Can a defence lawyer undertake contact with complainants in criminal matters?

It is almost universally suggested in common law jurisdictions that such contact ought to be undertaken sparingly and only after notification to the opposing party, especially in criminal matters and those involving sexual or family violence. As Professor Dal Pont notes:

> When interviewing a prosecution witness, defence counsel must be careful to ensure that nothing is said or done to intimidate the witness. It is especially unwise to interview complainants in sexual offences without notifying the prosecutor in advance[1].

He also suggests that such interviews be undertaken in the presence of an independent witness. Solicitors in other jurisdictions have recently been sanctioned or even imprisoned for misunderstandings arising when contacting prosecution witnesses.

Harold v Legal Complaints Review Officer [2012] NZHC 145.

Issue:

(1) *whether defence counsel may only contact crown witnesses on notice to the prosecution;*

(2) *what is the status of professional conduct rules?*

Facts: Defence counsel in a criminal assault matter met with the complainant, such meeting arranged by his client. The complainant gave a version inconsistent with prosecution case. She died before the matter came to trial and counsel's recollection of this meeting was used to attempt to exclude her statement to police.

Counsel was criticized for meeting with the complainant by the Judge at first instance. ("a more appropriate and safer practice would be for counsel to decline to meet with the complainant and refer her to an independent solicitor "; *Police v Rahman* [2009] DCR 614 15 [59])

The Crown Solicitor subsequently complained that counsel breached a "well established convention" that contact between defence counsel and complainant should only take place after notice to the prosecution.

The New Zealand Professional Conduct Rules contain a similar (but not identical provision) to ASCR rule 23 – (solicitor not to attempt to prevent opposing counsel speaking with a witness) and go further by explicitly stating that counsel may interview any witness.

Findings: The Standards Committee considered that the established convention, together with various Court practice directions (not specifically applicable in this case, but treated as persuasive) was sufficient to ground a finding of unsatisfactory professional conduct. Failure to adhere to such a convention amounted to a lack of "competence and diligence". The Legal Complaints Review Officer (the first line of review in the NZ regulatory system) upheld that finding.

The New Zealand High Court (Asher J) disagreed. Citing the NZ Court of Appeal in *Black v Taylor*[2] his honour observed [32];

> "The rules are not the only source of ethical standards, and in the commentaries there are references to cases and other sources of authority. The introduction makes it clear that they do not purport to deal with every circumstance that might give rise to an ethical responsibility …. and the rules are "not to be considered an exhaustive code or treatise".

[**Note** – this observation applies to the Australian Solicitors conduct rules as well; Rules 2.1 and 2.2 of the ASCR make it clear that the Rules apply in addition to common law obligations but do not supplant them.]

However, in the absence of a common law principle which established a higher duty than the Rules, the Committee's opinion of good practice – even if such a practice was sufficiently widely observed to amount to a

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[1] G Dal Pont, *Professional Responsibility* (5th Ed) 2012, Thompson Reuters at p 569.

[2] *Black v Taylor* [1993] 3 NZLR 403 (CA)

"convention" did not supplant an express or implied permission arising from the conduct Rules [47] – [51]. As the Rules reflected the traditional view that there was "no property in a witness", acting consistently with that position – although dangerous – was not prohibited in of itself.

> "… There is no requirement to notify, but it is made clear that a practitioner takes a risk if he or she talks about the case to an opponent's prospective witness without notifying the other side, particularly in a sensitive criminal matter. It follows that contact in certain circumstances may constitute unsatisfactory conduct … whether the discussion or interview involves unsatisfactory conduct will turn on the particular background and facts of the discussion or interview..." [at 43]

Would the same conclusion be reached in Queensland?

In all likelihood, yes. Both in relation to the status of the Australian Solicitors Conduct Rules ("ASCR") and the underlying question of contacting a crown witness the approach adopted by Asher J seem to be consistent with Australian authority,[3] although there is nothing on point.

It must be stressed that a finding of Unsatisfactory Professional Conduct (or Professional Misconduct) can – and regularly does - arise where there is no direct breach of a specific obligation in the ASCR.

The *Legal Profession Act* (2007) Qld defines unsatisfactory professional conduct as:

> Conduct of an Australian legal practitioner. .. that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

This is reflected in ASCR fundamental duty 4.1.3 ("deliver legal services competently, diligently and as promptly as reasonably possible; ..").

Professional misconduct includes conduct:

> "Whether happening in connection with the practice of law or happening otherwise … that would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice."

Conduct contravening a solicitor's paramount duty to the Court and the administration of justice (ASCR fundamental duty 3) or engaging in dishonest or disreputable conduct (ASCR paramount duty 5) may clearly fall within either definition. Prosecutions for breaches of general duties of competence or fundamental obligations to the Court are not uncommon. [4]

So can I talk to prosecution witnesses without notice or not ?

