

**SOCIAL SECURITY LAW PRACTITIONERS**  
**ASSOCIATION MEETING**

**7<sup>th</sup> MARCH 2007**

**Presentation by**  
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**Tactics In Respect of Advising and Representing Clients at**  
**Benefit Fraud Interviews : Andy Malik**

Due to many reasons Benefit Claimants are interviewed under Caution by Officers of the DWP and Local Authorities. It is noteworthy that many of these people are unrepresented or are represented by advisors who either lack an understanding of Criminal Litigation or Social Security Law or both.

This presentation intends to deal with the practicalities of how we can all advance our client's legal rights by giving them adequate advice in respect of Interviews under Caution.

**The Client makes contact with the Advisor**

It is usual for clients to receive a vague letter from the Fraud Officers which asks them to make contact with the Fraud Officer in order to arrange an Interview under Caution. Local Authorities and the DWP vary in their stance. Some letters indicate that the interview will take place under Caution whilst other don't.

**What as Advisors should we do when the Client receives such a letter and brings it to us?**

The starting point would be to take instructions from the client and ask him what he thought the letter was about. However this is usually a fruitless exercise because clients tended to be reluctant as to what they disclose on initial meetings or are generally unclear why they have received a letter. In these circumstances it may be appropriate to contact the relevant Officer and ask for disclosure.

A letter in the following terms may be appropriate:-

*Dear Sir/Madam,*

**Re:**

*We have been instructed by the above who we understand you wish to Interview under Caution. We would be grateful if you could give us an outline of why you need to Interview under Caution so that we can take instructions. Once we receive this information from you we will revert back to you.*

*Yours faithfully,*

Generally the DWP do not like responding to the above letter but you usually get a telephone which gives you an outline of the allegation. However the DWP usually advise that if the client attends the Interview under Caution disclosure will be provided at that stage.

## **Should the Client Attend the Interview under Caution?**

The best way to judge this is whether or not the client has current entitlement to benefit. For instance:

*" Mrs A has been claiming Income Support from 1990. Throughout her Claim and currently she has £70,000.00 savings. There is no question of the money belonging to anyone else or being held on trust. She is the sole beneficial owner of this capital".*

As there is prima facie no entitlement to Means Tested Benefit in light of her capital it would be a pointless exercise for her to attend an Interview under Caution unless her instructions are that she has made disclosure to the relevant office. Such instructions would need to be probed very carefully balanced with whether her admission that she has capital help establish a case against her. The questions that she would need to be asked would be as follows:-

- i. How many Income Support Review Forms she has completed?
- ii. When did she make disclosure?
- iii. Who did she make disclosure to?
- iv. How did she make the disclosure ?
- v. When did she acquire the money ?

It may be that the client does not know the above information. In these circumstances making a call to the DWP and requesting information about how many Review Applications have been submitted could provide the answer in most cases.

Some may feel that the advice for clients in the above circumstances not to attend an Interview under Caution is somewhat bold, but in cases that I have been involved in the Departments policy is that cases without an IUC shall not be accepted for prosecution unless the remaining evidence contains sufficient support. I attach the letter from the DWP Solicitors to a Fraud Officer in respect of a case that I was involved.

In the event that you have advised the client not to attend an Interview under Caution you should simply send a letter to the DWP stating that the client is exercising their legal right not to attend an Interview under Caution. Remember this advice is only applicable where the client has no entitlement to current benefit and no defence under Section 71 of the Social Security Administration Act.

Supposing you have a client who has no entitlement to benefit but strongly maintains that he/she made disclosure. Should you attend an Interview under Caution or not?

This is a tricky question. However before a definitive answer can be provided it may be useful to remember some basic general propositions in respect of Interview under Cautions at Benefit Offices/Local Authorities.

- They are voluntary and the client is not under arrest.
- They are under Caution. The Caution states *"you do not have to say anything but it may harm your defence if you do not mentioned something which you later rely on in your defence."*

In respect of the Caution and the silence provisions the following proposition should also be remembered:-

- Silence on its own cannot prove guilt.
- Over the years both domestic and national Courts have drawn up the following conditions for drawing inferences:-
  - i. The silence provisions only apply in criminal proceedings.
  - ii. The alleged failure to mention facts subsequently relied upon must occur before charge or on being charged.
  - iii. The question must be directed to trying to discover whether or by whom the alleged offence was committed.
  - iv. The failure of the accused must be to mention a fact relied on in his/her defence in those criminal proceedings.
  - v. The accused could reasonably be expected in the circumstances existing at the time to have mentioned the facts relied on at trial (**R v Argent**)<sup>1</sup>

Of course it goes without saying that tactically in the event that your client is going to do a total no comment interview at a DWP or Local Authority fraud interview , he should refuse to be interviewed in the first place. This is because the adverse inference will not bite because he was not questioned under Caution. As you will recall he has a right to leave as he is not under arrest .

