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Police Station Advice
Advising on Silence

by Professor Ed Cape
on behalf of the Law Society Criminal Law Committee

The Law Society

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The Criminal Law Committee of the Law Society published guidance for criminal defence solicitors on the implications of adverse inferences and waiver of privilege for police station advice in 2003.[1] Since that time there has been a number of important developments, both in case-law and practice. The purpose of this guidance is to assist defence lawyers to understand the implications, for advice at the police station and for trial preparation, of the 'silence' provisions of the Criminal Justice and Public Order Act 1994 (CJPOA 1994)[2] in the light of these developments.

The guidance has been prepared by Professor Ed Cape, with the assistance of the Criminal Law Committee's Police Station Working Group, on behalf of the Criminal Law Committee of the Law Society.

1 *See Criminal Practitioners' Newsletter Special Edition Number 54, October 2003.*
2 *For the purposes of this guidance, the silence provisions are ss 34, 36, 37 and 38 of the CJPOA 1994 (as amended).*

The legal position

The 'silence' provisions

Section 34 of the CJPOA 1994 permits 'proper' inferences to be drawn from the failure of the accused to mention facts relied on in their defence (a) on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, or (b) on being charged or officially warned that he or she might be prosecuted for it, provided that in the circumstances existing at the time the accused could reasonably have been expected to mention those facts. Section 36 permits 'proper' inferences to be drawn from failure to account for any object, substance or mark on their person, clothing or footwear, or otherwise in their possession or in any place in which they were at the time of their arrest, where a constable reasonably believes that the presence of the object etc. may be attributable to their participation in a specified offence, and informs them of that belief. Section 37 permits 'proper' inferences to be drawn from failure of the accused to account for their presence at the place, and at the time, that they were when they were arrested where a constable reasonably believes that the presence of the person at that place and at that time may be attributable to their participation in the offence for which they have been arrested, and informs them of that belief.

Sections 34, 36 and 37 of CJPOA 1994 were amended by s 59 of the Youth Justice and Criminal Evidence Act 1999 so that inferences cannot be drawn where the accused was at a police station or other authorised place of detention at the time of failure to mention a relevant fact (or failure to account), and he or she was not allowed an opportunity to consult a solicitor prior to being questioned, charged or informed that they may be prosecuted. This includes cases where the suspect has had their right of access to a solicitor delayed under the Police and Criminal Evidence Act 1984 (PACE) s 58(6)-(11) or the Terrorism Act 2000 Schedule 8 paragraph 8, and also where (exceptionally) the police are permitted to interview a suspect who has asked for legal advice before he or she has received it.[3] Where under these provisions inferences cannot be drawn, the caution to be given differs from the 'normal' caution.[4]

Where the conditions in ss 34, 36 or 37 are satisfied, the court or jury may draw an inference if the only sensible conclusion is that the accused had no (innocent) answer, or none that he or she believed would stand up to scrutiny, has subsequently invented the account put before the court, or has tailored their account to fit the prosecution's case.[5]

3 For circumstances where the police can proceed with an interview in the absence of advice that has been requested, see Code of Practice C Annex B.

4 This caution, and guidance on when it should be administered, is set out in Code of Practice C Annex C.

5 Judicial Studies Board Specimen Directions, paragraph 40(2).

'Silence' on its own cannot prove guilt

In this guidance the term 'silence' is used to mean failure to mention a fact subsequently relied upon by the accused in his or her defence, or failure to account for an object substance or mark etc. under CJPOA 1994 s 36, or failure to account for presence under s 37.