A legal practitioner who approached a prosecution witness and either consciously or subconsciously interfered with their evidence could of course attract disciplinary or even criminal sanction.

There are many good reasons why highly respected legal academics[5], judges,[6] law societies[7] and the authors of commentaries to professional rules[8] caution legal practitioners against contacting witnesses opened for the opposing party without notice to the opponent and (ideally) in the presence of a reputable witness. The wisdom of this course is especially apparent in criminal matters, particularly matters of a sexual nature.

HKSAR v Wong Chi Wai & HKSAR v Yeung Birney, is a salutary example. Although the Barrister and Solicitor involved were ultimately successful in their appeals, they had already served their respective terms of

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[3] There has been little explicit consideration of the status of the Rules in Queensland. Although decided before the "codification" (used with caution) of professional conduct rules in Australia, in L*aw Society of NSW v Moulton* [1981] 2 NSWLR 736 Hutley JA observed that incorrect advice from the Law Society may constitute some defence to charges of misconduct. The published views of the Society at that time were the closest analogy to current Conduct Rules. That approach is consistent with the position taken in *Black v Taylor* which has been cited with approval on numerous occasions in Australian jurisdictions, although not on that point. The ASCR are cited consistently in relation to applications to restrain solicitors from acting in conflict matters; eg *Australian International Islamic College Board Inc v Kingdom of Saudi Arabia & Anor* [2012] QSC 259 Martin J. The only time that they have been considered by the High Court; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 was a brief statement that the applicable rule "should not be necessary". (French CJ, Kiefel, Bell, Gaegler & Keane JJ at [66])

[4] For example; *Legal services commissioner v Rouyanian* [2013] QCAT 57 – mistaken view of the law; Legal Services Commissioner v JHMcC [2011] VCAT 231 – failure to pay outlays; *LSC v McClelland* [2006] LPT 13, 27 – failure to supply Pamda "lawyer's certificates".

[5] SeeDal Pont, cited at note 1.

[6] *Bar Association of Queensland v Lamb* [1972] ALR 285 at 286 per Menzies J

[7] Law Society of the ACT - *Guidelines for contact with the complainant in family violence or sexual assault matters*, Revised July 2003.

[8] Commentary – NZ Rules of Professional Conduct, rule 10.08; Shirvington "*Improper communication*" (1994) 32 LSJ 19;

imprisonment of six and four months for sending correspondence to a client's former solicitor threatening disciplinary complaint should she give evidence on subpoena that would (arguably) breach privilege. President Ribeiro of the Hong Kong Court of Final Appeal observed:

> "Even if, as the Court of Appeal and I have held, there is no legal requirement that the other side be informed of an approach made to a witness or potential Wong, an unannounced approach to the other side's witnesses in an adversarial system is bound to arouse suspicion. Not having been given notice of the approach and not being aware of what was said to the witness, concern may naturally arise as to whether some form of impropriety could have been involved"[9]

Defence counsel must also be aware that their contact with the witness may take place in the context of prior activity by their client. Where the client has applied improper or unlawful pressure, their representative's arrival to document the witness' timely change of heart could easily be viewed as a conspiracy. Even if the solicitor is well motivated – counselling a witness to withdraw what they believed to be previously perjured testimony - undue pressure to do so may amount to an offence.[10]

Whether – in the particular context of a specific matter there has been improper pressure upon a witness may be a complex question:

> "The decision will depend on all the circumstances of the case, including not merely the method of interfering, but the time when it is done, the relationship between the person interfering and the witness and the nature of the proceedings in which the evidence is being given. Pressure which may be permissible at one stage of the particular proceedings may be improper at another. What may be proper for a friend or relation or a legal adviser may be oppressive and improper coming from a person in a position of influence or authority"[11]

It is suggested that prudent practice, if not mandatory practice, suggests that a legal practitioner should always warn opposing counsel of proposed contact with opposing witnesses, especially in criminal matters.

Failure to do so is not in of itself misconduct, but could easily lead to an allegation of witness tampering.

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[9] *HKSAR v Wong Chi Wai FACC no 10 of 2012, Per Ribeiro PJ at 170*
[10] *Rex v Silverman* (1908) 17 OLR 248; Cited with approval in Kellett [1976] – See note 11, below.
[11] *R v Kellett* [1976] 1 QB 372 at 393, cited with approval in Meissner v R (1995) 184 CLR 132 per Deane J at [9]; *Powell v In De Braekt* [2007] WASC 165 per Simmonds J.