The purpose of this paper is to give defence advocates a basic guideline for preparation and performance at hearings in the NSW Local Court involving offences of domestic violence, including some direction with forensic decisions that arise commonly, as well as a brief discussion on ethical problems which may present and how to deal with them appropriately.

This paper is not a comprehensive guide and merely sets out a number of considerations advocates should be aware of. Further research on the topics covered is advised.

It is substantially based on my own experience as a solicitor with the Aboriginal Legal Service in Western NSW.

Defending Allegations of Domestic Violence in the Local Court of NSW

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A reference to:

*'**The Crimes Act**' means: the Crimes Act 1900 (NSW).*

*'**The Crimes (Domestic and Personal Violence) Act**' means: the Crimes (Domestic and Personal Violence) Act 2007 (NSW).*

*'**The Criminal Procedure Act**' means: the Criminal Procedure Act 1986 (NSW).*

*'**The Evidence Act**' means: the Evidence Act 1995 (NSW).*

*'**LEPRA**' means: the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).*

A Domestic Violence Offence means:

A personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship[1].

A Personal Violence Offence means:

An offence under relevant sections of the Crimes Act, and the Crimes (Domestic and Personal Violence) Act[2].

A Domestic Relationship exists between people where they are:

Married, de facto partners, involved in a sexual relationship, living or have lived together in the same household or residential facility, have or have had a dependant relationship involving paid or unpaid care, relatives[3], in the case of an Aboriginal or Torres Strait Islander part of the extended family or kin according to the indigenous kinship structure of that culture[4].

***F**rom a regional NSW perspective, the circumstances surrounding accused persons charged with offences of domestic violence often involve allegations of assault, intimidation or property damage not only by a partner to a relationship but also between siblings, immediate and extended family members, and often will involve complainants in a domestic relationship with protected persons pursuant to a current apprehended violence order.*

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[1] Crimes (Domestic and Personal Violence) Act 2007 section 11
[2] Crimes (Domestic and Personal Violence) Act 2007 section 4
[3] Crimes (Domestic and Personal Violence) Act 2007 section 6
[4] Crimes (Domestic and Personal Violence) Act 2007 section 5

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PART I

PREPARATION & PROCEDURE

Pleading Not Guilty & the Offence

Timetabling

Special timetable provisions apply to proceedings in the NSW Local Court involving domestic violence[5]. The plea of not guilty is the trigger that begins this timetable for proceedings.

Magistrates in the jurisdiction are under a duty to adhere as closely as possible to these practice directions, so as a practitioner, consider it essential to understand and abide by them as far as possible.

Material Necessary to Advise and Obtain Instructions

By the first mention date for an offence involving domestic violence, the prosecution is under an obligation to have provided a copy of the alleged facts, any statements already obtained from the complainant(s), any criminal antecedents as well as a copy of the Court Attendance Notice (CAN)[6].

The CAN contains particulars of the offence that the fact sheet does not such as time, place and victim. This information must be considered in order to properly advise your client about the allegation.

A facts sheet will often disclose multiple offences, sometimes against different people and it will be impossible to know what allegation your client is facing without the CAN.
Practitioners who negligently enter pleas without examining the CAN on the assumption they have discerned from the facts sheet what the charged allegation is stand to be seriously embarrassed if it transpires that the police are actually relying on conduct other than what they had assumed.

Because of the potential consequences for the client and the repercussions for the lawyer in such a situation, the importance of obtaining and thoroughly reviewing the CAN cannot be overstated.

[5] Local Court Practice Note Crim 1 Chapter 10
[6] Local Court Practice Note Crim 1 Chapter 10.3

Know the offence the client has been charged with and the elements required to be proved by the prosecution to successfully obtain a conviction. Knowing the offence and the relevant case law surrounding the offence helps narrow the issues for a defence practitioner and provides a basis for preparation focus.

Advice Necessary before Entering a Plea

Lawyers can only properly advise a client to enter a plea of not guilty once they are aware of the allegations, have obtained some instructions in reply to them and properly advised the client.

The ethical and other obligations on practitioners in this respect were recently emphasised by Johnson J in Gaudie v Local Court of New South Wales and Anor [2013] NSWSC 1425:

At 213:

> *The ethical obligations of legal representatives appearing for all defendants in the criminal courts are well known.... The obligation of a legal practitioner in these circumstances is to take early instructions concerning the charge in question and, in that context, to comply with the requirements under the Revised Professional Conduct and Practice Rules to explain to the client the consequences of an early plea of guilty. Rule A.17B is intended to ensure that the client makes an informed decision as to plea. If the matter is to proceed as a defended hearing, the defendant's legal representatives must also comply with the obligations under Rules A.15A and 20.*
>
> *These Rules serve to ensure the proper use of Local Court time to determine the real issues in dispute in the proceedings: Director of Public Prosecutions (NSW) v Wililo [2012] NSWSC 713; 222 A Crim R 106 at 121-122 [50].*
>
> *This obligation is emphasised with respect to summary hearings in the Local Court for domestic violence offences. The Chief Magistrate has issued Local Court Practice Note Crim 1, which provides for case management of criminal proceedings in the Local Court: ss.26(2)(a) and 27 Local Court Act 2007. Clause 10 of the Practice Note relates expressly to domestic violence proceedings. The objects of paragraph 10 include ensuring "that, where appropriate, pleas of guilty are entered at the first available opportunity and if a plea of not guilty is entered that a hearing occurs with expedition" (clause 10.2(a)). A time standard is nominated, proposing a hearing within three months of a charge being laid (clause 10.2(b)). Provision is made for streamlining any hearing, with certain specific steps to be taken where a defendant is legally represented (clause 10.3).*
>
> *These provisions give effect, as well, to a statutory object of the Crimes (Domestic and Personal Violence) Act 2007 - to ensure that "access to courts is as safe, speedy, inexpensive and simple as is consistent with justice" (s.9(2)(b) at [113] above).*

Instructions

You must explain each element of the offence to the client, and take them through *each relevant paragraph of every statement* including the facts sheet. Obtain their account of any dialogue or series of events they were witness to or could reasonably be thought to have knowledge about.

Obtain detailed instructions on the critical parts of the narrative; the words that were said or the way in which a weapon is alleged to have been held are important details because they may influence a Magistrate's opinion on the reliability of a witness.

Commonly, instructions in response to allegations of domestic violence will be that, for instance, while an argument may have ensued, no violence or intimidation occurred as a result. Knowledge of the offence (for instance, what constitutes intimidation) and appreciation of the related case law is necessary in order to adequately advise your client in these situations, but keep in mind these basic types of defences:

Defences

Self Defence

In matters involving an assault or other use of force a defendant may rely on self defence where they believe their actions were necessary:

(a) To defend themselves or another person, or

(b) To prevent or terminate the unlawful deprivation of their or another person's liberty, or

(c) To protect property from unlawful taking, destruction, damage or interference, or

(d) To prevent criminal trespass or to remove a person trespassing on any property

Any conduct must be a reasonable response in the circumstances as your client perceived them[7].