It is important to remember that inferences may be drawn under s 34 in circumstances where the accused did answer police questions, if the accused relies on facts at trial that he or she did not tell the police about in interview or on being charged e.g. where the accused lied to police,[6] or failed to mention the particular fact relied upon.[7]

It remains the case, however, that silence cannot, by itself, prove guilt (CJPOA 1994 s 38), and inferences can only be drawn if the court or jury first find that the other evidence establishes a prima facie case or is 'sufficiently compelling to call for an answer' from the accused.[8] However, this does not mean that in order for inferences to be drawn the police must disclose evidence amounting to a prima facie case prior to questioning the suspect. Despite the inherent unfairness, the courts have consistently held that the police are not under a general duty to disclose evidence to the suspect at the police station.[9]

Conditions for drawing inferences

It has been held that the silence provisions of the CJPOA 1994 do not, in themselves, contravene the right to fair trial under Article 6 of the European Convention on Human Rights.[10] The courts have given some guidance on the conditions that must be satisfied in order for inferences to be possible under s 34:[11]

1. **The silence provisions only apply in criminal proceedings.**

2. **The alleged failure to mention facts subsequently relied upon must occur before charge or on being charged.** Where there is more than one interview, inferences may be drawn from failure to mention relevant facts in one interview even if they were mentioned in a subsequent interview. Similarly, inferences may be drawn from failure to mention facts in an interview even though they were mentioned at charge, or from failure to mention facts on being charged even though no inference could be drawn from failure to

6 R v O (A) [2000] Crim LR 617, R v Webber [2004] UKHL 1, [2004] 1 All ER 770.
7 R v Brizzalari [2004] EWCA Crim 310.
8 There has been some differences of opinion on this, but see the Judicial Studies Board Specimen Directions, paragraph 40.
9 See R v Imran and Hussain [1997] Crim LR 754 and R v Nottle [2004] EWCA Crim 599.
10 Condron v UK [2000] Crim LR 679.
11 See, in particular, R v Argent (1997) 2 Cr App R 27, [1997] Crim LR 346.

mention facts in interview.[12] However, the prosecution must establish that the accused knew, or must have known, of the facts at the relevant time.[13]

3. **The suspect must have been cautioned** (Code C paragraph 10.1 (caution at interview), Code C paragraph 16.2 (caution at charge)). Minor variations in the wording of the caution are permissible provided that the sense of the caution is preserved. For inferences under ss 36 or 37, the accused must have been arrested and must also have been given the special warning prescribed by Code C paragraph 10.11.

4. **The questioning must be directed to trying to discover whether or by whom the alleged offence was committed** (inferences under s 34(1)(a) only). Inferences cannot be drawn if the police have already made up their mind to charge before commencing the interview.[14] However, inferences can be drawn if a court is persuaded that the police still had an open mind even if there was sufficient evidence to charge prior to the interview starting.[15]

5. **The failure of the accused must be to mention any fact relied on in his or her defence in those proceedings.** A defendant may be treated as relying on facts even if they do not give evidence where, for example, cross-examination of prosecution witnesses allows reliance on facts to be inferred,[16] or where defence counsel puts a positive case to a prosecution witness.[17] A hypothesis proffered by the accused does not amount to a reliance on facts, and neither does a bare admission made in cross-examination, but an assertion that 'something is actually the case' (e.g. an explanation given by the accused for his or her relationship with alleged co-conspirators) can amount to assertion of a fact.[18] An oral assertion of facts in interview (even though police questions are not answered), or the handing in of a written statement, can amount to the assertion of facts so that, if accepted by a court, inferences could not be drawn.[19] It was held in *R v Knight*,[20] in respect of a written statement handed to the police, that the purpose of the 'silence' legislation was to encourage early disclosure of the defence not the scrutiny and testing of the defence by police in interview. Note that inferences under ss 36 and 37 do not depend upon the facts put forward by the accused at trial since it is the mere failure or refusal to provide an account to the police that is relevant.

