

**Original citation:**

Sukumar, Divya, Hodgson, Jacqueline and Wade, Kimberley A.. (2016) How the timing of police evidence disclosure impacts custodial legal advice. *The International Journal of Evidence & Proof*, 20 (3). pp. 200-216.

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**Publisher's statement:**

<http://dx.doi.org/10.1177/1365712716643548>

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**\*\*\* 17 March, 2016 – Accepted for publication at *The International Journal of Evidence & Proof* \*\*\***

How the timing of police evidence disclosure impacts custodial legal advice

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### **Abstract**

Presently, the police in England and Wales disclose their evidence at different points during the arrest and detention of a suspect. While the courts have not objected to this, past field research suggests that lawyers can only advise their clients accurately when the police disclose their evidence before the police interview. To examine this from a law – psychology perspective, we recruited 100 criminal defence lawyers to participate in an online study. Lawyers read fictional scenarios and provided custodial legal advice to a hypothetical client (Christopher) when given either pre-interview disclosure or disclosure at various points during the police interview (early, gradually, or late). Lawyers given pre-interview disclosure provided considerably more informed legal advice compared to those who were only provided with disclosure during the hypothetical police interview. Using an interdisciplinary approach, this paper provides further evidence that pre-interview disclosure is essential for lawyers to deliver case-specific legal advice to suspects.

**Keywords:** police disclosure, legal assistance, law and psychology, evidence, criminal procedure

## How the timing of police evidence disclosure impacts custodial legal advice

### Introduction

In England and Wales, the police control the timing and amount of evidence that they disclose to a suspect and their lawyer during the interview process. By law, the police are under no obligation to disclose most of their evidence when questioning a suspect. For instance, the key legislation governing disclosure, the Criminal Procedure and Investigations Act 1996 (CPIA), offers comprehensive guidance on pre-trial disclosure by the prosecution but lacks any reference to evidence disclosure at the police station (Clough and Jackson, 2012). Likewise, the Police and Criminal Evidence Act 1984 (PACE) and Codes of Practice (Code C) that govern police interviewing practices only require the police to disclose “sufficient information to enable them [the suspect and legal adviser] to understand the nature of the offence and why they are suspected of committing it”<sup>1</sup> before the interview. Even in light of adopting the new EU Directive on the right to information,<sup>2</sup> the police are afforded discretion with regard to the extent of their pre-interview disclosure.<sup>3</sup> Thus, the police are largely free to decide when and how they present their evidence while interviewing suspects.

As a result, the police often strategically delay disclosing some evidence, such as a “golden nugget” or a “trump card”, to the suspect and their lawyer until the interview (Shepherd (2007: 331). Indeed, the Association of Chief Police Officers (ACPO)<sup>4</sup> recently released a statement stressing the importance of withholding evidence from the suspect in

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<sup>1</sup> Code C, para.11.1A. See the revised Codes of Practice at <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice>.

<sup>2</sup> Council Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L142/1. The Directive encompasses the right to information about procedural rights, the right to information about the accusation, and the right of access to the materials of the case.

<sup>3</sup> For a discussion of this EU Directive's impact on police practice, see Cape (2014).

<sup>4</sup> Now replaced by the National Police Chiefs' Council (NPCC).

order to test the suspect's account.<sup>5</sup> Likewise, psychology research recommends withholding evidence from suspects as it is easier to catch suspects lying when the suspect is not aware of the evidence against them (for example, Hartwig, Granhag and Luke, 2014: 30-1). In view of these recommendations, self-reports and in-depth interviews of police investigators reveal a preference for disclosing the evidence to the suspect gradually during the interview, or late in the interview, as opposed to early in the interview (King, 2002: 53; Smith and Bull, 2014; Walsh, Milne and Bull, 2015). Indeed, police investigators in England and Wales are trained to gradually present evidence when interviewing suspects (Walsh, Milne and Bull, 2015).

Consistent with police practice, the courts permit the police to use their discretion to determine the extent of pre-interview disclosure on a case-by-case basis. For instance, in *R v Nottle*, the court acknowledged the need for some pre-interview disclosure to allow the solicitor to advise their client properly but clarified that “the police were not obliged to disclose every piece of evidence they had”.<sup>6</sup> In this case, the police did not reveal the misspelling on a vandalised car and the suspect once again misspelled the name ‘Justin’ as ‘Jutin’ in a handwriting test. The appeal on the ground that the police used a form of deception was dismissed and the police were given the freedom to determine the “quantity and quality of disclosure”<sup>7</sup> for each case. *R v Farrell* was another appeal against incomplete police disclosure, in which the court held that withholding evidence, such as false car number plates in this case, cannot be considered an act of trickery or deceit.<sup>8</sup> The court further postulated that full disclosure would “threaten seriously to handicap legitimate police

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<sup>5</sup> National Investigative Interviewing Strategic Steering Group. *ACPO National Policing Position Statement: Pre-Interview Briefings with Legal Advisers and Information to be Supplied to Unrepresented Detainees*, June 2014, pp.2.

<sup>6</sup> *R v Nottle* [2004] EWCA Crim 599.

<sup>7</sup> *Ibid.* para. 4.

<sup>8</sup> *R v Farrell* [2004] EWCA Crim 597.

enquiries”.<sup>9</sup> It is apparent that the English and Welsh courts believe that limited pre-interview disclosure is sufficient for suspects and their lawyers to prepare for the interview, to the extent that the courts may even draw adverse inferences from a suspect’s silence during interview, regardless of whether the police provided the lawyer with full pre-interview disclosure.<sup>10</sup> Even the European Court of Human Rights (ECtHR) does not support pre-interview access to the case file for lawyers.<sup>11</sup> In essence, withholding evidence until the interview is accepted as standard practice.<sup>12</sup>

While the police, psychologists, and courts are largely in favour of withholding evidence from suspects, defence lawyers and criminal justice scholars argue that lawyers cannot advise their clients at the police station effectively when the police fail to provide sufficient pre-interview disclosure (Sanders, Young and Burton, 2010: 295; Toney, 2001). Without knowing what evidence the police have, lawyers face great difficulty in determining whether a client should provide an account or remain silent in the interview and must often guess at the strength of the police’s evidence when providing this advice (Clough and Jackson, 2012). In his guide to police station advice, Cape highlights that evidence disclosure is crucial to advising clients accurately on how to respond in the police interview (Cape, 2011: 5). For instance, if the evidence is very weak and circumstantial, the suspect may not need to answer any police questions at this stage. Conversely, if the evidence is quite strong and the suspect can provide an alibi or innocent explanation, it may be in their best interests to offer this account to the police. If the suspect claims to be guilty, lawyers are ethically only allowed to advise the suspect to remain silent during the interview or to make a full

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<sup>9</sup> *Ibid.* para. 22.

