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Via email and first-class mail

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Re: Proposed Rulemaking, I.D. No. CCS-20-25-00010-EP

Dear Deputy Commissioner Golub:

The Legal Aid Society, Prisoners' Legal Services of New York, Appellate Advocates, the Center for Appellate Litigation, the Office of the Appellate Defender, and the Parole Preparation Project jointly submit these comments on DOCCS's proposal to amend 7 N.Y.C.R.R. § 721.3 to authorize the scanning and potential destruction of privileged legal mail flagged as "potential contraband" by mail-scanning technology.

Collectively, we represent thousands of people incarcerated in DOCCS custody and send thousands of pieces of privileged legal mail to DOCCS facilities each year. Reliable delivery of that mail is essential to maintaining attorney-client relationships and protecting our clients' legal rights.

Although the proposed rule does not identify a specific technology, as you know, DOCCS has begun implementing RaySecur's t-ray scanning system under an emergency rule and plans to continue using it under the amended regulation. Over the

past several months, we have met repeatedly with DOCCS and RaySecur to understand how RaySecur’s t-ray technology functions and to raise concerns about its real-world impact. Those conversations have only deepened our concerns. As drafted, the proposed rule enables practices that undermine the integrity of legal mail and impair our ability to represent clients in DOCCS custody.

I. The Proposed Rule Enables DOCCS to Make Erroneous Decisions to Confiscate Legal Mail by Misusing Screening Technology.

The proposed rule authorizes DOCCS to withhold or destroy privileged legal mail flagged as *potentially* containing contraband but does not require any human verification or review of the flagged material. In practice, DOCCS is using RaySecur’s t-ray scanning system to flag mail as potential contraband. Section 721.3(c)(2) of the proposed rule permits DOCCS to confiscate and destroy legal mail based solely on this determination. This approach is inconsistent with the stated purpose of the screening technology DOCCS intends to use.

RaySecur itself has stated that its technology is designed to flag items for further inspection—not to make final determinations positively identifying contraband.¹ Mail screening using RaySecur technology is predicated on the assumption that flagged items will be reviewed before action is taken. That secondary review is what allows staff to “focus their time on a much smaller number of exceptions.”² In meetings with our organizations, RaySecur has acknowledged that its scanners may flag common and innocuous items like Post-It notes and signature tabs as potential contraband.³

Yet under the proposed rule, DOCCS is treating scanner flags as conclusive. Mail flagged as potential contraband can be withheld and, in many cases, subsequently destroyed. There is no requirement for additional inspection, and the proposed rule ignores the potential for false positives. There is no requirement in the proposed rule that flagged mail be reviewed, verified, or subject to any further inspection before it is denied delivery or discarded. The proposed rule thus allows final decisions to be made by a piece of technology that is not designed to make them.

¹ See generally RaySecur, *Drug and Contraband Detection in Inmate Mail*, <https://info.raysecur.com/wp-rs corrections-detect-drugs> (last visited July 18, 2025).

² *Id.* at 13.

³ Moreover, clients often send privileged legal documents to our office with stains from food, hygiene products, or tobacco—routine byproducts of life in a prison cell—that we understand RaySecur technology is likely to flag as potential contraband.

The risks attendant to such a screening process are especially concerning given the particular sensitivity around privileged legal mail. Legal mail can contain original, time-sensitive, or irreplaceable materials, the inadvertent destruction of which can have serious ramifications for clients. In a prison system where legal calls and visits are already limited, this proposed rule raises significant constitutional concerns in the way it further burdens attorney-client communications. Nevertheless, DOCCS intends to treat scanner flags as final decisions, and the proposed rule expressly permits mail to be withheld or destroyed based on those flags alone. By authorizing final action based on technology not designed or validated to support such decisions, the rule creates an unjustifiable risk of interference with attorney-client communications.

Notably, DOCCS has a record of misusing proprietary screening technologies for drug and contraband detection. In 2019, DOCCS erroneously punished thousands of incarcerated individuals for alleged drug use based solely on the results of preliminary urinalysis screening tests, without performing confirmatory testing required by the testing product's instructions.⁴ Similarly, from 2016 to 2020, DOCCS erroneously punished thousands of incarcerated individuals for alleged possession of drugs and contraband based on preliminary drug identification test results, without performing confirmatory testing required by the manufacturer's instructions.⁵

The language of the proposed regulations and DOCCS's use of unconfirmed RaySecur screening results indicate that DOCCS is now engaging in a similar misuse of screening technology with respect to privileged legal mail. DOCCS should learn the lessons of its past mistakes and require secondary manual review of mailings flagged as potential contraband before taking any action that might interfere with an individual's right to send and receive privileged legal mail.

⁴ State of N.Y. Office of the Inspector Gen., *Investigation of New York State Department of Corrections and Community Supervision Incarcerated Individual Drug Testing Program* (Jan. 2022), https://ig.ny.gov/system/files/documents/2022/01/doccs-microgenics_2764.316.2019_alb_report_20220103.pdf.

⁵ State of N.Y. Office of the Inspector Gen., *Investigation of the New York State Department of Corrections and Community Supervision Contraband Drug Testing Program* (Nov. 2023), <https://ig.ny.gov/system/files/documents/2023/11/doccs-drug-testing-program-report.pdf>.