This imports a 2 part test in order to rely on the section.

[7] Crimes Act 1900 section 418

Firstly, the accused must believe their response to the perceived threat was necessary. This is the subjective test. The court may rely on available inferences based on the evidence as to the accused state of mind, or receive such evidence from the accused under oath.

The court will then assess the proportionality of that response as to whether it was reasonable in the circumstances as they were perceived by your client. This is the objective test.

Self defence is not excluded merely because the accused person's actions were in response to lawful conduct[8].

Self defence need not be raised through defence evidence, it can be raised on the prosecution brief of evidence (either through witness accounts or otherwise).
It must be raised in a meaningful way[9], but once raised the prosecution must prove beyond reasonable doubt that at least one of the two elements was not present in the relevant incident[10].

Lack of Intent

- *Specific Intent*

Crimes that intend a required effect as a result of an act, like assault with intent to commit grievous bodily harm, are crimes that require the prosecution to prove the accused either intended to cause (or recklessly did cause) the resulting circumstances of an act. Given the requirement of foresight of the likely consequence of the conduct, the offence of stalking and intimidating[11] arguably falls into this category.

The law says these are crimes of specific, rather than general intent.

Section 428B of the Crimes Act states:

> *(1) An "offence of specific intent" is an offence of which an intention to cause a specific result is an element.*

The section provides a non-exhaustive list of example crimes that attract the element of specific intent. In such offences the

[8] Crimes Act 1900 section 422
[9] Douglas v R 2005 NSWCCA 419
[10] R v Katarzynski 2002 NSWSC 613
[11] Crimes (Domestic and Personal Violence) Act 2007 section 13

prosecution must prove the actual intent of the accused at the relevant time and not merely the capacity to form the intent.
Self induced intoxication may be taken into account for offences of specific intent when assessing whether that required intent existed at the relevant time or not.

Section 428C of the Crimes Act states:

Intoxication in relation to offences of specific intent:

(1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.
(2) However, such evidence cannot be taken into account if the person:
(a) Had resolved before becoming intoxicated to do the relevant conduct, or
(b) Became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

Intoxication may be highly relevant in convincing a Magistrate for example that a doubt exists as to whether your client intended a particular result of the charged offence. Often evidence as to intoxication will come from the prosecution case itself and sometimes witnesses will readily agree to questions designed to maximise the intoxication of the accused. The court will of course draw inferences from all the evidence as to your client's coherence and ability to perceive likely consequences with which to infer the requisite level of intent. Depending on the wording of the offence creating provision, an accused person may be reckless as to the likely effect of their actions as well.

- *No Hostile Intent*

There must be hostile intent to constitute an assault[12]. So where an accused person for instance throws a phone or book at a complainant without any intention of committing an assault, it may well be argued the offence is without the necessary basic intent.

A determination on whether an act was committed with hostility will turn on the Magistrate's interpretation of the evidence, and clearly some acts are inherently hostile, such as a punch or a slap.

Submissions based on this common law principle should only be raised in appropriate circumstances.

[12] Fairclough v Whipp 1951 2 All ER 834

Lawful Correction

See section 61AA of the Crimes Act.

This defence applies strictly to parents or guardians charged with assault on a child in their care. The defence is only available where:

- The force used on the child was for their punishment
- The force was applied by the parent or a person acting for a parent of the child
- With regard to the physical and mental characteristics of the child, or what the child did, the force that was used on the child was reasonable

However, the force will not be considered reasonable if:

- The force was applied to the neck or head of the child, unless it was trivial or negligible
- The force is likely to cause harm to a child that will last for more than a brief period

The burden lies with the defendant to prove they were correcting the child in their care on the balance of probabilities.

Remember as you take instructions, that fanciful or far-fetched explanations as to your client's behaviour or conduct will not return favour from the Magistrate and will do nothing for your own credibility either. Occasionally during a conference, asking questions of your client as a prosecutor would in cross examination, will yield a better quality of instructions as well as help you identify potential fabrications within their story.

First Mention

Once your client is properly advised and elects to plead not guilty a plea of not guilty is entered on the first mention date, where possible, though a Magistrate should grant an adjournment for up to 7 days for a practitioner to seek further instructions[13].

Seizing the opportunity for a week's adjournment can be a useful way for practitioners to research the elements and case law of an offence they may not be familiar with. This is far more beneficial for the court and the client than simply setting the matter down for hearing and researching during the interim.

[13] Local Court Practice Note Crim 1 Chapter 10.3

Two things happen as a result of the plea of not guilty; the Magistrate will list the matter for hearing at the first available opportunity without a further mention, and the prosecution become under an obligation to serve a copy of the brief of evidence no less than 14 days before the date set for hearing on the accused person or their legal representative[14].

The Brief

Part 4 Division 2 Section 183 of the Criminal Procedure Act provides:

> *(1) If an accused person pleads not guilty to an offence, the prosecutor must, subject to section 187, serve or cause to be served on the accused person a copy of the brief of evidence relating to the offence.*
>
> *(2) The brief of evidence is, unless the regulations otherwise provide, to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence and is to include:*
>
> *a) Written statements taken from the persons the prosecutor intends to call to give evidence in proceedings for the offence, and*
> *b) Copies of any document or any other thing, identified in such a written statement as a proposed exhibit.*
>
> *(3) The copy of the brief of evidence is to be served at least 14 days before the hearing of the evidence for the prosecution.*
>
> *(4) The Magistrate may set a later date for service with the consent of the accused person or if of the opinion that the circumstances of the case require it.*

The facts sheet is a synthesised reproduction of evidence the police will seek to adduce at hearing. That material is served as the brief of evidence. In domestic violence proceedings it usually contains:

- *Statements*
- *Transcripts of interviews*
- *Photographs*
- *AVO documents*
- *Criminal history*

The full brief of evidence must be served at least 14 days before the hearing[15]. Late service of brief items is dealt with in the next part of this paper.

[14] Local Court Practice Note Crim 1 Chapter 10.3

[15] Criminal Procedure Act 1986 section 183(3)

Disclosure

Material such as a witnesses criminal history, ICV footage, previous COPS entries or the custody management record are not usually provided in the brief (because they are not usually sought to be adduced by the prosecution) but can assist the defence in some cases.

Material that could reasonably be capable of assisting the defence case falls within the prosecutor's obligation of disclosure and does not require a subpoena to acquire[16].

