

May 26, 2019

Senator Dan Claitor, Chairman

Senator Bob Hensgens, Vice Chairman

Senator Regina Barrow

Senator Troy Carter

Senator Yvonne Colomb

Senator Fred H. Mills, Jr.

Senator Mack “Bodi” White

Re: Objection to House Bill 131, Relative to Crime Victims and Family Members

Dear Senators:

The National Association of Criminal Defense Lawyers (“NACDL”) represents thousands of attorneys across the country as well as state and local affiliate organizations which, together, total almost 40,000 attorneys including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is committed to promoting a fair and rational criminal justice system and, to that end, NACDL has studied and reported on many state and federal criminal justice issues over the last sixty years. In 2017, NACDL studied Louisiana’s public defense system and published a report entitled *State of Crisis: Chronic Neglect and Underfunding for Louisiana’s Public Defense System*.¹

Based on this expertise, I write to convey NACDL’s strong objection to H.B. 131, which is currently set for a hearing before the Senate on Memorial Day (Monday, May 27, 2019). NACDL believes that H.B. 131 would chill and deter the constitutionally mandated defense function by threatening jail time in situations in which a prosecutor accuses a defense lawyer or investigator with failing to “unequivocally” identify themselves to a victim. NACDL submits that the threat of jail time would effectively chill and deter defense investigations because false or mistaken accusations are likely and, in fact, have already occurred in Louisiana.²

¹ Since its founding in 1958, NACDL has engaged in systemic efforts to improve the quality of criminal defense representation. This includes training for public defender organizations, seminars for criminal defense practitioners, and producing reports in conjunctions with legal professors and other think tanks. In the past ten years, NACDL has produced over thirty reports addressing deficiencies in the criminal justice system that range from issues of pretrial detention and bond to the collateral consequences of convictions.

² H.B. 131 appears to dovetail with an extremely problematic practice pursued in Orleans Parish. The Guardian reports that:

NACDL's objections to H.B. 131 fall into the three broad categories listed below:

1. First, by chilling and deterring the defense function, H.B. 131 would undermine the most fundamental logic of a criminal trial: that both sides investigate a case and present evidence so that a jury can make the right decision. By undermining the fact-finding mission of trial, H.B. 131 would greatly increase the potential for mistaken verdicts which would, in turn, increase the complexity of appeals and strain judicial resources.
2. Second, the chilling effect on defense investigation (described above) would undercut the right to effective representation: the right to a lawyer who not only stands next to you in court but who ensures that the jury hears the facts. Those most likely to be deterred from investigating are solo practitioners who simply do not have the resources to "double up" on witness interviews (send two professionals rather than one) to avoid being falsely or mistakenly accused of misrepresenting themselves.
3. Third, H.B. 131 purports to solve a problem that does not exist. In the end, it would waste taxpayer resources by requiring increases in public defender office budgets because public defender offices will be compelled to "double up" in order to document contacts to avoid being exposed to false or mistaken accusations of misrepresentation.

More concretely, and as discussed below, H.B. 131 undermines the right to effective assistance of counsel, infringes upon the Louisiana Supreme Court's enforcement of the Louisiana Rules of Professional Conduct, requires attorneys to give advice to individuals who are not their clients, and seeks to solve a problem that does not exist.³

I. H.B. 131 Would Chill and Deter Defense Investigation Mandated by the Sixth Amendment.

H.B. 131 undermines an accused's right to effective assistance of counsel under the Sixth Amendment to the Constitution of the United States. The right to effective assistance of counsel encompasses more than having someone by your side at court appearances; an accused has the right to a "reasonable investigation" performed on his or her behalf.⁴ A "reasonable investigation" requires that, "*at a minimum,*" counsel "interview potential witnesses" and "make an independent investigation of the facts and circumstances in the case."⁵

If H.B. 131 is enacted, it will have a chilling effect on the constitutional mandate that attorneys perform investigations on behalf of the accused. Criminal defense attorneys and their

At least six defense attorneys and investigators say they faced threats of criminal charges by the Orleans parish district attorney for doing their jobs, the Guardian has found. Since DA Leon Cannizzaro took office in 2009, the attorneys have been accused of kidnapping, impersonation and witness tampering in the course of defending their clients. Each case has failed to stand up to scrutiny: all charges that have been brought were eventually dropped or overturned.