<sup>10</sup> *R v Argent* [1997] 2 Cr App R 27.

<sup>11</sup> See *A.T. v Luxembourg* [2015].

<sup>12</sup> See *R v W* [2006] EWCA Crim 1292.

admission – lawyers cannot assist the suspect to deceive or mislead the police.<sup>13</sup> Deciding whether the suspect should admit their guilt to the police also requires knowing the strength of the police's evidence. In this way, knowing the police's evidence is critical to deciding on an interview strategy for the client.

Thus, police station advisers are encouraged to seek further evidence disclosure from the police, for instance, by demanding that the police disclose more information or stopping the interview to consult with the client whenever new evidence is disclosed (Cape, 2011: 147). Accordingly, past field research suggests that lawyers do tend to argue with the police for greater levels of pre-interview disclosure (Kemp, 2010, 2013; Skinns, 2009). Lawyers also try to negotiate further disclosure from the police by advising their clients to remain silent or to respond with 'no comment' to police questioning (Blackstock, Cape, Hodgson, Ogorodova, and Spronken, 2014: 396; Quinn and Jackson, 2007). Essentially, lawyers make it clear that if the police control the flow of information and limit disclosure, then the lawyers will similarly restrict how much information their client provides to the police. However, as mentioned before, advising silence may be problematic because the court may still draw adverse inferences from a suspect's silence despite a lack of full, pre-interview disclosure (Azzopardi, 2002; Jackson, 2001). Ultimately, there is consensus amongst lawyers that when the police limit evidence disclosure before the interview, they limit the advice that lawyers can provide to their clients (Blackstock et al., 2014: 290). Of course, the police and defence represent two different ideologies and accordingly hold different objectives. On one hand, the police are investigating an offence and in arresting and detaining the suspect, they are not questioning the suspect in a neutral manner but as a suspected offender. This motivates delaying evidence disclosure to the suspect and lawyer. On the other hand, the defence must represent the interests of the suspect, including their due process and fair trial rights. This

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<sup>13</sup> Solicitors Regulation Authority, *Solicitors' Code of Conduct 2011*, ch 5, O (5.1) and O (5.2).

requires delivering considered legal advice to the client, which in turn requires earlier police evidence disclosure. Knowing the police's evidence early in the interview process also helps the suspect to avoid being caught out in a lie.

Approaching this issue from the disciplines both of law and psychology, we sought to gather new data on lawyer responses to disclosure at different points in the detention and questioning of suspects. Thus, we set out systematically to examine how the timing of police evidence disclosure impacts custodial legal advice. To this end, we recruited 100 lawyers from England and Wales to participate in an online study. The study presented lawyers with hypothetical police station scenarios in which the police disclosed all of their evidence before the interview began (as lawyers prefer), early in the interview (before asking the suspect for an account), gradually during the interview ('drip-feeding' the evidence while questioning the suspect), or late in the interview (after questioning the suspect thoroughly). We selected early, gradual, and late disclosure during the interview because past researchers have categorized police disclosure strategies during the interview in this way (for example, Walsh, Milne and Bull, 2015; Walsh and Bull, 2015). Additionally, we manipulated the scenarios to include either a client who claimed to be innocent or one who claimed to be guilty of the suspected offence, as this is a further factor likely to influence lawyers' advice to the client. Participating lawyers reported how they would advise their clients both before and during the police interview in the hypothetical scenarios. Based on past research, we expected that lawyers who were given pre-interview disclosure would be better equipped to deliver legal advice to their clients than lawyers who were only given disclosure during the interview.

## **Method**

### **Participants and design**

We identified over 2000 law firms specializing in criminal defence via the official website of the Law Society in England and Wales, an independent professional body for



solicitors. We sent emails containing the link to the online study and a brief description of the project to approximately 2156 law firms listed by the Law Society, in addition to the president of a local Law Society. Over a period of seven weeks, 100 lawyers working in criminal defence across England and Wales participated in the study.

The final sample consisted of 79 solicitors, 17 accredited police station representatives, 2 trainee solicitors, 1 chartered legal executive advocate, and 1 respondent who chose not to provide their status. The number of years participants spent in criminal defence ranged from 2 to 40 ( $M^{14} = 17.4$  years,  $SD^{15} = 10.5$ ). Only 89 participants were police station accredited as some were privately funded.<sup>16</sup> Of the participants who were accredited, the number of years they reported being accredited ranged from 1.5 to 38<sup>17</sup> ( $M = 14.8$  years,  $SD = 9.2$ ). Likewise, the number of clients they advised at the police station per month varied greatly from 0.2, with one participant reporting only a few clients a year, to 40 clients per month ( $M = 10.8$  clients,  $SD = 8.5$ ). Only one participant reported that they had never represented a client at the police station.

Participants were randomly assigned to one of eight groups according to whether the suspect was guilty or innocent, and when the disclosure took place (pre-interview; early; gradual; late disclosure) resulting in eight groups in total (see Table 1). Participants read

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<sup>14</sup> Means ( $M$ ) are used to describe the quantitative data that lawyers provided in this study, such as number of years spent working in criminal defence.

<sup>15</sup> Standard deviations ( $SD$ ) are used to describe “how well the mean represents the data” (Field, 2009: 38). Larger standard deviations indicate more variability in the data. For example, although lawyers spent a mean of 17.4 years in criminal defence, a large standard deviation of 10.5 years suggests that there was quite a spread in how many years lawyers spent in criminal defence.

<sup>16</sup> Police station accreditation is required in order to be eligible for legal aid payment for police station work.

<sup>17</sup> Police station accreditation was only introduced in 1994 so some lawyers may have interpreted this as ‘legally qualified’ to provide police station advice.

different scenarios depending on which group they were assigned to. There were 12 or 13 participants per group. As participants were randomly assigned to the eight groups, there were no significant differences between the groups for the number of years participants spent in criminal defence, years they were police station accredited, and number of clients they advised per month.<sup>18</sup>

	Timing of police evidence disclosure				
		Pre-interview	Early in the interview	Gradually during the interview	Late in the interview
<b>What the client claimed to be</b>	Innocent	1	2	3	4
	Guilty	5	6	7	8

**Table 1.** Participants were randomly assigned to one of the eight groups displayed in this table.

### Procedure

The study was conducted online and all of the data were collected anonymously. All participants provided informed consent before starting the study. Participants were initially presented with background questions regarding their job, their experience in criminal defence and police station advice work, as well as how frequently they advised clients at the police station. Next, participants were presented with one of eight scenarios depending on which group they were in. For all participants, the first part of the scenario began by asking them to imagine they were representing a young male client ('Christopher'), who had been arrested

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<sup>18</sup> We checked this with an 8 x 3 multivariate analysis of variance (MANOVA) and found that lawyers in the eight groups did not significantly differ in the number of years they spent in criminal defence, years they were police station accredited, and clients they advised per month, Pillai's trace = .21,  $F(21, 231) = .83$ ,  $p = .682$ . For an explanation of MANOVAs, see Field (2009: 584).

on suspicion of burglary, and was being held at the police station. Depending on the participant's group, the client either claimed to be innocent or guilty and the police either revealed all three pieces of incriminating evidence they had (in the pre-interview disclosure groups) or simply stated that they had evidence that suggested the client's involvement (in the early, gradual, and late disclosure groups). At this stage, participants had to report what they would advise their client before the police interview.