12 R v Dervish [2001] EWCA Crim 2789, [2002] 2 Cr App R 6.
13 R v N [1999] Crim LR 61 and R v B (MT) [2000] Crim LR 181.
14 R v Pointer [1997] Crim LR 676.
15 R v McGuinness [1999] Crim LR 318, R v Elliott [2002] EWCA Crim 931, R v Howell [2003] EWCA Crim 1, [2003] Crim LR 405.
16 R v Bowers [1998] Crim LR 817, R v Webber [2004] UKHL 1, [2004] 1 All ER 770.
17 R v Beckles [2004] EWCA Crim 2766, [2005] 1 All ER 705.
18 R v N [1999] Crim LR 61, R v Betts and Hall [2001] EWCA Crim 224, [2001] Crim LR 754, R v Milford [2001] Crim LR 330.
19 R v McGarry [1998] 3 All ER 805, R v Ashton and others [2002] EWCA Crim 2782.
20 [2003] EWCA Crim 1977, [2004] 1 Cr App R 9. See also R v Turner [2003] EWCA Crim 3108, [2004] 1 All ER 1025.

6. **The accused could reasonably be expected, in the circumstances existing at the time, to have mentioned the facts relied on at trial.**
'Circumstances existing at the time' is to be widely interpreted, and includes:

    - what disclosure had been made to the suspect, or their lawyer, by the police
    - what information the prosecution can demonstrate the suspect knew at the time of questioning or charge
    - the condition and circumstances of the suspect
    - any legal advice that the suspect received.

    What is reasonable is a question of fact for the court or jury. However, reasonableness depends, in part, upon on what is expected of suspects in our adversarial system, and the Court of Appeal have given very different indications of what the purpose of the 'silence' provisions is. In *R v Brizzalari* the court said that s 34 'was primarily directed [at] the positive defence following a "no comment" interview and/or the "ambush" defence'.[21] In *R v Hoare and Pierce*, on the other hand, the court said that s 34 is 'concerned with flushing out innocence at an early stage or supporting other evidence of guilt at a later stage.[22]

    Note that there is no reasonableness requirement under ss 36 and 37.[23]

The effect of legal advice

Legal advice not to answer police questions has presented the courts with a dilemma, best summed up by Woolf LCJ in *R v Beckles*:[24]

> *'Where the reason put forward by a defendant for not answering questions is that he is acting on legal advice, the position is singularly delicate. On the one hand the Courts have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 and by so doing defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal professional privilege. On the other hand, it is of the greatest importance that defendants should be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice.'*

21 See n 9. See also R v Beckles (n 19).
22 [2004] EWCA Crim 784.
23 Although this is open to challenge under ECHR Article 6.
24 n17, at paragraph 43.

The fact that an accused was advised by their lawyer not to mention facts or advised not to provide an account to the police does not, of itself, prevent inferences from being drawn.[25] In *Condron v UK*[26] the European Court of Human Rights (ECtHR) made it clear that legal advice is an important safeguard in the context of Article 6 and held that the fact that an accused is advised by their lawyer to remain 'silent' must be given appropriate weight by the trial court. Unfortunately, recent Court of Appeal decisions and the Judicial Studies Board Specimen Directions on the 'silence' provisions fail to stress the need to comply with this requirement.

Recent Court of Appeal decisions concerning the effect of legal advice on the question whether inferences may be drawn from 'silence' have not all been consistent, but the current approach appears to be embodied in *R v Howell*,[27] *R v Hoare and Pierce*[28] and *R v Beckles*,[29] and may be summarised as follows:

- Where an accused gives evidence that they remained silent on the advice of their solicitor, the question for the jury or court is whether, in the circumstances existing at the time, it is reasonable to expect the accused to have mentioned the relevant fact or facts. This is an objective question.
- The fact that the court or jury accepts that the accused genuinely relied on legal advice not to tell the police about facts on which they subsequently rely in their defence does not mean that they have to conclude that it was reasonable for the accused not to mention those facts. They may, for example, conclude that it was not reasonable to rely on that advice, or that the accused relied on the advice because it suited their purpose.
- A court or jury may be more likely to conclude that reliance on legal advice not to put forward relevant facts was reasonable if there were 'soundly based objective' or 'good' reasons for that advice. The following may be regarded as 'good reasons':
  - Little or no disclosure by the police so that the solicitor cannot usefully advise the client
  - The case is so complex, or relates to matters so long ago, that no sensible immediate response is feasible
  - The suspect has substantial difficulty in responding as a result of factors such as ill-health, mental disability, confusion, intoxication, or shock.