See <https://www.theguardian.com/us-news/2017/may/01/prosecuted-law-new-orleans>

³ As discussed in the ABA Journal, Dane Ciolino, a law professor at Loyola University at New Orleans, describes the bill as "anti-defense bill" which is "unnecessary and one-sided." <http://www.abajournal.com/news/article/anti-defense-bill-would-put-public-defenders-at-risk-of-jail-and-hamper-their-work-critics-say>

⁴ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

⁵ *Kately v. Cain*, 704 F.3d 356, 361 (5th Cir. 2013) (quoting *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994)) (internal quotation marks omitted).

investigators are already required to inform witnesses of their identity and function. This bill would effectively hang the threat of criminal sanctions over every defense investigation and, regrettably, would intimidate many lawyers and investigators (especially those who practice without a large defender office to back them up if they are accused of misconduct). Regardless of whether an alleged violation of H.B. 131 is well-founded, there is little doubt that many on the defense side will be intimidated and that the provisions of the bill can be weaponized against attorneys and investigators.⁶ This will have a negative impact on an accused's constitutional rights and, in some if not many cases, result in juries reaching decisions without relevant evidence and testimony which could have been presented, but was not, because of the intimidation described above.

II. H.B. 131 Would Usurp the Louisiana Supreme Court's Enforcement of Ethical Rules.

H.B. 131 seeks to impose new sanctions on criminal defense attorneys for violating existing ethical rules. The creation and enforcement of the rules of ethics is solely within the purview of the Louisiana Supreme Court.⁷ Attorneys are *already prohibited* from knowingly making a false statement of fact or law in the course of representing their clients.⁸ This includes impersonating another during the course of an investigation. This rule encompasses the conduct of investigators.

Moreover, lawyers are prohibited from stating or implying that they are disinterested.⁹ Put more simply, "a lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person."¹⁰ Attorneys are also prohibited from violating the legal rights of other persons.¹¹ Crime victims and their families currently have the right to refuse any requests for interviews with individuals working on behalf of the defendant.¹² If an attorney, or someone working on his or behalf, fails to identify themselves properly or fails to advise interviewees of the right to refuse an interview, there are already disciplinary sanctions available. Sanctions for violating any of the above Louisiana Rules of Professional Conduct are most properly handled by the Louisiana Supreme Court.¹³

III. H.B. 131 Would Compel Attorneys to Give Legal Advice to Witnesses Which Would Violate Ethical Norms.

The bill would require that a criminal defense attorney advise a victim or the victim's family of their right to refuse an interview which puts defense counsel in the position of giving legal advice to people whom they do not represent. Ethics rules in Louisiana – in fact, in all states – do not permit attorneys to give legal advice to people whom they do not represent and even more

⁶ See Emily Lane, *Prosecution of Orleans Public Defender's Investigator 'Destroyed My Life,' She Says: Report*, THE TIMES-PICAYUNE (May 1, 2017), available at https://www.nola.com/crime/2017/05/prosecution_of_orleans_public.html (in which an investigator was arrested for impersonating an Orleans Parish District Attorney's Office staffer after a third party mistakenly referred to the investigator as being from that office).

⁷ See, e.g., *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1979).

⁸ La. Rules of Prof'l Conduct r. 4.1.

⁹ La. Rules of Prof'l Conduct r. 4.3.

¹⁰ ABA Model r. 4.3, cmt [1].

¹¹ La. Rules of Prof'l Conduct r. 4.4.

¹² La. R.S. § 46:1844(C)(3).

¹³ See, *supra*, n. 5.

so a witness in a case in which the attorney already represents an individual. This requirement could generate substantial litigation in particular cases and in general.

IV. H.B. 131 Addresses a Non-Existent Problem.

H.B. 131 seeks to solve a problem that simply does not exist. There is no epidemic of impersonation. In fact, recent events suggest that some prosecutors have engaged in coercive practices including jailing crime victims¹⁴ and sending fake subpoenas to threaten crime victims.¹⁵ The damage done to these victims would only be aggravated by the chilling effect of H.B. 131 which would further isolate witnesses by deterring contact with defenders and their investigators.

Conclusion

In summary, H.B. 131 undermines the right to effective assistance of counsel, infringes upon the Louisiana Supreme Court's enforcement of the Louisiana Rules of Professional Conduct, puts defense attorneys in a position to give legal advice to witnesses who are not their clients, and seeks to solve a problem that does not exist. For these reasons, NACDL strongly urges you to oppose H.B. 131.

Sincerely,

Norman L. Reimer
Executive Director
National Association of Criminal Defense Lawyers

¹⁴ Larry Hannan, *Orleans District Attorney Leon Cannizzaro Sought to Jail Domestic Violence Victim*, THE APPEAL (Jun. 15, 2017), available at <https://theappeal.org/orleans-district-attorney-sought-to-jail-domestic-violence-victim-over-not-complying-with-fake-2d5c6825e1a7/>.

¹⁵ Heather Nolan, *Federal Lawsuit over Orleans DA's Use of Fake Subpoenas Can Proceed, Judge Rules*, THE TIMES-PICAYUNE (Mar. 6, 2019), available at <https://www.nola.com/crime/2019/03/federal-lawsuit-over-orleans-das-use-of-fake-subpoenas-can-proceed-judge-rules.html>.