



## Attorney General's Guidance

### Contact by defence lawyers with complainants and other prosecution witnesses

#### Introduction

- 1) This guidance seeks to provide a clear process to be adopted when a defence lawyer wishes to speak to, or interview, a complainant or other prosecution witness who has already provided a statement to the States of Jersey Police or other investigating authority.

#### Background

- 2) It is accepted that there is no property in a witness<sup>1</sup>, however, the nature and extent of contact with complainants or prosecution witnesses by defence lawyers may amount to improper conduct if not handled sensitively and sensibly. It is important that defence lawyers consider potential conflict of interests prior to taking any steps to contact a complainant or witness. Whether contact amounts to improper conduct will be "*fact sensitive*"<sup>2</sup> to each particular case. It is hoped that in following this guidance, the risk of allegations of improper conduct on the part of defence lawyers who make contact with complainants and prosecution witnesses will be reduced. The Law Society of Jersey Code of Conduct, which provides some assistance, is also considered below.

#### Process to be adopted

- 3) The following process is to be adopted in all cases where the defence seek to make contact with a complainant or other prosecution witness. It is designed to ensure that complainants and other prosecution witnesses are given the benefit of informed choice as to whether they wish to have contact with the defence and, if so, how that contact should take place.

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<sup>1</sup> AG v Monks [2018] JRC115

<sup>2</sup> Versloot Dredging BV v HDI Gerling Industrie Versicherung AG and others [2013] EWHC 581

- a. Upon determining that they wish to make contact with a complainant or other prosecution witness, the defence must first contact the prosecution in writing and inform them of their intention. All contact must be made at least 14 days before any trial.
- b. The prosecution will then contact the Officer in the Case and explain that a request has been made.
- c. The complainant or other prosecution witness will be contacted by the States of Jersey Police, or other investigating authority, and informed they do not have to speak to the defence, however, should they wish to speak to the defence then they ought to seek independent legal advice. The witness needs to be independently advised that they may be exposing themselves to a risk of (inter alia) prosecution for offences such as perverting the course of justice.
- d. If the witness does wish to speak directly with the defence, they will be asked if they consent to their personal contact details being passed to the defence so that the defence may make contact with them in writing.
- e. An independent third party, agreed by the prosecution, must be present during any meeting between the defence and the witness.
- f. The defendant must not be present during any meeting between the defence and the witness.
- g. Where a witness indicates they do not wish to speak with the defence, then no contact shall be made.
- h. A full written record must be made of any meeting that takes place, a copy of which must be provided to the prosecution.

## **Law Society of Jersey Code of Conduct**

### **Conflicts of interest**

- 4) Conflicts of interest are considered in Rule 6 of the Law Society of Jersey Code of Conduct.

- 5) Rule 6.2 provides that there is

*“a conflict of interest if a member or their firm owes separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.”*

- 6) It will be a conflict of interest for the same law firm to act for or advise a Defendant and a complainant in the same matter.
- 7) Where a witness wishes to retract their statement, it is the duty of the person taking that retraction statement, whether a defence lawyer or States of Jersey Police officer, to warn the complainant of the risks of providing a contrary statement. In these circumstances, a defence lawyer may consider they have a conflict of interests; on the one hand it may be in the interests of their client that the retraction statement is provided, on the other, it is in the interests of the witness to ensure they are fully advised that the provision of the retraction statement may give rise to a criminal offence. This situation falls squarely under the definition of conflicts of interests as provided for in Rule 6.2 of the Law Society of Jersey Code of Conduct.

### **Additional rules under the Code of Conduct**

- 8) It may be appropriate to consider the following additional Rules when determining if contact by a defence lawyer with a witness gives rise to improper conduct.

- 9) Rule 4.1 provides that

*“Members must not do anything which could reasonably be seen by the public to undermine their honesty, integrity and independence”.*

This includes not knowingly or recklessly misleading or attempting to mislead anyone, not rehearsing, practising or coaching a witness in respect of their evidence and not encouraging a witness to give evidence which is misleading or untruthful.

- 10) Rule 5 provides for acting in the best interests of each client, including promoting *“fearlessly, and by all proper and lawful means, the client’s best interests”*. This is subject to a lawyer’s duty to the court and obligations to act with honest and integrity referred to above.