Often police prosecutors will initially refuse to disclose material going to the defence case, for example a criminal record of a prosecution witness going to their credibility. The response from the prosecutor is often to the effect that the defence should issue a subpoena. This will often be impracticable due to the timetable requirements and is in any case unnecessary. An effective response generally is to raise the matter before the Magistrate, explain what the material is and why it ought to be disclosed. Then inform the court (as politely as possible) that you are not ready to proceed in the matter until disclosure is undertaken and that (if this is the case) you understand the material could be obtained in a few minutes from the police station.

Much of the case law on the court's power to enforce disclosure[17] and the current statutory obligations[18] upon the Director relate to matters proceeding on indictment, so when preparing an argument the defence should be provided with the material you request, advocates should consider authority for the proposition Magistrates possess the same power[19].

[16] Mallard v R (2005) 224 CLR 125 Kirby J
[17] Carter v Hayes (1994) 61 SASR 451
[18] Criminal Procedure Act 1986 section 137
[19] Gaffee v Johnson (1996) 90 A Crim R 157

The Case Theory

Preparation of any hearing consists generally of 3 things:

- Taking instructions
- Critically analysing the brief of evidence, and
- Creating a case theory

The defence case theory might be explained as an alternative narrative of events or a series of propositions as to what happened or might have happened, which if accepted, would lead to a favourable outcome for your client.

Aligned as closely with the evidence as possible, a case theory ideally navigates the path of least resistance in terms of any damaging evidence.

There are several ways a hearing can be won, the most common being:

1. The prosecution evidence does not prove a prima facie case.
   This allows the defence to remain silent and proceed to final submissions after the close of the prosecution case.

2. The prosecution case does prove a prima facie case but does not prove the case beyond a reasonable doubt.
   Again allowing the defence to remain silent and proceed to final submissions after the close of the prosecution case.

3. The prosecution evidence is rebutted by the defence evidence.
   In circumstances where a defence advocate cannot reasonably submit either of the first two scenarios without needing to rebut parts of the adduced evidence at the close of the prosecution case, the defence may open a case and provide evidence to the court in support of the case theory.

The first point above is obviously the easiest route to success. A succinct submission on the elements should be made at the close of the prosecution case, if the submission is upheld the proceedings will be dismissed. Costs would then be the only question.

Deciding whether points two or three hold the best prospects for your client is probably the hardest task of a defence lawyer in the Local Court. A clear and well thought out case theory will assist you in making an often hard decision.

A case theory is a narrative based on evidence, or inferences available from the evidence, in support of one of the above three ultimate submissions. A good case theory is:

- Consistent with your instructions
- Consistent as possible with the evidence
- Rational
- Not fanciful or far fetched

In order to build an effective case theory you must have thoroughly evaluated the factual material available and anticipated the material the prosecution is likely to focus on.

You will be forced to explain the strengths of the prosecution case and bear keenly in mind that unreasonable explanations surrounding incidents or conduct are unlikely to win the favour of any Magistrate, particularly in relation to allegations of domestic violence.

The case theory aims to decrease the probative value of damaging evidence and should be built, where possible, simply on the prosecution case.
Being able to submit on deficiencies in the prosecution brief is clearly advantageous, but in most cases at least some cross examination will be required of police, complainants or witnesses based on your clients instructions.

The case theory is employed at the hearing through cross examination of police witnesses, through examination-in-chief of your client and any defence witnesses or by tendering pieces of evidence, and ultimately delivered through submissions.

While the outcome of most domestic violence hearings will turn on a factual basis which will ultimately require you to advance a case theory involving your instructions, a case theory may also involve submitting a legal argument.

A legal argument concerning the weight or admissibility of prosecution evidence should be the first stop for case preparation before assessing the need for instructions in some cases. These are found when the brief is analysed.

This paper has examined the concept of a case theory first, but in reality the process of analysing the brief and forming a case theory may occur in any order and is often an interchangeable process.

Legal Analysis

Preparing argument for the hearing requires an appraisal of the prosecution case by understanding what evidence is admissible and noting the strength of that admissible evidence.
Appraising the strength of the case means cross referencing the evidence with the elements of the offence charged and asking the following questions:

- Is the evidence admissible
- If so, does it go towards proving the offence
- If it does then how strong is it
- To what degree is it corroborated
- Can my case theory explain it

Is the evidence admissible?

The first step in assessing the admissibility of evidence is considering whether or not it is relevant for the proceedings[20].

- *Relevance*

Evidence that does not bear on the offence in question other than to explain the narrative, is likely irrelevant and thus inadmissible. Bear in mind however the more evidence that remains unchallenged the more synthesised the issues become making the process simpler and more time effective. The issue is to strike a balance between evidence which is damaging, or in some way corroborative of such evidence, and evidence which is not.

Example:
W gives a statement to the police about an assault they witnessed. The statement details the assault but then concludes with an account of W's afternoon errands.
Evidence of the errands is not relevant to the assault or to any required narrative however an advocate need not necessarily object to its inclusion because it may be more time effective to focus on other more important areas of the statement

In a domestic violence setting, a statement from a complainant may include references to prior allegations of assault by your client, which are usually prejudicial to their character and often have no legal relevance to facts in issue and generally speaking, such material should be objected to.

[20] Evidence Act 1995 section 56(2)

If the prosecution seeks to rely on such matters as tendency, coincidence or context evidence this should be expressly done.
If the evidence is relevant then it is said to be admissible unless it can be further excluded under relevant provisions[21].
So, evidence may be relevant but excluded on a number of grounds.

The following types of evidence are routinely found within statements provided to the defence as part of the prosecution brief:

- *Hearsay*

Hearsay is one of the most fundamental rules of evidence but also one of the more complex. Principally, the laws of evidence revolve around reliability, and the hearsay rule is designed to keep inherently unreliable forms of evidence away from the tribunal of fact.

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation[22].

Put more simply, statements (or representations) made out of court (whether written or said) are not admissible in evidence if they are sought to be admitted for the truth of their content. Only the maker of the out of court representation may give such evidence.

It sounds confusing because it is, and this short introduction will not substitute for more thorough research on your behalf. For the purposes of this paper, evidence of what a person said will only be admissible if that person is available to give the evidence in the witness box.

Which means in a practical sense, if W gives a statement to police saying they saw your client assault V, that evidence will only be admissible if W is at court. By extension this means the police officer who took W's statement, although being told by W what happened will not be permitted to essentially give W's evidence to the court. Further, W's statement will not be admissible as a document either (because it is an out of court representation).

The Evidence Act contains a list of exceptions to the rule. The only exception discussed for the purposes of this paper is when the maker of the representation is unavailable, discussed later.

