Defence counsel beware when speaking to the complainant

SHARE

26 MAY 2017 — BY JOHN HICKEY AND ANTHONY ROGERS ON BEHALF OF THE COMMITTEE, WITH THE ASSISTANCE OF ELLA STOLWERK OF AUCKLAND LAW SCHOOL'S EQUAL JUSTICE PROJECT

There are cases (for example, involving a charge of male assaults female or similar) where the defendant arrives at Court accompanied by the complainant, and both approach defence counsel.

In some instances, the complainant will tell defence counsel that he or she no longer wants to give evidence against the defendant, and does not want the defendant convicted. Sometimes, the complainant will make comments indicating that the Police allegations about what happened are incorrect or that they are a fabrication.

Defence counsel should be aware of the risks of choosing to discuss the charges with the complainant. Allegations of inappropriate influence by counsel can be made that may taint their client's defence or bring themselves within the purview of disciplinary complaint.

On this topic, we note an item in a past edition of LawTalk (Issue 886, 22 April 2016, at pages 41 and 42), which discussed an instance of a lawyer being censured and fined by a Lawyers Standards Committee for his conduct in taking a "retraction statement" from the complainant. From the article, it appears that this was because defence counsel acted where there was a conflict of interest and failed to provide independent legal advice to the complainant. The article noted that:

> the Police do not have to withdraw even if the complainant retracts;
>
> the complainant may be subject to a charge of attempting to pervert the course of justice or perjury;
>
> the complainant might put his or her status as a reliable person and well-being at risk by such a retraction; and
>
> on reviewing the case, the Legal Complaints Review Officer (LCRO) upheld the Standards Committee's findings of a fine and publication of the facts.

The ADLS Criminal Law Committee also notes that, where a complainant has retracted his or her allegations, the Police might not process such a complaint as seriously on a subsequent occasion.

Another reported instance where defence counsel spoke to the complainant is Harold v Legal Complaints Review Officer and Auckland Lawyers Standards Committee [2012] HC 145. Initially, the Auckland Lawyers Standards Committee and LCRO upheld a complaint against counsel, but on appeal, those decisions were declared to be invalid and were set aside by Asher J.

The substance of the Harold complaint was with regard to the conduct of defence counsel in discussing matters with the complainant. The claim was that defence counsel had breached a convention that defence counsel should notify the Crown before interviewing a person when counsel is aware that person is a Crown or police witness.

Asher J found that the complaint was not proven on the basis that:

> Both the Standards Committee and the LCRO had erred in law. Instead of engaging correctly with the relevant Rules of Professional Conduct for Barristers and Solicitors (the Rules of Professional Conduct) under the Law Practitioners Act 1982, the Standards Committee had imposed its own perception of good practice and found that there was a convention requiring that the Police or Crown should be notified before speaking to the complainant. His Honour found this finding untenable.

> The LCRO was found to have made a further error in law by giving primacy to alternative guidelines utilised by the Waitakere Family Violence Courts. The Rules of Professional Conduct were applicable.

Both Rules 8.05 and 10.08 (of the then Rules of Professional Conduct (7th Edition)) set out the proposition that no practitioner had the sole right to call a witness or discuss the case with a witness (see Harold, para [37]). Prior to a preliminary hearing, counsel is not prohibited from speaking to a Crown witness without giving notice. However, counsel should have given notice to the Crown after a preliminary hearing of an indictable matter (para [38]).

Asher J also referred to Rule 13.10.04 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the 2008 Rules), which were not in force at that time. His Honour took the view that the Standards Committee failed to take into account the Rules because it took the view that a convention existed that had the effect of overriding the Rules (see para [45]).

We note the footnote to Rule 13.10.4 of the 2008 Rules states:

“Where a lawyer proposes to interview a witness for the other side, it is prudent to inform the lawyer representing the other side of this fact, especially in respect of sensitive criminal matters where it is important to take steps to avoid any suggestion of it interfering with the course of justice.”

Further, Rule 13.10.6 states:

“A lawyer must not discourage a witness or potential witness from discussing the case with the lawyer acting for the other party … a lawyer is however entitled to inform a witness or potential witness of the right to decline to be interviewed by the other party and of any relevant legal obligations.”

A footnote to Rule 13.10.6 also states that:

“… a lawyer may discuss matters with the witness at any stage up to the commencement of cross examination. A witness may however simply volunteer information to a lawyer.”

The Committee emphasises that, as noted by Asher J, there are risks for defence counsel in speaking to the complainant. Members of the Committee were divided about whether defence counsel should speak to the complainant at all, but overall, the Committee agrees that it is best practice not to do so. This is particularly true for more novice defence counsel who may get themselves into strife while believing that they are helping their client.

The Committee would encourage defence counsel to instead refer the complainant to an independent lawyer, court victim advisor or the Police prosecutor.