discovery. Those concerns were particularly pronounced as to electronic discovery ("e-discovery"), as attorneys reported that their clients often could not access such discovery on BOP computers. To address these concerns, BOP should explore ways to enhance and update its e-discovery technology, including through improvements to its electronic hardware and software. As part of this effort, BOP should partner with ATJ, the Department's Executive Office for United States Attorneys ("EOUSA"), the Justice Management Division (JMD), and other stakeholders, to identify software solutions that allow individuals in detention to review common discovery formats. In the interim, BOP's Central Office should issue guidance to all pretrial facilities on the use of laptops for legal visits, including to underscore the essential role that attorney laptops play in allowing a client to review discovery that is otherwise inaccessible on the facility's computers. Finally, BOP should also work to ensure that clients have access to other records, including medical records, necessary to mount their defense,

including by instructing each facility to implement a streamlined, reliable process for counsel to request client records.

6. ***BOP should enhance legal access in emergent situations.*** BOP is already in negotiations to revise two national Program Statements to protect legal access in emergent situations. The Advisory Group supports this effort and encourages BOP to finalize the guidance within the next 90 days or issue interim guidance if necessary. Likewise, each BOP facility should institute a plan for monitoring legal access during emergencies and ensuring that emergency-based limitations on legal access are reviewed regularly and lifted as soon as practicable.

7. ***BOP should enhance legal access for populations with specific needs.*** BOP should remain alert to obstacles to legal access needs that may primarily or disproportionately impact certain populations. This includes providing individuals in detention who are not proficient in English or Spanish with sufficient access to the information contained in its orientation materials; providing eyeglasses to individuals in detention who need prescription lenses to review discovery and other legal material; and helping individuals who have been placed in the Special Housing Unit ("SHU") maintain equivalent access to their attorneys and the legal material in their case.

BACKGROUND

Consistent with the Deputy Attorney General's directive, the Advisory Group conducted a thorough review of access to counsel in all 10 of BOP's standalone pretrial facilities.

1. Legal Scholarship

The Advisory Group reviewed reports, articles, and guidelines related to best practices in the context of pretrial legal access. *See* Appendix A for a list of the materials reviewed.

2. BOP Policy

The Advisory Group collected and reviewed all national BOP Program Statements related to pretrial access to counsel. The Group also reviewed handbooks distributed during orientation and, where available, each facility's supplementary policies ("Institution Supplements") related to legal access. *See* Appendix B for a list of the Program Statements and Institution Supplements reviewed. In preparing recommendations, the Group focused both on proposing revisions to existing policies and identifying discrepancies between the policies as written and institutional practices.

3. Defense Bar Listening Sessions

The Advisory Group conducted 11 listening sessions with leadership from 12 Federal Defender Organizations and six CJA Panel Attorney District Representatives.[4] Through these listening sessions, the Group heard from attorneys with clients in each of BOP's 10 pretrial facilities, who spoke not only to their own experience with BOP but also to the frustrations of their clients. As described below, the concerns raised by attorneys varied greatly across the facilities. These listening sessions also surfaced differences between access for clients represented by federal defenders compared to clients represented by CJA panel attorneys. Likewise, they highlighted additional challenges confronted by clients represented by attorneys whose districts or offices are far from the detention facilities in which they reside.

4. Warden Surveys and Interviews

The Advisory Group distributed written surveys to the Wardens at each of the 10 BOP pretrial facilities. In the surveys, the Group asked Wardens to describe the facilities' processes for legal meetings and communications and to describe any related challenges. After receiving the written survey responses, the Advisory Group conducted follow-up interviews with all 10 Wardens. Because multiple departments are involved in facilitating attorney-client communications at BOP pretrial facilities, the Advisory Group encouraged each Warden to consult with those departments and to include those departments in the follow-up interviews.[5]

[4] The CJA panel consists of qualified and court-approved attorneys who are appointed by the court to represent eligible clients who cannot be represented by the Federal Defender's Office. These attorneys may also serve as retained counsel for additional clients.

[5] While the number of officials attending these meetings varied by facility, there was at least one representative from each facility's legal department present at each interview.

5. Site Visits

Representatives from the Advisory Group conducted site visits at three BOP pretrial facilities: FDC Philadelphia, MDC Brooklyn, and MDC Los Angeles.[6] These visits allowed the Group to better understand the on-the-ground complexities, infrastructure, and resource constraints that affect legal access.

6. Targeted Outreach to EOUSA and United States Attorneys' Offices (USAOs)

The Advisory Group solicited and received, through EOUSA, written feedback from the USAO community including on discovery review in BOP pretrial facilities and the availability of confidential electronic communications between attorneys and their detained clients.

7. Interviews with National Organizations with Expertise on Access to Counsel Best Practices

The Advisory Group conducted interviews with experts on best practices from several national organizations, including the Sixth Amendment Center, the American Bar Association Standing Committee on Legal Aid and Indigent Defense, and the Prison Policy Initiative.

8. Feedback from Formerly Incarcerated Individuals

The Advisory Group collected feedback from individuals who had been incarcerated in one of the 10 BOP pretrial facilities.[7] This feedback allowed the Advisory Group to better understand current BOP practices from the perspective of those who have been directly impacted by attempting to access their counsel while in federal pretrial detention.

9. Research into Practices Outside the Federal System

The Advisory Group collected information on state and local approaches to enhancing access to counsel in pretrial facilities. First, the Advisory Group collected and reviewed policies and procedures from four states with large jail systems that have implemented innovative approaches to improve access to counsel. Second, the Advisory Group posed questions on legal access to the "Large Jail Network," which is managed by NIC and is comprised of 15 large jail and Sheriff's Departments in the United States. Third, the Advisory Group used an existing 50-state survey as a starting point for additional research. Finally, the Advisory Group interviewed leadership from the American Correctional Association, a nonprofit professional organization and accreditor of almost 1,000 correctional facilities.

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[6] Department officials, including representatives from ODAG, BOP, and ATJ, also visited FDC SeaTac in connection with the Department's Sexual Abuse Facility Enhancement and Review (SAFER) initiative. The Deputy Attorney General launched the SAFER team initiative to visit women's facilities in each of BOP's six regions and engage with leadership, staff, and women in custody at those facilities, as part of the Department's ongoing efforts to root out sexual misconduct within the BOP. Legal access can also promote prompt reporting of sexual abuse, and the SAFER Team visited relevant areas, including legal visiting rooms, during its trip.

[7] The Advisory Group solicited feedback from formerly incarcerated individuals rather than individuals currently detained in BOP pretrial facilities to ensure that no Department personnel inadvertently communicated with individuals who are currently represented by counsel and/or have pending federal criminal matters.

DISCUSSION

Following its review, the Advisory Group advanced recommendations around seven pillars, which include enhancing access related to: (1) communication and compliance with policies; (2) legal visits; (3) legal calls; (4) legal correspondence; (5) discovery and records; (6) emergent situations; and (7) the needs of specific populations. Those recommendations, and the findings supporting them, are described in detail below.

At the outset, the Advisory Group acknowledges several structural barriers that may impact BOP's ability to immediately implement reforms, including:

Staffing shortages. Despite continued recruitment efforts, most of BOP's pretrial facilities have faced considerable difficulties hiring and retaining custodial staff.[8] Employers throughout the country have experienced worker shortages, and BOP facilities have faced added difficulty competing with higher-paying correctional and non-correctional jobs in the same localities, especially given the occupational danger that corrections post entail. Staffing shortages can compound personnel problems, as they lead to higher stress and burnout, causing current employees to seek other, less stressful work. Staffing challenges are especially pronounced in certain facilities located in cities with high costs of living, such as FDC SeaTac, FDC Philadelphia, and MDC Brooklyn, where facilities may struggle to compete with market wages.

While staffing and recruitment were not within the scope of the Advisory Group's review, these staffing shortages have a considerable impact on legal access across all 10 facilities. As explained more fully below, staffing shortages can impact BOP's ability to timely schedule and accommodate legal visits or calls, facilitate access to discovery computers, or respond to and address client or attorney grievances.

The BOP Director considers it a top priority to address staffing shortages and is dedicated to a nationwide recruitment and retention effort.[9] Currently, BOP offers a recruitment incentive of $10,000 or 25% of initial salary (whichever is greater) for all new correctional officers who on-board by September 24, 2023. Additionally, BOP currently has a 10% retention incentive at seven pretrial facilities, and a 25% recruitment incentive at MDC Brooklyn.[10] While these measures are important, it is critical that the BOP receive additional, long-term funding to retain its current workforce and fill new positions. To that end, the Department has requested funding from Congress to hire 2,250 new BOP staff members through the end of FY 2024, including $109 million for new hiring and retention incentives.[11] The Group endorses these efforts, which are central to the Bureau's ability to promote access to counsel nationwide.

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[8] Currently, six facilities have correctional staff vacancy rates above 20%—MDC Brooklyn, MCC Chicago, FDC Honolulu, FDC Miami, FDC Philadelphia, and FDC SeaTac.

[9] For additional information on BOP's new hiring initiatives, see https://www.bop.gov/resources/news/20230405_new_hiring_initiative_underway.jsp.

[10] A 10% retention incentive is currently in place for eligible employees at MDC Brooklyn, MCC Chicago, FDC Honolulu, MDC Los Angeles, FDC Miami, MCC San Diego, and FDC SeaTac.

[11] Written Statement of AG Garland - Senate CJS hearing (DOJ Budget FY24) 2023-03-28, p 11.

Limitations related to technology. In some instances, federal laws and regulations limit BOP's ability to rapidly adopt new technology, as the Bureau often must comply with more stringent restrictions than many state or local facilities. In particular, a product must meet certain technical standards before introduction into a BOP facility, including:

- Federal IT security requirements. These security requirements are often more comprehensive and stringent than state and local requirements. For example, any new system must complete a security authorization protocol and receive an "Authority to Operate" ("ATO"), which requires testing thousands of IT security controls and typically takes 18 months to obtain. Moreover, procurements in this arena must integrate with the existing BOP infrastructure, which further constrains solutions.

- Federal procurement requirements. Federal agencies must comply with the federal laws and regulations governing acquisitions, including compliance with the Trade Agreements Act and supply chain certifications. These restrictions mean that BOP cannot purchase items that many states and local facilities may use.

- Federal Privacy requirements. Federal privacy laws and directives require that a vendor comply with encryption and identification, credentialing, and authentication requirements. Many vendors of off-the-shelf products are not prepared to comply with federal marketplace requirements.

Differing facility resources and needs. As discussed below, the Advisory Group often observed inconsistencies across BOP's facilities with respect to legal access. In some instances, BOP has an opportunity to standardize best practices across its pretrial facilities. But some variation is inevitable, as each facility has unique infrastructure, staffing challenges, and population needs, and the Advisory Group recognizes that it is important to preserve flexibility for individual facilities.

The Advisory Group has developed the recommendations below bearing in mind those limitations. While the Group believes that BOP can adopt many recommendations immediately, it recognizes that some recommendations would require a longer implementation trajectory—and in some instances, the location and commitment of additional resources.

I. Communication and Compliance with Policies

BOP has comprehensive national policies to promote legal access, and many institutions have supplemented those policies with thoughtful and thorough local policies. To ensure meaningful access, BOP must also (1) effectively communicate those policies to its staff, to detained individuals, and to attorneys; and (2) establish mechanisms to promote compliance with those policies, including opportunities for individuals in detention and their attorneys to raise informal

and formal complaints when policies break down. This section focuses on the accessibility and communication of BOP's policies, as well as compliance with those written policies.

A. Findings

Key Facts

- Attorneys in **10 of 10** facilities reported legal departments were highly responsive, even if attorneys were unsatisfied with resolutions.
- Attorneys with clients in **8 of 10** facilities reported needing to elevate legal access issues to courts to get compliance in at least some circumstances, and attorneys in **3 of 10** facilities reported regularly needing to seek court intervention.

1. Access to policies and procedures

All BOP pretrial facilities provide newly detained individuals with an Admission and Orientation Handbook (A&O Handbook) during intake. The A&O Handbooks generally provide, among other information, an overview of the facility's policies related to legal access, although some facilities include more detail than others. In addition, all Institution Supplements are publicly posted in English and Spanish in the law library and/or are available to individuals in detention through TRULINCS.

Every facility's Institution Supplement on Visitation is accessible on that facility's BOP website, although many of these postings are considerably out of date. Generally, other Institution Supplements and local policies relevant to legal access are not publicly available, but as illustrated in the text box, MCC San Diego engages in a best practice of proactively collecting and publishing its legal policies and distributing them to defense counsel.

Spotlight: MCC San Diego

The MCC San Diego Legal Department has created an "Attorney Guide" that consolidates all policies and practices related to legal access in one place, including information contained in Program Statements, Institution Supplements, MOUs, and official practices. The Legal Department has shared this guide with the Federal Defender's Office for the Southern District of California, as well as the CJA Panel Attorney District Representative. Other attorneys can request the guide by contacting the Legal Department.

2. Inconsistencies and Miscommunications

As explained in the sections that follow, the Advisory Group repeatedly identified inconsistencies between written policies and actual practice. Relatedly, the Advisory Group observed miscommunications between leadership of pretrial facilities and the correctional officers

implementing policy.[12] Of course, some inconsistencies are inevitable. BOP accommodates thousands of legal visits per month—MCC San Diego alone accommodated over 700 legal visits over a recent 30-day period—and isolated problems will inevitably arise when facilities handle such a high volume of requests and visits. In some instances, however, the Advisory Group heard reports of recurring or systemic problems, including inconsistencies that recurred across multiple facilities.

Ultimately, these inconsistencies not only proved frustrating for incarcerated individuals and their attorneys but also presented considerable challenges for critically important attorney-client relationships. Incarcerated individuals and attorneys both reported that inconsistencies between policies and practice can lead to an antagonistic relationship between attorney and client, as it can be difficult for the client to accurately evaluate the reason their attorney has not, for example, attended a legal visit or why legal calls are not occurring more frequently.

Moreover, the Advisory Group often heard conflicting reports from a facility's leadership and from defense counsel with clients at that facility. For example, the Office of the Federal Defender for the Central District of California reported that their primary legal access concern at MDC Los Angeles was extremely long wait times during in-person visits. In contrast, the legal department at MDC Los Angeles reported that they "had never heard of attorneys complaining that they had to wait too long." Similarly, FDC SeaTac reported that most attorney requests for client medical records are processed within one week. In contrast, the Office of the Federal Defender for the Western District of Washington reported that record requests must be made by the client and can take many weeks. While it was difficult for the Advisory Group to reconcile or resolve these differing reports, the disconnect underscored the need for more regular communication between facilities and attorneys, as well as better data collection and analysis.

3. Grievance procedures

To raise grievances on their own or their client's behalf, defense counsel may informally reach out to the facility's legal department and, if unable to reach a resolution, work with the U.S. Attorney's Office or bring the issue to court. Defense counsel reported that each facility's legal department was responsive and professional, often singling out their points of contact for recognition. Nevertheless, defense counsel reported that legal departments were not able to resolve all issues that surfaced. Attorneys with clients at three of the facilities reported that legal access grievances frequently require court intervention, while attorneys with clients at three other facilities reported needing court intervention in certain recurrent circumstances, such as client access to discovery, requesting client records, or proceeding with an expert assessment that requires use of a laptop.

Individuals detained pretrial in a BOP facility may themselves seek formal review of any grievance, including those related to access to counsel, through BOP's Administrative Remedy Program.[13] The Administrative Remedy Program is a four-part process, which allows individuals

[12] For instance, the Advisory Group heard reports that a facility's lobby staff prohibited attorneys from entering with electronic media that the legal department had previously approved and that another facility's visiting room staff prohibited access to confidential visiting rooms that the legal department maintains should be available.

[13] *See* 28 C.F.R. Part 542, subpt. B; and BOP Program Statement 1330.18: Administrative Remedy Program, *available* at https://www.bop.gov/policy/progstat/1330_018.pdf.

detained in BOP facilities to seek review of an issue related to any aspect of the individual's confinement, including concerns related to access to counsel. Detained individuals must first attempt to informally resolve the issue with staff before filing a Request for Administrative Remedy with the Warden. If dissatisfied with the Warden's decision, the detained individual can appeal that decision by filing an appeal to the Regional Director, and, if dissatisfied with the Regional Director's decision, to Central Office. The Administrative Remedy Program was not the focus of this review, and the Advisory Group heard little feedback related to its efficacy. As discussed *infra*, the Group recommends, as a next step to this report, a targeted, follow-up inquiry into the adequacy of the Administrative Remedy Program as it relates to complaints concerning legal access raised by individuals detained in BOP facilities pretrial.

B. State and Local Practices

During the course of this review, the Advisory Group identified several innovative state and local practices for promoting policy compliance, including:

- Independent Grievance Coordinator. Some jails have an independent grievance coordinator, which is a civilian position that reports to the Director of Corrections. For example, at the Arlington County Sheriff's Office, the grievance coordinator retrieves resident complaints from a locked "grievance mailbox" located in each housing unit three times per week. The coordinator is responsible for logging and directing complaints to appropriate command staff. Grievances can be appealed to the Sheriff for final resolution. The grievance coordinator submits a monthly report to the Director on grievance numbers, types, and final resolutions.