Participants were then presented with the second part of the scenario in which they were asked to imagine being present at the client's police interview. They were informed that the client's behaviour would depend on what was agreed upon prior to the interview. In the pre-interview disclosure groups, the interview consisted of the police asking the suspect (Christopher) for his account and questioning him about the evidence that the police had already revealed prior to the interview. In the early disclosure groups, the police revealed all three pieces of evidence that they possessed immediately after the caution and then asked for the suspect's account and questioned him about the evidence that they had revealed early in the interview. In the gradual disclosure groups, the police asked for an account at the start of the interview and then asked further questions while steadily revealing one piece of evidence at a time in between the questions. After each piece of evidence was revealed, the suspect was asked to explain it. For example, the scenario stated that "The police then ask a few questions about the crime, before revealing CCTV stills of Christopher's car parked in the victim's neighbourhood around the time of the burglary. The police then ask Chris for an explanation." In the late disclosure groups, the police asked the suspect for an account and then asked all of their questions. Only at the end of the interview, did the police reveal their three pieces of evidence and ask the suspect to explain the evidence. All participants had to state whether they would advise the client during the interview, and those who stated that they would, were asked to describe what they would advise their client.

All eight scenarios were identical except for whether the client claimed to be innocent or guilty and the manner in which the three pieces of evidence were disclosed. The three pieces of evidence were CCTV stills of the client's car parked in the victim's neighbourhood around the time of the burglary; a description of the burglar by the victim's neighbour, which fit the client's appearance; and the client's fingerprint on the garden fence of the victim's house (presented in that order). We chose these three pieces of soft evidence for several reasons. First, none of the evidence was sufficient to prove that the client had committed the burglary, which is why a police interview was necessary. Second, all three pieces of evidence could plausibly exist for both guilty and innocent suspects. Third, the police are more likely to employ various strategic evidence disclosure methods such as gradual or late disclosure during the interview when a serious crime has been committed but the evidence is not strong enough to charge the suspect immediately.

Following the scenario, participants who were assigned a guilty client were asked how their advice during the pre-interview consultation and their strategy during the interview would differ, if at all, had the client claimed he was innocent. Similarly, participants who were initially assigned an innocent client were asked the same question but with a client who instead claimed to be guilty.

Finally, all participants were asked which level of disclosure they believed was fairest to their client (pre-interview, early, gradual, or late) and why. Additionally, participants were asked how much of the evidence possessed by the police they required to advise their clients effectively. The whole study took an average of 16 minutes ( $SD = 15$  minutes) to complete.

### **Results and discussion**

Below we describe and compare the overall characteristics of lawyers' responses to pre-interview disclosure and early, gradual, and late disclosure of evidence during the police interview in the hypothetical scenario. Next, we examine the effect of the suspect's assertion

of innocence on how lawyers would advise their client. Finally, we discuss responses to the general follow-up questions on police disclosure and some limitations of this study.

To examine whether evidence disclosure and suspects' innocence affect how lawyers say they would advise their clients, we looked at four key aspects of the responses: what lawyers advised their client to do in the interview; the reasons behind those recommendations; whether or not interviews were interrupted; and the reasons why these interruptions took place. An initial read-through of the responses revealed that the two main reasons lawyers provided for their advice were the type of evidence disclosure (specifically, the lack of disclosure or the strength of the evidence when it was disclosed pre-interview) and suspects' innocence, indicating that our manipulations of the scenarios were effective. Responses could not be categorized according to what lawyers advised their client to do as some lawyers (20%) gave non-directive advice and let the client decide how to proceed in the interview. However, we found that advising the client to make no comment, to submit a prepared statement or to answer questions, and arguing with the police officers, were common interview strategies, thus we identified the frequency of such advice across groups. The initial read-through also revealed that regardless of the police disclosure strategy during the interview (i.e. early, gradual, or late), lawyers provided similar reasons, namely the lack of pre-interview disclosure, for recommending specific strategies. As lawyers treated the three types of disclosure similarly, responses to early, gradual, and late disclosure during the interview will be discussed together. Lawyers were assigned labels according to their job and response number and are referred to according to their label throughout the results section (see Table 2 for label meanings).

<b>Job</b>	<b>Label (x= assigned participant number)</b>
Solicitor	Solx

Trainee Solicitor	TSol <del>x</del>
Police Station Accredited Representative	Rep <del>x</del>
Chartered Legal Executive Advocate	Exec <del>x</del>
Unanswered	Respondent <del>x</del>

**Table 2.** Lawyers' labels and what they represent. *x* indicates participant number and ranges from 1-100.

### Hypothetical scenario

A preliminary analysis of the word count of responses indicated that lawyers considered the hypothetical scenario carefully. Respondents typed an average of 70.2 words ( $SD = 62.3$ ) in response to our key question: 'What would you advise Christopher before the interview begins'.

#### Pre-interview disclosure

*Innocent client.* Depending on whether the client could provide a plausible account, approximately half the lawyers (53.8%) in the innocent, pre-interview group advised cooperating with the police either by putting forward a prepared statement or by answering questions. In deciding this interview strategy, some lawyers (38.5%) took instructions from the client on the evidence:

First,<sup>19</sup> I would find out why Christopher was in the area at the time the burglary happened and whether he had any connection to the residents of that property, given Christopher's fingerprints on the garden fence. Depending on the response from Christopher, if he did know the residents and there is an explanation as to reasons for being in the vicinity, then I would suggest that Christopher answer the officer's questions. However, if there is no reasonable explanation for his presence in the vicinity then I would have suggested a 'no comment' interview due to the potential

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<sup>19</sup> Minor grammatical changes were made to the quotes to make them more readable.

doubt of the evidence which does not prove Christopher entered the house or actually committed the burglary.<sup>20</sup>

The finding that lawyers took time to ask for the client's account and compare it with the police's evidence echoes recent field observations in England and Wales (Blackstock et al., 2014: 316).