25 R v Condron (1997) 1 Cr App R 185.
26 n 10.
27 [2003] Crim LR 405.
28 n 22.
29 n 17.

- A court or jury is less likely to conclude that reliance on legal advice was reasonable if the advice was not based on 'good' reasons. The following are unlikely to be regarded as 'good reasons':
  - A belief by the solicitor that the detention is unlawful
  - The absence of a written statement from the complainant
  - A belief that the complainant may withdraw the complaint
  - A belief that the police intend to charge whatever the suspect says in interview.

As a result, solicitors should approach the issue of advising clients on 'silence' with extreme caution, and where they do advise silence, should explain to the client that the fact that they are giving such advice will not necessarily prevent inferences from being drawn. Whilst solicitors must have proper regard for the decisions of the courts, if there are cogent reasons for silence solicitors must not flinch from advising accordingly, whilst ensuring that their clients are made aware of the risks of following that advice.

Advising the client

Deciding what advice to give

In deciding what advice to give solicitors must balance the risks of answering police questions and/or disclosing relevant facts against the risks of not doing so. The following factors will be relevant to this decision (although in any particular case, some factors may be more important than others, and other factors may also be relevant):

1. **The level of disclosure**

   See Obtaining Police Disclosure Checklist (Appendix). It has been held that the fact that the police have disclosed little or nothing of the case against the suspect, so that the solicitor cannot usefully advise the client, can be a 'good' reason for advising silence.[30] However, the fact that the police do not have a written statement from the complainant was held in *Howell* not to be a 'good' reason for advice to remain silent. Solicitors should keep a careful record of what has been disclosed by the police prior to each interview, and should ask the interviewing officer or officer in the case whether they have any information that they have not disclosed. Particular care should be taken where the police are using the tactic of 'phased disclosure', reconsidering the advice on each occasion that further disclosure is given.

30 R v Argent, and R v Roble [1997] Crim LR 449.

2. **The nature of the case**

Advice to remain silent is likely to be justified where the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is appropriate.[31] Advice must be reviewed if the police give the suspect the time and opportunity to consider the allegation, to review relevant documents, etc.

3. **The circumstances of the suspect**

The courts have recognised that advice to remain silent may be appropriate where the suspect's condition is such that a response in interview would not be advisable. Relevant factors here include ill-health, mental disorder or vulnerability, confusion, intoxication, shock, etc.[32] However, the unsupported opinion of the solicitor may not carry much weight so where possible evidence of the condition of the suspect, from a doctor or other health care practitioner, should be obtained and, in any event, the solicitor should make a careful record of the relevant condition.

4. **The apparent strength of the police case**

If the prosecution evidence is, or is likely to be, strong a court is likely to take the view that this is a situation calling for an explanation from the suspect. Considering the strength of the evidence will involve an assessment of the likely admissibility of the evidence concerned. In *Howell* the court held that the possibility that the complainant may withdraw the complaint was not a 'good' reason for remaining silent. Nevertheless, it may still be appropriate to advise silence in such circumstances since if the complainant does withdrawn their complaint, there may be insufficient evidence for a successful prosecution.[33] Further, the court in *Howell* stated that the fact that the lawyer believed that the suspect would be charged whatever he said in interview was also not a 'good' reason. However, it has been held in other cases that inferences should not be drawn in such circumstances.[34] The solicitor should, where relevant, ask the police in advance of an interview what their intentions are once the interview has been conducted. If they believe that the interview and/or detention is unlawful or contrary to Code C, the lawyer should make representations and request that they be noted on the custody record together with the police response.

31 See R v Roble (n 30) and R v Howell (n 15).

32 See R v Howell (n 15).

33 Although the solicitor must consider whether the prosecution is likely to seek a witness summons or seek to adduce evidence of a written statement under the Criminal Justice Act 2003 ss116 or 117.