[21] Evidence Act 1995 section 56(1)
[22] Evidence Act 1995 section 59(1)

- *Opinion*

A witness may give evidence on what they saw, heard or otherwise perceived but not conclusions based on these observations[23].
Of course, there are exceptions[24], but for the purposes of most domestic violence proceedings, where a witness attempts to draw an inference from their observations not based on matters of common understanding (such as level of intoxication), an objection should be raised.

Example:
W gives evidence they saw D looking angry. This would constitute an admissible lay opinion.
W gives evidence that D must have been angry about an argument they had a week earlier. Without some further explanation as to why W might reasonably assume this, such evidence would constitute an inadmissible opinion.

- *Prejudice*

If the probative value of evidence is outweighed by the danger of its prejudicial effect, the court must refuse to admit it[25].

Some Magistrates are firmly of the opinion that section 137 of the Evidence Act has no application in the Local Court and certainly the law is clear that an assumption is made that Magistrates are professional fact finders trained and capable to exclude from their consideration prejudicial material. Indeed the efficient disposition of the business of the court requires that this assumption be made.
Magistrates for example will regularly hear bail applications by people they later preside over defended matters for. Similarly they may hear matters against the same defendant on multiple occasions depending on the context.

There is however a view held by some Magistrates that section 137 does have operation, particularly where admission of particular material will prejudice the defence in a significant procedural way making it possible the material will later assume undue importance. Such evidence on this view should be excluded pursuant to section 137.

[23] Evidence Act 1995 section 76
[24] Evidence Act 1995 section 77-79
[25] Evidence Act 1995 section 137

Should the Magistrate find the probative value of some piece of evidence is outweighed by the danger of unfair prejudice; the evidence must be excluded as per the mandatory terms of s137[26].

- *Admission and Interview Evidence*

Some of the most damaging pieces of evidence in any brief of evidence are admissions made by an accused person. The Evidence Act treats admissions as an exception to the hearsay rule[27] and admissible for the truth of their contents. Being statements "against interest" the law has long regarded admissions as among the most reliable of forms of evidence, however the law is stringent on the making and adducing of admissions.

The law regarding admissions is complex and the following is merely a brief guide for practitioners[28].

Ordinarily admissions arise in two ways:

- During the course of a police interview or police questioning
- Admissions are volunteered to police or 3rd parties

When an admission is made to police in response to questions, keep in mind the following:

Was your client cautioned before making the admission, and if so, did they understand the caution[29]?

Has the admission been acknowledged in documentary form[30]?

Does section 281 of the Criminal Procedure Act apply[31]?

Consider your client's state of mind at the time of questioning. The court holds a discretionary power to exclude unfairly obtained admissions[32]. This might include for instance, admissions obtained from highly intoxicated persons, or where breaches of safeguards pursuant to Part 9 of LEPRA can be shown on balance.
Practitioners should carefully examine Part 3.4 of the Evidence Act to determine whether there is a basis to exclude admissions.

[26] Blick [2000] 111 A Crim R 326
[27] Evidence Act 1995 section 81
[28] http://www.criminalcle.net.au/attachments/admissions_paper_version_for_crimcle.pdf
[29] Evidence Act 1995 section 139(1)
[30] Evidence Act 1995 section 86
[31] R v JG (No.2) [2009] NSWSC1055
[32] Evidence Act 1995 section 90

Sections 138 and 139 of the Evidence Act are also important.
The question of whether admissions should be excluded under section 138 will depend on whether they are improperly or unlawfully obtained. This will depend often on a close examination of whether the legislation used to obtain the admissions was breached. LEPRA is often important in this respect.

Statements made voluntarily will usually be assessed in terms of admissibility pursuant to sections 85 and 90 of the Evidence Act.

Good advocates anticipate these sorts of admissibility arguments and seek to deal with them at the outset of the hearing. Prepare a written summary of your objections identifying the evidence you wish to exclude, and the legal basis for its exclusion.

Such arguments usually take place on a voir dire, discussed later.

If so, does it go towards proving the offence?

Your objective is always to limit the amount of evidence the bench receives, however the more evidence which is unchallenged the more refined the issues become, allowing you to focus your preparation more appropriately.

Some evidence bears no consequence on the outcome of the hearing – usually (but not always) evidence from arresting officers need not be subject to objection. This is contingent of course on a variety of factors; if admissions have been made which require objection or if time in custody is in issue, the officer's evidence in question may need to be tested under cross examination.

The best case scenario at hearing is to have confidence the police are unable to prove their case on the evidence and allowing the matter to proceed on what is commonly referred to as a "hand up" basis. This is where the defence consent to the prosecution tendering the entire brief to the Magistrate at the beginning of the hearing. A hearing which proceeds on a "hand up" basis saves an advocate having to open a defence case and is the most favourable avenue for the defence.

In many instances though, invariably the evidence goes towards proving the offence thus creating a case to answer.

If it does then how strong is it?

If the evidence is admissible and it substantiates an element of the offence, an assessment of the strength of that evidence is essential.

Evidence varies greatly in quality, and some forms are inherently more reliable than others.
In terms of witness statements, advocates should evaluate the circumstances in which accounts are provided to police.

A witness's level of intoxication can be a relevant factor impacting on the level of reliability or 'weight' of an account. Other details of witness accounts such as distance from the scene or level of light are all important issues a competent advocate would cover during cross examination. An effective advocate would seek to draw the Magistrate's attention to such discrepancies, and between accounts of different witnesses or previous accounts of the same witness where possible, the net effect being to lower the strength of any damaging evidence.

To what degree is it corroborated?

Another factor which influences the weight of evidence is the degree to which it is corroborated by other sources.

A complainant's heavily intoxicated account to police of an assault may lack probative value when viewed by itself, but that value may increase to the extent to which it can be corroborated by other forms of evidence.
Evidence such as photographs of injuries or damage, immediacy of complaint, police observations and witness accounts all influence one another.

Of course several weak pieces of evidence cannot work to create one reliable account, but where evidence which can be relied upon substantiates a more inherently unreliable account the court will be slower to dismiss the latter.
The converse is also true. Where a seemingly reliable account of an assault is given, its credibility may be impacted by other contrary but reliable pieces of evidence. The extent to which the damaging evidence is impacted will be something for the advocate to highlight during evidence and elaborate on during submissions.
In terms of corroboration, circumstantial evidence is often one of the most reliable forms of evidence[33]. It might be defined as

[33] Taylor Weaver and Donovan 21 Cr App R 20, Hewart LCJ

evidence of a fact which a jury may use to draw a conclusion as to a fact in issue.

Example 1:
Your client is charged with occasioning actual bodily harm to their partner.
The complainant's statement alleges your client gained access to their home through an open window before assaulting them.

Given the charge, the fact in issue is the assault on the partner.