However, not all lawyers advised cooperating with the police as 30.8% of lawyers in this group directed clients to make no comment in the interview due to the circumstantial nature of the evidence. For example, one lawyer concluded that the client need not answer questions because,

[T]he police have not disclosed where on the fence the fingerprint was found. If the fence faced the pavement Christopher could have put his hand on it as he walked past. Although Christopher matches the description the neighbour has given, a formal ID procedure should be offered.<sup>21</sup>

The remaining 15.4% of lawyers did not recommend an interview strategy.

Regardless of whether or not lawyers advised the client to cooperate in the interview, the majority of lawyers (76.9%) explicitly referred to the nature and strength of the evidence they were given before offering their client advice that was specific to case facts. Lastly, all lawyers claimed they would not intervene in the interview unless there was more disclosure (and there was not) or if they had to remind the client to stay silent.

*Guilty client.* The two most common responses in the guilty, pre-interview disclosure group were advising a 'no comment' interview (53.8%) or letting the client choose whether to make an admission (30.8%). As for the reasoning behind this advice, some lawyers (53.8%) responded similarly to those in the innocent, pre-interview disclosure group

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<sup>20</sup> Respondent51.

<sup>21</sup> Rep4.

by evaluating the nature and strength of the disclosed evidence. However, their advice was also influenced by the client's admission of guilt, for example:

It would be in Christopher's best interest to make a 'no comment' interview. After admitting his involvement to me he would be unable to deny the allegation. The evidence does not put him in the victim's property. His car being in the vicinity means nothing. I would want to know whether the fingerprint was found inside or outside the fence. Also whether it was the front fence or back fence of the property.<sup>22</sup>

This focus on the client's guilt was particularly apparent in the responses (15.4%) that disregard the disclosure of evidence: "he has two options available to him, namely, he can answer questions and admit his guilt at the earliest opportunity, therefore retaining sentencing credit. Or alternatively, he can put the police to proof and provide a 'no comment' interview".<sup>23</sup> Of course, legal advisers only have two options once a client has admitted their involvement in a crime. Nonetheless, pre-interview disclosure still assisted lawyers in assessing how the client should proceed: "Make no comment in interview. Disclosure given does not provide evidence linking client to the actual building. No identification procedure has been conducted to identify the person witness saw. Not in client's interest to make admission at that time".<sup>24</sup>

The remaining 15.4% of lawyers did not specify an interview strategy in their responses. Finally, just like respondents in the innocent, pre-interview disclosure group, all lawyers claimed they would not interrupt the interview except to remind their client to remain silent.

### **Early, gradual, and late disclosure during police interview**

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<sup>22</sup> Rep58.

<sup>23</sup> Rep99.

<sup>24</sup> Rep77.



*Innocent client.* For innocent clients, over half the lawyers (56.8%) firmly advised the client to make no comment and a further 16.2% of lawyers recommended the same, unless the client had a complete alibi. The only reason lawyers provided for the ‘no comment’ interviews was lack of disclosure:

I would advise Christopher to enter a prepared statement which reads “I have not been provided with details of a prima facie case against me and for that reason I exercise my right to silence. At such time as the police comply with their disclosure obligations I will review my position”.<sup>25</sup>

Thus, unlike police beliefs that legal advisers always advise suspects to make no comment due to inexperience and regardless of evidential strength (Kemp, 2013), there are legitimate reasons, such as lack of disclosure, for advising a client to make no comment. Crucially, advising ‘no comment’ is a tactic aimed to elicit more disclosure and is well documented in field studies of police interviews and custodial legal advice (Blackstock et al., 2014: 396; McConville and Hodgson, 1993: 90-1; McConville, Hodgson, Bridges and Pavlovic, 1994: 105; Quinn and Jackson, 2007).

In addition to ‘no comment’ interviews, lawyers demonstrated other tactics for dealing with the absence of police disclosure including making “reps [representations] with custody sergeant that he [the client] should be released immediately as there are no grounds or reasons for arrest”<sup>26</sup> and making “a protest to the police regarding lack of disclosure”.<sup>27</sup> These responses highlight the much more active and adversarial role legal advisers claim to play and support conclusions that custodial legal representation has improved since the introduction of the accreditation scheme for police station advisers in England and Wales (Bridges and Choongh, 1998). Moreover, these tactics are in line with Cape’s

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<sup>25</sup> Sol53.

<sup>26</sup> TSol62.

<sup>27</sup> Sol65.

recommendations on how legal advisers should deal with police strategic disclosure, including pushing the officers for more information or advising ‘no comment’ until further disclosure is made (2011). In contrast to the majority of lawyers that advised ‘no comment’, 24.3% of lawyers advised submitting a prepared statement and only 2.7% of lawyers suggested that if the client had a credible account, then he (Christopher) should answer questions during the interview.

Notably, two lawyers not only advised on the lack of disclosure but also attempted to second-guess the evidence the police may have:

If he wants to deny the matter I would then have to discuss whether he knows of the address, its occupiers, whether he has been to the address at all with friends. Then advise him about DNA, fingerprints, DNA samples. Then ask whether there is any possibility of his DNA being at the address.<sup>28</sup>

Thus, as indicated in the literature, legal advisers who are denied disclosure resort to speculating on what type of evidence the police might have for the case in question (Clough and Jackson, 2012). This reiterates how knowing what evidence the police hold is a pre-requisite for delivering adequate custodial legal advice to a client.

Following the pre-interview consultation, over half the lawyers (64.9%) chose to interrupt the police interview once the evidence was disclosed. Lawyers reported that they would consult privately with their client and take instructions on the evidence. One lawyer underlined the tense and non-cooperative relations that arise between legal advisers and police interviewers as a result of withholding evidence:

[these pieces of evidence] implicate him as a suspect but do not by any means represent an overwhelming case and I would say that to him. Print on fence – which side? How fresh? etc. Car – yes, police can rely on presumption that registered owner

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<sup>28</sup> Rep24.

is the driver of a car at any material time but so what – who else has use of it?

However, given what has occurred and the inappropriate cat and mouse behaviour of the police I would [be] reluctant to advise him to answer questions.<sup>29</sup>

As this response indicates, the mid-interview consultation following disclosure was often the first time lawyers asked clients for an account. Lawyers may believe that clients cannot provide a meaningful account without knowing the evidence against them. For example, before knowing that the client's car was seen near the location of the burglary the lawyer could not question the client on who else used that car.