- Ombudsman Units. Some state correction departments have ombudsman units, which act as a liaison between the community and the correction office. For example, in the Georgia Department of Corrections, the Ombudsman and Inmate Affairs Unit investigates allegations of violations of departmental policies and procedures. The Unit also aims to monitor problems in the correctional system in a fair and consistent manner and address concerns in an unbiased, impartial, and courteous way.[14]

- Visitor Surveys/Feedback. In Pennsylvania's Department of Corrections, all visitors, including attorneys, can complete and submit a Visitor Quality Assurance Program Survey.[15] Survey information is compiled into a visitor service report that is submitted to the facility manager and appropriate Department heads on a regular basis to help improve visitor practices.

[14] *See* Georgia Department of Corrections, Ombudsman and Inmate Affairs, https://gdc.ga.gov/InmateInfo/Ombudsman/Ombudsman.

[15] Commonwealth of Pennsylvania, Department of Corrections, Policy Statement, Inmate Visiting Privileges, DC-ADM 812, Oct. 2022.

C. Recommendations

Consistent with the findings and best practices above, BOP should implement the following recommendations:

1.1. Collect and distribute Institution Supplements and related policies to attorneys and keep policies up to date. To set baseline expectations and promote transparency, BOP facilities should share with attorneys both national and facility-specific policies governing access to counsel. They should use as a model the practice at MCC San Diego, which distributes to public defense counsel an "Attorney Guide" that consolidates all policies related to legal access in one place. Each local facility should work with the Legal Access Adviser, *see* Recommendation 1.3, *supra*, to prepare an Attorney Guide in the next 180 days.

1.2. Consolidate key legal access duties under one position—the Legal Access Officer (LAO)—in each pretrial facility. To facilitate better communication between facilities and attorneys, BOP should collaborate with ATJ to create a new, full-time LAO position in each BOP pretrial facility, which would be managed out of the responsible legal office.[16] Each BOP pretrial facility should designate a staff member to perform this function As a longer term matter, the position should be a primary, rather than collateral, duty, where the incumbent continually maintains and addresses legal access within the facility. Recognizing that adopting such full-time positions nationwide would likely require additional funding, and may require additional FTE allocations, ATJ should work with BOP to develop, within 120 days, a staffing and hiring plan for each LAO position. The plan should include strategies for funding and staffing these positions, and a timeline to fill the positions.

1.3. Create a Legal Access Advisor position in the BOP Office of General Counsel. BOP should create a new Legal Access Advisor (LAA) position, which would initially be staffed through a detail assignment from ATJ to BOP for a one-year period. Once on board, the LAA would serve as the agency point of contact on issues related to legal access, e-discovery, legal technology, emergency situations, and related issues. The LAA would also serve as a point of contact for each LAO, as well as outside grievances related to attorney access, providing Department-wide consistency in the review process and an additional opportunity for resolution prior to elevating issues to district courts. Likewise, the LAA would consult with the Advisory Group in conducting a targeted review of the adequacy of the Administrative Remedy Program as a tool for individuals detained pretrial to raise

[16] MDC Brooklyn currently employs a "Court Liaison," who serves primarily as a point of contact to respond to and solve for systemic concerns raised by judges in the Eastern and Southern Districts of New York, including concerns related to access to counsel. The Advisory Group understands that the position has been well-received by judges and recommends evaluating MDC Brooklyn's experience to identify potential lessons learned and the feasibility of replicating this position—and salary level—at additional facilities in addition to the LAO model proposed. The LAO position recommended here would focus on liaising with attorneys and resolving internal legal access challenges, in addition to liaising with the courts.

and resolve their concerns related to access to counsel. The LAA would also work closely with USMS, to resolve third party inquiries regarding access to counsel at BOP's pretrial detention facilities when these inquiries are received by USMS headquarters. Finally, as discussed below, the LAA would help oversee and coordinate implementation of the Advisory Group's recommendations, including by determining what additional data collection and analysis is appropriate to monitor implementation.

1.4. Implement a series of regularly scheduled meetings and reviews to surface innovative legal access solutions and persistent legal access challenges. These should include:

- A Review Every Six Months by BOP's Central Office to evaluate legal access issues, including issues related to technology, in each pretrial facility;

- Annual Meetings at each pretrial facility, involving the Warden, BOP counsel, representatives from BOP Central Office, relevant FDOs, relevant USAOs, and the judiciary to assess legal correspondence, discovery, visiting, and other pertinent legal access challenges at pretrial facilities and to identify solutions;[17]

- Additional Regular Meetings between each facility and the legal community to address processes and concerns. Once in place, the LAO—in consultation with local defense counsel—should determine the frequency and formality of these meetings, which would serve as a supplement to the more formal annual meetings above. Members of the Advisory Group should participate in the first scheduled meeting for each facility to further address specific concerns that emerged over the course of this review.

1.5 Prepare and distribute a "satisfaction survey" for legal visits at all BOP pretrial facilities. Legal visitors should be given the opportunity to complete and submit surveys as frequently as desired, and the responses should be reviewed by each facility's LAO, *see supra* Recommendation 1.2, on a regular basis to ensure issues related to legal visits are identified and resolved in a timely manner. Any emerging patterns should be reviewed at the regular meetings discussed *supra,* Recommendation 1.4, and as part of the Central Office's review every six months.

[17] USMS districts routinely meet with the judiciary and the appropriate BOP pretrial facility representatives to discuss detention management issues and concerns. The Advisory Group should work with BOP and USMS to determine whether the Annual Meeting proposed here should replace one of these routine meetings organized by USMS.

II. Legal Visits

Meaningful access to counsel includes the detainee's ability to communicate effectively with their legal team and develop a strong attorney-client relationship. Legal visits are the most basic way to foster those connections. Sufficient legal visiting hours and access to private counsel rooms are essential to providing detainees with meaningful access to defense counsel. Meanwhile, impediments to legal visitation, including long wait times, inconsistent visiting protocols, and lack of space to speak confidentially, can negatively impact the attorney-client relationship and diminish the effectiveness of counsel. Indeed, the Advisory Group heard that when these obstacles lead to short or unproductive visits, individuals in detention might choose to avoid in-person legal meetings altogether. Moreover, delays can result in taxpayer dollars wasted on fruitless billable hours for panel attorneys waiting to meet with clients and further strain already burdened public defender organizations.

A. Findings

1. Hours

BOP in-person legal visits at pretrial facilities are governed by national Program Statement 1315.07: Inmate Legal Activities. The Policy states, in part, that the Warden may not "limit the frequency of attorney visits since the number of visits necessary is dependent upon the nature and urgency of the legal problems involved." In addition, the Policy states that "the Warden shall set the time and place for visits." Program Statement 7331.04: Pretrial Inmates provides additional guidance regarding access to legal resources, stating that "the Warden shall provide the opportunity for pretrial inmate-attorney visits on a seven-days-a-week basis." In addition to the BOP national policies controlling in-person legal visits, each of the 10 BOP pretrial facilities reviewed in the scope of this report maintains an Institution Supplement implementing these requirements. *See* Appendix B. These supplements, consistent with national policy, provide for legal visitation, to some degree, every day of the week.

Key Facts

- **100%** of BOP's pretrial facilities have returned to pre-pandemic visiting hours.
- **10 of 10** offer visitation hours seven days per week.
- **10 of 10** offer at least 50 fixed visitation hours.
- For **5 of 10** facilities, attorneys expressed that they were generally satisfied with visiting hours.*

*As described below, hours for three facilities changed in May or June 2023. This data reflects feedback before those facilities updated their hours.

Most pretrial facilities offer 50 to 70 hours of fixed, scheduled legal visitation hours, which tend to provide visitation during business hours on weekdays and limited weekend hours. During the course of this review, several facilities supplemented their hours:

- **FDC Miami**. On March 2, 2023, when Deputy Attorney General Monaco announced this 100-day review at the Office of Federal Defender for the Southern District of Florida, she was informed by defense attorneys present that FDC Miami cut off attorney visitation at 2pm. Within a week, the facility returned attorney visiting hours to pre-pandemic operating

hours. Visiting hours at FDC Miami are now seven days a week, from 7:00am to 2:00pm and 5:00pm to 9:00pm.

- **FDC Honolulu**. During the Advisory Group's May 4, 2023, meeting with defense attorneys who represent clients at FDC Honolulu, it learned that the facility was still operating under the reduced hours adopted in response to the COVID-19 pandemic. The next week, the facility extended legal visitation hours to resume in-person availability seven days per week, on the following schedule:

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Holidays
6:15am to 8:45pm	7:00am to 8:30pm	7:00am to 8:30pm	7:00am to 1:15pm	7:00am to 1:15pm	7:00am to 8:30pm	6:15am to 8:45pm	6:15am to 8:45pm

- **MCC Chicago**. According to MCC Chicago's Institution Supplement on visiting, legal visits can take place Monday through Friday from 8:30am to 3:00pm and 5:00pm to 7:45pm, and weekends and holidays from 8:30am to 3:00pm. During this review, the Advisory Group learned that hours for legal visits had been reduced due to staffing shortages and were temporarily available only Monday to Friday from 8:30am to 3pm. Effective June 4, 2023, the facility has resumed offering legal visits at the hours specified in the Institution Supplement.

- **FDC Houston**. During this review, the Advisory Group learned that FDC Houston had been providing visits only on weekdays (from 8am to 8:30pm). On June 4, 2023, the facility resumed providing weekend hours, consistent with its pre-pandemic practice.

In light of these changes, the Advisory Group has confirmed that every pretrial facility has terminated reduced legal visiting hours due to the COVID-19 pandemic and has returned to pre-pandemic scheduling.

2. Protocols

Appointments

Pretrial facilities varied in protocols related to legal visitation. Although national policy states attorneys "shall make an advance appointment for the visit through the Warden prior to each visit,"[18] both the Institution Supplements and the Advisory Group review process revealed that most institutions did not require, or even allow, advance appointments for legal visits. With certain exceptions,[19] pretrial facilities generally allowed attorney in-person visits without appointment or

[18] 1315.07 Inmate Legal Activities Sec. 12(c).

[19] MCC San Diego required an appointment for visiting clients in Special Housing Units ("SHU"), and more generally, Institution Supplements noted that appointments were required when attorneys needed to visit clients outside of the normal facility attorney visitation hours or when meetings with co-defendants needed to be arranged.

reservation on a first-come, first-served basis.[20] Many Institution Supplements state that attorney visitation will be given "priority" and processed prior to social visits.[21]

Five pretrial facilities (MCC San Diego, FDC Honolulu, FDC Houston, MDC Guaynabo, and MCC Chicago) reported that defense attorneys had the option to request to schedule a legal visit—via phone or email—for time-sensitive or other reasons. Three additional facilities (MDC Brooklyn, FDC SeaTac, and MDC Los Angeles) reported that they would entertain scheduling a visit after hours if attorneys identified a particularized need. Defense counsel with clients at MCC San Diego agreed that requests for confidential legal visits could be sent in advance. By contrast, defense counsel with clients at FDC Houston and MDC Guaynabo reported that scheduling was never an option. Defense counsel with clients at MCC Chicago and FDC Honolulu likewise stated that in-person visits are first-come, first-served, although they did not comment on whether scheduled visits were *ever* an option.[22]

Numerous defense attorneys expressed a desire for the option of scheduling legal visits in advance, so that they can more reliably visit their clients in detention. They emphasized a calendaring system would be particularly beneficial for mission-critical meetings (i.e., reviewing a plea deal that needs a response to the prosecutor in 24 hours), as well as when attorneys are traveling from out

Closeup: FDC Miami

FDC Miami is the only facility that requires attorney appointments for every legal visit. The facility uses a calendaring system and requires attorneys to request legal visits via email to a general email box. Attorneys are advised, via email, that they can expect a visit to be scheduled within three business days for routine requests and within two business days for requests marked as "Urgent."

FDC Miami explained that it began exclusively relying on the "calendaring system" during the COVID-19 pandemic to give attorneys allotted visiting time and provide ample time between attorney visits; however, the facility decided to retain the process after moving past COVID-protocols because the system helped to better manage staffing and made the legal-visitation process smoother. Before the pandemic, defense counsel in the Southern District of Florida reported that attorneys would request appointments via email but could print out the request when they arrived for the visit rather than await a response. The attorneys explained that before the pandemic, clients would "ordinarily" be brought down to the visiting area at the time requested in the email. Under the current system, by contrast, attorneys "cannot just show up;" a response from the legal coordinator at FDC Miami is needed first.

Defense counsel noted that the calendaring system generally works for cases without a pressing deadline but presents challenges for urgent matters. The FDC Miami Warden agreed that calendaring legal visits can present "a challenge" for time-sensitive attorney meeting requests but noted that attorneys may also communicate with clients via phone calls. Consistent with Recommendation 2.1, *infra*, FDC Miami should consider allowing unscheduled legal visitation in addition to the scheduling system. Attorneys that come without a scheduled visit should be handled on a first-come, first-served basis and have access to legal visiting rooms if the rooms were not occupied at the time of their visit.

[20] *See e.g.*, MDC Brooklyn Visitation Institution Supplement, MDC Guaynabo Visitation Institution Supplement,

[21] *See e.g.*, MCC Chicago Visitation Institution Supplement, MDC Los Angeles Visitation Institution Supplement.

[22] Attorneys with clients at FDC Honolulu did state that the facility allows attorneys to schedule legal meetings when a client is in the SHU. However, the attorneys also shared that this is often impractical as they rarely have advance notice that their client has been moved to the SHU.

of state for visits. They stressed that the proposed calendaring system should not eliminate unscheduled in-person legal visits; rather, scheduled visits should be an additional option for attorneys to use for particularly important meetings.

Intake/Dress Code Enforcement

Consistent and fair enforcement of facility visiting procedures is critical to ensuring access to legal visits. BOP, of course, has a strong interest in maintaining security, order, and decorum in the facilities it operates. To that end, all visitors, including attorneys must comply with BOP visiting rules, regulations, and procedures, including restrictions related to dress code. For example, sleeveless garments, skirts more than two inches above the knee, and hats or caps are generally not permitted. Other restrictions may include specific colors, "revealing" clothing, or clothing "similar to inmate attire."[23] If an attorney or legal staff member wears attire deemed inappropriate, the legal visit may be denied. BOP provides information about visiting individuals in detention on its national public website, which includes information on the dress code for visits. Each BOP pretrial facility also includes a link to the national policy on its individual public website and posts an Institution Supplement on Visiting that includes additional information about the dress code.

At several pretrial facilities, defense counsel reported recurring issues during intake for in-person visits that frustrated their ability to reliably meet with clients. Most commonly, defense counsel reported concerns with inconsistent enforcement of the dress code,[24] particularly for female attorneys.[25] Some attorneys also reported that staff conducted extensive security screening, including swabbing attorneys' hands and inspecting inside their mouths before allowing them entry for legal visits. In other instances, defense counsel remarked that the legal visiting experience depends significantly on the duty officer.[26]

BOP agrees that these or any other instances of arbitrary or inconsistent enforcement of legal visiting rules is unacceptable, and it has already worked to address some of these concerns. During the Advisory Group's visit to MDC Brooklyn, facility leadership highlighted that they had recently clarified who has authority to deny legal visitors access (e.g., for dress code concerns). Now, such decisions are generally directed to the facility's legal department, but in all cases, staff must be ranked at least at the lieutenant level in the facility to deny attorney access. MDC Brooklyn also provides training to staff on interacting with lawyers and the public.

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[23] *See, e.g.*, FDC Philadelphia, Institution Supplement: Visiting Regulations (PHL 5267.09C).

[24] For example, counsel with clients at MDC Brooklyn reported that attorneys and legal staff had been denied entry because their suit jacket did not match their pants, because they wore a prohibited color, or because staff thought their pants were "too tight." Likewise, attorneys representing clients in the Central District of California noted that although MDC Los Angeles staff were friendly and tried to be helpful, dress code enforcement was inconsistent; for instance, a female attorney was prohibited from visiting clients because she had a white t-shirt under her suit jacket and other attorneys were denied visitation for not wearing a suit jacket.

[25] For example, defense counsel recalled that a female attorney was told that she would be denied entry to visit a client at MCC Chicago unless she removed an underwire bra that was setting off the facility metal detectors. The MCC Chicago legal department reports that the FDO promptly brought this issue to their attention and the correctional officer, who was a new employee, was retrained on dress code and entry protocol.

[26] For example, an attorney with clients at MDC Guaynabo noted that some officers coordinate bringing multiple clients down for subsequent legal visits, while others require attorneys to request one client per visit.

3. *Confidentiality and Physical Space*

Key Facts

- **9 of 10** BOP pretrial facilities offer confidential space for legal visits.
- For **5 of 10** facilities, attorneys expressed that they were generally satisfied with the availability of confidential visiting space.

The attorney-client relationship depends on communications that are privileged and confidential. Accordingly, meeting spaces that allow detained clients to have private conversations with their attorneys are an essential component of legal access. Private meeting rooms promote candid conversations between detained clients and their attorneys, which enable attorneys to effectively represent their clients' interests. Private meetings rooms also allow clients to share information that might not be safe if overheard by other individuals detained in the facility or by staff, such as the terms of a plea deal, discussions related to cooperation with the government, or concerns about a client's treatment while in custody.

