

## **Additional chapter: Advising at the Police Station – Practical Steps**

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## **1 INTRODUCTION**

This chapter complements Part II of *Criminal Litigation* by exploring the practical steps that a legal adviser will take when discharging the onerous responsibility of advising a suspect at the police station. For this reason, it is written exclusively from the defence perspective.

Most specialised criminal law firms will have a rota of staff on call providing 24-hour assistance to suspects in detention. The task of advising the suspect at the police station is not always undertaken by a qualified solicitor. A non-solicitor (which includes a trainee or paralegal) must either have successfully completed the Police Station Representatives Accreditation Scheme (PSRAS) or be registered as a probationer under the scheme if

their firm is to receive payment from the Legal Aid Agency for the representation of clients at the police station. The process of accreditation is explained in greater detail at paragraph W1.22, below.

The legal adviser has a multi-faceted role at the police station, likely to require the following legal skills:

- interviewing;
- analysis;
- advising;
- negotiation;
- advocacy.

### **Interviewing**

The purpose of interviewing is primarily to extract information. You need to be able to effectively extract the salient information not only from your client, but also from the custody officer and investigating officers. An excellent rapport with all multifunction agencies is crucial to obtain as much information as possible from all parties.

### **Analysis**

You will be required to analyse the information you have obtained from the custody record, the investigating officers and what your client has disclosed to you. This is to evaluate the strength or weakness of the evidence against your client and to formulate a strategy for interview. It is crucial to remember there is no hard and fast rule - your strategy depends upon the evidence available.

### **Advising**

The police station adviser will clearly be called upon to give advice. The advice might cover:

- the extent of police powers;
- the application of substantive criminal law (is there a case to answer in terms of proving *actus reus* and *mens rea* and might your client have a defence?);

- whether to answer questions in interview or remain silent;
- whether to participate in an identification procedure, or perhaps to consent to a search procedure.

### **Negotiation**

Negotiation skills are needed. They are most likely to be deployed in your dealings with the custody officer who takes many of the important decisions under PACE 1984 and the Codes of Practice in relation to your client's detention. You may need to negotiate your client's release from custody or persuade the custody officer that an out-of-court diversion (simple caution/adult or youth conditional caution) is preferable to your client being charged, or that your client should be granted bail if charged. You may also need to deploy your negotiation skills against the investigating officer in order to achieve a satisfactory level of evidential disclosure.

### **Advocacy**

Advocacy skills are required because you may need to intervene in an interview in a proactive way to protect and advance your client's legal rights.

To discharge the role effectively, the legal adviser at the police station needs to be:

- knowledgeable;
- organised;
- assertive;
- decisive;
- confident

All police station advisers need a detailed knowledge of police powers and procedure under PACE 1984 and the Codes of Practice. A sound grasp of the substantive criminal law, the Bail Act 1976, rules of evidence and the rules of professional conduct are also necessary. It is impossible to effectively advise a client without such knowledge.

Given the number of tasks the legal adviser is likely to be called upon to fulfil, you need to be organised and assertive. If a legal adviser is to protect his client's best interests, this

may require you to challenge the authority of the police.

Legal advisers must be decisive. You will be required to exercise your powers of critical thinking on the spot. The decisions that your client makes on your advice may have significant repercussions. Do you, for example, advise your client to remain silent, knowing that adverse inferences might be drawn under s. 34 Criminal Justice and Public Order Act 1994 (see Chapter 5)? Do you advise your client to admit the offence? If so, what is the basis for your advice? If your client makes admissions during interview, charges may follow or your client may be offered a caution/reprimand.

It should be added that the working environment at the police station can be less than ideal. You may be called out or telephoned after work or in the early hours of the morning. You will be entering an environment where the police will often want one result and you will want another. You may well be under time pressures during an urgent investigation. Until you have undertaken some reflective practice and experience, new police station practitioners may feel isolated and intimidated.

The police station is at the sharp end of the adversarial justice system. In a serious case, where the police have considerable resources at their disposal and a strong suspicion that your client is involved: what does your client have? The answer is: you.

Having worked through the chapters in Part II of the *Criminal Litigation* on police powers, the detention process, the rules relating to the admissibility of confession evidence and evidence of identification, as well as the law relating to drawing adverse inferences from silence, you

now have the knowledge base to offer a client advice at the police station. How, then, might you undertake this role in practice?

*Note: Our Online Resource Centre includes a role-play exercise and accompanying, comprehensive set of video clips depicting the role of the legal adviser at the police station. The scenario (which is available to registered lecturers [here](#)) explores the process of detention and investigation of a fictional character called Peter West who is under arrest on suspicion of the rape of a 14-year-old girl. The scenario is unscripted and was brought to life by real police officers and an accredited police station representative. It includes the booking-in procedure; the disclosure interview between legal adviser and the*

*investigating officer; the interview between legal adviser and client and the police interview. Analysis of the action is provided on the clips and it is supported by a number of witness statements and related documentation.*

## 2 INITIAL CONTACT

You may be asked to represent a suspect at the police station either because the suspect has requested you or your firm to attend or a third party has sought your help on behalf of someone in detention or at the request of the Duty Solicitor Call Service (DSCS). Remember your client may be under arrest or attending the police station as a volunteer (see Chapter 4 of the main work).

Keep contemporaneous notes from the outset. If you are contacted by a third party, take full details. If you are contacted by the Defence Solicitor Call Centre (DSCC), you will be given the name of the person in detention; what he is in detention for and at which police station he is being detained. With this information, you should then contact the police station and speak with the custody officer on duty with a view to obtaining the following:

- your client's name and age (date of birth);
- the offence or offences for which he has been arrested;
- whether your client has made any significant statements;
- whether your client has been interviewed or whether the police intend to interview.

You should take a note of the time of the call and the name of the custody officer you are speaking with.

Ask to speak with your client and check whether your conversation can be overheard. Ascertain if your client wants you to attend the police station to give advice. If you are to attend, your client is best advised to say nothing to anyone and not to consent to anything until you arrive. Speak to the custody officer and let him know your estimated time of arrival at the police station and ask that your client is not interviewed or asked to undergo any procedures until you get there.

### **Should you attend the police station?**

It may not be necessary for the legal adviser to attend the police station immediately despite the client's insistence. If your client is drunk and the custody officer says nothing will happen until he has sobered up and is ready for interview, the solicitor need not attend until notified. A legal adviser should attend straightaway in any of the following instances:

- the offence is serious;
- the suspect is vulnerable;
- the suspect is complaining of ill treatment;
- an interview or identification procedure is about to be held;
- representations need to be made but they cannot be made effectively over the telephone;
- your client needs to speak with you in confidence.

### **3 WHAT SHOULD YOU TAKE WITH YOU TO THE POLICE STATION?**

You need to be very organised at the police station, so ensure you have with you a notebook, pen, PACE 1984, the Codes of Practice, proof of ID, legal aid forms and your checklists. In the student resource section of the Online Resource Centre you will find a checklist for use at the police station, which is reproduced with the kind permission of Lichfield Reynolds Solicitors in Staffordshire.

### **4 WHAT SHOULD YOU DO ON ARRIVAL?**

- Go to reception and make sure your mobile telephone is switched off. Do not use your mobile secretly, as this could compromise your integrity.
- Ask to speak to the Custody Officer, explaining who you are. S/he may want some proof of your identity.
- Check the custody record. You have the right to consult the custody record (Code C para. 2.4). Take your time to consider it, as it is a very important document in evidential terms and will provide you with a lot of useful information. From the custody record you will check your client's time of arrest, reason for arrest, time of arrival at

the police station and the reasons for detention. It should have details of the risk assessment undertaken in relation to your client and any requests made by your client. It will provide a record of any decisions about your client's detention including any searches and their authorisation, reviews of detention at six and nine-hourly intervals and any complaints by your client. Check whether an appropriate adult is required. Ascertain whether your client needs to be examined by a doctor or a nurse onsite at the police station. What is your client's first language? Is an interpreter required? You need to know the rules relating to the process of detention and questioning (see Chapter 4) to be able to evaluate the content of the custody record. Having considered the custody record, you should then ask to speak with the investigating officer(s).