*Guilty client.* When the client was guilty, lawyers provided quite similar advice to that provided to innocent clients, with 83.8% advising 'no comment' interviews. However, lawyers attributed this advice not only to the police's lack of disclosure but also the client's admission of guilt. Just as with the responses of lawyers with innocent clients, this advice was often tactical:

The safest course is to advise Christopher to go 'no comment' and justify it by a short introduction at the start of the interview saying that there has not been proper disclosure therefore no comment. This might lead to further disclosure.<sup>30</sup>

Even following an admission of guilt, lawyers actively sought police disclosure:

No Comment. In fact I'd have kicked off with the custody Sergeant over his arrest and detention due to the lack of disclosure. I'd have made representations as to the grounds for arrest. I'd have told the client not to speak to anyone and let me deal with it. I'd have advised him that his instructions to me were confidential and he still had a right to have a case proved against him.<sup>31</sup>

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<sup>29</sup> Sol65.

<sup>30</sup> Sol13.

<sup>31</sup> Sol14.

Thus, although guilty clients can only proceed in two ways with a lawyer present — to make ‘no comment’ or an admission of guilt in the interview — some lawyers still claimed they would invest time and effort to acquire more case information to protect their client’s best interests. Clearly, even lawyers advising guilty clients need to know the strength of the evidence against the client. Aside from ‘no comment’ interviews, a few lawyers (10.8%) let the client decide whether to make an admission or to make no comment and others (5.4%) did not specify any interview strategy.

Over half (56.8%) of the lawyers claimed that they would interrupt the police interview following disclosure in order to take instructions, a similar move to those advising ‘innocent’ suspects. At this stage a variety of responses were made. Of the lawyers who interrupted the interview, some (42.9%) reported that they would continue their current interview strategy of making no comment, because “the evidence against him [the client] is circumstantial and there is an issue of identification”,<sup>32</sup> while others (14.3%) considered the potential benefits of an early admission, such as a reduced sentence at court.

Further, two lawyers were unhappy with delayed disclosure tactics and claimed that the police were conducting “an interview by ambush”<sup>33</sup>. The following response underlines how withholding evidence may worsen working relationships, and as a consequence, cooperation between police and legal advisers; “I would demand the interview be stopped. I would criticise the police for failing to give proper disclosure in advance of the interview”.<sup>34</sup>

Although lawyers who were assigned guilty clients clarified that they would not sit through an interview in which the client lied or denied their guilt, surprisingly one lawyer did advise their client to present a false alibi following disclosure: “admit presence as his [the

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<sup>32</sup> Sol85.

<sup>33</sup> Sol47

<sup>34</sup> Sol55.

client's] girlfriend lives there".<sup>35</sup> While the police have reported concerns that full disclosure will only enable lawyers and their clients to concoct false accounts and avoid charges (Kemp, 2013), it is important to note that at least in this study, this was the exception rather than the rule. Moreover, lawyers are not allowed, both legally and ethically, to remain in an interview when a client lies to the police.<sup>36</sup> While it is a possibility that lawyers may use police disclosure of evidence to create a false account of the evidence, we rely on lawyers being professionally ethical.

Finally, it is vital to note that although the responses across the early, gradual, and late disclosure groups were similar, two lawyers responded to gradual disclosure by choosing to interrupt the interview not once but multiple times – essentially, following each disclosure. As a result, the client would receive advice on each piece of evidence separately over the course of a long, fragmented interview.

#### **Pre-interview vs. early, gradual, and late disclosure during police interview**

As mentioned above, there were many similarities between the early, gradual, and late disclosure groups. Next we outline key differences between these three groups (early, gradual, and late disclosure, or during-interview disclosure) and pre-interview disclosure.

The most apparent difference between pre-interview disclosure and during-interview disclosure was that the legal advice offered to clients with pre-interview disclosure was

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<sup>35</sup> Sol98. This anomaly is troubling. It is surprising that a lawyer would act, and admit to acting, unethically in this way. The reference to a fact that was not contained in our hypothetical scenario seems unlikely, as if advanced in interview, it would quickly be shown to be false. Unfortunately we were unable to seek further clarification as all responses were anonymous.

<sup>36</sup> Solicitors Regulation Authority, *Solicitors' Code of Conduct 2011*, ch 5, O (5.1) and O (5.2).

considerably more detailed and tailored to case facts. Lawyers offered insight into the strength of the case and could decide how to proceed with the client's best interests in mind. In the remaining disclosure groups, legal advice was focused on the lack of disclosure and how to respond to such a police tactic. Often, it was only during a mid-interview consultation following disclosure that lawyers took the client's account and advised the client on the case. It is apparent that lawyers' questioning of their client is directly related to the evidence presented and to which suspects would be required to respond. Unlike the pre-interview consultation, the mid-interview consultation requires actively interrupting the police interview and therefore, the mid-interview consultation is likely to be more pressurized and urgent. Thus, lawyers and clients may not be able to take their time when discussing the evidence presented in the interview.

The second key difference between disclosure before and during interview, was that there were virtually no lawyers choosing to interrupt the interview in the pre-interview disclosure group whereas in the remaining disclosure groups, more than half (60.9%) of the lawyers claimed they would interrupt the interview to speak to their client privately. The finding that lawyers only chose to intervene when evidence was disclosed during the interview highlights how vital evidence disclosure is to custodial legal advice. After all, the purpose of disclosure is to inform the lawyer of the case facts and enable them to advise the client properly. Thus, it is likely that pre-interview disclosure leads to shorter and smoother interviews.

The third difference was that innocent clients were advised to cooperate early on, either by giving an account or participating in identification procedures in the pre-interview disclosure group, more often than in the later disclosure groups. No comment interviews were only advised in the pre-interview disclosure group if the client had no explanation for the evidence or the evidence was judged as too weak. For early, gradual, and late disclosure, no

comment interviews were frequently advised to innocent clients. Even after disclosure in the interview, lawyers were reluctant to cooperate with the police due to their earlier tactics of withholding evidence.

The final difference between disclosure before and during interview is the reasons why lawyers advised guilty clients to make no comment interviews. Across disclosure groups, such legal advice was partially based on the client's admission of guilt. With pre-interview disclosure, the advice was also because lawyers judged the evidence to be weak. Conversely, in the remaining disclosure groups, the advice was due to the lack of disclosure.

**Innocent vs. guilty.** The main difference between the innocent and guilty groups worthy of highlighting, is that 34% of lawyers in the innocent group suggested or at least considered submitting a prepared statement to the police whereas none in the guilty group did. Lawyers representing innocent clients may simply be more willing to cooperate with the police. Alternatively, lawyers defending guilty clients may judge that if the client is to cooperate with the police and make an admission, the client may as well answer police questions rather than submit a prepared statement. In addition, the client (Christopher) was described as nervous and lawyers often suggest submitting a prepared statement because nervous suspects may find it less stressful than answering police questions (Blackstock et al., 2014: 324).