BOP policy requires, "[t]o the extent practicable, [that] attorney visits, for both pretrial and sentenced inmates, [] take place in a private conference room."[27] Moreover, "[t]o the extent practicable, staff are to provide an area for attorney-client visits that ensures their conversation has a high degree of privacy."[28] Where a private room is unavailable, "the attorney visit may occur in a regular visiting room, provided the inmate and the inmate's attorney have a degree of separation from other visitors."[29] BOP policy notes that "occasionally" a situation could arise when a private area or conference room is not available, and the attorney does not wish to meet with the client in a regular visiting room; in this situation, the attorney may reschedule the visit.[30]

The Advisory Group found that nine of the 10 pretrial facilities were equipped with private attorney rooms to accommodate confidential attorney-client meetings. The number of private rooms in each facility ranged from four (FDC Houston) to 10 (MDC Los Angeles). Moreover, these private rooms are generally soundproof, with doors that can be closed to facilitate confidential conversations.

Defense counsel with clients in five of the 10 pretrial facilities were satisfied with the availability of confidential space for legal visits.[31] Several facilities acknowledged that there are "occasions" where all of the attorney-client rooms are occupied; in those instances, attorneys can either meet with their client in the non-private visitation area or wait for a room to open up. Defense counsel with clients in MCC Los Angeles, FDC SeaTac, and FDC Philadelphia reported that attorneys routinely wait more than an hour to meet with clients in a private room. Counsel for clients in MCC Los Angeles, which does not allow attorneys to bring laptops into the facility for legal visits,

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[27] *See* Program Statement 5267.09: Visiting Regulations.

[28] *See* 1315.07: Inmate Legal Activities.

[29] 1315.07: Inmate Legal Activities also states that "the Attorney visits shall take place in a private conference room, if available, or in a regular visiting room in an area and at a time designed to allow a degree of privacy."

[30] 5267.09: Visiting Regulations

[31] These five facilities were FDC Honolulu, MCC Chicago, FDC SeaTac, MCC Los Angeles, and FDC Houston.

also reported that only some of the attorney visiting rooms are equipped with working computers to review discovery, and wait times for those rooms are often even longer. Other defense attorneys interviewed by the Advisory Group remarked that when the private rooms are occupied, they are presented with "a difficult choice," as the open visiting spaces are generally not suited for confidential attorney-client conversations.[32]

Closeup: MCC San Diego

MCC San Diego was the only pretrial facility in the scope of the review without dedicated visiting rooms for confidential attorney-client meetings. MCC San Diego is a high-rise building and does not have a centralized area for visitation. Instead, each housing unit has a visiting room for both legal and social visits. The rooms have plastic partitions for separation that were installed due to COVID-19. An attorney with clients at MCC San Diego told the Advisory Group that the visiting area does not allow for confidential conversations and that visits can be "cacophonous" with attorneys "literally shouting to be heard."

MCC San Diego staff acknowledged that it was "not ideal" that legal and social visits can occur at the same time in the visiting rooms and that the facility does not have "adequate" meeting space to meet the requests for legal meetings. The visiting areas are unable to accommodate more than 10 people at any given time, and attorneys "often" have to wait to meet with clients. MCC San Diego legal staff reported that in the 30 days prior to our interview, the facility had 727 legal visits and 137 social visits and that the quantity of visitors "creates an enormous amount of traffic." Further, defense counsel remarked that due to the limited space, there are times when attorneys are unable to meet with clients at MCC San Diego and have to make arrangements to come back another day.

To request a confidential legal visit at MCC San Diego, attorneys must submit an email to the facility. The hours for the confidential meetings are generally limited to 7:30am to 9:00am and, when accommodated, the visit occurs in the general visiting room on the client's housing unit with the area blocked to all other visitors during the scheduled time. Confidential legal meetings can also occur in the Associate Warden's Conference Room, but the staff noted the room is "not available every day."

The infrastructure limitations of MCC San Diego have a significant impact on the availability of confidential legal meetings at the facility. Accordingly, the Advisory Group recommends that, once practicable, BOP conduct a site review of the facility, including by retaining an external consultant as appropriate, with the goal of developing innovative solutions to the access challenges.

[32] For example, the FDO for the Eastern District of New York noted that an attorney had recently waited for a private room for 1.5 hours at MDC Brooklyn. Once the client, who was facing trial in less than one month, was brought down to the attorney visiting room, the attorney had only 15 minutes for the meeting, creating "frustration" for both the attorney and client.

Defense attorneys with clients in MDC Guaynabo told the Advisory Group that although the facility has private meeting rooms in the visiting area, the attorneys are often told by MDC staff that they cannot utilize the rooms or that the rooms are only available to review e-discovery. The attorneys reported that "generally" legal meetings occur in the same area as social visits, a big, open space with tables about eight to 10 feet apart, an environment not conducive to confidentiality. The attorneys noted that they had raised these concerns with the legal department at MDC Guaynabo, which confirmed the private rooms were available for attorney meetings. The attorneys, however, believe that this information is not disseminated to MDC Guaynabo staff, as the attorneys are not able to utilize the private meeting rooms consistently.

Spotlight: FDC SeaTac's Timer Protocol

To alleviate the amount of time attorneys need to wait for a private room, FDC SeaTac is currently in the process of establishing a timer protocol. When all of the attorney-client rooms are occupied, the attorneys who arrived the earliest (e.g., have been meeting with their client for the longest period of time) will be notified that there are attorneys waiting and asked to conclude their legal visit within the next 60 minutes to accommodate other attorneys waiting for private meeting room space.

4. Visitation for Legal Staff

To mount an effective defense, individuals in detention rely on not only attorneys but also a range of legal staff, including paralegals, investigators, legal assistants, experts, and interpreters. National policy provides guidance regarding in-person visits involving non-attorney legal staff.[33] Generally, BOP affords legal staff the same status as attorneys with respect to in-person visits.[34] This special visiting status depends on "an ongoing, supervisory relationship" with an attorney on the client's approved visiting list.[35] To facilitate a client's access to legal staff, the attorney must provide the Warden with a signed statement including: "(1) Certification of the assistant's ability to perform in this role and awareness of the responsibility of this position; (2) A pledge to supervise the assistant's activities; and (3) Acceptance of personal and professional responsibility for all acts of the assistant which may affect the institution, its inmates, and staff."[36] Further, the Warden may require legal staff to fill out and sign a personal history statement and a pledge to abide by Bureau regulations and institution guidelines.[37]

Most defense attorneys understood the BOP policy and were able to submit necessary documentation to allow their non-attorney staff to conduct legal meetings with their clients. These meetings may take place in the same private visiting rooms afforded to attorneys, where available. Attorneys reported that these meetings were particularly useful to clients who need to review

[33] Specifically, the policy includes paralegals, clerks, and legal assistants. Although not specifically mentioned in the policy, BOP has determined that investigators should be treated in the same manner as other non-attorney staff.

[34] *See* 1315.07: Inmate Legal Activities §543.16. The policy also accords non-attorney legal staff the same status as attorneys with respect to correspondence.

[35] *Id.*

[36] *Id.*

[37] *Id.*

discovery or sign documentation, such that attorney guidance is not essential. Panel attorneys also emphasized the cost-saving benefit to the government when a paralegal reviews discovery at a billable rate significantly lower than the attorney billable rate.

The Advisory Group nevertheless heard concerns regarding non-attorney legal access at some pretrial facilities. In addition, the Advisory Group also found that there were inconsistencies between facility policies and reported practices related to non-attorney access, including at:

- **FDC SeaTac.** The facility reported non-attorney staff are not permitted to conduct legal visits unless they work directly for the Western District of Washington Federal Public Defender and have valid federal credentials or are accompanied by an attorney. The Warden noted that the Federal Public Defender staff have been verified by the court.[38] The Federal Defender's Office for the Western District of Washington, by contrast, reported that paralegals and other non-attorney staff are not afforded legal visitation at FDC SeaTac. The attorneys understood that this access was provided in the facility's policy but said it "does not happen in practice." They speculated that the problem may relate to training new staff, as a number of officers are rotated through the visitation area and may not understand the policy.
- **FDC Miami**. The Office of the Federal Defender for the Southern District of Florida reported that non-attorney staff are not provided legal visitation to clients at FDC Miami unless they were accompanied by an attorney. By contrast, FDC Miami reported that paralegals and law clerks can conduct legal visits once they have an approved NCIC check and are sponsored by an attorney. FDC Miami noted that the facility's current process does not include investigators as legal staff, but hypothesized this population could be extended legal access after appropriate attestation and NCIC clearance.[39]
- **FDC Honolulu.** While the Office of the Federal Defender for the District of Hawaii reported that non-attorney staff can conduct legal visits, a CJA panel attorney with clients at the facility reported that panel attorney staff, including paralegals and investigators, must be accompanied by an attorney, with rare exceptions. By contrast, the legal department at FDC Honolulu reported that staff for both FDO and panel attorneys are permitted to conduct legal visits.

Finally, the Advisory Group found variation in institution policy around the frequency of reauthorization for non-attorney visitation. For example, after non-attorney staff receive NCIC clearance, FDC Houston has an annual renewal certification process for staff of both the Federal Defender's Office and private attorneys. By contrast, FDC Honolulu requires recertification every

[38] The staff at FDC SeaTac also noted that although it is currently not the facility's practice, non-attorney legal visitation could be "easily" extended to the District of Idaho Federal Public Defenders Office, who regularly have clients at FDC Sea Tac.

[39] The Advisory Group also heard that FDC Miami requires CJA panel attorneys and private defense counsel to submit a separate form and receive approval each time a member of their legal staff is assigned to a new client. In other words, after the legal staff member clears the background check, they still need to submit a request for each new client. The approval process generally takes about two weeks. While generally workable, this process can create challenges when the attorney requires an interpreter to meet with a client, as they will not be able to bring the interpreter for the first two weeks of representation.

three months for all non-attorney staff, including paralegals and investigators who work for the Federal Defender's Office. [40]

4. *Virtual Legal Meetings*

There are currently no BOP national program statements that govern virtual legal visitation.[41] BOP developed virtual visitation capabilities primarily in response to the COVID-19 pandemic. To decrease the spread of the virus, BOP facilities significantly curtailed in-person activities, including visitation. Federal court proceedings were held via virtual platforms, primarily Webex, and many pretrial facilities used this technology to facilitate communications between detained clients and legal counsel.

Key Facts

- **5 of 10** BOP pretrial facilities currently offer virtual legal visits.
- For **2 of 10** facilities, attorneys expressed that they were generally satisfied with the availability of virtual legal visits.

The Advisory Group found that the availability of virtual attorney meetings varied across pretrial facilities during the height of the pandemic. Generally, pretrial facilities had limited equipment and needed to prioritize court hearings and probation interviews over virtual attorney meetings. Most defense counsel that participated in successful virtual meetings with clients reported the meetings were beneficial, providing an opportunity for confidential legal conversations with clients. Conversely, some attorneys, including counsel with clients at MDC Guaynabo and FDC Houston, reported that they did not participate in virtual meetings and primarily relied on calls to communicate with clients during the pandemic. Other facilities provided limited opportunities for attorneys to meet with clients via videoconference.[42] Other attorneys highlighted that virtual legal visits were often canceled due to technical issues.

Now that facilities have returned to pre-pandemic visiting hours, the Advisory Group found that both demand and availability of virtual legal visits have declined. Many pretrial facilities have eliminated virtual attorney-client meetings. Wardens consistently noted that due to staffing limitations, it is difficult to maintain in-person legal visits at full capacity while also facilitating virtual legal visits and calls. Virtual meetings are currently operated by staff who are already tasked with full-time duties. This leads to unfulfilled scheduling requests, incomplete primary work, or both. Moreover, virtual legal visits require a dedicated staff member to facilitate each videoconference and monitor the individual in detention for the duration of the meeting. In contrast, when staff are assigned in-person visitation duties, there can be multiple visits occurring under the supervision of the staff member simultaneously. Nonetheless, five pretrial facilities

[40] FDC Honolulu believed that legal staff frequently have issues because they have not completed their three-month recertification and are removed from the approved staff legal visit list.

[41] BOP issued guidance on video visits under the CARES Act. *See* BOP Operations Memorandum No. 002-2022, available at 002-2022.pdf (bop.gov).

[42] For example, the Southern District of Miami Federal Defender's Office reported that the virtual visiting time for attorneys at FDC Miami was 6:30am to 8:30am. However, the firewall around the technology prevented attorneys from logging into the meetings from home, and attorneys therefore needed to come into the office as early as 6am to participate in virtual meetings with clients at FDC Miami.

(MDC Brooklyn, MCC Chicago, FDC Honolulu, FDC Houston and MCC San Diego) continue to offer virtual legal visits in some capacity; a sixth facility (FDC Philadelphia) plans to resume some virtual visitation this summer. Defense counsel at only two facilities (MCC Chicago and MDC Brooklyn) were generally satisfied with the availability of virtual legal visits.

Despite the overall decrease in demand, the Advisory Group found that the availability of virtual legal meetings can serve as a useful supplement to in-person visits. Formerly incarcerated individuals expressed that virtual legal visits would provide a valued alternative to in-person legal visits, especially for legal visits the attorney knows will be brief but that still require confidentiality. One formerly incarcerated individual shared that they were strip-searched and required to go through the process of squatting and coughing before legal visits. Then it could take hours after a visit was over for an officer to become available to escort them back to their unit. Some individuals in detention choose to avoid in-person legal meetings rather than undergo this process, and individuals might resent their attorney if, having endured this process, a meeting only lasts 15 minutes, or if the meeting could have otherwise taken place virtually or over the phone.

Likewise, attorneys with clients in out-of-district pretrial facilities, like the Federal Defender Services of Idaho with clients at FDC SeaTac and the U.S. Virgin Islands Federal Public Defender with clients at MDC Guaynabo, emphasized their reliance on virtual legal meeting capabilities. In-person visits for attorneys in those offices require a flight and often an overnight stay, which may not be feasible, particularly for time-sensitive matters, and require significant resources even if a meeting only takes 15 minutes. These attorneys and others also highlighted that virtual meetings provide capabilities not available via legal calls. For example, with videoconferencing, attorneys can use the screen-share feature to timely review discovery, proffers, plea deals, and other written material.

Notwithstanding the lack of national policy concerning virtual legal visits, BOP has taken steps to continue to provide virtual legal meeting capabilities. FDC Philadelphia reported that, although requests for virtual visits have decreased significantly, the facility is planning to maintain one virtual room to facilitate confidential attorney-client meetings via videoconference. Given the limited availability, the staff will prioritize out-of-state requests and requests related to imminent court deadlines. In addition, MCC Chicago offers virtual attorney-client visits using either WebEx or

Spotlight: BOP's Virtual Visitation Software-as-a-Service

BOP has developed a plan to purchase Virtual Visitation Software-as-a-Service platform to facilitate attorney and court virtual visits. With this platform, attorneys will be able to access a public-facing site, locate their client, and schedule a legal visit. Based on the client's location, the system scheduler will identify the available dates and times for a visit. Once the visit is scheduled in the system, the BOP facility will receive a notification that a visit is pending, and staff will access the application to approve or deny the visit based on BOP policy or facility operations. BOP plans to implement virtual visitation platforms not just at pretrial facilities, but at all 121 BOP facilities. Implementation of the system requires compliance with federal IT security requirements, including obtaining an "Authority to Operate" (ATO) after sufficient review and testing of required controls. Due to the complexity and thorough nature of the ATO process, BOP anticipates that it will take approximately 18 months to implement the platform after it is procured. While funding at this time has not been appropriated, BOP should prioritize this effort as funds become available.

Microsoft Teams during regular visiting hours. The meetings are on iPads purchased and maintained by the United States District Court for the Northern District of Illinois. MCC Chicago utilizes a calendaring system that allows attorneys to schedule virtual legal meetings via a Court licensed website. Once the meetings are scheduled, individuals in detention are placed in attorney-client visiting rooms with the iPad to provide confidentiality during the visits. Further, MCC San Diego reports that attorneys may conduct virtual meetings with a client, but requests for such meetings have declined since the facility returned to pre-pandemic visiting hours; however, the U.S. Probation Office regularly requests to conduct their interviews with detainees through virtual visits.[43] MCC San Diego specifically requested national guidance on VTC technology and encouraged BOP to investigate purchasing tablets.

Notably, both defense counsel and national organizations with expertise on access to counsel best practices stressed that virtual visitation should be a supplement to, rather than a replacement for, in-person legal visits. They noted that video visits could lead to confidentiality concerns and stressed the importance of meeting in-person to build relationships with clients. One organization expressed worries that if virtual legal visits became more widely available, courts could start to question panel attorneys' decisions to meet with clients instead of submitting fewer billable hours for a virtual alternative.

B. State and Local Practices

The Advisory Group identified several innovative practices that state and local facilities have adopted to promote in-person and virtual visitation.

- Increased Space for Legal Visits. Many jails have increased the physical space they use for legal visits. Some larger facilities use "book and release" areas, classrooms, dining areas, and interview rooms on unit floors for legal visits. Others have booths or "KIOSKS"[44] where attorneys can meet with clients in a no-contact environment, some of which allow for the passing and reviewing of legal materials. Some jurisdictions give jail management the authority to designate space as legal visiting space if regular visitation areas are unavailable.

- 24/7 Availability. The Franklin County Sheriff's Office in Columbus, Ohio, allows for in-person and/or virtual legal visits 24 hours a day and seven days a week (24/7).[45] In addition to using tablets for legal visits, the Franklin County Sheriff's Office allows for legal visits via private video teleconferencing on a 24/7 basis. In its newest facility, there is a designated professional visiting space in each housing unit, which has a door for privacy and a non-recorded video visitation monitor. All residents may use this space but must schedule time in advance.