34 See, for example, R v Pointer (n 14).

5. **The client's instructions**

If the client's instructions, having regard to the relevant law, indicate that they are guilty of the alleged offence(s) the solicitor should consider the strength of the police evidence.

If the police evidence is strong, the solicitor should consider the potential advantages of making admissions, including any possible effect on bail, charge or diversion from prosecution (e.g. caution). Normally, making admissions to the police will not reduce sentence any more than if the accused pleads guilty at the first opportunity at court.[35] However, admissions at the police station may have an impact on sentence if they lead to the recovery of property, a significant reduction in risk to or suffering experienced by a victim, the arrest of other suspects, the release of other suspects, or where they lead the police to accept that the suspect played a minor role or to a decision to charge a less serious offence than might have been warranted by the circumstances.

If the police evidence is weak, or the solicitor is unclear of the strength of the police case, the solicitor should consider the advantages and disadvantages of remaining silent at this stage. Remaining silent may mean that there is insufficient evidence to charge, or insufficient evidence to secure a conviction. On the other hand, if the evidence is subsequently strengthened (e.g. by a positive identification at an identification procedure) and questions are answered in a subsequent interview, inferences could be drawn from silence in the first interview. Furthermore, inferences from silence may add enough to a weak case to result in a conviction.

Remember that if the client has admitted their guilt, the solicitor cannot go into the police interview with them in the knowledge that the client is going to assert their innocence, but it is proper for the solicitor to accompany the client in the police interview if the client does not answer questions.

If the client has a defence, the solicitor should consider the dangers of not putting it forward in interview, particularly in terms of the potential damage from inferences and the general impact on credibility of the defence. The solicitor should also consider what strategy (e.g. answering questions or making a written statement) would be most appropriate. Answering police questions may be the most persuasive evidence of the veracity of the defence,

35 The police may try to persuade a suspect to make an admission by telling them that this will lead to a reduction in sentence. The solicitor should object to this on the grounds that it mis-states the law, and may amount to an unlawful inducement to confess. See Criminal Practitioners Newsletter Number 62, October 2005, p1.

but there are risks attached to putting forward a defence in a police interview even though it is genuine, especially where the facts are uncertain or complex, the client may become confused under questioning, or is at risk of admitting offences not under investigation.

In deciding what advice to give it is important that solicitors remember that their principal professional obligation is to advise, and to act, in their client's best interests. This may mean advising silence even in the absence of reasons recognised by the courts as 'good' reasons.

Questioning about previous misconduct

Following the introduction of the previous misconduct provisions of the Criminal Justice Act 2003[36] interviews of suspects at police stations now often include questions about previous bad character. In order to give appropriate advice to the client the solicitor should check with the interviewing officer whether they intend to ask such questions. If so, the solicitor should ask them:

- what information the police have about the client's previous convictions or other misconduct, including the source and extent of that information, and the precise details,
- what the specific purpose of the questions is, and
- under what 'gateway' of admissibility they are relevant.[37]

The solicitor should also press for such questions to be asked in an interview separate from that dealing with the substantive offence(s).

In some circumstances it may be to the client's advantage to answer questions about previous convictions, or to hand in a statement, particularly where this would demonstrate that there is no particular connection between the previous convictions and the current alleged offence.

However, there will often be no advantage to the client in answering questions about their previous misconduct. Although the issue has not yet been addressed by the courts, it is unlikely in most circumstances that inferences would be drawn from a failure or refusal to answer questions about previous misconduct.

36 Ss 98 -113. See P. Plowden, 'Police interviews on previous convictions' Criminal Practitioners Newsletter No 61 July 2005.
37 See CJA 2003 s 101(1) and R v Hanson [2005] EWCA Crim 824, [2005] 2 Cr App R 26.