**Reverse guilt.** Recall that all of the lawyers were asked how their advice would differ if their client had actually claimed to be innocent instead of guilty or vice versa. Unfortunately, lawyers in the early, gradual, and late disclosure groups tended to respond as if they had been given disclosure before the interview by referring to the incriminating evidence in deciding their interview strategy. Essentially, lawyers' hindsight prevented them from responding as if they were in the same scenario again but with a client whose guilt status had been reversed.

Nevertheless, lawyers in the pre-interview groups did consider how they would advise their clients if guilt or innocence was reversed and the evidence was released prior to the interview. Only 7.7% of lawyers assigned innocent clients and 23.1% of lawyers assigned guilty clients maintained their advice of 'no comment' regardless of the client's new guilt status – the remaining lawyers all changed their interview strategy when their client's guilt status was reversed. Most lawyers (69.2%) with innocent clients advised putting forward an account to the police if the client had an explanation while most lawyers (76.9%) given a guilty client advised making no comment or suggested it as an option. This pattern of findings fits well with the earlier responses to the hypothetical scenario. Essentially, lawyers were more cooperative when they were representing innocent clients at the police station:

If he told me he was innocent then personally I would advise him on the matters disclosed that they provide strong circumstantial evidence that he was in the area at the time of the burglary. If he can provide an explanation for each piece of disclosure he should give it - it may avoid him being charged and mean that the police will need to make some further enquiries before deciding how to proceed. There might be any number of reasons why he was around at the time...I have had many many clients released without charge because they have given a full explanation at the earliest opportunity.<sup>37</sup>

### **Follow-up questions**

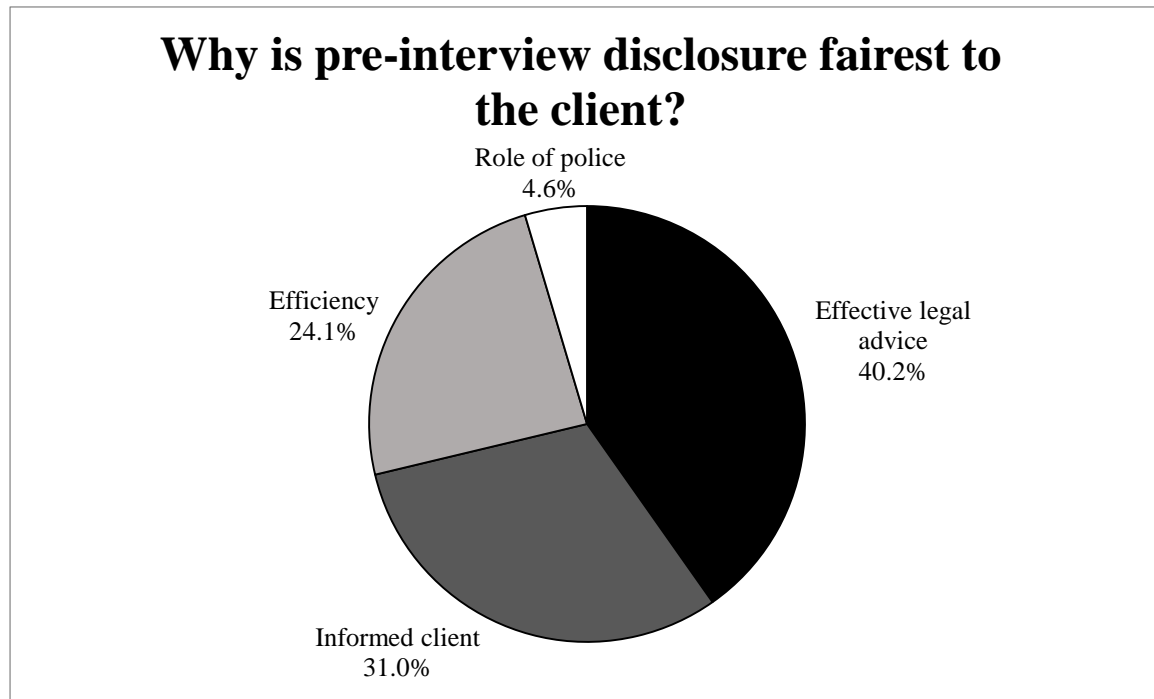
**Reasons for wanting pre-interview disclosure.** Of the 90 lawyers who answered the follow-up question on which level of disclosure is fairest to the client, all selected the pre-interview disclosure option and 87 provided reasons. We read over the reasons why lawyers preferred pre-interview disclosure and determined that there were four main categories of responses: [1] Effective legal advice, [2] Informed client, [3] Efficiency, and [4] Role of

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<sup>37</sup> Sol27.



police. Some responses included multiple reasons and were categorized according to the main reason provided. The categories are displayed in Figure 1 and will be discussed in order of frequency.



**Figure 1.** Pie chart displaying lawyers' responses to the question of why pre-interview disclosure is fairest to the client.

More than a third of lawyers (40.2%) claimed that pre-interview disclosure was necessary to advise their client effectively on interview strategy. Deciding whether the client should answer questions or remain silent and risk adverse inferences being drawn in court is a fundamental facet of custodial legal advice (Cape, 2011: 5). Yet, lawyers explained that without pre-interview disclosure, such decisions became problematic:

Because without knowing what evidence there is, it is impossible to advise the client on the strength of the case against him/her or potentially whether the offence is even made out. Fuller disclosure leads to better advice and quite often, more admissions.

With scant disclosure there is more justification for a no comment interview.<sup>38</sup>

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<sup>38</sup> Sol2.

A substantial portion (31.0%) of lawyers advocated pre-interview disclosure for the sake of having an informed client. An informed client is aware of the case against them, can provide a carefully thought out response, and is less likely to be distressed in the police interview. Here are some illustrative responses:

Clients are generally nervous in interviews, they think more clearly and are more coherent if presented with evidence before and given an opportunity to consider it and to give instructions so that they can be advised before being interviewed.<sup>39</sup>

Likewise it is unfair if police disclose late trying to trick a client into making up a story or prompting a lie. People admit things for many reasons - best not to know and cat and mouse is more than likely to lead to a miscarriage of justice.<sup>40</sup>

So he is not ambushed. So he has time to recall how the evidence came to be. So that he doesn't get flustered or nervous during the interview and accidentally say something incorrect.<sup>41</sup>

Evidently, lawyers believe uninformed clients are at a disadvantage in the police interview as the balance of power and resources is further swayed in favour of the police. This mirrors existing arguments that the lack of pre-interview disclosure violates the principle of equality of arms, a key part of the right to a fair trial as set out in Article 6, ECHR (Jackson, 2001). In addition, lawyers were particularly concerned about innocent clients being tricked or destabilised into producing unintentional inconsistencies during the police interview.