[43] Notably, all 122 BOP-operated facilities have video-conferencing capabilities for individuals to participate in judicial hearings, foreign embassy consultations, reentry-related communications from probation offices, preliminary reentry preparation, disciplinary hearings, and the Institution Hearing Program. *See* BOP_Stats_Under_FSA.pdf.

[44] Denver Sheriff's Department, Operations Division, Inmate Visitation Procedures, 5.00.1068, Nov. 2020.

[45] Email from Franklin County Sheriff's Office to Mike Jackson, CPS, NIC, 4/25/23.

- Electronic Scheduling System. The Los Angeles County Inmate Video Visitation System (IVVS) allows registered visitors with a valid identification and email account to schedule face-to-face and remote video teleconferencing visits with residents up to one to seven days in advance.[46]

C. Recommendations

Consistent with the findings and best practices above, the BOP should:

2.1. Update BOP's regulations related to scheduling legal visits to conform with current practice. BOP's current regulations (28 C.F.R § 543.13) state that all legal visits must be scheduled in advance. Although that provision may be reasonable for BOP facilities that do not have a pretrial mission, it is inconsistent with visitation policies and practices at 9 of BOP's 10 pretrial facilities and with attorney preferences. BOP, in consultation with ATJ, should revise this regulation to allow for walk-in visits at all pretrial facilities.

2.2. Assess feasibility of implementing a calendaring system to provide scheduled legal visits at all pretrial facilities, including by immediately establishing such a system at a pilot location. Several pretrial facilities reported that they offer attorneys the option to schedule meetings in at least some circumstances. Where feasible, BOP should provide attorneys the option to schedule legal visits at all pretrial facilities, at least for mission-critical meetings or when traveling from out-of-state. In particular, each BOP facility should consider adopting a calendaring system to schedule legal visits, taking current staffing into account at each facility and the average number of legal visits per day/month at that location. The calendaring system should not eliminate unscheduled in-person legal visits; rather, scheduled visits should remain an additional option for attorneys, particularly those with urgent meetings or who will travel from out-of-town. BOP should begin this effort by immediately establishing a pilot project at a single facility and, if successful, expand to additional sites.

2.3. Implement consistent dress code approach and enforcement. BOP should issue national guidance to promote consistent enforcement of the dress code for legal visitors. The guidance should identify the Warden and/or the Warden's designee, in consultation with the legal department, as the only officials with the authority to deny entry for a legal visit due to a purported dress code violation (or for a similar discretionary reason). The designee may be the LAO (once established, *see* Recommendation 1.2) but should not rank lower than the lieutenant-level. To provide transparency and promote tracking, BOP should authorize counsel denied entry for a dress code violation to request a written explanation of the reason for denial, including identification of the specific dress code provision alleged to have been violated.

[46] Los Angeles County Sheriff's Department, Custody Division Manual, 5-10/010.05, Inmate Video Visitation System.

2.4. Explore implementing a timer protocol to address wait times for legal visiting rooms. BOP should explore implementing at all pretrial facilities the timer protocol used at FDC SeaTac to decrease wait times for private attorney visiting rooms. Under this protocol, when all attorney-client rooms are occupied, the attorneys who arrived the earliest (e.g., have been meeting with their client for the longest period of time) should be notified that there are attorneys waiting and asked to conclude the portion of the legal visit that is taking place in the confidential room within the next 60 minutes. If an attorney is using the legal visit to 1) review extensive discovery, 2) meet with a client who requires extra time, or 3) prepare for an imminent trial, that attorney should notify visiting room staff in advance that they will require a longer window for their visit. Visiting room staff should exempt those meetings from the 60-minute notice whenever possible.[47]

2.5. Issue guidance to standardize the rules for legal visits by non-attorney legal staff. The Advisory Group identified considerable variation among facilities regarding legal visits by non-attorney legal staff. To promote consistency, BOP should clarify in its national policy regarding which types of legal staff can conduct visits without attorney supervision, including specific recognition of investigators as legal staff that can engage in visits, subject to appropriate vetting protocols.[48] In addition, BOP's Central Office should issue guidance clarifying several points:

- *First*, all non-attorney legal staff who 1) are employed by a FDO and 2) have already received their credentials should be afforded the same status as attorneys with respect to legal visits without undergoing additional security clearance requirements beyond the attestation from the supervising attorney required by 28 CFR § 543.16.
- *Second*, non-attorney legal staff retained by CJA panel attorneys and private counsel must be afforded the same status as attorneys with respect to visiting once they have cleared an NCIC background check and submitted the attestation from the supervising attorneys.[49]
- *Third*, non-attorney legal staff should be required to undergo re-authorization no more than once per year absent demonstrated good cause for a more frequent review on an individual basis.

2.6. Expand the availability of virtual legal meetings to supplement in-person legal visits. Consistent with available resources, BOP should further explore the use of video conferencing technology to enable attorney-client meetings in BOP pretrial

[47] This protocol would not be initiated if the attorney had received prior approval from the facility to utilize the private meeting room for a longer, agreed upon period of time.

[48] The Advisory Group recommends that facilities require that visiting interpreters be accompanied by another category of legal visitor (i.e., attorney, paralegal, investigator, legal assistant, or law clerk) for legal visits.

[49] Contrary to this requirement under 28 C.F.R § 543.16, the Advisory Group learned that certain facilities, such as FDC SeaTac, did not allow paralegals or other legal assistants employed by CJA panel attorneys or private counsel to conduct legal visits. Guidance is therefore necessary to reinforce this requirement.

facilities. In the short-term, the Advisory Group should conduct a follow-up review of lessons learned in federal, state, and local facilities that have adopted tablets for either 24/7 or pre-scheduled attorney access. Based on that review, BOP, in consultation with the Advisory Group, should develop and provide national guidance on the use of VTC technology. In the longer term, the Department should consider seeking to fund positions dedicated to facilitating these communications. As with confidential legal calls, virtual meetings are currently operated by staff who are already tasked with full-time duties, which leads to unfulfilled scheduling requests, incomplete primary work, or both. Full-time dedicated positions would help institutions reliably operate virtual meetings without detracting from in-person visitation or other correctional duties.

2.7. Develop a correctional staff training program related to visitation. BOP, in consultation with ATJ, should develop and implement a training program to ensure that all pretrial facility correctional staff are appropriately trained and understand the policies and guidance regarding staff visitation, including (1) the certification process for non-attorney staff visitation; (2) the availability of confidential rooms; and (3) dress-code enforcement.

III. Legal Calls

While they cannot serve as a substitute for legal visits, legal calls provide a separate, supplemental opportunity for detainees to experience meaningful access to counsel. As with legal visits, to maximize their utility, these calls should be provided in a setting that enables confidentiality to protect privileged attorney-client communications. Scheduled legal calls were particularly important when facilities needed to reduce visiting hours in response to the COVID-19 pandemic, when detainees were often unable to meet in-person with their counsel. Today, the ability to schedule legal calls remains an important pillar of legal access, particularly when attorneys are geographically distant from their clients or time-sensitive, attorney-client communications are necessary. Disruptions to legal calls stymie the legal process and undermine the ability of detained individuals to communicate effectively with their counsel.

A. Findings

BOP Program Statement 5264.08, Inmate Telephone Regulations, provides that unmonitored telephone calls to attorneys are available to individuals in BOP custody, including individuals detained in BOP pretrial facilities.[50] For confidential calls, individuals must specifically request staff assistance to first approve the call, and then place the call on an unmonitored staff telephone.

[50] Legal calls are governed by 28 C.F.R. Part 540 and BOP Program Statement 5264.08, Inmate Telephone Regulations.

Under BOP's national policy, staff shall allow individuals detained pretrial to telephone their attorney "as often as resources of the institution allow."[51] In addition, each of the 10 BOP pretrial facilities has adopted an Institution Supplement implementing these requirements.

Generally, the Institution Supplements provide that individuals in detention may request a confidential, unmonitored legal call by contacting their assigned Unit Team, while individuals assigned to the SHU may submit a request to the SHU officer or a member of their Unit Team. Attorneys may request a legal call with their clients in a variety of ways depending on the facility, including by contacting the Unit Team assigned to their client via email or telephone, or by contacting the facility Executive Assistant and/or facility legal office. Most BOP pretrial facilities provide a specific email address to which attorneys must submit their requests, and Unit Team staff are generally responsible for managing these requests.

Key Facts

- **8 of 10** BOP pretrial facilities provide unmonitored, direct phone line access free of charge to detainees to a local FDO.
- **3 of 10** BOP pretrial facilities also include numbers for CJA panel attorneys in the unmonitored, direct phone lines to FDOs.
- For **3 of 10** BOP pretrial facilities, attorneys expressed satisfaction with the availability of legal calls.

The space used to accommodate legal calls varies by facility. Generally, confidential unmonitored legal calls occur in unit team office space, in education/leisure rooms in the housing units, and/or staff conference rooms.[52] Legal calls for individuals in the SHU generally occur in a private room in the SHU or staff will connect a telephone to a phone-jack.

Eight BOP pretrial facilities provide dedicated legal telephones, located in the common area of each general population unit, that are preprogrammed with the numbers to call the Office of the Federal Public Defender in the District in which the facility is housed.[53] Only three BOP pretrial facilities include the phone numbers for all FDOs with clients in the facility, as well as CJA counsel on these dedicated telephones (MCC San Diego, MDC Los Angeles and FDC SeaTac).[54] Calls on these telephones are unmonitored and available on a first-come, first-served basis. However, because the phones are in the common area, they do not enable detainees to engage in confidential communications with counsel.

[51] *See* BOP Program Statement 7331.04, Pretrial Inmates; *see also* 28 C.F.R. § 551.117(c).

[52] Some defense counsel with clients at MDC Philadelphia expressed that the location of legal calls raised privacy concerns, such that they made calls to clients only in emergency situations.

[53] FDC Miami and MDC Guaynabo are the only pretrial facilities reviewed that did not provide direct phone line access to a local FDO.

[54] FDC SeaTac houses some individuals with pending charges in the districts of Idaho and Alaska. The facility thus includes phone numbers to the Federal Public Defender offices and CJA counsel in those districts on the dedicated legal telephones. Seven of the facilities only provide a direct line to the FDO with the largest number of clients in the facility. For example, FDC Philadelphia detains individuals with cases in the Districts of Delaware and New Jersey, but the direct line only goes to the FDO for the Eastern District of Pennsylvania.

Defense counsel at 7 of the 10 pretrial facilities expressed dissatisfaction with the system for scheduling legal calls. For example: attorneys with clients at MDC Los Angeles estimated that they did not receive responses to half of their requests for legal calls; attorneys with clients at FDC Honolulu reported that calls are not available if you are "on-island" (i.e., if your office is on the same Hawaiian island as the facility); and attorneys with clients at MCC San Diego shared that, in practice, legal calls are not available.

BOP Wardens reported that an attorney or detained individual requesting a legal call can convey the time-sensitive nature of the call to the Unit Manager. Alternatively, attorneys can contact the facility legal department to communicate the time-sensitive nature of the call, which will then discuss the matter with the responsible Unit Manager. The Wardens reported that upon confirming the time-sensitive nature of the call, staff will make necessary arrangements to complete the call as soon as practicable.

Spotlight: FDC SeaTac's Pilot Phone Booth Program

Wardens shared that arranging confidential legal calls strains limited resources. Unit Teams must balance these calls with other responsibilities, and the high volume of requests for legal calls frequently implicate augmentation, training, and other work responsibilities.

FDC SeaTac is piloting an innovative approach to address this concern. The facility reports receiving a large volume of requests for legal calls and "while the Unit Team Counselors make every effort to ensure calls are conducted when requested, there are times where deadlines are not imminent and/or staff resources do not allow for the call to be provided when requested." To address these issues, FDC SeaTac is a developing a pilot project, wherein they constructed private telephone booths to enclose the legal telephones located in one of the pretrial housing units to allow for confidential legal calls. The facility is assessing the feasibility of expanding this to other housing units at SeaTac.

MCC Chicago uses a calendaring system to schedule legal calls. Defense counsel with clients at the facility highlighted the efficiency of the system and also noted that the MCC Chicago staff proactively advise attorneys of delays or the need to reschedule calls.

B. State and Local Practices

Most jails allow legal calls only during specific time periods. Primarily, such calls are made through the regular inmate phone system but are not monitored or recorded. The right to call an attorney cannot be revoked as a disciplinary measure. Accordingly, individuals in detention who have lost their general telephone privileges must still be allowed attorney telephone calls.[55] Some facilities allow attorneys and residents to request legal calls outside of regular calling hours by submitting written requests to jail leadership.

[55] *See* Alaska, DOC Policy 810.01; Nebraska, 81 Neb. Admin. Code Ch. 9, § 004.05; Idaho. Idaho Sherriff's Ass'n, Minimum Stds for Detention Facilities, 14.13.03.

C. Recommendations

Consistent with the findings and best practices above, BOP should:

3.1. Provide free, unmonitored, phone lines that can directly connect to a pre-programmed list of defense counsel. Three pretrial facilities have already implemented this program so that individuals in detention can contact their counsel by phone without requiring staff intervention. BOP should provide the remaining seven facilities with the necessary technical support, technology, and training to implement the program before year end, including by compiling specs and lessons learned from the facilities that have already implemented these phone lines. All FDOs with clients in the facility should be granted access. Consistent with security requirements, all CJA panel and other verified defense attorneys with clients in the facility should be given the option to have their office numbers added as well.[56]

3.2. Review FDC SeaTac's pilot phone booth program and, if successful, expand to other pretrial facilities. All 10 pretrial facilities reported difficulty staffing confidential legal calls. Although the phone lines detailed in Recommendation 3.1 would allow individuals in detention to contact their attorneys at any time on an unmonitored line without staff mediation, those phones are located in common areas and are not a substitute for confidential legal calls. As detailed above, FDC SeaTac has launched a pilot program installing a confidentiality booth around the attorney phone line in three of the FDC's housing units. While these booths should not replace the provision of scheduled confidential legal calls, they can be used for unscheduled confidential legal calls with less demand on staff time. BOP's Central Office should coordinate with FDC SeaTac to identify the considerations, specs, costs, and lessons learned from this innovation. If the pilot program is successful, BOP should develop a plan to replicate these booths in all housing units in all facilities, with benchmarks for a staged rollout so that it can incorporate lessons learned as the program expands.

3.3. Consider purchasing and deploying scheduling software for legal calls. As highlighted above, BOP is exploring installation of software that would facilitate the advance scheduling of virtual legal visits and reduce the amount of staff time necessary to facilitate such scheduling. The Advisory Group strongly supports its implementation as soon as feasible and likewise encourages BOP to explore wider implementation of software for scheduling non-virtual legal calls, whether through this software or through a separate procurement.

[56] If a specific facility has security concerns about this process, they should consult facilities that have implemented the program about appropriate models for screening. FDC SeaTac, for example, requests the FDO to vet and sign off on a panel attorney before that attorney's office number is added to the pre-programmed list.

IV. Legal Correspondence

Meaningful access to counsel requires an operative system that enables confidential written communications between detained clients and their attorneys. Ordinarily, correctional staff can open legal mail only under strict protocols designed to protect the attorney-client privilege, such as requiring that the mail be opened in the recipient's presence and that review of its contents be limited to a scan for contraband. Confidential legal correspondence systems allow clients to receive discovery and other written legal material even when they are unable to visit with their attorneys in-person. And while physical legal mail allows clients and their counsel to remain in regular communication, electronic legal mail can enable time-sensitive communications when, for example, a facility is unable to facilitate a legal call or a housing unit is on lockdown.

A. Findings

1. Physical Legal Mail

Individuals in BOP custody may send and receive confidential legal mail.[57] According to BOP Policy, legal mail from attorneys is not copied or read if the sender is adequately identified on the envelope and the front of the envelope is marked "Special Mail - Open only in the presence of the inmate." The sender's return address must reference an individual identified as an attorney, not a firm, e.g., "John Doe, Attorney," not "Law Offices of Smith & Smith." In the absence of adequate identification or the "special mail" marking on the envelope, staff may treat the mail as general correspondence.

BOP mail room staff record incoming legal mail in the Legal/Special Mail Logbook, which is logged using the recipient's name and register number and the date and time of receipt in the mail room. The Unit Team assigned to the recipient picks up the incoming legal mail and signs the Legal/Special Mail Logbook acknowledging the date and time of receipt. The Unit Team then records each item in the Unit Team Mail Logbook prior to delivering the correspondence to the intended recipient. Legal/Special mail is opened in the presence of the recipient and inspected for physical contraband and the qualification of any enclosures as special mail. The date and time the mail is delivered to a detained individual and the name of the delivering staff member are then recorded in the Unit Team Mail Logbook. According to BOP staff, correspondence ordinarily is processed and delivered within 24 hours, with Legal/Special mail being afforded priority.

In addition to accepting legal mail via the U.S. Postal Service, each BOP pretrial facility provides a drop box in the facility lobby, where attorneys can hand-deliver legal mail for delivery to their client.[58] Each item deposited must be in an envelope with the legal mail markings described above.

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[57] The handling of legal mail is governed by BOP Program Statement 5265.14, Correspondence, and 28 C.F.R. §§ 540.18-19. Each pretrial facility has issued an Institution Supplement implementing the national policies on legal mail.

[58] *See* BOP Program Statement 5800.16, Mail Management Manual at pg. 23, 5800_016.pdf (bop.gov).

