ALAN WILSON
ATTORNEY GENERAL

June 2, 2015

Veronica Swain Kunz
Crime Victims' Ombudsman
Office of the Crime Victims' Ombudsman
1205 Pendleton Street
Columbia, SC 29201

Dear Ombudsman Kunz:

Attorney General Alan Wilson has referred your letter dated February 10, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter)**:**
"A Summary Court Judge contacted this Office to request clarification of the following issue. Defendants charged with domestic violence are ordered by the Court not to contact the victim in any way as a condition of Bond, a Restraining Order, and/or Order of Protection. However, it is common practice for defense attorneys representing the accused to directly contract these victims on behalf of their clients. Survivors of domestic violence rely upon these legal remedies to protect themselves from further abuse.
...
[Depending on the wording of the 'no contact order,' the order can] enjoin[] the defendant from (1) abusing, threatening to abuse, or molesting the victim or members of the victim's family; (2) entering or attempting to enter the victim's place of residence, employment, education, or other location; and (3) communicating or attempting to communicate with the victim ....
Domestic violence survivors are particularly vulnerable, physically, emotionally and financially, in the aftermath of the crime. They are usually unaware that they are not required to communicate with a defense attorney, and are often unable to afford to hire their own private attorneys to advise them throughout the criminal matter. Victims rely upon prosecutors (who represent the State, and not them) for legal information and advice.
The South Carolina Victims' Bill of Rights affords victims specific protections:

[South Carolina Constitution] ARTICLE 1, Section 24(A). Victims' Bill of Rights.

(A) To preserve and protect victims' right to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to:

...

(6) be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process;

....

Question: are criminal defense attorneys permitted to contact victims of crime directly on behalf of their defendant/clients during the pendency of a criminal matter despite [a court o]rder prohibiting contact [by the Defendant]?"

Law/Analysis:
The issue is a complicated one. There could be multiple scenarios to your question such as: would the defendant be present when the defense attorney tries to contact the Victim; what is sufficient notice to notify the defense attorney that the Victim does not wish to speak with him or her; if the court order prohibits the defendant from third party or indirect contact with the Victim, would contact by the defense attorney be considered third party contact by the defendant; and may the defense attorney acquiesce to a third party contacting the Victim?

By way of background, this Office has previously opined that "this Office believes a court will find neither the South Carolina Rules of Criminal Procedure nor any statutory law may be used in such a way that violates State Constitutional rights belonging to the Victim of a crime." Op. S.C. Att'y Gen., 2014 WL 1398591 (February 24, 2014). Therefore, first and foremost let us again clarify that the Victims' Bill of Rights (found in Article 1, Section 24 of the South Carolina Constitution) cannot be ignored based on a defendant's desire to evade the charges he or she is accused of. Under South Carolina law, a person receives the legal status of a Victim based on the definition of a Victim as found in Article 1, Section 24 (C)(2) of the South Carolina Constitution. That section reads:

> (C) For purposes of this section:
>
> ...
>
> (2) "Victim" means a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him. The term "victim" also includes the person's spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.

S.C. Const. art. 1 § 24(C)(2). According to the South Carolina Victims' Bill of Rights, the status of a Victim is unrelated to the charges of a defendant.[1] Let us again emphasize that regardless of whether charges are ever brought, regardless of whether an accused is tried, regardless of whether a defendant is found guilty or not guilty, a person is a Victim under South Carolina law if they meet the definition found in Article 1, Section 24(C)(2) of the South Carolina Constitution.[2]

With the aforementioned in mind, let us now address your question. There is more than one person's interest that a court must balance in addressing your question. It goes without saying the court must recognize a Victim's rights pursuant to the Victims' Bill of Rights[3] and all other applicable law. However, a court must also consider any conditions imposed by a court (pursuant to the defendant's bond, pursuant to an order of protection for the Victim [S.C. Code § 20-4-20], and/or pursuant to a restraining order [S.C. Code § 16-3-1700], a defendant's rights (especially as found in the Fifth and Sixth Amendments to the United States Constitution, i.e. the right to confront witnesses, the right to due process, the right to have witnesses in his favor, etc.), and a defense attorney's obligations (including the Rules of Professional Conduct and court rules such as the Rules of Criminal Procedure). As you

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[1] "Victim" is capitalized in this opinion as it is refers to the defined legal term as found in S.C. Const. art. 1 § 24(C)(2).
[2] Please note this is also the case with federal law, contingent on the Victim meeting the definition as found in 18 U.S.C. § 3771(e). 18 U.S.C. § 3771(d)(3).
[3] Especially noting S.C. Const. art. 1 § 24(A)(1), -(6), -(12).