Importantly, the lawyers' desire for pre-interview disclosure was to get the most considered and accurate account from the suspect during the interview – not to concoct a false account of the evidence for the police. Providing the police with a reliable account is increasingly important as so many cases are dealt with through out of court disposals – either at the police

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<sup>39</sup> Rep40.

<sup>40</sup> Sol65.

<sup>41</sup> Sol67.

station or based on the interview evidence gained at the police station (Cape, 2011: 3). In line with the arguments on the client's emotional state and resulting inability to withstand the interview, one lawyer highlighted:

It is extremely difficult for a suspect to make up a defence as it goes along and therefore gradual and poor disclosure serves little purpose. Good disclosure can often present opportunities to raise non-court disposals before the interview takes place.<sup>42</sup>

A third and pragmatic reason for favouring pre-interview disclosure was efficiency. Lawyers (24.1%) echoed past research by arguing that without pre-interview disclosure, the result would be costly, lengthy, and fragmented police interviews (Kemp, 2010):

[I]t saves time and money - I have been in numerous interviews where I have been "drip fed" disclosure and have told officers openly that we will [make] no comment until they provide what I consider to be sufficient evidence to identify a crime and evidence to identify that my client is a suspect. I can recall one in particular where if the officers had given proper disclosure at the beginning it would have saved us all a lot of time and effort.<sup>43</sup>

Finally, 4.6% of lawyers indicated that withholding evidence is not part of the police officer's role. The following response summarises a number of arguments against withholding evidence and reveals yet another tactic legal advisers have developed to gain further information before the interview:

It often proves difficult/impossible to make an assessment of the client's position without disclosure. Police will withhold to test the veracity of the account or to "catch out" defendants which is inconsistent with their role as investigators and duties under the CPIA. Where drip fed disclosure is given it results in delay, interruption to

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<sup>42</sup> Sol75.

<sup>43</sup> Sol8.

the interview process, but rarely results in the confessions officers clearly hope will arise...Officers, just as clients, find refusing to respond to questions a challenging prospect and much can be learned through what is not said in response to carefully aimed questioning in the disclosure process.<sup>44</sup>

Similarly, another lawyer reiterated how police strategic disclosure violates the presumption of innocence:

Police drip-feed disclosure is an archaic manner of disclosure. It is regularly used to catch out criminals lying or attempting to lie. It also drags out a case and turns a ten minute interview into a two hour interview. The interview should be a presentation of the evidence by the impartial investigating officer for the comment of the alleged criminal. As innocent until proven guilty, the approach of staged disclosure seems to question that and places a more adversarial role on the police. It is for the court to judge the evidence and not the impartial investigating officer.<sup>45</sup>

Lawyers' comments are consistently grounded in principles of procedural fairness.

Importantly, their criticisms levelled at the police highlight how police disclosure tactics may fuel the pre-existing tension between legal advisers and police interviewers and may contribute further to the "hostile"<sup>46</sup> atmosphere of the suspect interview. Likewise, previous empirical research has also demonstrated that lack of disclosure is a point of conflict and misunderstanding between lawyers and police officers (Kemp, 2010, 2013; Skinns, 2009).

**Amount of evidence needed to advise clients effectively.** For the final follow up question on how much of the police's evidence lawyers needed in order to advise their client effectively, we determined that there were six main categories of responses: [1] All of the evidence, [2] Anything indicating guilt, [3] Specific pieces, [4] As much as possible, [5]

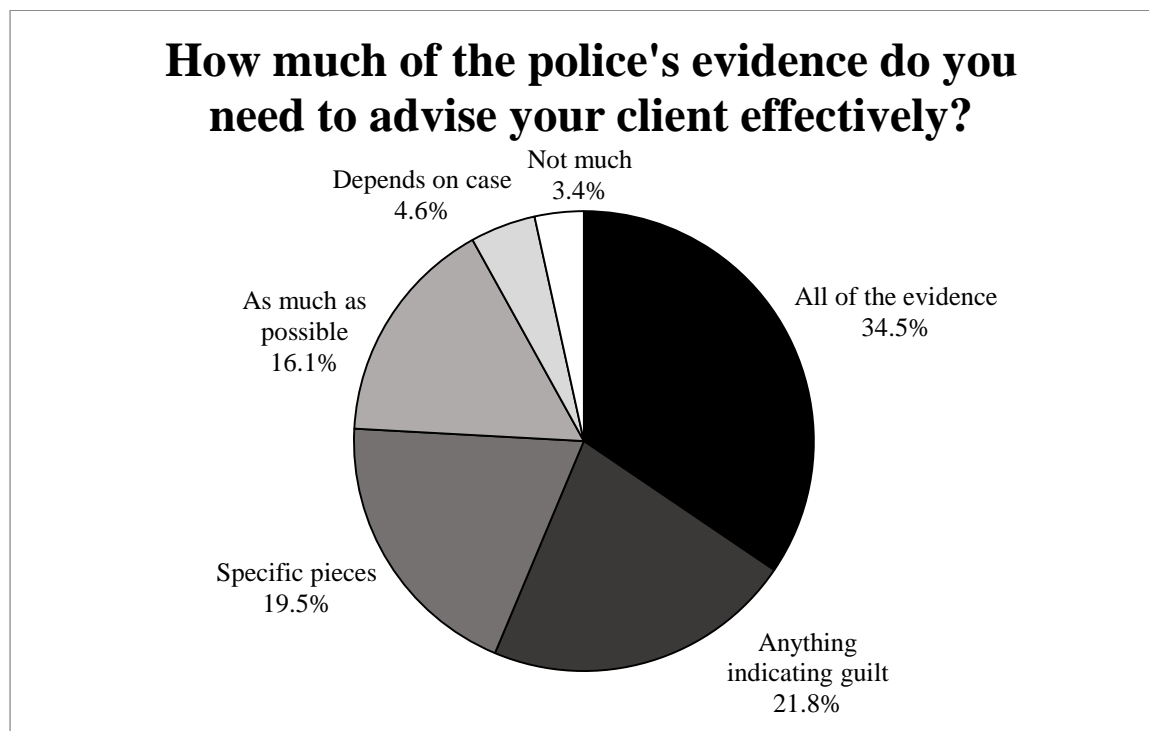
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<sup>44</sup> Sol7.

