

To: Colorado Legislature Judicial Committee

From: Colorado Association of Chiefs of Police (CACP)

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Designated Representative of CACP

Regarding: HB 25-1114 Concerning Allowing the Defense to Review a Tangible Object in Preparation for a Criminal Trial

CACP and ACA Emerine are grateful to the House Judiciary Committee for allowing us to be engaged in the legislative process for HB 25-1114. In order to be respectful of the time limitations for in person testimony and questions, CACP offers the following written outline for the Committee's consideration. This outline includes, but does not limit all of the concerns that CACP has with regards to the introduced version of HB25-1114. This outline is meant to discuss several bodies of law that may take more time to review than is available during in person testimony.

1. Colorado Rule of Criminal Procedure 16 (Crim. R. Proc. 16) already allows for, and requires that defense attorneys be permitted to inspect physical evidence in advance of trial.
2. In addition to being good policy, recording of defense attorney evidence views is required by law under the Law Enforcement Integrity Act C.R.S. § 24-31-901. Law Enforcement are required to activate their body worn camera (BWC) or other video recording device during any interactions with the public pursuant to this law. Defense attorneys are considered members of the public.
 - a. (1) "Contact" means an in-person interaction with an individual, whether or not the person is in a motor vehicle, initiated by a peace officer, whether consensual or nonconsensual, for the purpose of enforcing the law or investigating possible violations of the law. "Contact" does not include routine interactions with the public at the point of entry or exit from a controlled area; a non-investigatory and consensual interaction with a member of the public, initiated by a member of the public, unless and until the interaction progresses into an investigation of a possible violation of the law; a motorist assist; undercover interactions; or routine interactions with persons detained in a jail or detention facility. C.R.S. § 24-31-901
3. An evidence view is a factual interaction. It is not a confidential process. It cannot be considered "attorney client privilege" or "work product".
 - a. In Jefferson County 23CR2854 this specific issue of "work product" applying to a defense evidence view was litigated. The Judge in that case specifically found that a defense evidence view is not "work product." The following excerpt from that ruling is extremely helpful:

“THE COURT: This is an interesting issue that has been raised a couple of times that I think highlights an issue that's probably been in existence for decades, but is now just more relevant because of the use of body cam, and that is that evidence views have always been observed, one way or another, by law enforcement. It's interesting that you used the example of a camera in the corner, because, again, I think in the limited experience I have -- and a reasonable inference would be that when you're in a police station there are cameras everywhere, including cameras above, probably, watching what you're doing. Evidence views have probably been recorded for decades and we just -- nobody has ever paid that much attention to it. It's just we're more aware now because body cameras are, potentially, on every officer -- or should be on every officer - - and it's a new hot issue. Whether it's being recorded through a video camera or somebody was just standing there observing in 1975, it's the same difference. Law enforcement could have taken copious notes for any case, any time, and could have sent those over to the D.A. I suppose it's probably happened in multiple cases. It's now what's happening here. I'm not sure I can find a work product. In evidence view I absolutely understand defense's argument that if you're whispering or looking at something multiple times, or if you're manipulating an item a certain way, that all might go to the theory of the case, but you know somebody's there; whether they're recording or not, they've always been there.

So to the extent it might be some sort of work product -- there's some sort of waiver that goes with it, too, because you don't have that privilege or that confidentiality when law enforcement is standing in the room. And I think it's -- it falls short to think that even if you're over in a corner huddling and whispering, that law enforcement can't hear you. I mean, maybe people can hear you when you whisper, they can see you when you point, whether it's being recorded on a halo camera or on a body-worn camera.”

It is a new, interesting issue, but I don't know that it changes anything that hasn't been done for decades in one form or another. That being said, again, whether it was --you know, in 1970, law enforcement taking copious notes and giving their impressions, that is different than the People being able to view a body camera and zoom in or enhance audio or any of those other capabilities that come with technology. And so the Court is going to order as follows: I'm going to find that at least with the record I have right now, I cannot find that it is work product. To the extent the evidence view is some level of work product, there's likely some waiver, especially in this case where it was announced that the recording would occur.

Excerpt from Jefferson County 23CR2854 May 15, 2024.

- b. Attorney client privilege does not exist for a defense evidence view because it is not made “in confidence” and there is the existence of individuals not part of the defense team present.
- c. Attorney client privilege has been defined by the courts throughout America for a significant period of time. That definition can be boiled down to as follows:

Another much-quoted formulation was set forth by Judge [Wyzanski](#) in [United States v. United Shoe Mach. Corp.](#), 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (**b**) **without the presence of strangers** (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

However the definition is phrased, four elements are required to establish the existence of the attorney-client privilege:

- (1) A communication;
- (2) made between privileged persons;
- (3) in confidence;**
- (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.