mentioned in your letter, any conditions imposed by a court on a defendant would likely be pursuant to the defendant's bond, pursuant to an order of protection for the Victim (S.C. Code § 20-4-20), and/or pursuant to a restraining order against the defendant (S.C. Code § 16-3-1700). While each judge is given discretion in issuing such protections and every bond condition may differ, once an order is issued by a court, it must be complied with. A bond may or may not contain a restriction using language stating the equivalent of "no contact with the Victim, direct or indirect, no third party contact or contact with the Victim's family members." An order of protection prohibits the accused from many things, depending on what the specific order includes. An order of protection may include language prohibiting, among other things, the accused from communicating or even attempting to communicate with the Victim, directly or indirectly. S.C. § 20-4-60. A restraining order may prohibit the accused from further acts of abuse, future threats to commit abuse or may prohibit contact with the Victim. S.C. Code § 16-3-1700 et seq.; Form SCCA 751 (07/2008).

Similar to South Carolina's Victims' Bill of Rights in our State Constitution, the United States Code of Laws has a Crime Victims' Rights section. It provides many rights, including the following:

> (a) Rights of crime victims.--A crime victim has the following rights:
>
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> ...

18 U.S.C.A. § 3771. Like South Carolina's Victims' Bill of Rights, under this federal law there is no declared right for a Victim to decline to interview with a defense attorney or his representative, other than the right to be reasonably protected from the defendant. Id. Other states have a Victims' Bill of Rights in their state constitution. See, e.g., Ariz. Const. art. 2 § 2.1. However, unlike South Carolina, some states such as Arizona have a specific right in their state's Victims' Bill of Rights for the Victim of a crime to "refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. 2 § 2.1 (A)(5); see also Or. Const. art.1 § 42 (1)(c).[4]

As you are likely aware, the Fifth Amendment to the United States Constitution states:

[4] While there are various applicable statutes and case law to your question, this opinion is merely an overview of some of the legal considerations and cases in your question.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment likewise grants more rights to defendants. It states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI.[5] The United States Supreme Court has opined numerous times on the issue of balancing a defendant's rights. As the Supreme Court stated in one such opinion:

> We note that since *Roviaro,* the Supreme Court has made it plain that the "right to defend" is constitutionally protected. *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1972) ("the right to defend against the state's accusations" is protected under the due process clause of the Fifth Amendment); *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967) (Sixth Amendment right to compulsory process includes right to secure witness's attendance and to have a witness's testimony properly admitted); *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1973) (Sixth Amendment encompasses right to cross-examine); *California v. Green,* 399 U.S. 149, 176, 90 S.Ct. 1930, 1944, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring) (clauses guaranteeing rights to confrontation and compulsory process "constitutionalize the right to a defense as we know it"). Thus the right described in *Roviaro,* the right of an accused to have access to an available witness whose evidence is relevant, is of constitutional dimension.
>
> This is not to suggest that the application of a balancing test as set out in *Roviaro* ensures that the accused will always gain access to the witness he desires. In the analogous case of *United States v. Valenzuela-Bernal,* 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), the Supreme Court upheld the deportation prior to trial of illegal aliens the defendant was charged with criminally transporting. The defendant claimed the aliens were witnesses necessary to his defense. The Court held that before the government could be burdened with maintaining the aliens in this country as material witnesses, the defendant was required to make a sufficient showing that they could provide evidence that would be "both material and

[5] The Fifth and Sixth Amendments to the United States Constitution have repeatedly been held to apply to the States. See, e.g,, Malloy v. Hogan, 84 S.Ct. 1489 (1964); Pointer v. State of Texas, 85 S.Ct. 1065 (1965).

> favorable to the defense." *Id.* 458 U.S. at 873, 102 S.Ct. at 3449. In ruling the defendant had failed to make this showing, the Court pointed out the expense and unfairness to the government of maintaining illegal aliens in custody, contrary to congressionally mandated immigration policy, simply because they might *conceivably* turn out to be helpful to the accused's defense. *Id.*, 458 U.S. at 863-66, 102 S.Ct. at 3444-46. Moreover, as the accused had himself been in the company of the would-be witnesses during the commission of the crime, the Court felt that he could be expected to show, as a condition to the government's holding the aliens as witnesses, "the events to which a witness may testify, and the relevance of those events to the crime charged." *Id.* 458 U.S. at 871, 102 S.Ct. at 3448. (The Court emphasized that the accused's burden did not go so far as to include avowing precisely *how* a witness may testify, or presenting a "detailed description" of the witness's lost testimony. *Id.*)
>
> We do not view *Valenzuela* as setting forth a static rule in respect to the showing a defendant must make in every case. Rather, *Valenzuela* reflects the proper balancing in that particular setting, a setting where the federal interest weighing against access to the witnesses was particularly strong, and where the crime was one in which the accused and the putative witnesses had jointly participated. The showing of materiality and favorableness that an accused must make in one setting may not be the same as in another, since the accused's ability to predict what the witness will say may vary, as will many other relevant factors, including the harm to the government in being forced to produce the witness.