## 5 INITIAL CONTACT WITH THE INVESTIGATING OFFICER(S)

This is a particularly important stage in your role as an adviser at the police station. Have you a right to disclosure of the evidence the police purport to have against your client? The legal obligations upon the police to make disclosure of their evidence at this stage are minimal. They are set out in Code C para. 10.3 Note 10B and were considered in *R v Imran and Hussain* (1997) Crim LR 754, in which the Court of Appeal held there is no legal obligation on the police to make disclosure of evidence prior to interview.

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### *R v Imran and Hussain* (1997)

In this case, it became apparent during the interview that the police had video evidence of the robbery in which the defendants were alleged to have been involved. Neither the defendants or their legal adviser asked that the interview be suspended so that the content of the video could be viewed. On appeal, it was contended on behalf of the defendants that the police should have disclosed the video, and having failed to do so, that no adverse inference could be drawn under s. 34. Rejecting such a proposition, the Court of Appeal reasoned:

'In support of the application it is submitted that the tenor of sections 34 to 38 of the Criminal



Justice and Public Order Act 1994 require the police to give as full a briefing as possible of disclosing all material to a legal representative before the interview with the suspect commences. We do not agree. There is of course a duty on the police not actively to mislead any suspect, but it is in our judgment totally impossible to spell out either expressly or by any permissible implication from those five sections any such requirement on the part of the police . . . ’

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Reference must also be made to Code C para 11A:

‘Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence. However, whilst the information must always be sufficient for the person to understand the nature of any offence (see Note 11ZA), this does not require the disclosure of details at a time which might prejudice the criminal investigation. The decision about what needs to be disclosed for the purpose of this requirement therefore rests with the investigating officer who has sufficient knowledge of the case to make that decision. The officer who discloses the information shall make a record of the information disclosed and when it was disclosed. ’

Code C Note 11ZA states:

‘The requirement in paragraph 11.1A for a suspect to be given sufficient information about the offence applies prior to the interview and whether or not they are legally represented. What is sufficient will depend on the circumstances of the case, but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly.’

Notwithstanding the minimal legal requirements, you must press the investigating officers

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for full disclosure of the evidence they have against your client at this stage. Be assertive if necessary. You are not going to be in a good position to offer your client informed advice as to what strategy to adopt in interview unless you can assess the strength of the evidence against him. Keep a careful record of what you are told. It is not uncommon (particularly in relation to serious crimes) for the ‘disclosure interview’ to be digitally recorded.

You should ask what witness statements the officers have and what they contain. If searches have been undertaken, ascertain for what purpose and what evidence they might have yielded. Check if your client has made any incriminating admissions to date. Check whether the incident was covered by CCTV. If it was, ask to see the footage.

How much information you extract at this stage may depend on the personalities of the investigating officers and the nature of the investigation. Your purpose in extracting as much information as possible is to enable you to evaluate the strength of the evidence against your client before you speak with him or her. Press for full disclosure, including a full list of your client’s previous convictions.

What if you have pressed the police for disclosure of their evidence but you feel the officer is holding back information which means you cannot properly advise your client? In *R v Roble* [1997] Crim LR 449 CA, this was a factor in assessing the reasonableness of a defendant’s decision to remain silent.

If the investigating officer is refusing to provide disclosure or a sufficient level of disclosure, you need to adopt a strategy to try and persuade the officer to provide sufficient disclosure to enable you to do your job. Point out the mutual benefits of such disclosure in that your client will be forced to seek legal advice repeatedly during the interview as new facts emerge if evidence is withheld until interview. This will require the interview to be repeatedly suspended. You may feel obliged to advise your client to remain silent if sufficient disclosure is not forthcoming. This is more likely to frustrate the police than to assist them. One good way of ascertaining whether you have been told all by the police is to ask: ‘Is there any information you have not disclosed?’ The police cannot lie to you and you will either be answered with a yes, no, or not prepared to say.

## 6 THE IMPORTANCE OF KEEPING A COMPREHENSIVE RECORD

The importance of keeping detailed notes cannot be over-emphasised. Keep a written record of everything. Checklists are extremely useful in this regard, as they act as a comprehensive *aide-mémoire*. You may not be taking the matter further than the police station and, as such, you need to ensure your notes are comprehensive. Anyone reviewing the file in the office or at court later ought to be able to quickly ascertain the key points of what took place at the police station. Remember, your written records may be adduced in evidence at a later trial.

Whatever representations you make at the police station, ensure they are recorded on the custody record.

In an environment which favours the police, your written records are vital. When you provide your client with the information obtained from disclosure for example, it must be accurately recorded. You do not want to forget or misinterpret an important piece of evidence that may affect the advice you give to your client and therefore the case overall.

## 7 EVALUATING THE DISCLOSED EVIDENCE

To be able to offer your client the most appropriate advice, you need to constantly evaluate the evidence against him in the context of the offence he is under suspicion of having committed. Therefore you must carefully consider the information in the custody record and press the investigating officers for as much disclosure as possible. Your evaluation of the evidence needs to take account of the rules of evidence (are there likely to be issues of admissibility?). You need to ask yourself whether the police are disclosing a *prima facie* case against your client at this early stage?

Generally, the burden of proving your client's guilt rests on the prosecution. This should always be borne in mind. On occasions a legal burden of proof rests on the defendant where certain defences are raised. In discharging its legal burden, the prosecution must rely on admissible evidence. Consequently, if the evidence the police disclose to you is, in your view, likely to be inadmissible at trial, you will no doubt take the view that the evidence at this stage is weak. Similarly, if the principal evidence comes from your client's

spouse, or from a co-accused, the prosecution may be unable to compel the witness to give evidence. It is quite common for allegations of domestic assaults, after the initial complaint has been made to the police, for the victim to retract her complaint at a later stage. You must ask yourself— is the offence made out and will the prosecution be able to prove my client's guilt if this matter proceeded to a trial?

## **8 INTERVIEWING YOUR CLIENT AT THE POLICE STATION**

Your client has the right to be interviewed in private (Code C para. 6.1 and Note 6J). Introduce yourself, as your client may not know you. She/he may be suspicious of you, given their current surroundings. Provide proof of identification and assure your client of your total independence and that anything he says will be treated in absolute confidence due to the protection which is afforded to your client by legal professional privilege. Explain the funding position - advice at the police station is free of charge. Interpersonal skills are especially important when conducting an interview with a client for the first time. It is crucial to develop a good relationship with the client so that they trust and open-up to you.

Before you invite your client to give his version of events, you should ensure your client signs the Advice and Assistance form and the Legal Aid Declaration after explaining what each document is.

You should go on to explain what the police have disclosed to you about the circumstances of the offence under investigation. Does your client understand what he has been arrested for? What are the elements of the offence which the prosecution will ultimately have to prove? You need to explain in language that will be understood by your client, what the legal elements of the crime he is accused of are. You should then invite your client to comment at length. Allow your client to give their account in an uninterrupted fashion. Listen carefully to your client. What is s/he saying? Is s/he firmly maintaining his innocence? Is he indicating that he may have a defence to the allegation against him? Does he have an explanation for the evidence against him? Is he prevaricating or reticent? Clarify the detail by a series of closed questions. Stress how important it is that he is completely honest with you. Take notes and be alert for signs of stress/vulnerability in

your client.

You will need to be in a position to answer any questions your client may have about his detention. He might wish to know for how long they can be detained without charge, whether they have to give a sample of his fingerprints or an intimate or non-intimate sample. These issues are considered in Chapters 4 and 7.

Re-evaluate the strength of the prosecution's evidence in the light of what your client has had to say. It is vital never to form an opinion about what advice you will provide until you have heard the client's instructions. This is because not everything disclosed by the police may be exactly as it seems, and it is surprisingly easy to form a view about the case even before meeting your client.

As you observe your client consider how he is he likely to come across in interview? Can he handle an interview or is he likely to incriminate himself? You will recall the case of *R v Argent* (Chapter 5.2.1) in the context of the s 34 CJPOA 1994 adverse inference. A jury or magistrates may not draw an adverse inference unless it was reasonable "in the circumstances existing at the time" for the defendant to have mentioned the facts he subsequently relies on at trial. The Court of Appeal held courts should not be restrictive in their interpretation of "circumstances existing at the time." The jury are entitled to consider matters such as:

- Age
- Experience
- Mental Capacity
- State of Health
- Sobriety
- Tiredness

You should be assessing these 'Argent' factors during the interview with your client. If you have reason to doubt your client's state of mind, or general health, make representations to the custody officer and press for the opinion of a health care practitioner. It may be that your client is not fit to be interviewed. It goes without saying that you should always be wary of your personal safety when interviewing a client in private. Be sure to record the

advice given to your client. That advice will of course include assistance to your client in determining what strategy to adopt with the police.