Waiver of privilege

Consultations between solicitors and their clients are normally covered by legal professional privilege, so that an accused may not be asked, and if asked, cannot be required to state, what passed between them and their lawyer. There are special difficulties, however, in relation to advice not to answer questions because mere evidence of that advice is unlikely to be enough to prevent inferences from being drawn. The following principles can be drawn from the cases:

- If the accused simply gives evidence that he or she was advised by their solicitor to remain silent, this will not amount to waiver of privilege (but is also unlikely to be very persuasive).[38]
- If the accused, or his or her lawyer, tell the police of the reasons for the advice, or give evidence of the basis or reasons for the advice, this is likely to amount to waiver of privilege.[39] Note that a lawyer's opening statement in a police interview can be adduced as evidence by the prosecution at trial.[40]
- Waiver of privilege is indivisible, so that if privilege is waived, the accused (and his or her lawyer if giving evidence) may be asked what else was said in consultation, and whether there were other reasons for advice to remain silent.

Normally, therefore, the solicitor should not tell the police nor state in the police interview the reasons(s) for the advice given to the client. In most circumstances the lawyer should simply tell the interviewing officer at the beginning of the interview that his or her client is not intending to answer police questions (and, if appropriate, that a statement is to be handed in). In cases where the police have disclosed little or no information about the allegation, an explanation given in interview such as 'In view of the lack of police disclosure I have not been able to advise my client' may be appropriate, and should not amount to a waiver of privilege. If the solicitor believes that the police are in breach of a provision of PACE or the Codes of Practice, representations should normally be made concerning the breach to the interviewing officer and/or the custody officer, but the solicitor should not normally tell the police that this is the reason for their advice.

38 See R v Condron (n 25), and R v Quang Van Bui [2001] EWCA Crim 1.
39 R v Bowden [1999] 4 All ER 43.
40 R v Fitzgerald (1998) 6 June (CA, unreported).

The need to keep proper records

It is essential that solicitors keep a full, clear and contemporaneous record of the information obtained, prevailing circumstances and advice given at the police station. In any particular case, the solicitor may be required to give evidence of the advice given and the reasons for it, and are open to significant judicial criticism if their records are found to be inadequate. Furthermore, since the evidence of a solicitor may be crucial in the decision whether to draw inferences, such a failure may do a considerable disservice to a client which could amount to inadequate professional service or, in an extreme case, a disciplinary offence. It is normally appropriate for the solicitor to ask the client to sign the written record of the instructions obtained and the advice given.

A careful note, together with relevant times, should be taken of the following:

- the physical and mental state of the client
- the general conduct of the police and the 'atmosphere' in which the investigation is conducted
- what the police allege has been said by the client prior to the solicitor's attendance
- what the police assert has been said to the suspect by the police e.g. a request to account for an object etc., and what reply, if any, was made
- what information is disclosed to the solicitor by the police
- what requests for information and disclosure are made to the police by the solicitor, and the response
- any request for information to be recorded in the custody record, and any representations made to the custody officer
- what information and instructions are given to the solicitor by the client
- the suspect's apparent understanding of the significance of the allegation, and the significance of his or her replies or failure to respond
- what advice the solicitor gives to the client, and the reasons for that advice
- the wording of any caution or special warning given to the client, and of any explanation of the caution or special warning
- what was said during the course of a police interview
- what was said at the time of charge/report for summons.

Strategies where the client is not answering police questions

Where the suspect is not going to answer police questions in interview, either as a result of advice given or of their own volition, the solicitor should consider and advise upon the appropriate strategy to adopt.

1. **Informing the police**

   The solicitor should normally make an opening statement at the beginning of a police interview setting out:

   - their role in the interview
   - the fact that the client is not going to answer police questions
   - the disclosure given to the solicitor by the police (if appropriate)
   - the circumstances in which the lawyer will intervene.