A Crime Scene Officer finds fingerprints belonging to your client at the window said to be the point of entry. Such evidence would be consistent with the complainant's account of the assault and because an inference exists consistent with the prosecution case, this would be classified as circumstantial evidence.

The potential bearing that such evidence may have on the outcome of a hearing should not be underestimated.
Magistrates will draw inferences from all available evidentiary sources to confirm or exclude alternative possibilities put forward by the defence in relation to the prosecution case. As such, particular attention should be spent on analysing the strength of circumstantial evidence and the inferences reasonably available to be drawn from it.

Indeed, a strong prosecution case may be based entirely on circumstantial evidence. It is the obligation of the prosecution in such cases to exclude all other competing rational inferences available on the evidence beyond a reasonable doubt which are favourable to the defence. The Magistrate may only draw inferences from facts which are proved beyond reasonable doubt[34], though this principle has received some qualification[35].

Does my case theory explain it?

The prosecution may present a substantial case in terms of probative material for the defence to overcome. Should the admissible evidence be sufficient for the prosecution to secure a conviction, the defence will look to the case theory to explain the evidence which can't be discredited or deemed unreliable.
In the above example your client's instructions might be that they were not there on the night in question, that they do not know why

[34] Chamberlain (1983) 153 CLR 521 at 538
[35] Shepherd v R (1990) HCA 56

their fingerprints would be at that location but they have visited the premises an innumerable amount of times in the past.

Thus, there are potentially competing inferences to be drawn from the fingerprint evidence.

Example 2:
In order to use the fingerprint evidence as a basis to draw an inference of guilt of the accused as to the assault, the prosecution must prove that there exists no other rational explanation as to why the fingerprints are at that location other than because the accused gained entry there before assaulting the complainant.

The defence would argue in accordance with their instructions and based on supporting evidence before the court, that given the history of the relationship between these parties and the regularity at which the accused person found themselves at that particular residence on previous occasions, the court could not dismiss an inference your client came into contact with the window and left fingerprints there on a previous and unrelated occasion.

Bear in mind that such an inference would only form *part* of the case theory. Reasons as to why such an allegation would be made in the first place would obviously need to be canvassed with your client and submitted upon.

Client Awareness

Prior to the hearing schedule a conference with your client and explain the process and the issues so they can engage as best as possible with the proceedings.

The more aware your client is of the court room procedure the more communicative they are likely to be with you.

For example, informing a client or witness as to the effect of a section 128 certificate can be a difficult task but when one is required, effective pre hearing communication can diffuse potential problems later on.

So consider the client conference a transaction. You are receiving instructions but also informing your client as to:

- Your assessment of the strength of the case
- The proposed course of action
- The order of events at the hearing
- The possible outcomes of the proceeding

Performance at the Hearing

Having assessed the brief and analysed the evidence, noted your objections and prepared the case theory, advocates consider the course of the hearing and structure the timing of the arguments to be made. Come the day of hearing you will know:

- The evidence that is uncontested
- The evidence that is contested
- How to contest such evidence

The course of any hearing, much like a trial, follows a standard pattern:

- Opening Addresses
- Prosecution Case
- Defence Case (if required)
- Closing Submissions

In the Local Court, openings are not always undertaken but they are helpful.
Even if the defence do not wish to give an opening, the prosecutor will usually be asked to provide one.
Such an opening usually contains a summary of the allegations and the evidence the prosecutor intends to rely on in order to prove them.

An opening from the defence is also often favourable because it helps refine the issues for the Magistrate allowing them to better focus on the salient parts of the brief. As such, in the opening by the defence you should explain what parts of the evidence are not in dispute as well as which parts are.

After the opening addresses the prosecutor will begin proceedings by calling witnesses or tendering evidence.

Evidence which is uncontested is usually tendered at this point – if there is a fair amount of reading involved it's preferable to mention

this to the Magistrate at an early stage so as to allow them some time to read the unchallenged evidence in chambers. This will be appreciated by the judiciary and shows some foresight on your behalf.
You may like to speak with the prosecutor firstly to discuss any objections to inadmissible evidence. A great deal of time can be saved having your objections discussed and the evidence agreed not to be tendered before the hearing.

More contentious objections which can't be resolved before the hearing should be argued early. If you propose to hold a voir dire make sure the Magistrate knows at the outset. A voir dire is usually held at the beginning of the hearing.

The Voir Dire

A voir dire is a procedure for determining the admissibility of evidence. The voir dire can occur before or during a hearing or trial. Ordinarily defence advocates seek to hold a voir dire in order to keep evidence away from the tribunal of fact.

Holding a voir dire is not an advocate's right and will be held at the discretion of the presiding Magistrate[36]. In practice however, once the evidentiary issue is raised and appropriate reasons expressed as to why the evidence should not be admitted, Magistrate's are invariably willing to take this course.

While the Evidence Act does not clearly express that the voir dire exists in the Local Court, the wording of section 189 clearly anticipates proceedings being heard in the absence of a jury. Its terms are not exclusionary to Local Court proceedings, and when read in combination with section 4 a strong argument can be made for any sceptical Magistrate.

In most voir dires, lawyers are seeking to exclude evidence pursuant to one or more sections of relevant legislation. Sections 90, 137 and 138 of the Evidence Act (and section 281 of the Criminal Procedure Act) are usual suspects and are commonly arising sections for defence advocates involved in domestic violence related proceedings.

The procedure for a voir dire can generally follow that of the hearing proper. Parties may call evidence followed by submissions. After the arguments have been made a Magistrate will rule on the admissibility of the evidence, and the hearing will continue.

[36] R v Hawkins (unrep) NSWCCA 17 Dec 1992 (BC9202721)

However often in practice it is desirable for the voir dire in the Local Court to simply run as part of the hearing proper, with the Magistrate determining all issues at the end of the hearing.

Whether this occurs, or whether a stricter approach is taken, will generally be determined by the Magistrate often on submissions from the parties.

It's important that an advocate is aware of the standard of proof that applies to the application being made.
Whilst most voir dires involve the determination of legal tests (such as fairness to the accused and other threshold based discretions) which impart their own standard, facts necessary for deciding the admissibility of evidence are generally required to be proved on the balance of probabilities[37].

Bear in mind an application for a voir dire and a subsequent proposal under section 138 places an onus on the defence advocate of proving the unlawful or improper conduct. However in general, the prosecution bear the onus of proving facts asserted by the evidence.

Examination-In-Chief and Re-Examination

The narrative told by a witness during examination-in-chief is usually the basis of the case theory. It is a story told in response to questions posed by the advocate who has called the witness to the stand.
The questions asked regarding contested facts must be non leading[38] and by virtue of this rule of advocacy, the task of effectively eliciting the evidence is one which requires fair amount of preparation and practice.