II. The Proposed Rule Provides Inadequate Procedural Safeguards Against Unwarranted Destruction of Privileged Legal Mail.

Even if the RaySecur technology could reliably identify contraband, the proposed rule lacks basic procedural safeguards necessary to protect against improper withholding or destruction. Subsection b(5)(ii) of the proposed rule requires only that DOCCS make “reasonable efforts” to contact the sender of mail flagged as abnormal and to hold the mail for a “reasonable period of time.” But neither term is defined, and the proposed rule provides no mechanism to ensure meaningful notice or retention.

In our experience, DOCCS has begun calling our organizations’ general office lines instead of individual senders and, in some cases, has failed to notify senders at all. Facilities have also demanded that senders retrieve flagged mail in person within impractically short windows, despite many correctional facilities being hundreds of miles away from our offices. For organizations like ours, which send thousands of pieces of legal mail annually to facilities statewide, this is unworkable.

Moreover, the proposed rule fails to account for the fact that legal mail may contain original, time-sensitive, or irreplaceable documents. In the short time it has been using RaySecur technology, DOCCS has already incorrectly flagged privileged legal mail to some of our organizations’ clients as potential contraband. In some cases, this has led to the confiscation and destruction of original client documents. Such occurrences will inevitably become the norm under DOCCS’s proposed rule.

III. The Proposed Rule Fails to Provide Transparency into How Legal Mail Is Screened, Flagged, or Withheld.

The proposed rule requires DOCCS to log when incoming privileged legal mail is refused by the recipient but says nothing about recording or reporting mail flagged by scanners or withheld for potential contraband. Section 721.3(c)(2)(iii) omits any obligation to log scanner flags, rendering the system opaque.

Without basic transparency, there is no way for senders or recipients to understand what has happened to their privileged legal mail. DOCCS cannot assess how often mail is wrongly flagged, and legal providers cannot track patterns or advocate for systemic fixes. Logging and notification are minimum requirements for any fair mail screening process, especially when privileged legal communications are at stake.

The proposed rule also revises § 721.3(a)(2) to permit DOCCS to screen *outgoing* privileged legal mail. The proposed rule does not set forth any criteria for determining when DOCCS staff may inspect and screen outgoing privileged legal mail, nor does it clearly state what actions will be taken if outgoing correspondence screens positive for potential contraband. Critically, DOCCS is proposing to give its staff new powers to seize and destroy incarcerated individuals' outgoing mail to attorneys and outside government agencies at a time of deteriorating prison conditions and increased public focus on violence and misconduct by DOCCS staff. The lack of standards and transparency around this provision will facilitate malicious or retaliatory screening and destruction of incarcerated individuals' outgoing privileged correspondence by facility-level staff.

IV. DOCCS Has Failed to Consider Costs the Proposed Rule Will Impose on Incarcerated People and Their Attorneys.

The notice of proposed rulemaking also fails to account for the financial and logistical burdens it imposes, both on incarcerated people and the organizations, like ours, which serve them.

Legal service providers will bear the costs of resending documents, emergency printing, additional mailings, lost staff time, and, in some cases, travel to remote prisons to retrieve flagged mail. These burdens fall hardest on non-profit organizations and their indigent clients. And the stakes are high: Delayed or lost mail can disrupt legal representation and lead to missed legal deadlines.

Incarcerated individuals, the vast majority of whom are indigent, will bear additional postage and copying costs to replace destroyed correspondence and documents and to contact legal service providers from whom they have not received expected correspondence. The proposed rule will inevitably interfere with incarcerated individuals' ability to consult with legal counsel and pursue legal claims.

V. DOCCS Has Failed to Consider Alternatives to the Proposed Rule.

DOCCS has not explained why it has rejected less intrusive alternatives that protect privileged legal mail while addressing contraband concerns. Other jurisdictions have adopted secure electronic mail to supplement regular legal mail, unique attorney identifiers, and barcode tracking systems to flag suspicious patterns without interfering with delivery.

Even RaySecur's materials describe its system as part of a layered screening process that contemplates additional verification steps. The rule fails to address these

approaches, giving stakeholders no assurance that less harmful alternatives were even considered.

The proposed amendments to 7 NYCRR § 721.3 would enable DOCCS to withhold or destroy privileged legal mail based on unreliable use of technology and without meaningful safeguards or transparency. The notice of proposed rulemaking compounds these flaws by failing to account for the burdens the rule imposes or to consider less harmful alternatives.

The proposed rule threatens the ability of our organizations and the clients we represent to engage in privileged, constitutionally protected legal communications. We urge DOCCS to evaluate more targeted and less harmful alternatives before further expanding the use of RaySecur; and, at a minimum, to revise the rule to require manual review of flagged mail, establish, clear notice and retention standards, ensure logging and transparency, and remove the section permitting the screening of outgoing privileged legal mail.

We appreciate your consideration of our comments on this proposed rule and look forward to reviewing DOCCS's response.

Sincerely,

THE LEGAL AID SOCIETY

/s/ Antony Gemmell

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Supervising Attorney, Prisoners' Rights Project

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