The solicitor should inform the police that their client is not going to answer police questions, but should not normally state the reasons for any advice (see above). If, for example, the solicitor believes the detention and/or interview to be unlawful or contrary to Code C, he or she should inform the custody officer prior to the interview, and repeat it at the beginning of the interview. The interviewing officer may, following *Howell*, try to undermine the solicitor's advice by telling the suspect that they are not obliged to accept advice to remain silent. The solicitor should deal with this possibility in the following way:

- Prior to the interview, warn the client that the interviewing officer may use this tactic, explaining the officer's aim – to make the client lose faith in the legal advice given – and what the solicitor will do if the officer attempts to do so.
- During the interview, if the officer attempts to use this tactic intervene immediately to inform the officer that (a) should the case go to trial, it will be for the court to decide on the merits of the legal advice given to the client and the client's decision, and (b) the court will draw its own conclusions as to the appropriateness of the officer's conduct.

2. **Handing in a statement**

Handing a statement to the police setting out the relevant facts has been treated by the courts as 'mentioning' facts for the purposes of the silence provisions, and the same principle should apply to providing an account for the purposes of ss 36 and 37 CJPOA 1994.[41] This strategy should be considered where there are good reasons for informing the police of facts that are likely to relied upon by the defence at trial (or for providing an account), whilst not wanting to place the client at risk of 'cross-examination' by the police (e.g. because they are nervous or because police disclosure has been limited). However, note that handing in a statement will 'fix' the suspect with the defence, and may have the effect of providing the police with sufficient evidence to charge.

It was held in *R v Knight*[42] that handing in a statement does not, in itself, prevent inferences from being drawn. If the defendant relies on facts at trial that were not mentioned in the statement, inferences can still be drawn from failure to mention those facts.[43] Therefore, the statement should set out the facts that have been disclosed by the police, and cover the essential features of the defence in as much detail as possible having regard to the prosecution case as far as it is known. Care must be taken to anticipate the facts that are likely to be relied on at trial, and also to anticipate any request to account under ss 36 or 37 CJPOA 1994, and to deal with these in the statement. If there is more than one interview, or there is 'phased disclosure', the statement should be reviewed in the light of any information disclosed by the police during the course of a prior interview, or between interviews, and consideration given to handing in a supplementary statement.

Provided that the facts subsequently relied upon at trial are adequately covered, a statement handed to the police during a police interview should have the effect of avoiding inferences under s 34(1)(a) (or under ss 36 and 37), but will not prevent inferences under s 34(1)(b). Normally the courts appear reluctant to draw inferences under s 34(1)(b), but it could be particularly relevant if information is disclosed by the police during the interview that is not adequately covered in the statement. In these circumstances, as noted above, the solicitor should consider whether a supplementary statement should be handed to the police.

41 See p5.
42 n 20.
43 Not all Court of Appeal cases are consistent on this point, but this appears to be the predominant view.

The solicitor must consider at what point the statement should be given to the police. Strictly, a statement only prevents inferences under s 34(1)(a) if it is handed to the police during a police interview, so that it amounts to mentioning facts 'on being questioned under caution'. In a straightforward case where the solicitor is satisfied that the police have made adequate disclosure, it will normally be appropriate to hand in the statement at the beginning of the interview. However, in a more complex case or where the police have given no, or limited, disclosure it may be better to hand the statement to the police towards the end of the interview. In this case, before the interview ends, the solicitor should tell the police that before it is concluded they wish to have a private consultation with the client. The statement should then be drafted in consultation with the client, and handed in to the police at the resumed interview.

Normally it is better to hand a statement in rather than to simply read it out in the interview. If, before handing it in, the solicitor considers that the statement that has been prepared omits relevant information or includes information that should not be disclosed to the police, the statement should be re-drafted during a private consultation with the client. However, since such statements are covered by legal professional privilege, the police have no right to seize them.