It should be recalled that your client may have the services of an interpreter and/or appropriate adult (see Chapters 4 and 25).

For further guidance on the role of the appropriate adult, consult- [For people who need an AA \(appropriateadult.org.uk\)](https://www.gov.uk/guidance/appropriate-adults-guide-for-youth-justice-professionals)

<https://www.gov.uk/guidance/appropriate-adults-guide-for-youth-justice-professionals>

Special considerations of confidentiality arise where your client has an appropriate adult in attendance. Code C1E states that: "An appropriate adult is not subject to legal professional privilege." For this reason, most defence lawyers will try to conduct private consultations in the absence of an AA or indeed any other third party. Sometimes however, the situation is difficult to avoid. Where it is impracticable, or undesirable to interview a detained client without an AA in attendance, it is good practice to require the AA to sign a confidentiality undertaking: "*I [Name.. ] (appropriate adult/interpreter) understand that lawyer/client communications are confidential and are subject to legal professional privilege. I undertake not to breach these principles by discussing with third parties including the police anything that is discussed in my presence in that context. I understand that I could be questioned by the police about what has been said to me. I shall not be answering any such questioning.*" Signed [.....]. A refusal to sign would give rise to the need for further and robust legal advice to the client and a file note should be kept should the client choose to proceed without taking the advice. A confidentiality undertaking is not binding but it does at least attempt to protect and safeguard a client's rights.

## 9 STRATEGIES OPEN TO YOUR CLIENT

Effective police station practice requires you to explore the safest strategy for your client to adopt in interview. As part of this you need to explain the elements of the caution that was administered to your client on arrest and which will be repeated in interview. Break it down into its three elements:

*"You do not have to say anything...."*

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You should explain to your client that he enjoys a right to silence. He cannot be forced to speak in interview. Therefore he can say 'No comment' or simply sit in silence throughout the interview.

*But it may harm your defence if you do not mention when questioned something you later rely on in court.*

You might explain this to your client in the following terms: "If you do have a defence or explanation to put forward in response to the allegation against you then you need to be aware that if you remain silent and you don't put it forward, then if you are charged and the case goes to court and you plead not guilty and rely on that defence or explanation, the jury or magistrates may well ask themselves -why didn't he put it forward at the police station? They may be less willing to believe your defence".

*Anything you do say may be given in evidence."*

Your client needs to know that the interview will be digitally recorded so that anything said can be used in evidence against him/her.

There are a limited number of strategies your client might be advised to adopt, depending on the circumstances. They include:

- Provide an account/advance a defence
- Make an admission
- Exercise their right to remain silent
- Put forward a prepared statement and therefore remain silent by refusing to answer questions

In determining the safest course of action for your client to take, the following are relevant factors:

- the strength of the evidence against your client;
- the level of disclosure provided by the police;
- your client's instructions (evaluated in the context of what the police have disclosed to you);
- your client's ability to cope with the interview (relevant to this is your client's mental state and ability to communicate clearly and effectively (see the 'Argent' factors listed

in section 8 above));

- the nature of the case against your client (is the subject matter of the investigation is complex or is the offence under investigation an historical or dated offence, making an immediate response unwise?).

## 10 ADVISING YOUR CLIENT TO MAKE ADMISSIONS

The admissibility of confession evidence is discussed in Chapter 6. Clearly, a defendant will have difficulty challenging the admissibility of a confession under s. 76 and/or s. 78 PACE 1984 which has been obtained in the presence of a legal adviser. In *R v Dunn* (1990) 91 Cr App R 237, the presence of a legal adviser prevented the defendant from relying on these grounds, as the legal adviser's presence was deemed to have cured the alleged breaches of Code C. It is an entirely different proposition where a solicitor is misled by the police and advises his client to confess as a result (*R v Mason* [1988] 1 WLR 139).

In what circumstances would you advise your client to confess? Generally speaking, you might advise your client to do so where the evidence disclosed by the police is so overwhelming that there is little point in denying it. If it is blatantly obvious that, in the event of a charge being made against your client, he will invariably have to plead guilty, your client's co-operation with the police during the investigation stage can usefully be mentioned by the defence advocate in mitigation of sentence.

If your client has no previous convictions or a very limited antecedent history, they may be eligible for an out of court disposal if they admit the offence. This could include a community resolution where the crime is a minor one and the client indicates a wish to put things right.

Alternatively, the police could caution or conditionally caution a client. Whilst these disposals do not count as convictions they would show as a caution on the client's criminal record (see Chapters 8 and 24 of the main work). If there is overwhelming evidence against them, it would be better for a client to receive an out of court disposal or a caution than a conviction at court.

Suppose your client confesses his guilt to you, but you are of the opinion that the police do



not have a strong case against your client? Are you bound to advise your client to confess in interview? Your client is not obliged to assist the police in any way. The burden of proof rests on the prosecution and it is onerous: proof beyond reasonable doubt. If you take the view that the evidence disclosed to you by the police is weak then, by confessing, your client increases the likelihood that he will be charged. You should explain this to your client. In these circumstances, the safest course of action might be for your client to exercise his right to remain silent.

If you have concerns about the reliability of your client's admissions, explore them with him. Does your client understand the elements of the offence to which he purports to confess, or does he have a defence in law? Consider whether your client may be confessing to something he has not done for reasons of expediency: a desire to protect someone/or a desire to relieve the pressure of the situation, particularly in the case of a drug addict. You should always explore the possibility that the police may have offered your client an inducement to confess.

If your client has made a voluntary and unambiguous confession to you, you cannot allow your client to go into the interview maintaining his innocence, as this would be a serious breach of professional conduct, but you may properly advise silence in these circumstances.

## **11 ADVISING SILENCE**

We looked in detail at the law relating to drawing adverse inferences from silence in Chapter 5. Advising a client to remain silent may have evidential consequence if your client is later charged and relies on a defence at trial. Legal advisers at the police station must fully understand the effect of s. 34 if they are to be in a position to properly advise a client.

Taking account of the case law to date when might you advise silence? In practice this is one of the most difficult questions to answer, requiring a careful and considered exercise of critical judgment. Some instances in which you might safely advise silence may be more clear-cut than others.

### **11.1 STRENGTH OF EVIDENCE AND AMOUNT OF DISCLOSURE**

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An important consideration when determining if silence is the safest option is whether the prosecution will ultimately be able to prove a case against your client. This clearly depends on the nature of the allegation and the strength of the evidence which, in turn, underscores the importance of pressing the investigating officer for as much disclosure as possible.

The burden of proof is on the prosecution throughout and the suspect is not obliged to assist the prosecution by answering questions. Where the evidence disclosed by the police is weak, absent or contradictory, why risk strengthening it by waiving the privilege against self-incrimination and answering questions?

In a case where the evidence discloses a case for your client to answer, silence may not be the safest option where your client's instructions indicate that he has a defence and is capable of advancing that defence in interview. An adverse inference only becomes an issue if your client is charged, pleads not guilty and advances a defence at trial.

Where your client admits his guilt to you, but you are of the view on the basis of what has been disclosed, that the police have little or no case against your client, silence is the only sensible advice.

## **11.2 ASSESSMENT OF YOUR CLIENT'S ABILITY TO COPE WITH AN INTERVIEW**

Having interviewed your client and taken their instructions, you will have formed an opinion as to your client's state of mind. If your client is vulnerable (for whatever reason); is unwell; in a state of shock or under the influence of an illicit substance; inebriated or heavily medicated, the safest course of action may be to advise silence in interview. Your client is more likely to incriminate himself in these circumstances if he chooses to answer questions. This remains the case even where a police doctor has pronounced your client fit to be interviewed. You should always ask yourself: 'Is my client fit enough to be interviewed?' You are once more reminded of the 'Argent' factors listed in section 8, above.

