March 16, 2015

The Honorable Daniel Kagan
Chair
House Judiciary Committee
Colorado State Capitol
200 East Colfax
Denver, CO 80203

The Honorable Pete Lee
Vice Chair
House Judiciary Committee
Colorado State Capitol
200 East Colfax
Denver, CO 80203

Dear Representatives Kagan and Lee:

I write on behalf of the American Bar Association (ABA) regarding Colorado House Bill 15-1218 (“Concerning the Right of Parties in a Class 1 Felony Case to Refuse Contact with Defense-Initiated Victim Outreach Specialists”). With over 350,000 members, the American Bar Association is the voice of the legal profession in the United States and one of the world’s largest voluntary professional organizations.

If passed, H.B. 15-1218 would interfere with the duty of defense teams to seek to interview witnesses by, among other things, requiring written authorization prior to contact with witnesses. The ABA strongly opposes legislation that would prevent defense teams from meeting their duties under the Sixth Amendment and ABA standards. While every witness has the right to refuse to speak with an attorney, prosecutors and defense attorneys both must be allowed to meet their duties to investigate, including attempting to interview witnesses.

The defense team’s duty to seek to interview all potential witnesses, including victims and their families, is well established:

Defense counsel or counsel’s agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness. [ABA, Criminal Justice Standards for the Defense Function, Standard 4-4.3(c) (4th ed. 2015).]

The duty to seek to interview is intensified in death penalty cases, where the right rests on both the Sixth and Eighth Amendments. See ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1016, 1019-20 (Guideline 10.7 and commentary) (2003) (explaining that the unique nature of death penalty proceedings intensifies counsel’s duty to investigate and asserting that, “Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to . . . members of the victim’s family.”); see also Guideline 10.9.1 (“counsel should know and fully explain to the client . . . concessions that the client might offer, such as . . . an agreement with the victim’s family, which may include matters such as: a meeting between the victim’s family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution”).
Defense counsel’s duty to seek to interview is so fundamental to American criminal justice that the *ABA Prosecution Function Standards* bars prosecutors from hampering communication between defense counsel and witnesses:

The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government’s employees or agents if consistent with applicable ethical rules. The prosecutors should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. . . . [ABA, *Criminal Justice Standards for the Prosecution Function*, Standard 3-3.4(h) (4th ed. 2015).]

H.B. 15-1218’s impingement upon the duty to interview is therefore unwise and impermissible. While this bill would be improper in any state, the ABA has a special interest in states like Colorado where the legislature expressly requires attorneys to adhere to ABA standards:

The general assembly hereby declares that the state public defender at all times shall . . . conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association [*sic*] standards relating to the administration of criminal justice, the defense function. [Section 21-1-101, C.R.S. (2013).]

This bill’s contents are unique and disfavored in American criminal law and could give rise to litigation, further delaying the prosecution of serious felonies and the prospect of closure for victims and victims’ families. As well, Defense-Initiated Victim Outreach serves important needs of the survivors by providing a bridge with the defense team. In this way, the survivor’s questions about the crime, the defendant, and even general concerns about the court process can be addressed directly by the defense team. Curtailing defense outreach to victims thus harms their interests. Moreover, where the bill seeks to end witness harassment, it is duplicative. ABA *Defense Function Standard* 4.4-3(c) provides that defense counsel may not intimidate witnesses, and Colorado law contains several civil and criminal remedies for witness harassment. See C.R.S. 18-8-708 (2014); C.R.S. 18-8-707 (2014); C.R.S. 18-8-704 (2014); C.R.S. 18-9-111 (2014).

The ABA firmly opposes H.B. 15-1218, where it would interfere with defense counsel’s duty to interview victims and other witnesses and encourage the prosecution to obstruct such interviews. We therefore recommend that members of the Colorado General Assembly vote against this bill.

Thank you for your consideration.

Sincerely,

Thomas M. Susman