Correctional staff retrieve all items from this box Monday through Friday and process the items for distribution via the legal mail procedures described above.[59]

Under BOP policy, properly marked outgoing legal mail may be sealed by the detained individual and is not subject to inspection.[60] The individual in detention must deliver the outgoing legal mail directly to a staff member for further processing. Staff then confirm that the individual delivering the outgoing special mail is the same individual reflected in the return address. During a site visit at FDC Philadelphia, staff explained that a logbook is maintained for outgoing legal mail in which staff enter their name, the date the outgoing legal mail was received, the sender's name and register number, and the address of the outgoing legal mail.

During interviews, Wardens explained the burgeoning problem of drugs being introduced into BOP facilities through both general and legal mail.[61] In some instances, third parties have secreted strips of drugs underneath envelope flaps or soaked papers, stamps, or parts of envelopes (especially non-white envelopes) in various drugs and mailed those to individuals in detention. In response to this security threat, some facilities have adjusted their procedures for incoming mail, as detailed in the text box.

Spotlight: MDC Los Angeles

MDC Los Angeles has implemented a process where the front and back of envelopes containing Legal/Special mail are photocopied prior to delivery to the detained individual. After correspondence is opened in the detainee's presence and the contents are inspected, the contents and the copies of the envelope are provided to the detainee. MDC Los Angeles retains the original envelope for 30 days prior to disposal. MDC Los Angeles notified the local District Court, the U.S. Attorney's Office, the Federal Public Defender's office, and the CJA panel of the changes prior to implementation. *See* Appendix C.

During listening sessions, some defense attorneys shared instances where a client received legal mail that had been opened outside their presence. Defense counsel also stated they were unable to prove the legal mail had been labeled properly because the original envelope was no longer available. Others reported that clients failed to receive mail that the attorneys sent or, conversely, that they had not received mail sent by clients to them. In addition, an attorney with clients at FDC SeaTac reported that the facility had repeatedly returned mail.[62] The facilities maintained that they were unaware of

[59] While legal materials placed in the depository are processed only on weekdays, each BOP pretrial facility now offers weekend visiting hours, and clients may review any time-sensitive materials with attorneys during those sessions. Additionally, if an urgent circumstance arises, an attorney may request from the facility's legal department an accommodation to accept delivery of legal materials on a weekend.

[60] *See* Program Statement 5265.14, Correspondence; 28 C.F.R. § 540.18-19.

[61] *See, e.g.*, Department of Justice, Press Release (January 29, 2019), available at https://www.justice.gov/usao-ndoh/pr/eleven-people-indicted-roles-conspiracy-distribute-synthetic-narcotics-federal-prison.

[62] The attorney cited, for example, an instance where a client had voluminous discovery that was not accessible to him on a disk, and thus requested her to print and mail the materials. The material was returned to her twice, and she ultimately needed to go to the facility and put the materials directly in the drop box in multiple envelopes.

any substantiated complaint where mail had been labeled properly but handled inappropriately and were otherwise unaware of concerns related to legal correspondence.[63]

2. *Electronic Legal Mail*

BOP encourages incarcerated individuals to maintain ties with their family, friends, and other community contacts. To help facilitate those communications, BOP enables individuals in detention to send and receive electronic messages with outside parties via a secure email exchange using the Trust Fund Limited Inmate Computer System (TRULINCS). The operation and software of TRULINCS is implemented by a private vendor contract overseen by BOP staff, and the current budget for the operation and maintenance of TRULINCS is approximately $12.3 million. Currently, TRULINCS is 100% self-supporting through revenue raised by the BOP Commissary, as well as its service fees.

In BOP pretrial facilities, each individual in detention is provided a TRULINCS account and may use dedicated TRULINCS workstations within housing units and common areas, including to contact management and to send and receive electronic messages. Individuals in detention must have pre-approved contacts for electronic messaging. If an email address is entered for a contact, TRULINCS sends a system-generated message to the contact giving them the opportunity to accept or reject the email prior to receiving any messages from the detained individual. Messages are limited to 13,000 characters. Individuals in detention have no access to the Internet, nor are they able to receive pictures or any other attachments.

The current system monitors all electronic messages, and message content is subject to the same restrictions as regular mail. The monitoring capability is a core aspect of the system, and it therefore cannot easily be modified to turn off the monitoring feature only for those communications with attorneys. Individuals in detention who choose to opt-in to TRULINCS email communication are provided advance notice that, in doing so, they have consented to having ***all*** of their written communications over this system, including communications with their attorney, subject to monitoring for content that might jeopardize public safety or the safety of the facility, and that "such messages will not be treated as privileged communications."

In 2017, to address concerns about inappropriate disclosure of attorney-client communications over the TRULINCS platform, BOP added a filter so that it could withhold attorney electronic messages from production when defendant communications are requested by United States Attorneys' Offices (USAOs) or others. The filter allows staff to produce emails for law enforcement while excluding specific email addresses from the requested search, such as email accounts belonging to attorneys. The requesting law enforcement officials are expected to provide the specific email addresses to be excluded from the search. In addition, the requesting law enforcement entities are responsible for verifying that no emails from the attorney were included in the production.

[63] Several facilities acknowledged receiving complaints that legal mail was delayed or did not arrive, but stated the problem lies with USPS, not BOP.

During listening sessions with defense counsel, a number of attorneys noted that they use TRULINCS to communicate non-substantive matters with their clients. They expressed concern that although they caution their clients to refrain from using the email system to discuss substantive case issues, clients often do not understand the contours of this limitation and include sensitive matters in email communications. In some cases, attorneys reported they have had to remove their email addresses from their clients' approved lists in order to safeguard the confidentiality of their communications. Many attorneys shared that access to a confidential electronic communication method would enhance the ability to communicate with their clients. Specifically, attorneys noted that it would provide an efficient means to confer with clients quickly and confidentially, and significantly increase access to counsel for the clients.

Because TRULINCS is a pay-for-service platform, formerly incarcerated individuals shared that their ability to email their attorney to request a visit or to ask them to schedule a legal call hinged on whether they had money in their account. This is a particular concern in facilities that do not have a free, direct telephone line to all FDOs and CJA panel attorneys.

BOP reports that creating a free messaging system that ensures communications with attorneys remain confidential would present significant resource and infrastructure challenges. The Congressional Budget Office ("CBO"), for instance, reviewed draft legislation requiring that BOP implement a new e-mail system that excludes communications between individuals in detention and their legal representatives from monitoring. CBO estimated that the total cost to design, develop, and install the new system required by that legislation would be $33 million, and expected the project would take three years to complete.[64] During interviews, BOP Wardens also emphasized that any proposed system must have the capability to restrict electronic communications to only verified legal representatives. Further, the Wardens noted that any system deployed to allow confidential communications must have safeguards to prevent manipulation that would enable communication with non-attorney contacts in the community, potentially in furtherance of criminal activity or to contact/harass victims.

B. State and Local Practices

State and local facilities have adopted several innovative practices to enhance access to physical and electronic mail, including:

- Locked Legal Mailboxes. Some newer jails use locked mailboxes where residents can deposit their outgoing legal mail. Staff collect and inspect all legal mail deposited in the locked mailbox and jail management logs and review it daily. Generally, when legal mail is denied for contraband, all parties, including jail management, are notified in writing regarding the reason.[65]

- Free Legal Mail. In Maryland, upon the request of an indigent individual in detention, staff provide the individual with pen, paper, envelopes, and first-class postage for seven letters per week. If a detained individual requires additional materials or postage for legal

[64] H.R. 5546 (cbo.gov).

[65] DC Dept. of Corrections, Inmate Correspondences, Policy # 4070.4F (g.).

correspondence, the individual may request these through their classification counselor who must grant the request unless it is determined that the postage provision is being abused.[66]

- Confidential Email System. In some jurisdictions, attorneys, legal representatives, and court officials are authorized to send legal correspondence through email. In York County, Pennsylvania, legal email service is free of charge to both the attorney and the recipient and must be sent to the York County Prison Legal Mail Account. Legal emails are protected, confidential, and not retained on the facility's servers. Mailroom clerks open the emails in the presence of the detained individual, who will sign and be given a copy of receipt indicating the sender and documents received. Attorneys and other legal representatives must be verified in advance and added to an email list.[67]

- Tablets. More jails are beginning to use tablets with preloaded applications so that residents can send email to family, friends, and attorneys of record. This service is usually provided by private, third-party vendors for sending electronic mail and photos at the cost of regular mail. The Pennsylvania DOC makes tablets available for residents to purchase for $147.[68] Some facilities provide tablets with preloaded applications to residents at no cost.[69] Residents can register for email accounts that allow for direct, two-way communication with their attorneys at any time.

C. Recommendations

Consistent with the findings and best practices above, the BOP should:

4.1. Issue national guidance to facilitate resolution of disputes related to the proper handling of legal mail. As explained above, BOP facilities must respond to the threat that smugglers will secrete drugs in envelopes marked as legal mail while ensuring they do not unnecessarily interfere with privileged communications. To facilitate resolution of disputes, BOP should issue national guidance instructing staff to photocopy and preserve all sealed envelopes that are (i) marked legal mail, but that (ii) BOP staff determine are improperly labeled and/or suspicious.

4.2. Investigate the feasibility of implementing an unmonitored, secure email method for attorney-client communications. The Advisory Group heard repeated requests for an unmonitored email capability but recognizes the significant barriers to implementation. BOP, with assistance from ATJ, should further investigate the feasibility of such a program, including an in-depth review of the associated costs, necessary security parameters, and existing technology at the state and local level. The review should include identifying, in consultation with the Office of

[66] 12 Code of Md. Regs. Sec. 12.02.20.02 (A)-(B)

[67] Prison Policy Initiative, "A Tale of two Technologies: Why Digital", Oct. 2020.

[68] *See* Pennsylvania Department of Corrections, www.cor.pa.gov/Inmates/Pages/Tablets.

[69] People Over Profits: A Truly Free, No Cost Tablet Program For Incarcerated People in San Francisco, The Financial Justice Project, May 2023.

Legislative Affairs ("OLA") and JMD, any necessary legislation and/or appropriations.

4.3. Release guidance codifying filter protocols. In 2017, BOP adopted a filter that can exclude Attorney-Client TRULINCS communications from inclusion in productions to USAOs, where exact attorney email addresses are provided. BOP should codify that guidance in its national policy. It should also issue guidance recommending that, if the USAO or law enforcement partner fails to provide such information, BOP officials should affirmatively ask USAOs for email addresses to exclude from productions.

4.4. Partner with ATJ to identify intermediate steps for improving the confidentiality of attorney-client electronic communications. In consultation with external stakeholders, and within 180 days, BOP and ATJ should issue a report, with concrete recommendations, on interim steps that may be taken to better safeguard the confidentiality of electronic attorney-client communications. The report should include the feasibility of establishing mechanisms for excluding FD.org emails from monitoring, as well the feasibility of issuing, for example, guidance that instructs BOP officials to end email review if/when they determine that an electronic communication is with the detainee's legal counsel.

V. Access to Discovery and Client Records

To mount an effective defense, a defendant should have a meaningful opportunity to review the discovery produced in his or her case. This process often requires reviewing discovery alongside counsel, investigators, and/or expert witnesses.

In 2016, the Department of Justice and Administrative Office of the U.S. Courts' Joint Working Group on Electronic Technology ("JETWG") issued guidance on the provision of electronic discovery ("e-discovery") or "Electronically Stored Information" ("ESI") to individuals in federal pretrial detention.[70] At the time, the JETWG concluded that "[m]ost information is now created, stored, and processed electronically, and most discovery in federal criminal cases is now in digital format." The JETWG also recognized the competing concerns of efficiency, costs for all stakeholders, court delays, and institutional constraints.[71] Today, these concerns are even more pronounced, as even simple cases can generate large volumes of e-discovery, and it is increasingly common for complex cases to involve terabytes of electronic material. The challenges presented by the volume and complexity of e-discovery impact all stakeholders in the judicial system, including defendants, defense counsel, prosecutors, and the courts.[72]

[70] *See* Guidance for the Provision of ESI to Detainees (doj.gov).

[71] *Id.* at 1.

[72] Although this report is focused on individuals detained in BOP facilities pretrial, the Advisory Group recognizes that these issues are far-reaching and that defense attorneys and prosecutors may often face the same challenges.

A. Findings

Key Facts

- In **100%** of the listening session, attorneys reported their clients had difficult reviewing discovery.
- **5 of 10** facilities always allow attorneys to bring laptops in for legal visits.
- **2 of 10** facilities never allow laptops.
- **10 of 10 facilities** have discovery computers available in the visiting room, although those computers are not always operational.

Concerns about client access to e-discovery emerged as a central theme of every listening session with the FDOs and CJA panel attorneys, and in two of the listening sessions, attorneys flagged client access to e-discovery as the top issue that they hoped the Department would address through this review. These concerns were echoed by several Wardens and BOP legal counsel, although leadership at other facilities stated that they were unaware of any systemic e-discovery challenges.

1. National Policies

Program Statement 1237.16: Information Security governs electronic media in BOP facilities. The policy states, in relevant part, that detained individuals can review legal electronic media only on "workstations designated for e-discovery that are configured to exclusively provide read-only access." The policy also states that media provided by legal counsel must be "read only" and "must be approved by the local CEO."[73] The policy acknowledges that court-ordered discovery is not always accessible to detained individuals, and states "Quick View Plus software is available for IT staff to download and install on applicable electronic discovery workstations, which allows for viewing and printing documents of various formats." Finally, the policy lists the various electronic media subject to this provision, including "DVDs, thumb drives, or other formats approved by the CEO as resources permit," and concludes, "[t]he Central Office may also approve additional technology as formats evolve."

Program Statement 1315.07: Legal Activities "permits" a Warden to allow a lawyer to bring in a computer or other "electronic device[s]...if it is shown that such use is absolutely essential to facilitate the attorney-client relationship, and such use would not be inconsistent with the institution's maintenance of security, good order, or discipline." More generally, this Program Statement also permits staff "to allow an inmate to possess those legal materials which are necessary for the inmate's own legal actions."[74]

In short, the existing national guidance on e-discovery leaves a great deal to the discretion of the individual facilities. Local policies and practices concerning how, in what formats, and under what conditions individuals detained in a BOP pretrial facility may review the e-discovery produced in their case vary significantly. Notably, Program Statement 1315.07 has not been updated since 1999, and even though Program Statement 1237.16 was updated in 2016, several Wardens volunteered that the import and volume of e-discovery has grown exponentially since then, prompting a spate of recent policy changes at the local level.

[73] As used in this policy, the term "CEO" is synonymous with "Warden."

[74] This policy is codified by regulation at 28 C.F.R § 543.11(d)(2).

2. Local Policies, Practices, and Challenges

Discovery Workstations

Every BOP pretrial facility stated that individuals in detention have access to computers to review e-discovery. Eight of the 10 facilities stated that at least one discovery computer is available in each pretrial housing unit. These computers generally are located in the common areas, often next to the computers used for social email. Most, if not all, of these eight facilities also maintain at least one discovery computer in the law library, where detained individuals can review sensitive discovery or discovery under protective order. While some facilities allow detained individuals in the general population to access the computers on a first-come, first-served basis, others require incarcerated individuals to schedule an appointment with their unit or education department staff.

The other two facilities require individuals to make special requests to review their discovery. At MDC Guaynabo, the only discovery computers are in the visiting room, and detained individuals seeking to review their e-discovery must request an appointment to access the equipment. MCC San Diego has a similar policy: detained individuals must request computer access and, if granted, the Computer Services Department will configure a mobile standalone computer for discovery review. Defense counsel with clients at both facilities shared that, in practice, their clients faced considerable obstacles when trying to secure computer access for discovery review.

Defense counsel raised three overarching concerns regarding their clients' access to e-discovery through the workstations. First, the attorneys stated that discovery productions frequently contain files that are incompatible with BOP computers. The following two sections of this report elaborate on this concern. Second, defense counsel shared that the hours for their clients to review discovery are insufficient in facilities that have time and place restrictions on discovery review. Likewise, even in facilities without time and place restrictions, attorneys shared that some facilities have too few computers (or those computers are too slow) for their clients to have sufficient access. And third, defense counsel expressed concern that discovery computers are in communal areas, making it difficult for their clients to confidentially review materials.

Facilities have tried to address this last critique with varying degrees of success. Almost all of the pretrial facilities allow individuals in detention to reserve time in the law library to review sensitive material, although, as mentioned above, imposing time and place requirements on discovery review may exacerbate the countervailing concerns about *sufficient* access to their discovery. FDC Philadelphia has also created an additional private discovery room that is available upon request. In addition, at least one facility—MDC Los Angeles—has placed screen shields on the discovery computers, so that the screen is only visible to someone looking at the computer head-on and in close proximity.

Visiting Room Computers

Every facility stated that computers for discovery review are available during legal visits. While some facilities, such as MDC Los Angeles, have discovery computers in each confidential legal visiting room, others, such as FDC Honolulu, have only one discovery computer. In nine facilities, the computers are a permanent fixture of the visiting room. At MCC San Diego, two mobile

computer workstations are available upon attorney request, although defense counsel reported that they were unaware of this option and have never seen another attorney exercise it.