Does your client need access to further information before he can safely advance a

defence? Suppose the circumstances are such that your client is not able to fully articulate his defence to the allegations? Perhaps their defence is one of alibi or is dependent upon access to documentation not currently in his possession. There may be a danger in disclosing the details of the alibi too soon as the police will want to talk to the individual before you have an opportunity to do so. The safest course may well be to remain silent. Suppose your client makes a complaint about mistreatment while in custody and feels he cannot trust the investigating officers. Unless this is resolved to your client's satisfaction in advance of an interview, the safest course may be to advise silence.

### **11.3 FURTHER CONSIDERATION OF *R v HOWELL* [2005] CR APP R 1 AND WHAT IT MEANS FOR THE LEGAL ADVISER**

You will be aware from Chapter 5 that the Court of Appeal has made some strongly worded statements in relation to the role of the legal adviser at the police station, suggesting that there should be objectively sound reasons for giving a client advice to remain silent. It had previously been the case (*R v Betts and Hall* [2001] 2 Cr App R 16) that a jury had to be instructed that if it concluded that the defendant's reliance upon legal advice had been genuine, it could not draw an adverse inference. Since the decision in *R v Howell*, the position now is that a jury may draw an adverse inference where it is satisfied that although the defendant genuinely relied on legal advice, his reliance was not reasonable in the circumstances.

Some commentators have described the decision in *R v Howell* as dangerous, while others feel its effect has been overstated. As examples of the type of situations in which a solicitor could justifiably advise silence, the Court of Appeal cites such matters as the suspect's mental condition and his ability to recollect events without reference to documents or some other source. You are already aware that if a defendant is to avoid an adverse inference being drawn under s. 34 CJPOA 1994, he will invariably need to put forward an explanation for his decision. Where the decision was based on legal advice, the defendant is not immune from having an adverse inference drawn. The reasonableness of the defendant's decision to remain silent is a question of fact for the court. In assessing the true reason for a defendant remaining silent, the adequacy of the explanation advanced by the defendant will help the court decide whether reliance upon

legal advice was the true and genuine motive for not mentioning facts. What if a suspect has an explanation to put forward, but you feel there are sound tactical reasons for advising silence?

Suppose the evidence disclosed at the police station does not reveal a particularly strong case against your client? Why should he potentially help the police in this regard by answering their questions and possibly incriminating himself? In essence this is what we must assume the defence solicitor in *R v Howell* had reasoned. At the time of Howell's arrest the police had only an oral as opposed to a signed written statement of complaint from the victim and the suggestion from Mr Howell that his friend, the victim, might not wish to pursue a complaint. There was therefore a distinct possibility that the prosecution might not have been able to prove its case. The solicitor wished to wait to see how matters developed. Is such an approach to be regarded as being unreasonable in an adversarial system of justice where a suspect enjoys the right not to incriminate himself? The Court of Appeal did not find these reasons to be objectively sound. Mr Howell had a defence and could have articulated it. He had been the only person present at the flat when his friend was stabbed. He must have known whether he injured his friend accidentally or in self-defence. Was Mr Howell let down by his solicitor in your view? Was his solicitor's advice ill-conceived? If Mr Howell was not in a fit state to be interviewed because he was tired and emotional, having regard to the serious injury inflicted on his friend, this might have afforded a more convincing reason (in the eyes of the court) for failing to mention facts which he subsequently relied on.

There is a school of thought that subscribes to the view that if the police have evidence against your client and he has an explanation or denial to the allegations and is capable of advancing the explanation in interview, he should answer police questions. If charges follow, the defendant is protected from an adverse inference under s. 34. The statements in *R v Howell* and subsequent cases endorsing it, support this school of thought.

The advice given in *R v Howell* was based on tactical considerations. The tactics might have paid off had the victim not in fact wished to pursue a complaint to trial.

The danger of *R v Howell* is that the legal adviser makes choices without the benefit of hindsight. The decision does not make the role of the legal adviser any easier! You must

trust your judgement. Experience and reflection will help to fashion that judgement. If there are (in your view) cogent reasons for advising silence, do not shirk from your responsibilities for so advising, but be careful about advising silence for purely tactical reasons where your client is indicating he is not guilty and is capable of advancing a defence to the allegations. Always keep a full and contemporaneous note of the instructions you receive and the advice that you give as you may be required to give evidence as to why you advised silence.

#### **11.4 IMPLICATIONS FOR LEGAL PROFESSIONAL PRIVILEGE WHERE THE DECISION TO REMAIN SILENT IS BASED ON LEGAL ADVICE**

Any legal advice given to a client at the police station is protected from disclosure by legal professional privilege. The privilege is that of your client and only your client can expressly or impliedly waive it. If an accused is to persuade a court that his decision to remain silent was reasonable in the circumstances, an explanation for his decision will invariably need to be given. Where an accused chooses to remain silent on legal advice, the legal adviser may be called upon at trial to adduce evidence (in person or by adducing contemporaneous written notes) as to the reasons for the advice given. In such a case, the accused must waive his legal professional privilege.

#### **11.5 WARNING YOUR CLIENT ABOUT EXERCISING HIS RIGHT TO REMAIN SILENT**

Your client must be informed of the full effect of s. 34 CJPOA 1994, and in particular that your advice to remain silent does not prevent your client from having an adverse inference drawn against him at any subsequent trial. The question of whether it was reasonable for your client to have remained silent is a question of fact for the jury or the magistrates. If your client is to avoid an adverse inference, an explanation for his silence will need to be tendered and this may involve a waiver of legal professional privilege (see *R v Condrón* [1997] 1 Cr App R 185). It is not easy to advise a lay person about the operation and effect of s. 34 CJPOA 1994.

If silence is to be advised, you should record your advice in writing and get your client to sign and date your written record.

### 11.6 WHAT AMOUNTS TO WAIVER OF LEGAL PROFESSIONAL PRIVILEGE?

If your client or you (his legal adviser) tell the police the reasons for remaining silent, this will amount to a waiver of privilege. The solicitor in *R v Bowden* [1999] 4 All ER 43 unwittingly did this by making an opening statement on the tape-recorded interview. His statement was subsequently adduced in evidence at court. You need to consider whether you want to put the reasons for your advice on tape (see suggested opening statement for legal advisers in interview at 17.1. below).

Once legal professional privilege is waived, the prosecution can ask searching questions in cross-examination about precisely what the defendant told his legal adviser with a view to exploring what the actual basis for the legal advice to remain silent was. Such line of questioning would assist the fact finder to determine whether the defendant's reliance was both genuine and reasonable in the circumstances.

It is not unusual for the prosecution to accuse the defendant of making up his defence to fit the facts as disclosed by the prosecution. If the defendant has previously disclosed his defence to his legal adviser at the police station but on legal advice chose to remain silent, evidence of what the defendant stated can be adduced to rebut a suggestion of recent fabrication without resulting in a waiver of legal professional privilege (*R v Loizou* [2006] EWCA Crim 1719).

### 11.7 PREPARING YOUR CLIENT FOR THE 'NO COMMENT' INTERVIEW

Your client should be warned about the difficulties of the no comment interview. Is he going to remain silent throughout or is he going to say: 'No comment'? The latter is easier. The fact that your client is going to remain silent will not of course prevent the police from putting their questions. There will be considerable psychological pressure brought to bear on your client. This might manifest itself in the officers seeking to undermine you and the advice you have given, asking innocuous questions to get the interview started and pointing out the tactical advantages to your client if the matter goes to trial. Always advise your client that if he answers easy and innocuous questions, he will find it difficult not to carry on answering questions.

## 12 THE PREPARED STATEMENT

As an alternative to remaining completely silent, your client may choose to read out a prepared statement. The prepared statement is self-serving in nature and admissible in evidence at a subsequent trial where your client relies on the same defence. The prepared statement is used in conjunction with your client being advised not to answer questions in interview. The statement should be drafted in your client's handwriting with your assistance. If your client requests that you write the prepared statement on his behalf, this is acceptable providing it is the client's instructions and the client signs the statement to confirm this. It can be read during the course of the interview or upon your client being charged. The statement protects your client from having an adverse inference being drawn against him, provided his defence advanced at trial is the same. Any material departure from the prepared statement is likely to be the subject of adverse comment and possible inference under s. 34 CJPOA 1994. The adverse inference that might be drawn in these circumstances would be that your client did not wish to have his defence subject to critical questioning by the police. The leading case on prepared statements is *R v Knight* [2004] 1 Cr App R 9, which is considered in Chapter 5. Once again, a prepared statement will not prevent the police from asking questions.