Having received your client's instructions or a witness account, the question becomes what to show the court in evidence, and how best to show it, in order to achieve a favourable outcome for your client.

Structure questions so as to allow the witness to tell a persuasive story. The structure would not necessarily follow that of any prepared statement; it's a matter for the advocate who bears in mind the foremost principle - you are seeking to persuade the court.
A persuasive narrative is credible and detailed, even nuanced. It is in a logical order yet interesting to the listener.

[37] Evidence Act 1995 section 142
[38] Evidence Act 1995 section 37

Use plain language and maintain eye contact with your witness to help the conversation flow, and always listen to the answers given.
Don't be afraid to allow your witness to further explain an answer they have given if it is important, or if the answer given is not sufficient for your purpose. Advocates can commonly miss vital pieces of evidence not listening to an answer given by a witness because they are too busy thinking about the next question, with potentially embarrassing and severe consequences.

Following cross examination of your witness the opportunity arises for you to re-examine your witness. The form of questioning is just the same as it is in examination-in-chief (non leading questions only) however with the added stipulation that witnesses can only be re-examined on matters arising from the evidence given in cross examination unless the court gives leave[39]. Effectively this is an opportunity to clarify or quantify certain damaging answers your witness may have given to the prosecutor. It is not an opportunity to ask the questions an advocate forgot to during examination-in-chief. You can expect the prosecutor to be acutely aware of the limits of your questioning.

Cross Examination

The opportunity to confront an opposing witness through cross examination is of central significance to the adversarial system[40]. The aim is always to lay the foundation for your final argument by eliciting favourable evidence or discrediting an unfavourable witness.
Cross examination is difficult to perform well, and the scope of this paper does not encompass a thorough guide for what essentially is an art form which takes years of practice to accomplish effectively. But some basic guidelines should be mentioned.

To cross examination effectively, you must:

- Focus your questions on the issues that advance or hinder your case theory
- Use short, leading questions
- Know the rules of evidence
- Control the witness
- Comply with the rule contained in Browne v Dunn
- Utilise an effective structure – arrange questions according to themes
- "Close the gates" effectively

[39] Evidence Act 1995 section 39
[40] Lee v The Queen (1998) ALJR 1484

Effective cross examination requires a fluid approach. Almost always a witness will deviate in some way from their statement and it is impossible to prepare for these moments. Be prepared to change and adapt your structure and questions during the hearing in response to how the evidence falls. Some questions may become redundant, and others much more crucial, depending on what a prosecution witness says during examination-in-chief.

The tone of cross examination should also be carefully considered in light of the material you are dealing with.

It is inevitable that on occasion advocates will prepare damaging cross examination based on heated instructions from a client, and part of good advocacy can at appropriate times include robust and bellicose cross examination of a witness. However advocates must do so at the right time and know when to keep a civil and respectful tone with a witness or complainant. It is trite to mention allegations of domestic violence bring the ire of the community for good reason and the courts view seriously such allegations that come before it. It will always be a matter for the lawyer to gauge an appropriate tone with a witness or complainant based on the quality of instructions and the nature of the allegations.

Advocate Awareness

Take effective notes during the hearing of the evidence. They're invaluable for your closing submissions but essential in situations where proceedings do not finish on the day and are adjourned part heard. In some situations a transcript may not be available on the next occasion due to time constraints, and in undesirable circumstances (as many an ALS solicitor will confirm) you may not be the solicitor appearing. Thorough and detailed notes on the evidence are mandatory in these situations.

Equally however, it is important to pay particular attention to witness body language and reaction to questions posed by the prosecutor or yourself. Effective criminal advocacy is not simply preparing good questions and arguments – it is this, but it is also about being keenly aware of human behaviour, about understanding patterns of both truthful and untruthful conduct, and anticipating reactions and being able to capitalise on them. Whilst this is invariably a trait an advocate won't learn in a book, those who spend the hearing with their head down, crouched over the bar table feverishly taking notes are bound to miss crucial pieces of unsaid evidence that might be used to great effect in cross examination or closing submissions.

Sentence

Be prepared with submissions on sentence. Following the return of a guilty verdict after the summary hearing concludes the court will usually wish to finalise the matter immediately.

Make sure your client knows the potential outcomes on sentence; if a custodial term is possible, make sure they know so to make appropriate arrangements. Having a client bring their children to court in such instances can be problematic as well as distressing. Avoid the scenario at all costs.

If you think it would be advantageous to seek an adjournment for reports or references then prepare submissions for that purpose. Be aware of the timetables that Magistrates are under pressure to keep and as a result they may still urge you to finalise the matter immediately.

The AVO

Apprehended violence orders (AVOs) are central to domestic violence related court proceedings in NSW. Advocates who appear for clients charged with domestic violence related offences *must* be aware of the process and the effect of these orders. Too many lawyers wander into such proceedings without a practical comprehension of the Crimes (Domestic and Personal Violence) Act, with major consequences for the client.

The Act criminalises conduct constituting the stalking and intimidating of *any* person including those within a domestic relationship[41], and the act of contravening an AVO[42].

[41] Crimes (Domestic and Personal Violence) Act 2007 section 13
[42] Crimes (Domestic and Personal Violence) Act 2007 section 14

AVOs take three forms:

- **Provisional:** An authorised justice, upon an application by the police (or a person), may make a provisional order. A provisional order is considered an application for the making of a final order by the court.
- **Interim:** Upon application the court may make an interim order prior to final determination, if it appears necessary or appropriate to do so in the circumstances.
- **Final:** Once the matter has been determined and the court is satisfied of the actual fears of the protected person, or by consent of the parties, the court may make a final order prohibiting a person from engaging in certain conduct with the protected person(s) for specified duration of time.

Whether your client is charged with breaching a condition of a provisional, interim or final order, the elements of the charge and the legal effect is the same.

If your client denies their conduct in the criminal proceedings, they will rarely consent to a final order being made. But the court will, if a current final order does not exist, convert any provisional order to an interim one on the first mention date following the not guilty plea for the duration of the criminal proceedings regardless of your client's wishes.

The court's findings on the appropriateness of making a final AVO will be based on the evidence provided during the criminal proceedings. In that sense, the application's determination runs concurrently with the criminal charge.

Stalking and Intimidating

Lawyers must understand the broad definitions of both stalking[43] and intimidating[44].

As section 13 indicates the actions of the accused person need not actually put a person in fear of mental or physical harm, merely that the accused person is aware their conduct is *likely* to cause such fears.
Because there must be a foreseen consequence to the conduct a strong argument can be made (at least in this solicitor's opinion) that offences charged under section 13 are offences of specific intent and therefore an accused person's level of intoxication must

[43] Crimes (Domestic and Personal Violence) Act 2007 section 8
[44] Crimes (Domestic and Personal Violence) Act 2007 section 7

be considered in assessing the requisite intent. Of course, it should be kept in mind an accused person may be reckless as to the likely impact of their conduct also.