Computer Hardware

The computer hardware at the majority of BOP's pretrial detention centers is considerably out of date. Defense counsel reported that many of the available computers—both in the visiting room and in the housing units—are non-operational. Several facilities reported that individuals in detention frequently vandalize the e-discovery computers; other facilities stated that this is rarely a problem.[75] Most, if not all, facilities encase the unit computers in a protective enclosure, with varying degrees of effectiveness. FDC Philadelphia recently updated its computer protective equipment to make the computers "tamper proof." Since making this change, the facility reports that incidents of computer damage have dramatically decreased. Previously, the computers were encased in metal cages.

Facilities report that they face challenges in upgrading outdated equipment, including due to budgetary constraints. For instance, FDC Miami adopted a now-defunct pilot program in which they received computer hardware from the Federal Defender's Office each time that office received equipment upgrades. That program was shut down due to perceived concerns with unauthorized transfers under federal appropriations law.[76] Several other facilities reported declining technology donations on these or similar grounds.[77]

Discovery Software

BOP Central Office specifies which software may be installed on computers in BOP detention facilities. This software suite—known as "Image"—relies heavily on Quick View Plus, which purportedly allows users to open a broad range of file formats as read-only documents. In practice, defense counsel shared that Image is unable to open *many* common e-discovery formats, including certain video recordings, Cellebrite data, and most audio. In some facilities, these concerns were echoed by the Wardens and legal staff.

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[75] For example, MDC Brooklyn stated that e-discovery computers are "frequently destroyed" by individuals in detention seeking wiring for other purposes. In contrast, MDC Los Angeles stated that physical tampering only happens "once in a great while."

[76] *See generally,* GAO-06-382SP Principles of Federal Appropriations Law: Third Edition, Volume II at 6-163 ("BOP, because of the anti-supplementation principle of federal appropriations, cannot itself take ownership of a device from an outside source.").

[77] A thorough review of the accuracy of this position was outside the scope of this Report, but, as detailed in the recommendations that follow, additional analysis is warranted. In general, the Department addresses authority to accept gifts in DOJ Order 2400.2. This policy refers to 28 U.S.C. § 524(d) and applies to "the solicitation and acceptance of gifts, devises and bequests of property of all kinds" for the entire Department. *Id.* The Assistant Attorney General for Administration analyzes the Department's authority to accept gifts, including donations made to a component such as BOP, in accordance with criteria specified in the policy. *Id.* The Assistant Attorney General for Administration has delegated to the BOP authority to accept donations of religious or education items from religious or educational groups or entities, provided such donations are valued at $250 or less. *See* BOP Program Statement 1350.02, Acceptance of Donations, available at www.bop.gov/policy/progstat/1350_002.pdf.

To help address these concerns, BOP recently disseminated guidance requiring its facilities to replace the "Image" on all e-discovery workstations with the new "Image" containing Quick View Plus 2020. The guidance also provided information on how facilities could request computers to replace outdated or nonfunctioning devices or request additional computers as needed. Additional research is warranted to determine whether the most extreme software challenges are a consequence of hardware incompatibility with the latest software updates from Image, or whether even the most up-to-date iteration of Image would face the same restrictions. At a minimum, there are certain common e-discovery formats that even the latest Image software updates cannot process, including Cellebrite phone data. Even where facilities have up-to-date hardware and software, however, individuals in detention may still face barriers to viewing discovery—challenges shared by defense attorneys and prosecutors alike. In some instances, the large volume of electronic data cannot be opened and viewed on standard computers. Likewise, particularly complex cases may require on-site expert assistance to facilitate review of massive data sets.

Attorney Laptop Policies

Defense counsel universally reported that the ability to bring a laptop into a legal visit significantly improves their clients' legal access. Given the volume of e-discovery and the limitations of facility computers, attorney laptops ensure that clients are able to review necessary evidence. Use of laptops can also minimize wait times for legal visits, maximizing the client's time with his or her attorney. In several facilities, attorneys reported that the wait times for legal visits are exacerbated by the limited number of functioning e-discovery computers and the inability to prepare the relevant discovery from thousands of pages of data in advance. Attorneys also shared that allowing legal assistants, such as paralegals and investigators, to bring in laptops could further enhance their clients' access to discovery, as reviewing discovery with a client can require a full day, especially when the client is unable to review the discovery on the unit computers.[78]

Five of BOP's pretrial facilities allow all attorneys to bring laptops when conducting legal visits.[79] Three facilities—FDC Miami, MCC Chicago, and FDC Houston—allow attorneys to bring laptops on legal visits if they can demonstrate a compelling need and secure pre-approval. However, defense counsel stated that the latter two facilities rarely, if ever, approve this request.[80] At least three facilities—MDC Brooklyn, FDC Miami, and FDC SeaTac—also allow legal assistants to bring laptops when conducting legal visits, and several other facilities indicated that legal assistants may apply and receive special approval to do so. Two facilities—MDC Los Angeles

[78] *See* Guidance for the Provision of ESI to Detainees (doj.gov) at 3 (CJA panel attorneys and FDOs "have an interest in avoiding the expenses incurred when an attorney or other member of the defense team must travel to lengthy legal visits merely to permit a detained client to review ESI on a defense team device. Subject to facility concerns discussed below, an investment in devices for use within a facility can result in substantial savings in this regard.").

[79] The five facilities are MDC Guaynabo, MDC Brooklyn, FDC Philadelphia, FDC SeaTac, and FDC Honolulu. The process at these facilities ranges from signing an attestation every six months that the laptop user will abide by the facility's security protocols (FDC Philadelphia), to submitting a form 24 hours in advance of every visit (MDC Guaynabo), to signing a form at the time of the visit certifying that Wi-Fi and other mobile capabilities are disabled while the laptop is inside the institution (MDC Brooklyn).

[80] Defense counsel also reported that, although FDC Miami generally does approve laptops, it can take four weeks to receive that approval.

Closeup: MDC Brooklyn

As a consequence of both the hardware and software issues described above, judges have increasingly issued orders to allow laptops containing discovery review programs and discovery materials to be introduced and maintained inside MDC Brooklyn. These laptops are held in the custody of the facility's staff and detainees may request access to their assigned laptop to review discovery in their case. This process has several notable drawbacks. First, and primarily, it is staff-intensive, requiring facility staff to securely store laptops, as well as bringing the detainee to a secure space to review the materials. Second, it may exacerbate the problem of limited hours to review discovery because detainees can only review discovery when staff are available. Third, since this policy is driven by *ad hoc* court orders, it may not be applied consistently, nor with regard to staff capacity. Finally, attorneys have reported that this approach is extremely costly, as it requires the government to provide a separate laptop computer for each client.

and MCC San Diego—do not allow attorneys to bring in laptops under any circumstances, notwithstanding national BOP policy authorizing facilities to allow such use.

Nine of the pretrial facilities reported allowing expert witnesses to bring in laptops when needed to perform a medical assessment, although defense counsel report varying degrees of success in securing this approval. MCC San Diego is the only facility that does not allow laptops even for court-ordered medical assessments.

According to staff at the facilities that do not or rarely allow attorneys to enter with laptops, doing so would raise security concerns, particularly to the extent that those laptops can connect to the Internet. Facilities that do allow laptops share that doing so has helped alleviate the considerable challenges associated with e-discovery review. Only one facility that allows laptops reported a security breach, and this single breach involved a paralegal, not a licensed attorney.[81]

Physical Media

Local policies and practices also vary with respect to permissible e-discovery formats. For example, at least six facilities allow attorneys and legal assistants to bring USB drives with them when conducting legal visits (either to plug into the visiting room computer or to use on their own computer, depending on that facility's policy). One facility—FDC Philadelphia—only allows the DOJ-embossed wallet card USB drives.[82] Two facilities do not allow any USB drives. Meanwhile, nine facilities allow legal visitors to enter with external hard drives (although FDC SeaTac only allows hard drives that do not have a motor).[83] Wardens and legal staff shared that allowing USBs and external hard drives into their institutions can trigger security concerns, both because it can be difficult to ensure the material is read-only and because it has become increasingly common for USAOs to produce entire cell phone dumps, including photos and conversations that are unrelated to the legal case. At least one facility—FDC Houston—addresses

[81] FDC Philadelphia reported that a paralegal brought pornography into the facility on his laptop.

[82] EOUSA recently announced plans to phase out these wallet drives and will instead purchase regular USB drives on the open market.

[83] FDC Houston is the only facility that does not allow any external hard drives, but they do allow USB drives.

these concerns by having one of their attorneys review the content of all USBs and scrub material that is not legally relevant before turning it over to the detained individual.[84]

Local policies also differ as to which, and under what circumstances, e-discovery formats may be stored in the housing units. At a minimum, all facilities require e-discovery material to go through the legal or education department before it is cleared and made available to a client. Some facilities allow clients to retain custody of e-discovery in their cells. Others store the material with the unit or education department staff and allow the individual to schedule an appointment to check it out for review.

Defense counsel raised several concerns related to restrictions on e-discovery formats. USAOs tend to produce discovery on USB drives, making it difficult, time consuming, and/or expensive to convert that discovery into a format that a client can review when detained at a facility that does not allow USBs inside. Further, several attorneys reported that needing to check discovery out from the unit staff significantly restricted the time frames during which their clients could engage in discovery review.

Discovery Under Protective Order

Some facilities, such as MDC Brooklyn, reported that many of their detainees receive discovery under a protective order. Those facilities have clear policies in place for handling this discovery, which generally include storing the material with unit or education staff and allowing the detained individual to schedule a time to check it out and review it confidentially in the law library. Other facilities, such as FDC Honolulu, reported that they had never dealt with discovery coming in under a protective order, and maintained that if it did, they would leave it to the individual in detention to ensure the confidential review of sensitive information.

Both approaches come with challenges. Discovery under a protective order may include sensitive information that can put the individual in detention at risk if reviewed on the e-discovery computers in the common areas. At the same time, defense counsel reported that several facilities do not have sufficient law library hours or workstations for their clients to review discovery that is under a protective order, especially when it is voluminous.

3. *Access to Client Records and Legal Materials*

In addition to access to discovery, clients should have access to the other records necessary to mount their defense, including medical records, Pre-Sentencing Reports ("PSRs"), and additional legal materials.

Medical Records

Client medical records can play an essential role in mounting a competency defense or laying a foundation to justify the need for an expert witness.[85] When the process for requesting or receiving

[84] It is unclear how the facility assesses the legal relevance of the material produced.

[85] Defense counsel also relayed that post-conviction, medical records can play a significant role in evaluating the appropriateness of compassionate release.

records for detained individuals moves slowly, it can cause considerable delays to court proceedings, unnecessarily extend the period of detention, and place an unnecessary burden on court resources. Further, detained individuals often depend on their attorneys to advocate for necessary medical interventions, and when those attorneys face obstacles and delays in obtaining the necessary records, it can both delay medical care and undermine trust between client and attorney.

The review revealed that institutional policies, practices, and timelines related to attorney requests for client medical records varied greatly across facilities. For example, defense counsel with clients at five facilities—MDC Brooklyn, FDC Miami, FDC Honolulu, MDC Los Angeles, and FDC Philadelphia—reported that the process is streamlined, and they did not experience delays. In contrast, defense counsel with clients at the other facilities shared that there can be long delays and inconsistent requirements, such as requiring a request pursuant to the Freedom of Information Act ("FOIA") or stating that the client needs to request the records directly.[86] Relatedly, attorneys with clients at FDC Houston and MDC Brooklyn reported that every time they request medical records from either institution, both the records and the request are simultaneously sent electronically to the USAO. Both offices conveyed that this policy undermines their ability to build trust and effectively represent their clients.

In May 2020, the BOP FOIA office implemented an expedited process to permit attorneys representing individuals detained pretrial and/or sentenced individuals for purposes of CARES Act/Compassionate Release matters to request medical records by submitting a FOIA request via the publicly available email (bop-ogc-efoia-s@bop.gov). From approximately May 2020 to November 2021, the BOP processed approximately 6,840 requests from attorneys and released approximately 1,129,449 pages pursuant to this process. BOP expanded that program and now any request for medical records from an attorney that includes a signed consent form from their client submitted to the FOIA email address will ordinarily be processed within 24 hours of receipt. Records beyond the most recent two years and/or other records, such as a central file, are processed through the regular FOIA process.

Additionally, BOP drafted a proposed modification to the BOP routine use exceptions for records, specific to System of Record Notices 007, Inmate Physical and Mental Health Record System.[87] The proposed modification adds a routine use category that will make it easier for attorneys to receive medical records pertaining to their detained clients. Specifically, the proposed routine use adds "attorneys representing current and former inmates in either a criminal or civil matter to receive their client's medical records." The BOP is collaborating with the Department's Office of Privacy and Civil Liberties ("OPCL") on this initiative.

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[86] Some counsel, such as those with clients at MDC Guaynabo and FDC Houston, reported that the procedures for requesting medical records can depend entirely on the staff processing the request. Although most defense counsel reported occasionally needing a court order, counsel with clients at MCC San Diego, FDC Philadelphia, and MDC Guaynabo shared that a court order is often necessary. Defense counsel with clients at MCC Chicago reported going through USMS for medical records, as requests to the MCC result in prolonged delays. Although multiple Federal Defenders with clients at FDC SeaTac reported considerable delays and inconsistencies with regard to record requests, the CJA panel representative from WDWA shared that she had recently used a new streamlined BOP form that resulted in the prompt release of her client's records.

[87] Available at 02-6205.pdf (govinfo.gov).

PSRs

PSRs play a crucial role in calculating an individual's criminal sentence. They can also impact potential post-conviction relief and eligibility for diversion programs and other services. These reports contain a great deal of personal information—including personal and family history—that only the client can verify, and the material contained in the PSR can help a detained individual facing sentencing prepare their statement to the court. Consistent with BOP Program Statement 1351.05, Release of Information, all individuals facing a sentencing hearing, including those detained pretrial, should have unfettered access to their PSR.

During the review, several facilities indicated that they did not allow individuals in detention to retain PSRs for security reasons, despite BOP Program Statement 1351.05. In response, the Advisory Group followed up with each facility to underscore the importance of adhering to policy, and each facility now reports that they have resumed allowing individuals to keep PSRs where consistent with Program Statement 1351.05. Consistent with Recommendation 5.7, *infra*, BOP should issue additional guidance to prevent similar misunderstandings and ensure continued compliance with this policy.

Legal materials in transit

Individuals incarcerated pretrial should have consistent access to the records and legal materials they have collected and prepared as part of their case. Clients frequently annotate the material they receive from their attorneys, and when those materials are lost in transit, a client can lose hours of work that they have put into preparing their defense. Likewise, when an incarcerated individual's legal material is misplaced, their defense counsel must dedicate time and resources to reproducing the material in a format their client can review.

Defense counsel with clients at four of BOPs pretrial facilities—MDC Brooklyn, FDC Houston, FDC SeaTac, and MDC Guaynabo—stated that their client's legal material, including discovery, is frequently lost in transit. Specifically, when a client is transported 1) from a BOP pretrial facility to another facility; 2) between pretrial facility housing units; or 3) to and from court, defense counsel report that discovery, research notes, and other legal material often get lost. Defense counsel was unsure at what point in the process the material is lost, although it is unlikely there is one cause, or that causes are consistent across facilities. USMS and BOP have committed to working together to addressing the problem(s). *See* Recommendation 5.5, *infra*.

B. State and Local Practices

State and local facilities have adopted several innovative practices to promote access to discovery and legal materials:

- Dedicated Legal Research Area. At the San Bernardino Sheriff's Office, residents who sign a "Pro Per Policy Inmate Agreement" have access to a part of the jail used exclusively

for legal research and review of legal materials in their cases only. The facility designates one or more officers to act as liaisons for the program.[88]

- Discovery Tablets. The Alameda County Sheriff's Office provides certain individuals in detention access to designated "discovery tablets" to review discovery in their cells between 6am and 11pm. They are also allowed to bring these tablets to legal visits.[89]

C. Recommendations

Consistent with the findings and best practices above, the BOP should:

Access to Discovery

5.1. Update policies and issue interim guidance addressing when attorneys can bring laptops into pretrial facilities. Given the volume of e-discovery and the limitations of facility computers, attorney laptops help ensure that clients are able to review necessary evidence. Section 12(e) of the Legal Activities Program Statement (1315.07) currently states that the Warden at each facility "may permit" the use of laptops by attorneys conducting legal visits "if it is shown that such use is absolutely essential to facilitate the attorney-client relationship, and such use would not be inconsistent with the institution's maintenance of security, good order, or discipline." The BOP should update its policy to reflect that facilities "shall" permit laptops in such circumstances. It should also update the policy—and issue interim guidance—instructing Wardens at pretrial facilities that:

- They may not issue blanket prohibitions on attorneys bringing laptops to legal visits;
- The use of a laptop will ordinarily be essential to facilitate the attorney-client relationship when an attorney demonstrates that they need to review discovery with a client that is otherwise inaccessible on the facility's computers;
- They must confer with the BOP Regional Counsel prior to denying a request allowing an attorney to bring in a laptop to facilitate a legal visit; and
- They must confer with the Regional Counsel prior to denying a request to allow an expert to bring in a laptop for purposes of conducting an assessment which utilizes computer-based tools.

5.2. In consultation with EOUSA, JMD, ATJ, and other stakeholders, establish minimum e-discovery standards to promote consistency and share those standards

[88] Email from San Bernardino Sheriff's Department to Mike Jackson, CPS, NIC, 4/25/23.