U.S. v. Bailey, 834 F.2d 218, 223, 56 USLW 2367, 24 Fed. R. Evid. Serv. 90 (1987). In one case, the Arizona Court of Appeals determined the Arizona Victim's Bill of Rights "must yield to the federal and state constitutions' mandates of due process of law so that the defendant is able to present her theory of self-defense, which she has adequately raised here." State ex rel. Romley v. Superior Court In and For County of Maricopa, 172 Ariz. 232, 836 P.2d 445 (2002). A California Appeals Court held that based on California law, a defendant's attorney or investigator may contact the Victim in a criminal case to request an interview, though the Victim is not required to submit to an interview. Reid v. Superior Court, 55 Cal.App.4th 1326, 94 Cal.Rptr.2d 336 (1997). The New Hampshire Supreme Court held that based on New Hampshire law, a defendant could violate an order of protection prohibiting contact with a Victim by contacting the Victim through the defendant's attorney. State v. Kidder, 150 N.H. 600, 843 A.2d 312 (2004). Even in a state that required a Victim to be notified if they were contacted by the defense and given the opportunity to refuse, the Oregon Court of Appeals held that Oregon law did not impose a duty on a private investigator working for the defendant's lawyer to notify the Victim whom he was employed by. Johnson v. Department of Public Safety Standards & Training, 253 Or.App. 307, 293 P.3d 228 (2012). The Alaska Supreme Court held (among other things) even though Alaska's Victims' Rights Act required a defendant's attorney to have written consent from a Victim or witness before interviewing them, this violated the due process rights of the defendant. State v. Murtagh, 169 P.3d 602 (2007). In that same decision the Court also held that other than in cases involving a Victim of sexual offense or domestic violence, a defense attorney was not required to notify Victims and witnesses that they do not have to speak with the defense attorney or his representatives. The Court also held that in sexual assault cases the defense could contact a witness even if the witness had signed a document stating they did not wish to be contacted and that where the Alaska Victims' Rights Act provided otherwise, it violated the defendant's due process rights. Id.

Next, let us look at some of the authority concerning defense attorneys. Rule 1.2(d) of the South Carolina Rules of Professional Conduct states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Rule 1.2(d), RPC, Rule 407, SCACR (emphasis added). This rule would encompass violations of "no contact" orders, whether as a bond condition or prohibited by a restraining order or an order of protection. This Office believes it goes without saying that any contact by the defendant in violation of a court order (whether a bond condition, an order of protection, or a restraining order) against the defendant prohibiting or limiting contact with Victim would be contact that is prohibited. Furthermore, this Office believes a court will find that contacting the Victim while the defense attorney is in the presence of the defendant would undoubtedly be a violation of a court order prohibiting contact with the Victim. See State v. Craig, 112 A.3d 559 (2015) (where a court upheld convictions for online posts and thus broadly interpreted a court order preventing communication with a Victim pursuant to State law based on legislative intent). Moreover, both our State and federal law recognize the crime of witness intimidation and impeding a witness. See, e.g., S.C. Code § 16-9-340; 18 U.S.C.A. § 1512; Rule 804(a), SCRE; State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) (evidence of intimidation of a witness may be admitted to prove consciousness of guilt).

Contrastingly, a lawyer has the duty to represent his client diligently and promptly. Rule 1.3, RPC, Rule 407, SCACR. Rule 1.3 of the S.C. Rules of Professional Conduct states:

> Rule 1.3
> A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> COMMENT
> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
> ...