However, the offence of contravening an AVO is proved on an entirely different legal test.

Contravening an Apprehended Violence Order

Having an AVO put in place is not a criminal charge; it is a civil sanction. However, the Crimes (Domestic and Personal Violence) Act makes it a criminal offence to breach or contravene one or more of the conditions of an order.

Every AVO contains a common condition that prohibits conduct amounting to assault, molestation, harassment, threats, intimidation or other similar types of interference against a protected person. This is known as the mandatory condition[45].

There is no additional requirement under section 14 that an accused person act with the *intention* of causing another to fear physical or mental harm like there is within section 13. Under section 14 a person is guilty if they simply knowingly contravene a prohibition contained within the order. If that prohibition is stalking, the court need only be satisfied (as per the definition) that the conduct amounted to:

- the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity

Or, in the case of intimidation, the court is satisfied:

- The conduct amounted to harassment or molestation of the person, or
- There was an approach made to the person that caused the person to fear for their safety, or
- The conduct caused a reasonable apprehension of injury to a person or to a person with whom they have a domestic relationship, or of violence or damage to *any person* or property

As well as the mandatory condition, there are several other types of restrictions which may be imposed on a person pursuant to an

[45]Crimes (Domestic and Personal Violence) Act 2007 section 36

AVO[46]. What is common to all is that the contravention must be done by an accused person knowingly[47].

So the prosecution must prove a person subject to restrictions under a valid AVO knew of the conditions imposed and breached them accordingly. From personal experience, the court will rely on the AVO document at hearing, which will indicate whether an accused person was present in court when the order was made and if so the court, keeping in mind its obligations to explain the conditions and effect of any order it imposes[48], will effectively take judicial notice that the accused person was aware of the conditions to the extent that any breach of them would be conducted knowingly.

However, such knowledge may be rebutted by the defence in circumstances where an accused person does not understand, or does not hold the capacity to understand terms of any order[49].

Where an accused person was not present at the making of an interim or final order by a Magistrate, or where the statement of service document in relation to a provisional AVO cannot be produced the prosecution face problems in proving the necessary element of contravening the AVO 'knowingly'. Knowledge of the effective duration of provisional orders and the consequences of non attendance at the making of an interim or final order is essential should an advocate face such a situation where knowledge is a fact in issue, and advocates should consider the decision of Magistrate Heilpern in DPP v Jeremy Jane [2010] NSWLC 13 a persuasive authority in this regard.

AVO Conditions

Initially after receiving a complaint, police apply for, and are usually granted a provisional order against the accused containing conditions they deem appropriate, which in some cases may lead to unnecessary restrictions being put in place.
The discretion to impose either an interim or final order is entirely the court's but in usual cases on the first mention date and upon a plea of not guilty, the granted provisional order will be converted into an interim order.

[46] Crimes (Domestic and Personal Violence) Act 2007 section 35
[47] Crimes (Domestic and Personal Violence) Act 2007 section 14(1)
[48] Crimes (Domestic and Personal Violence) Act 2007 section 76
[49] Farthing v Phipps [2010] NSWDC 317

Advocates should bear in mind the court is not bound to impose the conditions sought by the police, rather the court is to be satisfied as to the appropriateness or desirability of any conditions sought to be imposed[50]. This is important to mention in situations where defence advocates and prosecutors cannot come to an agreement themselves on appropriate conditions.

In arriving at a decision as to appropriate conditions the court must consider all relevant matters[51]. The client's needs and obligations should be considered in regards to the making of any order, and onerous conditions that do not bear on the safety and protection of protected persons and children should not be imposed, or removed if they are contained within the provisional order[52].

Post Hearing

A final order must be made upon a finding of guilt for a domestic violence offence[53] although a peculiar provision exists allowing the court not to make an order in situations where it is satisfied that one is not required[54]. I have not experienced a situation where the court has not made a final order following a finding of guilt, however considering the court's duty to be satisfied on the balance of probabilities that a person has reasonable grounds to fear, and in fact does fear prohibited conduct, it *might* be argued (likely with varying levels of success) that after the hearing (in appropriate situations) that although there has been a finding of guilt, the evidence would not satisfy the court that the requisite fears are in fact held by the victim.

Further, it is important your client be aware that where an AVO is proven to be breached by an act of violence the starting point at sentence will be a custodial penalty[55].

Bear also in mind that even upon a finding of not guilty by a court as to the criminal charges, the lowered civil standard the court entertains as to the fears of the protected person on the AVO application means that although not satisfied to the criminal standard as to the allegations, a final order may still be put in place because the Magistrate has been satisfied of the allegations (or the complainant's evidence) on the balance of probabilities.

[50] Crimes (Domestic and Personal Violence) Act 2007 section 35(1)
[51] Crimes (Domestic and Personal Violence) Act 2007 section 17
[52] Crimes (Domestic and Personal Violence) Act 2007 section 17(3)
[53] Crimes (Domestic and Personal Violence) Act 2007 section 39(1)
[54] Crimes (Domestic and Personal Violence) Act 2007 section 39(2)
[55] Crimes (Domestic and Personal Violence) Act 2007 section 14(4)

Conflict with Bail

It is not unusual for discrepancies to exist between bail and AVO conditions. It is essential that the bail conditions are cross referenced with the AVO (and appropriate amendments made) as soon as you are in a position to do so, so your client doesn't find themselves being arrested and charged and refused bail at some later time because for instance, although the AVO does not prevent contact with the complainant, the bail conditions do.

PART II

COMMON ISSUES AND FORENSIC DECISIONS

Sometimes it's unclear on the evidence brief if the prosecutor will be able to prove their case or not. Issues such as unfavourable witness or unserved brief items also commonly arise on the day of hearing. A discussion on how to approach these situations follows:

Unserved Evidence

Occasionally you will receive an incomplete brief of evidence from the police.
Brief service requirements are contained within Chapter 4 Part 2 Division 2 of the Criminal Procedure Act.

Table 1 and 2 offences dealt with in the Local Court attract pre-trial procedures contained in ss182-189 of that Act. Namely that a prosecutor must serve, or cause to be served, a brief of evidence (in cases where a brief must be served) at least 14 days prior to the hearing date.

Should the prosecution seek to tender evidence at the hearing that was not included in the brief, or was served within 14 days of the hearing a decision will have to be made whether to object to the inclusion of the evidence or not.

In this regard it is particularly important to be aware of sections 187 and 188 of the Criminal Procedure Act.