[89] *See "Alameda County Sheriff's Office: Inmate Discovery Tablet Agreement,"* available here. The ABA echoed that the introduction of discovery tablets for incarcerated individuals is a promising development, but stressed the importance of ensuring those tablets are password protected, so individuals in detention are able to review the material without fear of another individual in their housing unit accessing the discovery in their case.

with the courts and defense bar. The Advisory Group review revealed significant variation in local procedures concerning e-discovery storage, formats, and how e-discovery is introduced to the facility. Consistent with preexisting policies and regulations, BOP should adopt minimum standards that are widely disseminated within BOP and made publicly available. While new standards will not entirely resolve concerns related to e-discovery—particularly discovery involving massive data files—they will help provide a baseline for facilities and promote access to common data files. These standards should include, at a minimum, that:

- Each facility is responsible for ensuring their discovery and visiting room computers have been updated to the latest version of BOP's "Image" platform;

- Each facility is responsible for notifying Central Office when their computers are incompatible with an "Image" software update pushed out by Central Office;

- Subject to appropriate additional security protocols, pre-cleared legal staff and experts should be allowed to bring in laptops for legal visits under the same circumstances as attorneys, consistent with Recommendation 5.1, whether or not they are accompanied by an attorney;[90]

- Housing unit discovery computers should be outfitted with screen privacy shields;

- Discovery computers should be tamper-resistant without impeding ability to use USBs and external hard drives;

- Each facility should provide to stakeholders in the legal community (and update as appropriate) a list of file formats that are compatible with the discovery and visitation room computers, so that defense counsel has the opportunity to convert incompatible files before entering the facility when possible;

- Discovery that is produced under a protective order should be handled pursuant to procedures developed in consultation with ATJ, EOUSA, and other litigating components as appropriate (and that should incorporate provisions to ensure detainees have sufficient opportunity to review protected discovery).

At the same time, BOP, in consultation with ATJ, should explore incorporating guidance on the protocols detailed above into Program Statement 1315.07: Legal

[90] To the extent certain facilities have objected to allowing attorneys to bring in laptops due to security concerns, BOP should evaluate these objections and, if appropriate, identify security measures to address them. BOP Central Office should include these security protocols in its national standards.

Activities. BOP should also revise the Program Statement on Information Security (1237.16) for consistency.

5.3. Explore ways to enhance and update e-discovery technology. In the short term, BOP should review its "Image" platform and confirm that the software available to all pretrial facilities is consistent with the latest Quick View Plus update. BOP should also work with EOUSA, JMD, ATJ, and other stakeholders, including the National Litigation Support Administrator in the Defender Services Office, to identify which common e-discovery formats are incompatible with the "Image" platform. This group should then identify mechanisms to allow common e-discovery formats, such as cell phone extractions, to be safely reviewed on BOP discovery computers.[91] This may include supplementing the "Image" platform with additional software. Finally, the Department should further investigate whether legal restrictions prevent donations of computer technology to BOP facilities, and, as necessary, seek approval from the Assistant Attorney General for Administration and/or pursue congressional authorization to accept such donations. The Department should also explore alternative avenues, such as receiving donations through the courts.

5.4. Conduct an inventory of computer equipment in all facilities on a regular basis, including a formal inventory at least annually. BOP should conduct this inventory, to include the locations, numbers, and technological capabilities of each facility's e-discovery and visiting room computers, including compatibility with the most up-to-date iteration of BOP's national "Image" platform (and any updates to that platform that result from this review).

Legal Material and Client Records

5.5. Coordinate with USMS, Federal Defender Organizations, and CJA panel representatives to improve the transfer of legal materials. Defense counsel in four districts stated that their clients' legal material often gets lost when clients are in transit, either between facilities, between housing units, or to and from court. USMS and BOP should coordinate with FDOs and CJA panel representatives from these districts to understand the source(s) of the issue, identify solutions, and report those solutions through the Advisory Group to ODAG.

5.6. Establish a clear and streamlined policy to ensure defense counsel have timely access to client medical records in BOP's possession. This policy should issue from BOP Central Office and include a provision that BOP pretrial facilities should not, as a matter of course, send defense requests for medical records to the USAO unless the USAO specifically requests them.[92]

[91] To the extent Quick View Plus is incompatible with commonly used applications, such as the latest versions of Microsoft Office, Adobe, and certain video platforms, BOP should immediately explore pursuing other options.

[92] This may include revisions to BOP's Release of Information Program Statement after appropriate consultations and as consistent with applicable regulations, including 28 CFR Part 16, subpart B.

5.7. Ensure facilities are complying with policies related to the provision of PSRs. BOP Central Office should distribute a memorandum to all pretrial facilities reiterating that, under national policy, individuals detained pretrial are entitled to possess and review a copy of their PSR to prepare for sentencing. The memorandum can acknowledge the security risks that may accompany detainee possession of Pre-Sentencing Reports (PSRs), and it should encourage unit staff to explain to both detained individuals and their defense counsel the risks that accompany maintaining possession of the PSR. Staff may also offer to hold the report on behalf of the detained client or for the individual to review in the law library. But staff may not prohibit individuals from maintaining possession of their PSR in accordance with BOP Program Statement 1351.05, Release of Information.

VI. Emergent Situations

Ensuring detained individuals are able to access their legal representatives during emergencies and unexpected situations—including lockdowns, infrastructure damage, and staff shortages—is a common challenge for pretrial facilities. The COVID-19 pandemic demonstrated just how long these emergencies can last, and affirmed the importance of having meaningful plans in place to ensure alternative forms of legal access are available.

A. Findings

Attorneys interviewed during this review understood that legal visitation can be impacted by unexpected circumstances that cause institutional disruption. The COVID-19 pandemic represented the most significant impact to operations, and as previously detailed, led to the initiation of virtual visitation in pretrial facilities. More typically, unexpected circumstances that impact legal visitation include staff shortages,[93] lockdowns, or health and safety concerns.

Generally, attorneys indicated that such disruptions currently are not frequent.[94] Defense counsel reported that they receive timely notification from FDC Honolulu and

Key Facts

- For **6 of 10** facilities, defense counsel report that emergency circumstances rarely cause cancellation of visits.
- For **2 of 10** facilities, defense counsel reported that staffing issues are the most common reason for cancelled visits.
- For **2 of 10 facilities**, defense counsel report that lockdowns are the most common reason for cancelled visits.
- For **2 of 10 facilities**, defense counsel reported that separatees are the most common reason for delayed or cancelled

[93] The Federal Public Defenders for the Eastern District of New York and the District of Puerto Rico report that legal visits are regularly cancelled due to staffing shortages at MDC Brooklyn and MDC Guaynabo.

[94] There is an ongoing lawsuit against BOP and MDC Brooklyn, which was originally brought in response to the facility's alleged failure to meaningfully and timely address the consequences of a power outage in the middle of winter. One of the allegations in the Complaint focused on the blanket cancellation of all legal communications and visits for the duration of the emergency. The lawsuit subsequently evolved to address the facility's response to the COVID-19 pandemic.

MDC Guaynabo when visiting is unexpectedly cancelled. The Federal Public Defender in San Diego, by contrast, reported that lockdowns at MCC San Diego occasionally result in cancellation of legal visits and that the MCC does not alternatively accommodate legal calls in those circumstances. The FDO in Miami indicated that cancellations and delays frequently occur due to issues with "separatees," i.e., other detained individuals from whom the client must be kept separate.

BOP pretrial facilities reported that when legal visits are temporarily restricted in these situations, the Warden or his/her designee will notify the courts, the defense bar, and the USAO. That notification is made by email and/or phone. In addition, a memo explaining the closure is affixed to the facility's entrance door and a notice is generally posted on the webpage. Further, BOP is considering proposed revisions to Program Statement 7331.04: Pretrial Inmates, and Program Statement 1315.07: Inmate Legal Activities, to provide guidance on institution disruptions that may affect access to counsel. These proposed changes, which are currently the subject of negotiations with the BOP union, include a requirement that each facility develop alternative legal access arrangements, including alternative visiting locations, expansion of visiting hours, or additional procedures after a significant or disruptive event at a facility exceeds 24 hours. The proposed changes also include a requirement that facility staff make reasonable efforts to notify persons impacted by disruptions, including alerting defense counsel of restricted legal visitation.

B. Recommendations

Consistent with the findings above, BOP should:

6.1 Finalize updates to BOP national policies that address access to pretrial facilities in emergent situations. BOP's Central Office is currently in negotiations with the union to revise the national Program Statements on Pretrial Inmates (7331.04) and Legal Activities (1315.07) to expressly address legal access during and following disruptive events. These proposed revisions will provide guidance to all pretrial facilities on developing alternative legal access arrangements when a disruptive event restricts visiting, as well as guidance on ensuring stakeholders affected by the disruption are notified. The Advisory Group endorses those efforts and encourages BOP to finalize the policy within the next 90 days. Otherwise, the Advisory Group should explore the need for interim guidance.

6.2 Ensure that changes to legal access made in response to an emergency are in place no longer than necessary. Each facility should prepare a plan for monitoring legal access during emergencies and ensuring that emergency-based limitations to legal access are lifted as soon as practicable. This plan should address both short-term emergencies, such as lockdowns, and long-term emergencies, such as a pandemic. For the latter, the plan should include benchmarks for assessing whether less restrictive modifications can be implemented as the emergency develops. These benchmarks would depend on the type of emergency but, at minimum, the LAA and facility's Emergency Preparedness Officer, should review whether restrictions are necessary twice per month.

VII. Access Needs for Specific Populations

While this report has primarily focused on separate categories of legal access, there are also access needs for specific populations that cut across all six of the previous pillars. For example, a detained individual who is not proficient in English may not be able to access information about communicating with counsel or using the discovery computers. Or an individual with disabilities may require accommodations to participate in legal calls or attend a legal visit. Individuals detained in the SHU may also confront infrastructure restrictions that interfere with continued and meaningful legal access. All individuals are equally entitled to an effective defense, regardless of their specific circumstances or access needs.

A. Findings

Language Access

As explained above, every newly committed individual, whether a pretrial detainee or a sentenced prisoner, receives a copy of the A&O Handbook, which includes sections that address access to legal materials, legal visits, legal calls, and resources for preparing legal documents. These handbooks are available in both English and Spanish.

To facilitate communication with individuals who speak languages other than English and Spanish, each facility contracts with a telephonic translation service. When an individual arrives at a BOP pretrial facility and is not proficient in English or Spanish, the facility uses this service to complete intake. However, these translated intake processes do not review the handbook in depth, and several facilities indicated that individuals detained pretrial who are not proficient in either Spanish or English primarily receive information related to legal access from their attorneys.

Key Facts

- **10 of 10** facilities provide the A&O Handbook in both Spanish and English
- For **4 of 10** facilities, attorneys reported clients having difficulty obtaining prescription lenses and reading glasses
- **10 of 10** facilities reported having e-discovery computers in the SHU
- For **4 of 10** facilities, attorneys reported challenges reviewing legal material with clients detained in the SHU

Disability Accommodations[95]

BOP Program Statement 5200.06, Management of Inmates with Disabilities, provides guidance to ensure detained individuals with disabilities have appropriate access to programs, services, and accommodations. Each Warden indicated that the rooms used for legal visits are wheelchair accessible.[96] To the extent additional accommodations are needed, BOP facilities reported that

[95] Defense attorneys with clients in multiple BOP facilities reported significant concerns with the medical care provided to clients with mental illness. Although this subject is outside the scope of this review, these attorneys noted that untreated mental illness interferes with the ability of a client to meaningfully participate in his or her own defense, and the Advisory Group therefore supports the BOP Director's ongoing efforts to address these concerns.

[96] MCC San Diego and MDC Brooklyn reported that individuals with mobility disabilities are not assigned to their facilities due to the unique infrastructure limitations. However, one defense counsel reported having a paraplegic

detained individuals can contact their Unit Manager and ask for an accommodation so that the facility can determine how to best accommodate the individual. Similarly, BOP pretrial facilities report that attorneys may contact the respective facility's Executive Assistant via e-mail or telephone, or in person upon arrival, to request accommodations. FDC SeaTac reports that it has wheelchairs available for visitors who cannot bring their own personal wheelchair or walker.

Regarding accommodations for legal calls, each pretrial facility reports that portable telephones with volume control and a telecommunications device for the deaf and video relay service are available for individuals in detention with hearing and/or speech disabilities. If a detained individual needs to use one of these devices, the individual's unit team coordinates provision of the device.

Finally, during listening sessions, multiple defense attorneys raised concerns about clients reporting difficulty obtaining eyeglasses and regularly requesting attorney assistance to obtain them.[97] Defense counsel emphasized that delay in providing prescription eyeglasses is problematic for clients who need glasses to review discovery material. Defense counsel in the Eastern District of New York, Southern District of Florida, Central District of California, and Western District of Washington reported that their client's eyeglasses frequently are taken at the time of arrest (or they did not have their reading glasses on them at the time of arrest), and that the process for getting prescription eyeglasses at their respective pretrial facilities is slow and often requires attorney intervention.

Under BOP policy, individuals newly entering BOP facilities may retain prescription eyeglasses in their possession at the time of admission.[98] BOP will furnish prescription eyeglasses to individuals requiring them, following an eye exam resulting in a prescription. BOP obtains eyeglasses from Federal Prison Industries at the Federal Correctional Institution in Butner, North Carolina. Additionally, detainees may purchase reading glasses at the facility commissaries which stock them. The A&O Handbook for FDC Philadelphia states that once an individual in detention is evaluated by the optometrist, prescription eyeglasses will be ordered from Federal Prison Industries, and orders from individuals detained pretrial are given priority.

Individuals Detained in the Special Housing Unit

The Advisory Group also explored the legal access available to individuals detained in the SHU. Defense counsel with clients at five facilities reported that visits to clients detained in the SHU often involve significantly longer waits, although these longer wait times largely appear to be the result of additional security requirements and the need for an escort. Counsel with clients at FDC Philadelphia conversely reported shorter wait times when visiting clients in the SHU.

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client at MDC Brooklyn who frequently missed legal calls and meetings due to the facility's inability to accommodate his wheelchair. The attorney reports that after elevating the matter to the court, the client was transferred to an accessible facility.

[97] The Federal Public Defender's Office for the Southern District of Florida reported that clients frequently do not get eyeglasses without attorney intervention.

[98] Program Statement 5800.18, Receiving and Discharge Manual, Section 403.

Defense counsel with clients at four facilities reported that it is extremely difficult, if not impossible, to share discovery or legal material with clients detained in the SHU during legal visits.[99] Many facilities only or primarily have non-contact visiting rooms for SHU legal visits, although some facilities allow attorneys to schedule contact visits with clients detained in the SHU in advance.[100] This can prove challenging, as attorneys rarely know their client is detained in the SHU before arriving, unless the client has been there on a long-term basis.

No attorneys reported concerns about confidentiality during SHU visits, where available. Defense counsel with clients in MCC San Diego and MDC Guaynabo reported that SHU visits are more confidential than regular legal visits.

Every BOP facility reported that the SHU is equipped with its own e-discovery computers. However, counsel with clients at several facilities reported that their clients faced additional difficulties accessing e-discovery when detained in the SHU because they must request access and be escorted to the electronic law library in the unit.

B. Recommendations

Consistent with the findings above, BOP should:

7.1 Enhance language access. The Advisory Group applauds BOP for translating its policies into Spanish. If an individual in detention is not proficient in either written English or Spanish, the pretrial facility should also ensure that the information related to legal access that is contained in the A&O Handbook is reviewed in the detainee's primary language as part of the intake process, including by exploring the use of tablets that offer the A&O in every commonly encountered language.

7.2. Promote equivalent legal access for individuals in the SHU. BOP should ensure that, during legal meetings, detainees, including detainees in the SHU, are able to review documents and other written communications directly and contemporaneously with their attorneys.[101] The Advisory Group should conduct a follow-up review to identify facilities that do not currently have the infrastructure

[99] For example, at FDC Honolulu, most SHU visits take place through a small portal in a large door, making discovery review or sharing documents impossible. Attorneys can schedule meetings in a no-contact room if they know two-days before a visit that their client has been moved to the SHU, but even there it is very difficult to review discovery. At FDC SeaTac, SHU visits often take place virtually: the attorney is situated in a legal visiting room at the FDC with a computer, and their client is brought to a computer in the SHU. Legal material must be mailed to the client in advance if the attorney wishes to review it during the meeting, although attorneys rarely know their client is in the SHU before arriving. FDC SeaTac reports that attorneys can request to be brought to the SHU for an in-person visit, where they can share paper material through a slot under the screen divider or over a computer that has dual screens, but defense attorneys report that, in practice, this option is not available.

[100] For example, MCC San Diego offers contact visits with individuals detained in the SHU, but only three days per week, and the attorney must schedule the visit in advance.

[101] This recommendation does not relate to the ability of detained individuals to retain those documents once the meeting is over.

to implement this recommendation and consider innovative solutions to this problem, including through engagement with external experts as necessary.

7.3 Enhance access to prescription and reading glasses where necessary to review discovery. BOP should consider options to help ensure eyeglasses are available in a timely manner to detained individuals who need them to review their discovery. As an immediate step, BOP should issue guidance to its Wardens on requesting waivers at pretrial facilities authorizing pre-sentence detainees to receive eyeglasses from outside sources (such as family) and evaluate amending BOP policy accordingly.