### 12.1 WHEN MIGHT YOU ADVISE A CLIENT TO PUT FORWARD A PREPARED STATEMENT?

Prepared statements are best limited to straightforward cases where you can be clear and confident of your client's defence at the outset. Until you have had full disclosure of all the relevant and critical facts in the investigation which will require an answer, it may be prudent to wait until after the first interview before finalising a prepared statement. This is especially so if the police have been reticent in terms of their disclosure. A prepared statement may be a sensible option for a client who maintains his innocence but who is not best placed to advance his defence or explanation by agreeing to answer all questions.

## 13 ANSWERING ALL QUESTIONS/ADVANCING AN EXPLANATION/DENIAL OR DEFENCE

When might you advise your client to answer question? Having interviewed your client, if you have formed the view that your client is fit to be interviewed, is willing to be interviewed and that you have a sufficient level of disclosure, your client might safely be advised to advance his defence or explanation. Indeed, you might try and persuade the police to take no further action where your client's explanation totally undermines the prosecution case. If the defendant is tried and relies on the same defence put forward at the police station it demonstrates consistency and shows the defendant was prepared to have his account scrutinized by the police.

Care must always be taken when advancing a defence. Raising self-defence for example, necessarily involves an admission that your client was involved in the incident under investigation with no guarantee that a jury or magistrates' court would conclude it was both necessary to use force and that the force used was reasonable. It should be carefully explained to the client that if he is advancing a defence such as an alibi, the police are likely to interview that person before you are able to do so. Can you be sure that the defence to be put forward is credible or not? It should be explained to your client that he must be honest with you, since if his defence changes at trial, he will be at risk of an adverse inference being drawn against him. Once again, you should prepare your client for the interview experience. You should not coach your client but make him aware of the tactics and ploys the police may adopt. Anticipate questions likely to form the basis of s. 36 or s. 37 CJPOA 1994 inferences (see Chapter 5). If, as is likely, the interview is to be tape recorded, explain the mechanics of this.

The police may bail a suspect under s. 37(7)(a) PACE 1984 where they deny an offence. The purpose of this is to enable the police to seek the advice of the CPS as to whether charges should be brought. On a purely pragmatic level, if there is a significant risk that your client will be refused bail if charged, a denial at this stage may be a sound tactical option.

## **14 ANSWERING SOME QUESTIONS BUT NOT OTHERS**

Your client should never be advised to answer some questions but not others if this is in relation to one offence only. This would be an evidential disaster. Visualise how it would look to a court if your client did so. It would imply that your client had something to hide.



However, if the client is to be interviewed about more than one offence it may be an appropriate course of action.

## **15 How do I decide what advice to give?**

There is no easy answer to this question. Experience will help. However, a good strategy is to draw up a list of the advantages and disadvantages of your client remaining silent and compare them to a list of the advantages and disadvantages of answering questions or advancing a prepared statement. The advice you give in each case will need to be assessed on its own merits.

## **16 PREPARING YOUR CLIENT FOR THE INTERVIEW**

In preparing your client for interview, you should explain:

- the digital recording process;
- the fact that the interview can be stopped at any time if your client requires further legal advice;
- what your role in the interview is (i.e. you will intervene and ask that the interview be stopped so that further advice can be given if necessary)
- the importance of listening carefully to the question asked; and
- the importance of staying calm when responding to questions (your client needs to realise that if he is charged, what is said in interview can be used in evidence against him).

## **17 WHAT SHOULD THE LEGAL ADVISER DO DURING THE INTERVIEW?**

A lot of behavioral psychology occurs during the police interview. The atmosphere may be tense. It is the police who are in control. They control time, space and information. It is important that you regain some of the psychological control.

In the interview room you should sit where you feel comfortable and not where you are asked to sit, if you feel this hinders your ability to communicate with your client. Be confident. Your role is to ensure your client's best interests are met. Remember you may have an appropriate adult or interpreter in the interview room with you. It is worth

reminding such individuals as to the nature of your respective roles.

### 17. 1 MAKING AN OPENING STATEMENT AND THEREAFTER

The Criminal Law Committee of the Law Society recommends the following form of words to be recited by the legal adviser at the outset of the interview:

(i) I am . . . . ., a solicitor/trainee/accredited police station adviser with (firm/PDS). I am now required to explain my role. It is to advance and protect my client's basic and legal rights. I shall continue to advise my client throughout the interview and if necessary I shall ask that the interview be stopped in order to allow me to advise my client in private.

(ii) I shall intervene in the interview if

- my client requests or requires legal advice; or
- your questioning is inappropriate; or
- you make statements which are not based on matters that have been made known to me.

(iii) After receiving legal advice my client has decided:  
(either) to exercise the right to silence (consider giving reason). Please respect that decision.

(or) to answer questions which you may raise that are relevant to my client's arrest.

(or) to put forward a prepared statement which I will read out-thereafter he will exercise his right to remain silent.'

If you are at all concerned about waiving legal professional privilege then, in stating the fact and any reason/s for your client's decision to remain silent, you must avoid reference to any privileged conversation with your client. If the reason for your advice is based on something external to your instructions and consequent advice, e.g. lack of police disclosure or your client's mental condition, then it should be safe to put this forward as a reason since it is without reference to any privileged conversation.

A detained person has a right to free legal advice and to be represented by a solicitor. Code C—Notes for Guidance para. 6D acknowledges the nature of the legal adviser's role in the interview:

'The solicitor's only role in the police station is to protect and advance the legal rights of his client. On occasions this may require the solicitor to give advice which has the effect of his client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene to seek clarification or to challenge an improper question to his client or the manner in which it is put, or to advise his client not to reply to particular questions or if he wishes to give his client further legal advice.'

The extract justifies a *positive* role in the interview. You must interrupt if you feel the questions being put are:

- unclear
- ambiguous
- oppressive
- irrelevant
- threatening
- are not questions at all (i.e. the officer is making a statement)
- leading questions
- multiple questions
- hypothetical questions
- questions seeking an opinion from your client
- repetitive questions
- about a matter for which your client has not been arrested
- about past bad character which has no relevance to the present offence.

You may at any time advise your client not to answer a question and you should challenge inappropriate behaviour by the police which might include:

- protracted silence
- a misrepresentation of the law
- inaccurate summarising
- bullying
- making inducements to encourage a confession
- giving own opinion
- not allowing suspect to answer a question
- questioning exercise of right to silence

- undermining your role

You will recall ss. 76 and 78 PACE 1984 (see Chapter 6). These give you justification to intervene during an interview. So, if an officer is asking leading questions of a vulnerable suspect, or the questions are unfair, you have the authority to intervene. Place your objections on the record and set up the argument for the trial advocate should the matter come to court.

If you are taken by surprise by a question (perhaps with reference to evidence against your client not previously revealed), advise your client not to answer the question. If you feel your client is losing control of the situation you should ask your client if he wants further legal advice. Hopefully, he will say yes, resulting in the interview being suspended and allowing you to consult with your client in private. Consider what you would do if, against your advice, your client starts to answer questions? You would ask your client if he wants further legal advice. If the interview is suspended for this purpose, you should make your advice very clear and keep a note to this effect. If your client chooses to ignore your advice, so be it. Most advisers would consider it good practice to get their client to sign a written disclaimer to this effect.

If the investigating officer chooses to comply with only the minimum disclosure requirements in Code C Notes for Guidance 10.B, you may need to stop the interview frequently to take instructions as new facts emerge. You might wish to ask the investigating officers at the outset of the interview if they have disclosed to you everything of relevance to the allegation made against your client. If they say they have but it later transpires that new evidence emerges you should point out the unfairness to your client and ask whether he wants further legal advice. Indeed, your advice about answering questions may need to be revised.

It can be daunting when confronting officers, but it is an integral part of effectively representing your client in interview.

## **17.2 CAN THE POLICE ASK YOUR CLIENT ABOUT HIS PREVIOUS CONVICTIONS?**

Yes - but he doesn't have to answer the question(s).