### **"I told em guv"**

It is not uncommon for our clients to assert that they have made disclosure to the DWP. If these are our clients' instructions we should not make judgemental comments that "*we have heard this one before*". The reality is that if a client asserts in an Interview under Caution that disclosure was made the Secretary of State will have to disprove that. He would have to disprove it by evidence.

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<sup>1</sup> 1997 2 Cr App R 27) [1997] Crim LR 346

In CSB\347\1983<sup>2</sup> Mr Commissioner Edward Jones dealt with the difference between evidence and assertion; at Para 10 he stated :

*" finally I would like to refer to a submission by the benefit officer now concerned as to " burden of proof " . It is put in the following terms: -*

*" Although the burden of proof rests on the benefit officer .... He discharges at least the initial burden by his evidence that he has no record of any disclosure. The claimant must then give his account of what happened and the tribunal then come to a positive finding whether the benefit officer has discharged the burden of proof ."*

*Though it contains much that is sound , the submission as so stated is in my judgement over- stated. True it is that the burden of proof rests on the benefit officer. True it is ( as is implicit though not stated in the submission ) that it is a burden of proof upon a simple balance of probabilities. True it is that if the benefit officer lays a proper foundation for establishing that :*

- (i) there is no official record of disclosure by the claimant;*
- (ii) there was a material change of circumstances; and*
- (iii) had that been disclosed , there would , on the balance of probabilities , be extant a record of that disclosure held by the department;*

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<sup>2</sup> Not available on the website – copy attached.

*it could then properly be said that a prime facie case had been established , and the burden of proof resting upon the benefit officer would stand discharged unless the claimant ( or his representative ) was by evidence or submission to displace the prime facie case. **But such a foundation must be properly laid – and until they are there is nothing for a claimant or his representative to rebut. "***

In these circumstances rather than subject your client to an Interview under Caution a prepared Statement in general terms may assist him.

The Statement will need to be in broad terms and not lead to disputes in respect of collateral issues. Further two leading cases – **R v Roble** (21 January 1997) and **R v Knight**<sup>3</sup>, have held that a prepared Statement which covers the relevant facts which are relied upon at trial do not invoke the adverse inference provisions. However the dangers of a prepared Statement are that if the client's evidence changes or he misses a vital piece out of the jigsaw out this could be subject to damning cross examination.

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<sup>3</sup> [2003] EWCA Crim 1977, [2004] 1WLR, 340, [2004] 1 Cr App R 9, [2003] Crim LR 799, see also R v McGarry [1999] 1 WLR, 1500, [1998] 3 All ER 805, [1999] Cr App R 377; [1999] Crim LR 316.

Once the Statement is read on tape the advisor should advise his client to leave.

An Example of such a prepared statement could be :

" I Mrs A do say as follows:

1. In the event that the secretary of state / local authority can prove that I was paid the benefits which they say I was not entitled and which they say I have been overpaid to I will say that :
  - (a) I deny failing to report a change of circumstances
  - (b) I deny behaving in a dishonest manner
  - (c) I have disclosed details of all capital I have at the material time. ( Add details such as when disclosure was made etc here )
  - (d) The reason I made the disclosure in ( c ) was because I did not know what would and what would not effect my benefits so I told the DWP. I assume that everything was in order because I did not hear back from them.



2. I have nothing more so at this stage on legal advise and exercise my right to leave.

Client with mental & \ or learning disabilities

If you have a client with mental heath issues or learning disabilities it may be appropriate to seek expert medical evidence in respect of whether or not the client understands. Whilst he are seeking this evidence you may wish to defer the IUC. The expert particularly in respect of suffers of learning disabilities should be asked to carry an IQ test and in light of that test be specifically asked if the caution would be understood and if not why not.

Andy Malik ©

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Attached

CSB\347\1983