In interviewing witnesses and potential witnesses, a defense attorney would be fulfilling his ethical duties and fulfilling a minimum standard of conduct considered the duty of a lawyer in a criminal case. Moreover, our Supreme Court has stated a defense attorney must interview potential witnesses when it is reasonable to do so as a part of his duty to his client. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011). However, please note that a lawyer must be truthful in speaking to others, which would include speaking to a Victim in a criminal case. Rule 4.1, RPC, Rule 407, SCACR. The rules state:

> Rule 4.1 Truthfulness in Statements to Others

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
>
> COMMENT
> Misrepresentation
> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.
> ...
> Statements of Fact
> [3] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.
> Crime or Fraud by Client
> [4] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so unless the disclosure is prohibited by Rule 1.6.

Furthermore, even in criminal cases where a Victim may willingly cooperate with the defense attorney to the point of recanting the facts as previously reported to law enforcement, the defense attorney would still be subject to other Rules of Professional Conduct such as Rule 3.3. Rule 3.3 states:

> Rule 3.3 Candor toward the tribunal
> (a) A lawyer shall not knowingly:
> ...

> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Rule 3.3(a)(3), RPC, Rule 407, SCACR. Moreover, the South Carolina Rules of Professional Conduct are clear in preventing defense attorneys from advising Victims, as the Victim of a crime would clearly have an interest that would be or could have the reasonable possibility of being in conflict with the defendant. Rules 4.3, 1.7, RPC, Rule 407, SCACR.[6] Nevertheless, there are other Rules of Professional Conduct that could be pertinent to the treatment of Victims of a crime, but those rules do not apply to Victims. For example, Rule 3.4, RPC (Fairness to Opposing Party and Counsel) as currently written would not apply to Victims, as Victims are not a party in a criminal case.

Conclusion:
To answer your question of whether a defense attorney may contact the Victim of a crime in a criminal case when the court has issued an order prohibiting contact by the defendant with the Victim, based on the current law and rules at this time, this Office believes a court would likely find that South Carolina Rule of Professional Conduct 1.3 would authorize the defense attorney (not in the presence of the defendant) to contact any potential witnesses as a part of "reasonable diligence" in defending a client. We would note that a court would limit such contact to "diligence" in Rule 1.3 related to the incident involving the charges, not to transfer messages by the defendant to the Victim or otherwise attempt to circumvent a court's order prohibiting contact. However, after a Victim declines to speak with a defense attorney, any contact by the defense attorney, or any third party at his or her direction, would be analyzed based on the South Carolina Rules of Professional Conduct, the Victims' Bill of Rights, case law and statutory law balancing the rights of the defendant with the rights of the Victim with the responsibilities of the defense attorney. Even though South Carolina's Victims' Bill of Rights does not specifically list the right to refuse to speak with a defense attorney, we believe a court would find a Victim, as any other potential witness, would have such a right to refuse unless a court compels testimony via a subpoena, summons or other order. While a subpoena (or summons) in a criminal case requires the presence of the Victim or other witness in court, it does not require a person to speak to either party except under oath in the courtroom. See, e.g., Rule 13(a), SCRCrimP. Certainly a new or amended South Carolina Rule of Professional Conduct or an addition to the South Carolina Victims' Bill of Rights could further require notice to Victims by defense attorneys (or third parties) whom they represent (or are working for), that Victims may hire their own attorney and that Victims have the right to refuse to speak to the defense attorney or any third party contacted on their behalf. Such a rule or addition could also add additional penalties in the law for unwanted contact after notice and refusal by a Victim to speak to the defense attorney or a third party.[7] Nevertheless, until a court or the Legislature specifically addresses the issues

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[6] See also In re Clauson's case, 164 N.H. 183 (2012) where an attorney was disciplined for representing both the Victim and the defendant in requesting bail be amended to allow contact. This was found to violate the New Hampshire Rules of Prof. Conduct Rule 1.7(a) prohibiting representation involving a concurrent conflict of interest.

[7] Conduct by a defense attorney, a private investigator or other third party may not meet the statutory elements of a specific crime under the law (e.g., stalking requires fear as an element [S.C. Code § 16-3-1700(C)]; intimidation of a witness requires threat or force [S.C. Code 16-9-340]). Moreover, please note there is a specific exception in the law regarding some offenses against a person for "words or conduct protected by the Constitution of this State or the United States, a law enforcement officer or a process server performing official duties, or a licensed private

presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. There are also many other sources and authorities you may want to refer to for a further analysis. For a binding opinion, this Office would recommend seeking a declaratory judgment from a court on these matters or contacting the South Carolina Office of Disciplinary Counsel or the South Carolina Commission on Lawyer Conduct. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

investigator performing services or an investigation as described in detail in a contract signed by the client and the private investigator pursuant to Section 40-18-70." S.C. Code § 16-3-1700(G).