

Second Circuit Urges District Court to Require Brooklyn Prison to Provide Defense Attorneys with Remote Access to Inmates During The COVID-19 Pandemic

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On March 20, 2020, the Second Circuit granted the Federal Defenders of New York, Inc. (“Federal Defenders”) a second shot at their suit against the Federal Bureau of Prisons (“BOP”) concerning the lawfulness of the BOP’s unilateral restrictions on attorney-client visits with detainees at the Metropolitan Detention Center-Brooklyn (“MDC”) during a series of emergency situations in early 2019.

Upon remand, the Second Circuit further urged the United States District Court for the Eastern District of New York to direct the parties to mediate further disputes in order to find immediate solutions that allow Federal Defenders to have meaningful, continuous access to inmates during emergency situations, such as the present public health emergency presented by the COVID-19 (new coronavirus) pandemic.

MDC currently houses more than 1,600 inmates, most of whom are pretrial detainees who have not been convicted of any crimes. Generally, MDC allows attorneys to visit detainees between 8:00 am and 8:00 pm seven days a week. Beginning in January 2019, however, the BOP began restricting and cancelling attorney-client visits at MDC due to a series of unforeseeable emergency events, including the partial shutdown of the federal government, a fire at MDC causing power outages, and a bomb threat at the MDC facility.

Shortly thereafter, in February 2019, the Federal Defenders sued the BOP for violations of the BOP’s own regulations under the Administrative Procedure Act, 5 U.S.C. § 706(2) (the “APA”), and the right to an attorney under the Sixth Amendment. The District Court dismissed the complaint finding that the Federal Defenders failed to state a claim under the APA and the Sixth Amendment because the right to counsel belongs to the accused rather than their attorneys.

On appeal to the Second Circuit, the Federal Defenders argued that the District Court erred in dismissing their claims under the APA because it misapplied the relevant zone of interests test. Under the zone of interests test, a plaintiff has a cause of action only if his interests are “marginally related” to the purpose of the challenged law or regulation. The Second Circuit vacated and remanded the District Court’s order and found that the APA claim could be based on the BOP’s failure to comply with its own regulations regarding inmate-attorney visits, which interfered with the Federal Defenders’ interest in having frequent and predictable access to their clients at MDC.

The Federal Defenders also argued that the BOP's curtailment of attorney-client visits in early 2019 violated the Sixth Amendment's right to counsel. The Second Circuit noted that the Federal Defenders' claims are brought not under the Sixth Amendment directly, as the District Court concluded, but rather under the court's inherent equitable powers to enjoin a defendant from violating constitutional rights. The Second Circuit acknowledged the substantial questions of constitutional law presented and reinstated and remanded the Sixth Amendment claim for further consideration by the District Court.

In vacating and remanding the District Court's judgment, the Second Circuit noted that prison management faces a variety of challenges during ordinary and emergency times, but reiterated that Courts must ensure that constitutional rights are not violated by considerations of expediency. The Second Circuit further urged the District Court and parties to consider mediation or alternative dispute resolution instead of protracted litigation after the fact in order to balance the needs and rights of attorney-client visitation during emergency situations, including during the present public health emergency. In response, on March 23, 2020, U.S. District Judge Margo Brodie appointed former U.S. Attorney General Loretta Lynch to referee the dispute and implement new protocols that will ensure that detainees have access to their attorneys during emergencies like the coronavirus pandemic.

The Second Circuit's opinion provides a strong basis for attorneys and clients to overcome arbitrary or restrictive attorney visitation rules imposed by prisons and continue to have meaningful and regular contact either in person or by remote access during a variety of challenging and emergency situations, including the present coronavirus pandemic.

Attorneys in Kelley Drye's [White Collar, Investigations and Compliance](#) practice group are monitoring developments related to the COVID-19 pandemic and advising clients with respect to the obligations they create. Clients should feel free to contact the author or any other Kelley Drye attorney they work with to further discuss the topic. Kelley Drye will provide any updates and further information on our [COVID-19 Response Resource Center](#) as this situation develops.