<sup>45</sup> Sol74.

<sup>46</sup> Sol26.

Depends on case, and [6] Not much. The categories are shown in Figure 2 and these, too, will be discussed in order of frequency.



**Figure 2.** Pie chart displaying lawyers' responses on how much of the police's evidence they need to advise their client effectively.

As is evident from Figure 2, approximately a third of lawyers (34.5%) claimed that they required all of the evidence held by the police to advise their clients effectively but that this “never happens”.<sup>47</sup> Lawyers seemed to believe such full and timely disclosure was beneficial to all parties involved, including the police. Thus, when asked how much evidence should be disclosed prior to the interview, this lawyer was typical in responding:

All of it. I appreciate that in certain circumstances the police wish to test the truthfulness of the client's answers, but generally speaking, by not disclosing properly, the police will not get what they want. In this scenario Christopher is almost certainly going to be convicted and therefore if I had known the evidence prior to the interview

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<sup>47</sup> Rep91.

my advice may have been very different. It is not the client's responsibility to admit the offence but if the evidence obtained is overwhelming he may as well admit it.<sup>48</sup>

Some lawyers (21.8%) claimed that any evidence that indicated the client's guilt and that would be the subject of questions in the interview, would enable them to offer effective advice. In essence, the disclosure had to allow them to prepare for the interview. Such a response is in line with the minimum disclosure requirements set out in the aforementioned EU Directive on the right to information.<sup>49</sup>

Others (19.5%) listed specific types of evidence that they believed was key to custodial advice, such as, "identification, CCTV, phone evidence, DNA, dates, times and places".<sup>50</sup> Notably, these subsets of evidence may not only indicate guilt but also an alibi for the client.

A few lawyers (16.1%) were willing to settle for as much disclosure as possible from the police while a handful (4.6%) highlighted that the amount of evidence needed depended on the case. Lastly, three lawyers (3.4%) stated that it was not essential to know all the evidence the police had and that ultimately they could advise their client effectively "with whatever level of evidence the police provide".<sup>51</sup>

### **Limitations**

This study is chiefly limited by its sole reliance on what lawyers say they would do in response to a hypothetical scenario as opposed to what they would actually do in reality. Although lawyers were encouraged to be as honest as possible and all responses were anonymous, some respondents may still have provided idealized accounts. However, many of

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<sup>48</sup> Sol69.

<sup>49</sup> See Council Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L142/1, para. 27.

<sup>50</sup> Sol15.

<sup>51</sup> Exec83.

the findings, such as advising clients to make no comment when the police withhold evidence, are in line with past field research (Blackstock et al., 2014: 396; Quinn and Jackson, 2007). Thus, it is unlikely that participants' responses in this study differ greatly from their advice at the police station. Moreover, by presenting participants with hypothetical scenarios, we could control for all other case factors and thus identify the specific effects that the timing of evidence disclosure and the suspect's assertion of innocence have on custodial legal advice. In this way, we combined the disciplines of law and psychology to draw on a different type of data to explore the consequences of various types of disclosure.

A second limitation is with regard to the recruitment of participants – the lawyers who were willing to take part in the study may feel more strongly about police disclosure tactics, hence their interest in this research. Thus, their views on how much pre-interview disclosure is necessary for custodial legal advice may not reflect the views of all criminal defence lawyers in England and Wales.

A final limitation is the ecological validity of the hypothetical scenarios presented to participants. In the scenarios, all the evidence was disclosed before the interview, early in the interview, gradually during the interview, or late in the interview whereas in practice, the police may use a combination of those approaches. For instance, we know that the police often disclose some evidence before the interview begins in order to avoid a 'no comment' interview from the suspect but that they strategically disclose the remaining evidence during the interview (Kemp, 2013). In other cases, the police strategically disclose evidence during several interviews (King, 2002: 53). The hypothetical scenarios used in this study did not capture such possibilities. Thus this study's findings cannot generalize to lawyers' advice in response to more complex police disclosure strategies.

## **Conclusions**

In sum, lawyers' responses to both the hypothetical scenario and follow-up questions advocate pre-interview disclosure of evidence as opposed to early, gradual, or late disclosure of evidence during the interview. As we expected, the pre-interview disclosure scenario allowed lawyers to provide more comprehensive, tailored legal advice highlighting how essential pre-interview disclosure is to ensuring the effectiveness of the right to legal assistance in practice. In contrast, early, gradual, and late disclosure of evidence during the interview led lawyers to advise tactically to elicit more disclosure, for example, by advising 'no comment' or arguing with the police. Such advice mirrors field observations in past research (Blackstock et al., 2014: 396; Kemp, 2010, 2013; Quinn and Jackson, 2009; Skinns, 2009).

Although lawyers were more cooperative when advising an innocent client compared to when advising a guilty client, withholding evidence until the interview discouraged lawyers to advise even innocent suspects to cooperate. In addition, early, gradual, and late disclosure typically led to more interruptions from the lawyers indicating that pre-interview disclosure may be a more effective and efficient way for police to gather information from suspects. As for the amount of pre-interview disclosure needed to advise clients, lawyers varied in their responses but the most common response was to receive all of the case evidence before the police interview.

Thus, by drawing upon a large sample of English and Welsh lawyers and employing a novel law – psychology procedure, this study provides further empirical support for the view that lawyers need pre-interview disclosure from the police in order to provide informed legal advice to their clients (Sanders, Young and Burton, 2010: 295; Cape, 2011: 5). This study's findings, along with past field research, carry important implications for how the police disclose evidence to suspects and their lawyers (Blackstock et al., 2014: 493; Kemp, 2013). Currently, the police show a preference for strategically releasing evidence during the



interview (King, 2002: 53; Smith and Bull, 2014; Walsh, Milne and Bull, 2015) – an approach that the courts support.<sup>52</sup> Yet, preventing lawyers from knowing the evidence against their client can greatly limit their ability to advise their clients before the interview and as a consequence, suspects will not benefit from case-specific legal advice. Thus, although the police in England and Wales dominate the process of disclosing evidence to suspects and their lawyers, it is vital that they consider the detrimental effects of delaying evidence disclosure for suspects.

### **Acknowledgements**

We thank Roger Leng, Juliet Horne, and Laurene Soubise for their insightful advice as we planned the study, the president of the local law society for generously circulating our study to numerous law society members, and the lawyers who gave up valuable time to participate in our research.

### **Declaration of Conflicting Interests**

The authors declare that there are no conflicts of interest.

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<sup>52</sup> For example, see *R v Farrell* [2004] EWCA Crim 597.

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