

Access to Suspects in ICAC Custody.

Issue No. 1.

The 1992 Rules and Directions for the Interviewing of Suspects and the Taking of Statements (the 1992 Rules) are explicitly stated to apply to the ICAC. The Rules lay down procedures relating to the questioning of suspects and the taking of statements.

Whilst the Rules do not have statutory force they may be seen as an attempt to balance the rights of suspects and the interest of the investigating enforcement agency. These Rules are therefore mutually beneficial and may be said to indicate the 'best practice' for investigators.

The Rules expressly recognise the principle:

'That every person at every stage of an investigation should be able to communicate and consult privately with a solicitor or barrister. This is so even if he is in custody-----.'

That right is not however an unqualified right as is recognised by the subsequent wording:

'---provided that in such case no unreasonable delay or hindrance is caused to the process of the investigation or the administration of justice by his doing so.'

That wording means that access to a lawyer can only be denied for due cause and places the onus of proving due cause firmly upon the enforcement agency concerned.

The Rules do not have statutory effect. However a breach of the Rules may well lead to a court exercising its discretion to exclude evidence (see e.g. the Law Tat Ming cases). Discretionary exclusion must be contrasted with the mandatory exclusion of confession where the confession is involuntary according to Ibrahim, Adjodha and Ping Ling.

Whilst the 1992 Rules are not statutory, they must be seen alongside Article 35 of the Basic Law which provides that:

'Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interest or for representation in the courts, and to judicial remedies.'

Article 35 sets out an important principle. Particular attention must be paid to the words 'timely protection'. The suspect who has been arrested or who has voluntarily gone to the office of an enforcement agency to assist with their enquiries needs advice at that stage if their lawful rights and interests to be protected.

The ICAC imposes additional qualifications in its Request for Legal Representation in its Standing Orders (SOs). Those SOs cannot override the Rules or Article 35. Any SOs which conflict with the Rules and/or Article 35 must be treated as of no effect.

POINT 1.

The ICAC must be made to appreciate that access to a lawyer is the basic right of a person in custody. That right should only be denied where there is an overwhelming need for denial.

Practicality

There may be situations where the enforcement agency is trying to arrest other persons involved in the criminality and/or seeking to recover stolen property. Arguably access to a lawyer in those situations could impede the investigation. A lawyer faced with such an objection should be provided with written details of the objection and those details should be signed by a senior officer. Such objections should not lead to any lengthy denial of access. There could be a time limit on the period for which access is to be denied. There would not in any event be any reason why the lawyer who has gone to the enforcement agencies office speaking to the client over an internal telephone, advising the client of their presence and being able to remind the client of the right to silence. The initial conversation with the client should not go further than that, not the least for reasons of confidentiality.

Particularly in denial of access situations, the initial instructions will come from a third party. Unless and until the lawyer is retained by the suspect, the third party will be the client. It is recommended that the consent of the third party to their name being revealed be obtained. The suspect will likely ask who has sent the lawyer during any internal telephone conversation and as the conversation will be overheard by officers who are present, confidentiality issues need to be addressed in advance.

Issue No. 2.

The Client's right to choose.

The basic principle is that the client has the right to select their own lawyer (particularly where they are paying the lawyer themselves).

The lawyer who seeks to visit a suspect in custody will justifiably be expected to establish their identity, their status and their reason for seeking access. The reason will simply be to advise (the suspect). No issues of breach of confidentiality arise here.

If the suspect declines to see the lawyer, that is the suspect's right. The lawyer should not however accept that their service have been declined unless this comes from the person to who access is sought. In those situations the lawyer should insist upon the suspect being brought to them so that suspects can tell the lawyer their services are declined. A record should be kept of this, the suspect should be asked to sign the record and the lawyer should ask for a record to be made in the occurrence (or equivalent) book. This protects the client and the suspect. If the enforcement agency will not agree to this, the lawyer will perforce have to accept the situation but an

immediate written complaint should be made to the enforcement agency concerned and to the Secretary for Justice. This will at least ensure there is a record of events which might be relevant to issues of admissibility of evidence later on. Even though the suspect has declined the lawyer's services there will still be a duty to the person who gave instructions for the visit to carry out their instructions both to the letter and to the spirit.

POINT 2

The ICAC should be asked to acknowledge that this 'bringing up' procedure will be fully complied with in refusal situations, that appropriate entries will be made in record books in consultation with the lawyer and that a copy of the entry will be supplied to the lawyer forthwith.

The ICAC does attempt to deal with this situation in its SOs at point 9 but does not go far enough,

ISSUE 3

The Right Lawyer

Suspects in custody may not previously have consulted a lawyer.

The suspect's objective will be to get competent advice.

Simply giving the suspect a list of solicitors will not be good enough.

Suspects must be provided with a list which enables them to identify a lawyer with competence in criminal law and procedure.