The bad character provisions (ss. 98–112) under the Criminal Justice Act 2003 (CJA) have implications for advice given to suspects at a police station. The provisions are considered in Chapter 19.

The effect of these provisions is to increase the situations where evidence of the defendant's bad character may be admitted at trial. For this reason, it will be easier for the police to justify the questioning of suspects on their past record in interview. Under the provisions, there are a series of gateways through which the prosecution are able to adduce evidence of bad character. Three of these gateways can be triggered by your client at the police station if he (i) gives a false impression of himself and/or (ii) attacks the character of another person or (iii) introduces his own bad character in interview. A client may well need to be advised about these provisions and the dangers of potentially opening up one or other of the gateways during the police interview. Unless the relevance of the questioning can clearly be established, there will often be no advantage to your client in answering questions about his previous misconduct. Many defence practitioners argue that such questions (if indeed they are relevant) should be dealt with in a separate interview dealing with the substantive offence.

### **17.3 CAN A LEGAL ADVISER BE EXCLUDED FROM AN INTERVIEW?**

The relevant provisions are contained in Code C paras. 6.9–6.11. A legal adviser may only be required to leave if his conduct is such that the interviewer is unable properly to put questions to the suspect. Such conduct could include answering questions on behalf of your client. The decision to remove a legal adviser from an interview is a profoundly serious step and as such it requires the interviewing officer to consult with an officer of superintendent rank, who will take the ultimate decision. If the legal adviser is removed, the suspect must be given the opportunity to consult another solicitor and to have that person present in interview.

## **18 IDENTIFICATION PROCEDURES**

In many cases the police will wish to take samples from your client, or they may wish your

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client to participate in an identification procedure. You need to discuss these matters with your client and advise as to what response to give the police. Full consideration is given to these matters in Chapter 7, which also examines the law relating to the admissibility of identification evidence. To effectively defend a client's interests at the police station, the defence adviser needs to have a good working knowledge of Code D and its annexes and always carry a copy of the Codes of Practice.

Consider the following practical guidance:

- Keep an independent record of all that goes on in relation to identification procedures, including the advice you give to your client.
- Be prepared to make representations where appropriate and ensure that your representations are properly recorded. Every decision taken by the identification officer must be justified. Code D para. 3.12 is most important and is set out in full in Chapter 7. It gives the police discretion when an identification procedure must be held. A failure by the police to convene a parade may be challenged in court. Be prepared to challenge a decision not to convene an identification procedure where appropriate. If your client indicates that he does not know the eyewitness make the police aware of this.
- You are entitled to make representations as to the most appropriate identification procedure that should be used. But remember a failure by the suspect to consent or to co-operate can lead to a potentially prejudicial identification procedure being adopted and it can lead to adverse evidential inferences being drawn.
- A properly convened video identification will include the suspect's image amongst eight other people who resemble the suspect in age, height, general appearance and position in life. Police forces using the latest VIPER technology have access to an extensive database of volunteer faces. The images used must show the suspect and the other volunteers in the same positions or carrying out the same sequence of movements. You are allowed to see the complete set of images before they are shown to a witness. You should be present when the compilation is put together. Ensure that your objections are recorded. Unusual features can be disguised using the video technology now available. The compiled video is burned onto a DVD and is usually shown to the eyewitness at a later date. You are entitled to be present when the compilation is shown to the witness.

- If a conventional identification parade is used there are many practical things you can do to ensure it is to be conducted fairly. You should check the layout to ensure witnesses cannot communicate with each other or see members of the parade in advance. You might want to take a photograph of the parade to show its composition. A photograph will be supplied to you on request but it may take some time.
- Where there is time (and where there are varying descriptions of the suspect by different witnesses), make representations as to the parade's composition.
- If your client has a unique identifying feature such as a scar or an unusual hairstyle ensure that steps are taken by the police to disguise it. Participants in the parade might be asked to use a plaster on the same part of their face or to wear a hat or adopt a seated position.
- Offer your client advice on where to stand on a conventional parade or where to be placed in a video compilation and, in the case of a conventional parade, how to deal with (a) being identified and (b) not being identified.
- If dissatisfied with the parade's composition, make sure your representations are noted in the parade record.
- If an inferior form of identification is used such as a group identification or confrontation, it is important to observe all aspects of the procedure and to document them all.
- Always assess and record the degree of confidence with which a witness purports to make a positive identification. It is important for the defence legal adviser to make appropriate representations about the manner in which identification evidence is obtained and to ensure those representations are properly recorded. In doing so not only are you protecting your client's rights at the police station, you are preparing the ground for a s.78 PACE 1984 argument at trial for the exclusion of any identification evidence obtained in breach of Code D.

## 19 POST-INTERVIEW

Your role does not end once the interview is concluded. You will need to advise the client in relation to the next steps. Will a sergeant make the charging decision? Or must the case go to the Crown Prosecution Service for a charging decision?

There are a number of different outcomes that may occur at the police station. A decision might be taken to:

- release your client with ‘no further action’. In other words, release without charge
- release your client under investigation (RUI)-this is now common practice where the police have further enquiries to pursue (which may take weeks or even months). The police should let your client know the outcome of their investigations and if no further action (NFA) is the outcome this should be communicated.
- charge your client and either release on bail (conditional or otherwise—(s. 47(1A) PACE 1984) or charge and withhold bail (s. 38 PACE 1984);
- release your client on bail (conditional or otherwise) pending further enquiries (s. 37(7)(b) PACE 1984) or release him unconditionally (s. 37(7)(c) PACE 1984);
- continue to detain your client (subject to custody time-limits and justification under s. 37(2) PACE 1984);
- detain or release your client on bail pending a decision to charge or conditionally caution by the CPS under s. 37(7)(a) PACE 1984. Conditions may be imposed to the grant of police bail in these circumstances. You must be prepared to make appropriate representations. Knowledge of PACE 1984 and Code C is important in this regard.

Be aware that with the extensive use of RUI, police bail is now an uncommon practice and is only used in certain situations (see Chapter 4 of the main work).

## 19.1 THE DECISION TO CHARGE

You will recall that s. 37(7) PACE 1984 imposes a statutory duty on the custody officer, in conjunction with the CPS, to either charge or release a detainee where there is sufficient evidence to charge him with an offence.

An individual who has been arrested but not charged may only be detained where the custody officer is satisfied that the grounds for detaining him in accordance with s. 37(2) are met. Custody time limits apply (see Chapter 4), and continued detention is subject to



review.

If the investigation has been completed and your client has been interviewed, the police/CPS ought to be able to determine whether to charge or not. Having interviewed your client and having assessed the overall state of the evidence against him, you should be able to make representations in this regard.

If you are of the opinion that there is insufficient evidence, you should be pressing for your client's release with or without bail (ss. 34 and 47 PACE 1984). Where an investigation is likely to be ongoing, your client can expect to be released on police bail, pending further enquiries or a decision to prosecute by the CPS in accordance with s. 37(7)(a) PACE 1984 (see Chapter 4).

Where it is being proposed that your client should remain in custody for the time being, you need to ascertain the reasons for this and make appropriate representations. Your client's continued detention must be justified in accordance with the conditions laid down in s. 37(2) PACE 1984 where, for example, the police wish to undertake a further interview or conduct further enquiries of witnesses. Press for your client's release on police bail if this is likely to take some time. Custody time limits will of course continue to apply if your client continues to be detained (s. 41 PACE 1984).

A caution (conditional or simple) is an alternative to charging your client. For a caution to be administered however, your client must have accepted his involvement in the crime and consent to a caution. This alternative course of action should be discussed with your client and if it is appropriate you might choose to raise it with the custody officer. The utilization of a caution as an alternative to a prosecution is considered in Chapter 8.

## 19.2 NEGOTIATING POLICE BAIL

Full consideration is given to police bail in Chapter 4 of *Criminal Litigation*. A custody officer can refuse bail after charge if one or more of the grounds under s. 38(1) PACE 1984 apply.

Ensure that before you leave the police station your client fully understands the state of the investigation and where he stands. If his detention is to continue, you will need to provide him with the necessary reassurances and that if a further interview is to be undertaken you will be informed. It is sensible to advise your client that 'walls have ears' in police stations,

and that if he does not wish to incriminate himself, he should be very careful about who he speaks to and what he says.

