Observations on advising clients about making statements to the police

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What advice should a client be given about whether to make a statement to the police? It is impossible to answer this question simply, because each case has different circumstances. Some lawyers use rules of thumb, such as, "Never give a statement", or, "Only give a statement if it is a sex case". But other lawyers may use rules of thumb that are the opposite of these. Rather than asking what advice should be given, it is more useful to ask what factors are relevant to the decision about what advice to give.

First, however, a fundamental point. It is the client who must make the decision about whether to give a statement to the police. The lawyer must ensure that the client's decision is properly informed with legal knowledge. The client needs to know what a statement is, why the police want one, and what use will be made of it. The client should also be made aware how to stop a police interview. To give proper legal advice on those points, the lawyer will need to obtain information from the police.

One of the mistakes that the lawyer may make is to confuse legal advice with moral advice, that is, with what the lawyer thinks is the conscientious thing for the client to do. To begin by saying to a client, "If you are guilty you should tell the police all about it," is not legal advice. It is a moral view that the client may not share and it is of no legal assistance to the client. What the client "ought" to do is a completely separate question from what are the legal consequences of the client's options. It is about those options and consequences that the client needs the advice that the lawyer is trained to give. It is really an abuse of his position as legal advisor for the lawyer to impose his moral views on the client.

Relevant legislation has been introduced on the use that a defendant may make of the exculpatory, or as they are sometimes called, self-serving, parts of a statement to the police: s 21 of the Evidence Act 2006, which provides:

"**21 Defendant who does not give evidence in criminal proceeding may not offer own statement**

(1) If a defendant in a criminal proceeding does not give evidence, the defendant may not offer his or her own hearsay statement in evidence in the proceeding."

A consequence of this is that the client will need to take into account the likelihood that he will not want to give evidence if he is charged with an offence and the case goes to trial. If he thinks he will not want to give evidence in court, then he must be made aware that he will not be able to rely on any innocent explanation that he may give to the police in his statement. In such a case there is, legally, no point in his giving the police a

statement, as it could only be used as evidence against him. At least, that is so if he intends to deny the charge.

If the client is going to give evidence, then he needs to be aware that what he says in his statement can be used as evidence of its truth, not only by the prosecution (who would, of course, rely on any admissions it contains), but also by the defence. The defence will be able to use the statement both as an aid to recollect the details of what happened (s 21(2) and s 35(3)) and as a response to an allegation that he is lying in court (s 35(2)). The latter point is that he will be able to argue at trial that consistency between his statement and his evidence in court increases the likelihood that what he said is true.

The position is simpler if the client is going to want to plead guilty to the charge. Here, cooperation with the police by making a statement can be advanced in mitigation of penalty if it is a sign of genuine remorse and indicative of an intention not to reoffend. Further, assistance to the authorities that leads to the apprehension of other offenders can result in a significant reduction in sentence.

Those considerations bring out two important matters: what is the likely charge that the client will face after he makes his statement, and how is he likely to plead to that charge? Related to these are the need for the client to know what are the legal ingredients to the charge, and what defences are available. Advice on ingredients and defences can be given in general terms, before the lawyer receives detailed information from the client about what happened. Here, it is essential that the lawyer avoids crossing the line between imparting relevant legal information and coaching the client in what to say to improve his chances of acquittal. Coaching could amount to obstruction of justice: *R v E* 29/8/03, CA62/03, *R v Momodou* [2005] 2 All ER 571 (CA).

An assessment will also have to be made of how much information the police already have about the offence and the identity of the offender, and, importantly, whether that amounts to admissible evidence. Evidence that has been obtained wrongfully may be excluded by the judge, creating a hole in the prosecution's case. There would be no legal advantage to the client in making admissions in a statement that may fill any gap in the case.

The introduction of video technology to record police interviews has reduced disputes about whether the police used improper interviewing techniques, but it has also raised questions about what role the lawyer should have in such interviews. Some lawyers get themselves into the position of appearing with the client in the video recording of the police interview. In my opinion that is a mistake. Legal advice should be given in private. It is not the job of the lawyer to help the police ensure the admissibility of the interview by keeping the questions on a proper track. Nothing makes any admissions that the client may make seem more reliable than if his lawyer is present and acquiescing in the interview process. The client should be advised that if at any stage he wants legal advice during the interview, the recording device will be turned off and a private consultation can be arranged.