POINT 3

The Law Society should ensure that the ICAC has an up to date list of lawyers with criminal law and procedure competency and the ICAC should give that list to the suspect. The list should be updated regularly, say once every three months.

ISSUE 4.

Genuine Legal Practitioner?

Once the lawyer has confirmed their identity, their status as a lawyer and their instructions that should be the end of it.

POINT 4

Once the lawyer has confirmed identity, status as a lawyer and their instructions that will be sufficient for them to have access to the suspect.

ISSUE 5

Conflicts of interest

Conflicts of interest or potential conflicts of interest do arise from time to time. These matters are addressed in the Hong Kong Solicitors' Guide to Professional Conduct and are matters for the solicitor (and the Law Society). It is not for the ICAC to determine there is, or may be, a conflict of interest and to seek to bar access on that ground. That is to usurp the professional judgement of the lawyer. It is for the lawyer to decide there is an actual or potential conflict of interest and this cannot realistically be done in most cases until there has been access to the suspect. The contents of SO 15 and 16, especially, the suggestion of referring such situations to the Law Society are intimidatory.

POINT No. 5.

The ICAC must not seek to bar access to a suspect on the grounds of actual or potential conflict of interest. Conflict of interest issues are the responsibility of the lawyer and the Law Society, not the ICAC. SOs 15 and 16 should be removed from the ICAC SOs.

Issue No. 6.

The 'Disreputable' Lawyer

The SOs at point 11 refer to situations where the ICAC claims it would be justified to refuse access e.g. transmit messages to other suspects. Whilst the ICAC will argue that prevention is better than cure, the measures go too far and are capable of abuse.

The ICAC claim the right to refuse access where it is 'reasonably suspected' of deliberately going to use the legal adviser to transmit message to other suspects. If a solicitor joins with a suspect to deliberately impede an investigation issues of doing of acts tending and intended to pervert the course of public justice arise. The ICAC can prosecute in such cases. Solicitors should be taken to be aware of their professional responsibilities in this respect and to act accordingly. Criminal and/or disciplinary consequences can follow in appropriate behaviour.

Similarly remarks apply to the denial of access on the grounds of the suspected involvement of the lawyer in the criminality for which the suspect is being interviewed. The remedy here is to arrest the lawyer.

Point d is insidious and begs the meaning of 'compromised previous criminal investigations'. Would a lawyer with a good record of defending in ICAC cases come within these words?

POINT 6

SO11 (b) to (e) are untenable. They present as an attempt to resile from the Rules and conflict with Art 35. The ICAC should be told that any attempts to deny access on one or other of those grounds will be met with an immediate complaint to Secretary for Justice and/or will be used on an application to

exclude evidence at a subsequent trial. SO11(f) adds nothing to the Rules and is therefore surplus.

ISSUE No. 7

Referring and Considering.

There are various reference to ICAC officers seeking advice from more senior officers e.g. SO13 and 15. Whilst there may be need to refer to senior officers, there is a danger this can become a delaying tactic whilst the suspect is interviewed.

Point 7

Where a request for access is being considered any interview with the suspect then in progress should cease. If the suspect has not yet been interviewed, no interview should commence until a decision has been made on the request for access.

Stopping any interview in progress or postponing the start of an interview may well afford the suspect a time to reflect upon the wisdom of making a statement or answering questions.

ISSUE No. 8

Note (c) of the Rules

Words are wide. Could there be more precision?

Point 8

Traditional wording here. Normally test whether there was a good reason for refusing access at a subsequent trial on issues of admissibility of evidence obtained in these situations. Difficult to see how more precision could be obtained without a Code of Conduct/Practice. Is a Code desirable?

9 Conclusion on Access

Should continue trying to get a dialogue with the ICAC to see if a 'Code' can be achieved.

Is there a need for a Code in view of the Rules?

Would it be worth seeking to involve the Secretary for Justice as being in overall charge of prosecutions?

Layers must ensure that there is adequate recording of situations where access is refused and also of situations where the suspect declines the lawyer's services.

Lawyers must be alert to opportunities to challenge admissibility of evidence where access has been refused or delayed, particularly on grounds which objectively and/or subjectively lack foundation.

10 Confidentiality during the access to the client

This has already been discussed.

However lawyers interviewing clients in custody must be aware of the possibilities CCTV cameras present to law enforcement agencies.

Whilst the CCTV system may not be recording sound, pictures can be enlarged. This may enable e.g. a lip reader to discover what is being said. What is being said could, I suggest, come into evidence on the basis that legal professional privilege is to be protected and if it is not protected the right is lost.

Would there be anything inherently improper in such evidence being allowed in where the lawyer is aware, or should have been aware, of the existence of the CCTV camera and did nothing to preserve confidentiality?

Even if the evidence does not come into the trial, the prosecution may be altered to problems in the defence case and may be able to turn those problems to advantage