CONCLUSION AND NEXT STEPS

This report reflects the Advisory Group's review of seven pillars of legal access. The Group has made immediate recommendations within the 100-day parameter of our review. We also welcome the opportunity to continue the efforts of the Advisory Group and collaboratively work with BOP and ODAG to implement these recommendations. While we believe that the proposed Legal Access Advisor position (*see supra*, Recommendation 1.4) could play a significant role in leading implementation of the recommendations put furth in this report, this Advisory Group's cross-component partnership could also support and track implementation, including in considering opportunities for data collection and analysis.

The Advisory Group also hopes to further review certain areas beyond the scope of this expedited, 100-day review. We recommend that this Group remain assembled and report regularly to the Deputy Attorney General, including to:

- Review additional areas related to access to counsel at BOP's pretrial detention facilities, including access to legal research materials, client access to grievance procedures, and access to counsel challenges for indigenous populations, as well as further review language access and accommodations for individuals with disabilities;

- Create a work plan, with concrete timetables, to staff each pretrial facility with a Legal Access Officer, *see* Recommendation 1.2;

- Complete a more thorough survey of technological innovations that enhance virtual access to counsel*, see* Recommendation 2.6;

- Identify intermediate steps for improving the confidentiality of attorney-client electronic communications, *see* Recommendation 4.4; and

- Collaborate with EOUSA, JMD, and other litigating components and stakeholders, including the National Litigation Support Administrator in the Defender Services Office, to further review and resolve challenges related to access to e-discovery, *see* Recommendation 5.3.

Finally, while this review focused only on the 10 pretrial facilities run and operated by BOP, the USMS separately contracts with state and local facilities for the placement of detained individuals pretrial in jurisdictions across the country. To build on the findings and recommendations here, the Advisory Group should expand its review to these facilities. Likewise, the Advisory Group should review access to counsel for individuals in BOP custody following a conviction. Even post-conviction, adults in custody frequently need to access counsel, including while their case is pending appellate or collateral review; in some instances, individuals may need attorneys to seek other forms of legal relief, including reductions in sentence. The Advisory Group should consider and assess post-conviction access to counsel for individuals in custody, including any unique barriers to accessing counsel they may face. At the same time, while this review focused on pretrial facilities, many of its recommendations may be relevant to all BOP facilities, and we recommend that BOP disseminate this report broadly within the agency.

Appendix A

Literature Review

1. ABA Criminal Justice Standards on Treatment of Prisoners (2010). *See* below for ABA Standards relevant to this review.
2. Johanna Kalb, Gideon Incarcerated: Access to Counsel in Pretrial Detention, 9 UIC L. Rev. 101 (2018).
3. Amber Baylor, Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement, 14 Cardozo Pub. L. Pol'y & Ethics J. 1 (2015).
4. Mary Vukovich, Deprivation of the Right to Counsel for Federal Pretrial Detainees During the 2019 Novel Coronavirus Pandemic, 54 UIC L. Rev. 659 (2021).
5. Joint Elec. Tech. Working Group, Guidance for the Provision of ESI to Detainees (2016).
6. Nat'l Ass'n of Criminal Def. Laws. & Samuelson Clinic for Law, Tech., & Pub. Pol'y at UC Berkely Sch. of Law, Preserving Incarcerated Persons' Attorney-Client Privilege in the 21st Century: Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails (2020).

Relevant ABA Standards

Legal Visits

- **ABA Standard 23-8.5**, Visiting. (d) Visiting periods should be of adequate length. Visits with counsel and clergy should not be counted as visiting time, *and ordinarily should be unlimited in frequency*. Pretrial detainees should be allowed visiting opportunities beyond those afforded convicted prisoners, subject only to reasonable institutional restrictions and physical plant constraints.
- **ABA Standard 23-9.4(c)(ii)(F)-(G),** Access to legal and consular services. (F) Rules governing counsel visits should be as flexible as practicable in allowing counsel adequate time to meet with a prisoner who is a client, prospective client, or witness, including such a prisoner who is for any reason in a segregated housing area, and *should allow meetings to occur at any reasonable time of day or day of the week*; and (G) the time a prisoner spends meeting with counsel should not count as personal visiting time.

Legal Calls

- **ABA Standard 23-9.4(c)(iii)(B).** "The time a prisoner spends speaking on the telephone with counsel should not count against any applicable maximum telephone time."

Legal Mail

- **ABA Standard 23-9.5(c).** Correctional authorities should allow prisoners to purchase or, if they are indigent, to receive without charge materials to support their communications with courts, attorneys, and public officials. These materials should include paper, writing implements, envelopes, and stamps.

APPENDIX B

Relevant Statutes, Regulations, and BOP Policies the Advisory Group Reviewed

I. Relevant Statutes:

A. 18 USC 3142 (i)(3)
- Pretrial detention order shall "direct that the person be afforded reasonable opportunity for private consultation with counsel"

II. Relevant regs:

A. 28 CFR Part 540 ("Contact with Persons in the Community")
- 540.18 – "Special Mail" (marking requirements and how treated)
- 540.19 – "Legal Mail"
- 540.102 – "Monitoring of Inmate Telephone Calls" (references legal calls)
- 540.103 – "Inmate Telephone Calls to Attorneys"
- 540.203 – "Written Correspondence Limitations" (re CMUs)
- 540.204 – "Unmonitored Telephone Communication Limitations" (re CMUs)
- 540.205—"Visiting Limitations" (re CMUs)

B. 28 CFR 541.31(l) – "Conditions of Confinement in the SHU" ("Legal Activities")

C. 28 CFR 543 (Subpart B) – "Inmate Legal Activities"
- 543.11 – "Relates to Legal Materials" (subsection (d), (d)(2), (j))
- 543.13 – "Visits by Attorneys" (prior notification!)
- 543.16—"other paralegals, clerks, and legal assistants"

D. 28 CFR 551 (Subpart J) ("Pretrial Inmates")
- 551.103 (f) – "Procedure for Admission"
- 551.117 – "Access to Legal Resources"

III. National Policies[4]

A. Inmate Legal Activities (PS 1315.07) is the key policy discussing inmate access to the court and counsel. It includes discussion on law libraries, legal research, preparation of legal documents, retention of counsel, attorney visitation, and contact with non-attorney legal assistants and visitors. The entire policy is relevant to the concerns of this Advisory Group.

B. Correspondence discusses the rules governing inmate legal mail. **Pages 3-9, 14-17, and 23** contain relevant regulations and implementing text.

C. Pretrial Inmates discusses attorney contact and legal research on **pages 16-17.**

D. Inmate Telephone Regulations discusses attorneys calls on **pages 10-12.** Policies specific to pretrial inmates appear on **pages 4, 9, and 10.**

E. Visiting Regulations briefly mentions attorney visitation on **page 10**, referring back to the Inmate Legal Activities policy.

F. Information Security discusses discovery software and inmate access to electronic media from legal counsel on **page 45.**

IV. List of Institutional Supplements (*not available online*)

A. Institutional Supplements to PS 1315.07 (Inmate Legal Activities)
- HON 1315.07C (FDC Honolulu)
- SET 1315.07L (FDC SeaTac)

B. Institutional Supplements to PS 5265.14 (Correspondence)
- BRO 5265.14G (MDC Brooklyn)
- CCC 5265.14D (MCC Chicago)
- GUA 5265.14D (FDC Guaynabo)
- HON 5265.14F (FDC Honolulu)
- HOU 5265.14D (FDC Houston)
- LOS 5265.14C (MDC Los Angeles)
- MIM 5265.14 (FDC Miami)
- PHL 5265.14G (FDC Philadelphia)
- SDC 5265.14B (MCC San Diego)
- SET 5265.14C (FDC SeaTac)

C. Institutional Supplements to PS 7331.04 (Pretrial Inmates)
- BRO 7331.04M (MDC Brooklyn)
- CCC 7331.0I (MCC Chicago)
- GUA 7331.04F (FDC Guaynabo)
- HON 7331.04I (FDC Honolulu)
- HOU 7331.04I (FDC Houston)
- LOS 7331.04C (MDC Los Angeles)
- MIM 7331.04C (FDC Miami)
- PHL 7331.04I (FDC Philadelphia)
- SDC 7331.04F (MCC San Diego)
- SET 7331.04J (FDC SeaTac)

D. Institutional Supplements to PS 5264.08 (Inmate Telephone Regulations)
- BRO 5264.08E (MDC Brooklyn)
- CCC 5264.08D (MCC Chicago)
- GUA 5264.08E (FDC Guaynabo)
- HON 5264.08H (FDC Honolulu)
- HOU 5264.08H (FDC Houston)
- LOS 5264.08B (MDC Los 7331.04I Angeles)
- MIM 5264.08B (FDC Miami)
- PHL 5264.08G (FDC Philadelphia)
- SDC 5264.08D (MCC San Diego)

V. Pretrial Facility Visitation Hours and Related Documentation:

VI. Inmate Admission and Orientation Handbooks

a. MCC Chicago's inmate Admission & Orientation Handbook

References to legal access:

- Legal Material (pages 7, 8, 15, 35, 36, 70)
- Law Library (pages 13, 24, 36-37, 49)
- Legal Visits (pages 15, 17, 21, 36)
- Electronic Legal Materials (page 24)

- Legal Mail (pages 32-34, 36)
- Legal Calls (pages 35, 36)
- Attorney Requests for Inmate Records (pages 37-38)
- "Access to Legal Services" (pages 36-39)
- Right to Counsel/Access to Law Library (page 49)

b. MCC San Diego's Admission & Orientation Inmate Handbook

References to legal access:

- Legal Visits (pages 9, 11, 26)
- Law Library (pages 12, 29, 37)
- Legal Materials (pages 12, 22)
- Legal Mail (pages 15, 29)
- Inmate Records (page 16, 19
- Legal Calls (page 23)
- Right to an Attorney/Access to Law Library (page 37)

c. MDC Brooklyn's Inmate Admission & Orientation Handbook

References to legal access:

- Legal Materials (pages 5, 27, 28, 54)
- Law Library (pages 9, 17, 27, 36)
- Legal Calls (pages 10, 26, 27)
- Discovery (page 17)
- Legal Mail (pages 25, 27, 54)
- Legal Visits (pages 27, 53-54)
- Inmate Records (page 28)
- Right to an Attorney/Access to Law Library (page 36)
- "Access to Legal Services" Summary (pages 27-29)

d. MDC Guaynabo's Unit Admission & Orientation Booklet

References to legal access:

- Inmate Records (pages 5, 28)
- Legal Calls (pages 6, 7)
- Legal Calls in SHU (page 7)
- Legal Visits (pages 9-10, 11)
- Law Library (page 13)
- Legal Materials (page 41)
- Legal Mail (page 23)
- Electronic Correspondence w/ Attorney (page 20)
- Right to an Attorney/Access to Law Library (page 45)

e. MDC Los Angeles's Admission & Orientation Handbook

References to legal access:

- Right to an Attorney/Access to Law Library (page 3)
- Legal Materials (pages 5, 30)
- Legal Calls from SHU (page 9)
- Legal Calls (pages 9, 10)
- Electronic Correspondence w/ Attorney (page 11)
- Legal Visits (pages 12, 14)
- Law Library (pages 15, 17)
- Legal Mail (page 21)
- Inmate Records (page 25)

f. FDC Honolulu's Inmate Admission & Orientation Handbook

References to legal access:

- Relevant SHU Specific Policies (page 14-15, 42)
- Legal Materials (pages 16, 34, 79)
- Legal Mail (pages 20, 21, 23, 75, 76, 78-79)
- Law Library (pages 30, 52-53, 79)
- Legal Visits (pages 32, 34, 35, 79)
- Legal Calls (pages 77, 79)
- Inmate Records (page 80)
- General "Access to Legal Services" Section (78-81)
- Right to an Attorney/Access to Law Library (pages 96-97)
- Transporting Legal Materials (page 121)

g. FDC Houston's Designated Inmate Admission and Orientation Handbook

References to legal access:

- Legal Visits (page 6)
- Law Library (page 11)
- Legal Calls (page 13)
- Legal Mail (page 17)
- Legal Materials (page 18)
- Federal Defender as a Resource (page 35)
- Inmate Records (pages 37, 39)
- Right to Counsel/Access to Law Library (page 43)

h. FDC Miami's Inmate Admission and Orientation Handbook

References to legal access:

- Legal Calls (pages 4, 6)
- Inmate Records (pages 7-8, 39)
- Legal Materials (pages 10-11, 17)
- Legal Mail (pages 14, 16)
- Legal Visits (pages 28, 29)
- Law Library (pages 28, 60-61)
- Right to Counsel/Access to Law Library (page 80)

i. FDC Philadelphia's Inmate Admission and Orientation Handbook

References to legal access:

- Legal Calls (pages 5, 37)
- Legal Visits (pages 24-25, 40)
- Inmate Records (page 27)
- Law Library (page 30)
- Legal Materials (pages 30, 46-47)
- Legal Mail (page 36)
- Right to Counsel/Access to Law Library (page 44)

j. FDC SeaTac's Inmate Admission and Orientation Handbook

References to legal access:

- Securing Legal Assistance (pages 9-10)
- Law Library (pages 9, 18, 19, 52, 56)
- Legal Materials (pages 10, 12, 13-14, 22)
- Legal Correspondence/Legal Mail (pages 12, 22)
- Legal Calls (page 19)
- Legal Visiting Hours (page 21)
- Attorney Requests for Inmate Records (pages 53-54)
- Right to Counsel/Access to Law Library (page 56)

Appendix C

Letter from MDC Los Angeles Announcing New Legal Mail and E-Discovery Policies

(Similar letters were sent to the FDO, USAO, and CJA Panel Representative)

U.S. Department of Justice

Federal Bureau of Prisons

Metropolitan Detention Center

535 N. Alameda Street
Los Angeles, CA 90012

October 30, 2018

Honorable Virginia A. Phillips
Chief Judge of the District Court
United States District Court,
Central District of California
255 East Temple Street, Courtroom 780
Los Angeles, CA 90012-3332

Honorable Patrick J. Walsh
Chief Magistrate Judge of the District Court
United States District Court,
Central District of California
312 North Spring Street, Courtroom 23, 3rd Floor
Los Angeles, CA 90012-4701

RE: Changes to the Mail and Electronic Discovery Policies at the Metropolitan Detention Center in Los Angeles

Dear Judge Phillips and Magistrate Judge Walsh,

I write to notify you of changes to the mail and hard drive policies at Metropolitan Detention Center in Los Angeles ("MDCLA"). The changes to the mail policy described below will not take effect until Monday, November 26, 2018, while the changes to the electronic discovery policy are effective immediately. I would respectfully ask that you convey these policy changes to the Judges of the Central District of California

1. Mail Policy

Effective Monday, November 26, 2018, the institution is making the following changes to its policy regarding incoming mail. To begin with, all incoming general correspondence must be written on white paper and mailed in white paper envelopes. Please note that this requirement does not apply to special or legal mail.

All correspondence containing materials such as, glitter, stickers, lipstick, crayon or marker, will be rejected. Correspondence sprayed with fragrance such as, but not limited to,

perfume or cologne, will be rejected. Similarly, all correspondence that is stained or contains an oily substance will be rejected. In addition, correspondence on card stock will be rejected. Please note that this requirement applies to both commercial and homemade greeting cards; they will be rejected if printed on card stock.

BOP staff will remove postage stamps and envelope flaps from envelopes containing general correspondence before the item is provided to the receiving inmate. If the stamps or envelope flaps cannot be removed, the envelope will be photocopied and the photocopy will be provided to the inmate.

All incoming general correspondence utilizing a label for either the recipient and/or sender will be rejected, with the exception of inmate to inmate correspondence. The recipient and sender information must be completed either in ink or through address stamp.

Finally, envelopes containing special mail and legal mail will be photocopied and only the photocopy will be provided to the inmate. Please note that all other rules and procedures pertaining to incoming special and legal mail will continue to be enforced. For example, such correspondence will only be opened in the presence of the inmate. Please review BOP Program Statements 5265.14, Correspondence and 5800.16, Mail Management Manual for details about how incoming special and legal mail is managed.

2. Electronic Discovery

Starting immediately, inmates at MDCLA are authorized to possess electronic discovery on hard drives, subject to the limitations listed below. Attorneys may henceforth send their clients hard drives that utilize "flash" memory and containing case related discovery. Hard drives that have any moving parts and/or that need a power source other than a USB data cable are not authorized for introduction, retention or use in the institution.

As with the CDs and DVDs previously authorized within the institution, all hard drives must be clearly and permanently labeled with the inmate's name and register number as well as with the case name and number. The attorney sending in the hard drive must also comply with the institution's rules for sending in electronic discovery.

If you or any other Judge has any questions regarding these policy changes, we would be happy to respond. General inquiries can be submitted to LOS/ExecutiveAssistant@bop.gov. Alternatively, you can reach the attorneys of the Federal Bureau of Prisons' Los Angeles Consolidated Legal Center utilizing the e-mail addresses listed below or by calling (213) 485-0439, and dialing their respective extensions:

Supervisory Attorney Eliezer Ben-Shmuel, ext. 5428, eben-shmuel@bop.gov
Senior Attorney May Shin, ext. 5187, mshin@bop.gov
Senior Attorney Meryl White, ext. 5474, mawhite@bop.gov
Senior Attorney Audrey Lambert, ext. 5474, alambert@bop.gov

Thank you for your attention to these matters.

Sincerely,

Bret Dorethy
Acting Warden