## **20 PAYMENT FOR POLICE STATION ADVICE**

Public funding of criminal defence services is administered by the Legal Aid Agency (LAA). Advice given at the police station is covered by the Police Station Advice and Assistance Scheme which is explained fully in Chapter 4, para. 4.7.4.

## **21 INTERVIEW ON A VOLUNTARY BASIS**

It is important to note that not only do the police interview upon arrest but they can and often will interview a suspect on a voluntary basis. Your role at the police station remains the same where your client is interviewed as a volunteer.

When a client attends as a volunteer, you will meet them at the police station and take their instructions, personal details and record their version of events. The major difference is that as a volunteer the client is not obliged to stay at the police station and is free to leave at any time. However, if the police believe that before your client leaves they have not asked all relevant questions, they could arrest your client in order to complete the interview. This is because it would then become necessary to arrest under S.24 PACE 1984 to ensure a 'prompt and effective' investigation is carried out.

## **22 THE ETHICS OF POLICE STATION ADVICE**

The dynamics of advising the suspect at the police station are all-encompassing, requiring the legal adviser to be constantly on his or her guard. Your foremost duty is to protect the interests of your client, but as with all aspects of legal practice, this must be done within the rules of professional conduct. Professional conduct issues often arise at the police station. What would you do in the following situations? The rules are contained in the 2019 Principles and Code of Conduct (The Code for Solicitors) which are part of the SRA's

Standards and Regulations. These important provisions can be accessed in full at <http://www.sra.org.uk>.

### **A conflict of interest arises between two suspects**

It is not unusual to find more than one person arrested in connection with a criminal matter. A legal adviser may advise more than one suspect in an investigation, provided there is no conflict or significant risk of conflict between them. If your duty of confidence to one client conflicts with the duty of openness to another, you must cease to act for either. Having interviewed one client, it may become apparent that a conflict of interest is likely to arise, in which case you should advise the second client to consult an alternative legal adviser. Detailed guidance on conflicts between co-defendants can be found in the Law Society Practice Note '*Conflicts of interest in criminal cases*' (2019) and in Chapter 1 of *Criminal Litigation*.

### **Your client wants you to pass on a message to a third party**

Given your client's confinement, this is not an unusual request. However, be very careful that you are not being used as an innocent conduit to tip-off someone implicated in a criminal enterprise. Clearly a lot will depend on the nature of the crime your client has been arrested for and the nature of the message you are being asked to pass on. Always explain to your client that you will have to discuss his request with the custody officer.

### **Your instructions come from a third party**

It is not unusual to be asked to represent someone in custody by a friend or relative of the detained individual. You should attend the police station and inform the custody officer that you have been asked to attend on behalf of X and that you would like X to be informed of that fact. Clearly X cannot be forced to see you, but if X does speak with you, you must obtain his authority to enable you to act for him.

### **Your client seeks to give misleading information to the police**

You must never put yourself in a position where you allow your client to knowingly mislead the court (*Principles 1, 2, 4 and 5* of the 2019 Code). You run the risk of having criminal proceedings instituted against you for perverting the course of justice. Although the rules

are expressed in the context of the court, they should be applied equally in the context of the police station.

A client who admits his guilt to you (in circumstances where you have no reason to doubt his admission) can still plead not guilty and put the prosecution to proof of its case. You cannot, however, allow your client to make a positive assertion of innocence in your presence during the interview as this would be misleading. If your client insists, you must cease to act. In these circumstances however, you are still bound by client confidentiality. A client who has given the police false particulars is likely to be found out, particularly if they have been in trouble with the police before.

### **Your client is giving you inconsistent instructions**

A solicitor is not under a duty to enquire in every case whether his client is telling the truth. In some instances, the solicitor may be put on enquiry and may need to check the truth of what his client asserts before relying on such assertions in court. The fact that a client has given his solicitor inconsistent instructions is not a ground for refusing to act further. Where it is clear, however, that a client is attempting to put forward false evidence to the court, the solicitor should cease to act (*Principle 1* and Part. 2.2 of the Code).

You must never construct a defence for your client or put words into their mouth (*Principle 1* and Parts 2.2. and 2.3 of the Code). Your role is to offer advice, based on the evidence and the applicable substantive law.

### **Your client states he is not guilty but is prepared to take the blame and to plead guilty**

You can offer your client advice and endeavour to persuade your client to plead not guilty, but you must not assist him in the deception (*Principles 1, 2, 4 and 5 of the Code*). You should point out the difficulties he could later find himself in if he was to change his mind and of course, there is a risk that if the true facts emerge he could be prosecuted for perverting the course of justice.

## **23 POLICE STATION REPRESENTATIVES ACCREDITATION SCHEME**

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If all the above has not put you off and you wish to become a police station accredited representative, you need to complete a three-part assessment process:

- a written exam;
- a portfolio comprising nine cases, divided into Parts A and B, which are based on advice given at the police station in real situations; and
- a critical incidents test (CIT).

The Police Station Representatives Accreditation Scheme (PSRAS) is regulated by the Solicitors Regulation Authority. Detailed guidance on the scheme is available at: <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page>

If you wish to embark upon the process of accreditation, you will need to find a supervising solicitor who is qualified as a police station duty solicitor to steer you through the process.

### **Seeking accreditation**

The first stage of the accreditation process is to contact an assessment organisation (AO). You must first pass the written test (or be exempt - which you will be if you have passed the LPC or BTC) and submit Part A of your portfolio requirement. The AO will confirm receipt of Part A and (if applicable) issue a pass certificate on successful completion of the written test. Once you have these, you can apply for probationary registration to the LAA. Having achieved probationary status, you then have 12 months in which to complete the full assessment process.

### **The accreditation assessment process**

The standards of competence by which you will be assessed can be accessed at: <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page>

The competency standards comprise three parts:

- underpinning knowledge

- underpinning skills
- standards of performance

In terms of knowledge, you will need to demonstrate an understanding of criminal law and procedure, including immigration law. You need to have an awareness of the components of and possible defences to the following common crimes:

- possessing a controlled drug with intent to supply
- handling stolen goods
- possessing an offensive weapon
- taking a motor vehicle
- theft
- affray
- criminal damage
- robbery
- burglary

You also need an understanding of the rules of criminal evidence as they apply at the police station; police procedures (PACE and the Codes of Practice) and, of course, professional ethics.

### **Written Test**

If you have passed the LPC or BPTC you are exempt from having to take the written test. If not, you need to sit and pass a written test, administered by your AO which will assess your knowledge and understanding of basic criminal law, law of evidence and police station procedures. The test will comprise both multiple choice and questions requiring fuller written answers.

### **Portfolios (Part A and Part B)**

The SRA describes the purposes of the portfolio as being to:

- encourage you to consider and reflect upon your performance in the police station;
- encourage your supervising solicitor to review your competence and assist you;
- identify and rectify any deficiencies;
- enable an AO to assess your competence against the standards

## **Part A**

Part A of the portfolio comprises two stages.

Stage 1-two cases in which you observed a solicitor giving advice in a police station

Stage 2-two other cases in which you were observed giving advice at a police station by your supervising solicitor.

## **Part B**

The remaining five reports must be on cases where you have attended on a client at the police station unaccompanied. Your AO should provide you with guidance on how to complete the portfolio element of the assessment process. Detailed guidance issued by the SRA is available at:

<http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page>

Consider this before reading further.

## **Critical Incidents Test**

The critical incidents test is an audio assessment which requires you to respond to a number of simulated incidents that might occur at the police station in relation to your dealings with the custody officer; investigating officer; client and third parties, such as an appropriate adult. The CIT assesses your oral skills, assertiveness and the suitability of your responses under pressure of time. You must record a response within 30 seconds. You will be assessed on content; confidence and control.

### **KEY POINT SUMMARY**

- Keep and maintain a contemporaneous written note of all that occurs whilst you are at the police station.
- Extract all the necessary information from the custody record on your arrival.
- Press the investigating officer(s) for as much disclosure of evidence as you can, as this will have a direct bearing on the advice you give your client.
- Carefully evaluate the evidence against your client before deciding on the most appropriate strategy for your client.