3. **Taking a statement that is not handed to the police**

This will not prevent all inferences, but may avoid an inference that facts put forward by the defence at trial have been fabricated since the police interview.[44] If, at trial, the prosecution argue recent fabrication, the statement becomes admissible to rebut the inference. However, if the prosecution do not assert recent fabrication but, for example, seek to persuade the court or jury that an innocent person would have wanted to assert their innocence to the police, the statement will normally be inadmissible as a self-serving statement.[45] Nevertheless, taking a statement that is not handed in may be an appropriate strategy where there are good reasons not to hand a statement in, and there is a real possibility that the prosecution will argue recent fabrication.

44 R v Condron (n 25).
45 See R v Howell (n 15).

4. **Answering some questions and not others**

   This is not normally an appropriate strategy because of the adverse effects on credibility of the defence at trial. It would normally be more advisable to hand in a statement covering the relevant facts.

5. **Refusal to be interviewed**

   It is not normally appropriate to advise a client to refuse to be interviewed unless, for example, the solicitor is strongly of the view that they are not fit to be interviewed. However, clients do, on occasion, decide that they are not prepared to leave their cell for the purpose of an interview. Such a refusal may have the effect of preventing a police interview from taking place, and it has been held that in these circumstances inferences cannot be drawn under s34(1)(a).[46] However, whilst it appears that the police cannot use force to place a suspect in an interview room,[47] there is no reason why the police cannot attempt to conduct an interview in the cell. [48]

The Criminal Practitioners' Newsletter is edited by Janet Arkinstall, Policy Adviser, and Secretary to the Criminal Law Committee of the Law Society. It is published by the Law Reform and Legal Policy Team of the Law Society.

The Law Reform Team will always try and assist lawyers who need advice or who are facing difficulties. Enquiries should in the first instance be sent to the Practice Advice Service in the Law Society's Members' Services Directorate at the Law Society.

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46 R v Johnson; R v Hind [2005] EWCA Crim 971.
47 See R v Jones and Nelson (1999) Times 21 April.
48 See Code of Practice C paragraph 12.5.

Appendix

Obtaining Police Disclosure Checklist

- ❑ Seek disclosure regarding the alleged offence(s)
- ❑ Respond appropriately to the serving of a written disclosure document
- ❑ Comprehensively record initial disclosure
- ❑ Assess initial disclosure
  - The allegation against the client
  - The line of reasoning that leads the police to believe the client rather than anyone else committed the offence
  - The 'special knowledge' that the police attribute to the client concerning the circumstances before, during, and after the offence
  - The police case
  - The prosecution evidence
  - The police investigation

IF THE DISCLOSURE EQUATES TO 'NO DISCLOSURE OR MINIMAL DISCLOSURE'

- ❑ Make representations.
- ❑ If necessary, make a position statement.

IF THE EVIDENCE IS COMPLEX OR RELATES TO AN OLD OFFENCE(S)

- ❑ Ask for full disclosure
- ❑ Press for time to consider disclosure

IN ALL CASES

- ❑ Probe the case narrative
- ❑ Obtain information held by the police concerning:
  - the client – including information on 'bad character'

- the client's potential vulnerability
- any medical examination of the client.

❑ Probe the crime scene and any other key location(s)

❑ Probe systematically every form of potential prosecution evidence

- Covert information on the client.
- Accounts and descriptions from victim and witnesses (initial version and subsequent formal statements/video-recorded interviews; first descriptions)
- Accounts or statements by co-accused
- House-to-house enquiries
- Films, video-recordings and photographs released to the media
- Identification by witnesses
- Object evidence (ie. material items of any kind: recovered from crime scene or in searches; video- and audio-recordings; still photography)
- Fingerprints, impressions, traces and substances
- Specialist opinion and testimony
- Significant statements by, or silence from, the client
- Interviewing of the client to date (account(s) given)
- Formal statements taken from the client.

❑ Obtain detail on outstanding investigations

❑ Obtain detail on intentions concerning other investigatory procedures.

❑ Obtain the investigating officer's assessment of the prosecution evidence.

❑ Identify the purpose of interviewing the client – including intended coverage of 'bad character'

❑ Obtain detail on proposed interviewing arrangements

❑ Obtain the investigating officer's view on case disposal

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