- Be prepared to advise silence when you consider it to be the appropriate advice.
- Where silence is to be advised, ensure your client gives his or her informed consent by making him or her fully aware of the consequences.
- Consider whether a prepared statement might be the best option for your client.
- Ensure that any representations you make are recorded on the custody record.
- Be proactive during the interview and intervene where necessary even where your client is exercising his right to remain silent.
- Prepare your client for the interview experience.
- Instruct your client in advance to answer in the affirmative if you ask him during the interview whether he wants further legal advice. This way the interview has to be suspended enabling you to consult in private with your client.
- After the interview has concluded, press the custody officer for a decision and be prepared to make appropriate representations.

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## SELF-TEST QUESTIONS

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### Case study 1: *R v Lenny Wise*—alternative hypothesis

You will be aware that having worked through the Lenny Wise scenario up to this point, Lenny was not represented at the police station, and made incriminating admissions to his involvement in the burglary. Let's take an alternative course and imagine you had been called to the police station to represent Lenny upon his arrest. Picture yourself walking into the custody suite:

#### What is the first thing you would do?

You would speak to the custody officer and ask to consult the custody record. By consulting the custody record, you would know the reason for Lenny's arrest (domestic burglary at the home of an old age pensioner). You would be able to ascertain the reasons for his detention



(which in Lenny's case would be the need to secure or preserve evidence relating to the offence or to obtain such evidence by questioning). There would be a record of all searches undertaken in connection with the investigation, from which you would be able to ascertain that Lenny's flat has been searched.

**Having extracted all the pertinent information from the custody record, what would you do next?**

You would ask to speak with the investigating officer and your goal would be to ascertain the precise nature of the evidence against your client. What is revealed to you depends to a large extent on the type of questions that you ask and the personality of the investigating officer.

**With the information that you have from the custody record, what questions do you think you would put to the officer(s)? Would you ask open-ended questions or closed questions?**

You would want details of the burglary (time/place/account of what was stolen etc . . .). You would clearly want to know whether there were any witnesses to the burglary and an account of what they saw. You need to try and ascertain the nature of the evidence that has led to Lenny's arrest. Do the police have a statement of complaint? Has any particular witness identified Lenny? Has an identification procedure been convened or is an identification procedure being contemplated? Is there any forensic evidence? Has Lenny made any admissions? Is there CCTV footage? Why was his flat searched and has any material been seized and if so, why? You would need to press for full details of the co-accused. Has this individual implicated Lenny in any way? Does this individual have any previous convictions?

Let's assume you ascertain the following information from the investigating officer:

- Lenny lives in the vicinity of the burgled property and his appearance matches the description of two eyewitnesses;
- the victim has identified Lenny to the police as someone she had spoken to in her street a short while before the burglary;
- there is an eyewitness who saw the burglar who may be able to identify him;

- the suspected burglar was seen to be wearing white trainers;
- entry to the burgled property was through the back door of the property and a scene of crime officer has lifted shoeprints;
- a pair of white trainers were recovered from Lenny's flat and have been sent for forensic comparison with the shoeprint discovered at the scene;
- the police are not prepared to disclose whether or not the co-accused Lloyd Green has made any significant statement;
- Lloyd Green has one previous conviction for a motoring matter;
- Lenny has a string of previous convictions for drug possession, theft and burglary.

**What has been the purpose of your exchange with the investigating officer?**

Your purpose has been to find out the nature of the evidence against your client and to assess it.

**What conclusion have you reached as regards the strength of the evidence?**

There is some circumstantial evidence of Lenny's involvement in the burglary and further investigation by the police is merited. The next stage will be for you to interview Lenny.

**How will you conduct this interview and what is its purpose?**

Having met Lenny and explained your role, you should let him speak. This gives you the opportunity to observe his demeanour. Through a series of closed questions, and preferably with the aid of a questionnaire, you need to ask Lenny for all relevant details and put to him the evidence that has been disclosed to you. Your questioning should have picked up the fact that Lenny is undergoing treatment for a mental disorder and that he is not in possession of his medication. This triggers a number of the safeguards under Code C. With Lenny's permission, you will need to alert the custody officer and you may wish to make representations as to why this fact was not picked up on the booking-in procedure. Make sure your representations are recorded on the custody record. Lenny needs to be medicated by a qualified health professional. It will almost certainly be necessary for a doctor to be called to check and administer the correct dosage and to offer advice as to

whether Lenny is fit to be interviewed. This is likely to cause a significant delay. You need to decide whether to stay or to return to the station later. In view of Lenny's mental disorder, he must have access to an appropriate adult.

Assume it is a couple of hours later. You continue to interview Lenny, this time in the presence of an appropriate adult (his sister). He states he is not guilty of the burglary and that he probably has an alibi, but the details are vague. He knows Lloyd Green who (he says) is a drug dealer. Lenny accepts he possesses a pair of white training shoes but says they were given to him a couple of weeks ago and he has never worn them.

**What advice will you give to Lenny, assuming the police doctor has deemed him fit to be interviewed? Should he exercise his right to remain silent or should he put forward his defence and an explanation? What factors have a bearing on this?**

- Are you satisfied with the disclosure of evidence?
- Do you feel Lenny's state of mind is such that he could cope in an interview situation?
- What assessment have you made as regards the strength of the evidence that has been disclosed?

On balance, you should advise Lenny to exercise his right to remain silent. The police have little substantive evidence against Lenny currently. Lenny is likely to incriminate himself if he answers police questions. His alibi is very sketchy, and you do not know at this stage whether the co-accused has implicated him. If he has, this is likely to come out in the interview. If the co-accused is a drug dealer, Lenny may wish to proceed with caution out of concern for his own safety. Lenny should be advised about the potential risks of remaining silent. On tape you should state that your client is to remain silent and consider giving your reasons for this advice (without reference to any privileged conversation with Lenny). Your reason might be the fact of Lenny's mental illness. Assuming Lenny follows your advice, the investigation is not advanced through Lenny's interview. Let us assume that it is not apparent that Lloyd Green has implicated Lenny in any way, as no questions are put to Lenny as regards anything Lloyd Green might have said. At the conclusion of the interview, you should be pressing for Lenny's release on police bail.

**Should you advise Lenny to participate in an identification procedure?**

The issues surrounding the identification of Lenny Wise are specifically considered in Chapter 7. On balance, Lenny should be advised to consent to either a video parade or an identification parade conducted in your presence. The police are obliged to disclose records of the initial description by an eyewitness (Code D para. 3.1) and it would be important to obtain them in this case.

**If Lenny answers police bail at a later date, whereupon he is identified by one of the eyewitnesses at a video parade and a forensic link is established between the training shoes recovered from Lenny’s flat and the print by the back door, what then?**

The police may charge Lenny without holding a further interview or they may wish to interview further.

**Would your advice to Lenny change? Should he now answer questions or continue to remain silent?**

The evidence against Lenny is now stronger but Lenny’s alibi is no further advanced as he has not been to see you in the meantime. He is however adamant that he did not commit the burglary. It becomes a calculated risk at this point. Which course of action poses the least risk? Arguably it would be remaining silent. If Lenny were to make incriminating admissions during the interview, the prosecution would have a much stronger case against him when combined with the other evidence. If he were to remain silent he would be less likely to incriminate himself. If charged, his defence at trial may be confined to cross-examining prosecution witnesses on the basis that their identification of Lenny is mistaken. This would not trigger s. 34 CJPOA 1994 (*R v Moshaid* [1998] Crim LR 420). If Lenny were to advance a defence of alibi he would of course be at risk of an adverse inference under s. 34. However, if you were to give evidence explaining the reason for your advice, the court may accept it was reasonable for Lenny to have remained silent. In any event, the jury must be satisfied that there is a sufficiently strong case against Lenny before any question of an adverse inference is considered.

All of the above is hypothetical in the light of what did in fact occur in this case scenario. You will recall that Lenny was interviewed without a legal adviser being present. He made

a number of incriminating admissions which resulted in him being charged and which will no doubt be used by the prosecution in evidence against him.

One way of deciding whether to advise a client to remain silent or answer questions is to consider:

1. What are the advantages to the client of answering questions?
2. What are the disadvantages to the client in answering questions?
3. What are the advantages to the client remaining silent?
4. What are the disadvantages to the client of remaining silent?

These questions should be constantly asked and re-evaluated. They do not always result in a clear and simple answer, but they should at least guide your thought processes on this difficult and challenging aspect of legal practice.