187 When brief of evidence need not be served

(1) The court may order that all or part of the copy of the brief of evidence need not be served if it is satisfied:
- *a) That there are compelling reasons for not requiring service, or*
- *b) That it could not reasonably be served on the accused person.*

(2) The court may make an order under this section on its own initiative or on the application of any party.

(3) An order may be made subject to any conditions the court thinks fit.

(4) Without limiting any other power to adjourn proceedings, the court may grant one or more adjournments, if it appears to it to be just and reasonable to do so, if the copy of the brief of evidence is not served in accordance with this Division. For that purpose, the court may extend the time for service of the brief of evidence.

(5) A prosecutor is not required to serve a brief of evidence in proceedings for an offence of a kind, or proceedings of a kind, prescribed by the regulations.

188 Evidence not to be admitted

(1) The court must refuse to admit evidence sought to be adduced by the prosecutor in respect of an offence if, in relation to that evidence, this Division or any rules made under this Division have not been complied with by the prosecutor.

(2) The court may, and on the application of or with the consent of the accused person must, dispense with the requirements of subsection (1) on such terms and conditions as appear just and reasonable.

This will be a weighing exercise for practitioners as in some cases the likely outcome upon objection will be an adjournment to allow compliance with brief service requirements.

It *may* be more expedient to simply allow the evidence in where the advantage of an adjournment is either negligible for the defence or detrimental to the client. However there will be instances where objection should be taken to both the inclusion of the unserved or late brief item and objection taken to any application by the prosecution for adjournment. How commonly you take such objection will depend on a variety of factors, including your knowledge of the particular Magistrate and the issues which arise. Of course it's important not to be unreasonable in circumstances where the prosecution or police are not to blame for the error but also important to ensure your clients legitimate interests are safeguarded even where the prosecution can legitimately claim not to have made an error.

Consider the following circumstances:

- Whether the proceedings are of some age
- Whether there have been previous adjournments
- Whether your client is in custody
- The seriousness of the charges
- Your knowledge (if any) of how the Magistrate has dealt with similar issues in the past

It's important to realise a decision by a Magistrate to refuse an adjournment or refuse to admit evidence is a discretionary one and one that may be reviewed by an Appellate Court in accordance with the principles stated in House v The King [1936] 55 CLR 499.

The case of Streeting[56] involves an interesting discussion of these relevant issues albeit in a different legislative context. It is important to give your submissions in such a way that the Magistrate is assisted to turn their mind to all relevant factors.

Another useful authority dealing with the consequences of prosecution non compliance with brief service requirements is DPP v West[57]. Though it concerned predecessor legislation, most of the principles discussed are still applicable.

No Complainant / Witness Statement (Complainant / Witness Subpoenaed)

Occasionally due to an unwilling witness the prosecution will not be able to procure their statement prior to the hearing. Be aware that even with the safeguard of section 188 of the Criminal Procedure Act the Magistrate will more than likely allow the prosecution to call the witness if they attend court in order to give evidence (see section 187). This may be particularly so where the reason for the failure to provide the statement is that the witness is a complainant in a domestic violence matter and has refused to provide one.

Should this situation arise defence counsel can object to the prosecution being able to call the evidence pursuant to section 188 however if this is unsuccessful often the proper course of action would be to adjourn proceedings to allow the defence time to adequately prepare[58]. It's not uncommon for some Magistrates to simply stand the matter and allow the defence a short amount of time to conference the witness while still having the matter commence that day. This is often not a favourable outcome for defence practitioners and it should be stressed to the court that the brief service provisions exist out of fairness to the defence and do not envisage generally that a hearing would proceed on the same day that disclosure is effectively made.

If the defence have had no prior knowledge of the evidence seeking to be lead, a strong case will exist to adjourn proceedings and potentially allow the police to obtain a statement to be served on the defence.

[56] DPP v Streeting [2013] NSWSC 789
[57] Director of Public Prosecutions v West [2000] NSWCA 103
[58] DPP v Chaouk and Anor [2010] NSWSC 1418

Unfavourable Witnesses

Often a prosecution witness who alleges an offence in their statement to police for various reasons either recants their allegation once in the witness box, or simply "can't remember" what happened.

Section 38 of the Evidence Act allows a party who calls a witness with leave of the court to cross examine that witness as to:

a) *evidence unfavourable to the party*
b) *matters the witness should know about where the witness is not making a genuine attempt to give evidence*
c) *prior inconsistent statements*

There is some conjecture as to what "unfavourable" means, however in practice the threshold is fairly low and contemplates evidence which is simply 'not favourable' rather than adverse[59]. It is unclear whether "not favourable" is in relation to securing a conviction or previously 'favourable' evidence. From personal experience in situations where no witness statement has been supplied, most Magistrates will construe unfavourable as unfavourable to the obtaining of a conviction.

A prosecutor must first make an application under section 38 in order to be granted leave to cross examine. Any application should specify under which of the 3 grounds it is being made. The prosecutor will be limited by these grounds as to the extent of the permissible cross examination – note that prosecutors regularly overstep their leave by asking impermissible questions.

Section 42

It is practice for some prosecutors after a successful section 38 application to suggest that the defence be limited to non-leading questions under section 42 of the Evidence Act.

This is a discretionary power of the court to impose a prohibition on a party seeking to cross examine an opposing witness by restriction the type of questions to non leading. This does not as a matter of course follow unfavourable material despite what some prosecutors might like the court to accept.
The test the court must consider is whether the facts would be better ascertained if leading questions were not used.

[59] Souleyman (1996) 40 NSWLR 712 at 715

S42 can be a difficult direction to counter – but keep in mind the wording of the section; it will not be a blanket direction and should apply on a question by question basis.

There is a long standing and well known tradition of defence counsel's right to cross examination and often a need to "Browne and Dunn" adequately should allow the defence to put critical leading questions to unfavourable police witnesses.

Admissibility of Prior Inconsistent Statements

If the prior inconsistent statement of a witness who has been declared unfavourable is tendered in cross-examination it may now be used as evidence of the truth of the statement[60]. This effectively means that the court may accept the earlier version even if the witness does not adopt the truth of it in court.

The effect of the admission of a prior inconsistent statement means that the previous representations contained within the statement and made by a witness can be relied upon for the truth of their asserted facts. This is because although section 59 of the Evidence Act provides that:

> *(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation*

The provisions of section 60 state:

> *(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than the proof of an asserted fact*

This means where the hearsay representations are contained within a prior inconsistent statement, they are inevitably relevant for the purpose of affecting the witness's credibility. Thus section 59 will not operate to exclude them.

Keep in mind the representations sought to be admitted into evidence must have been made at the time when the events were 'fresh in the memory' of the witness. As to the current definition of 'fresh', days rather than weeks is the accepted measure[61].

However it is important to remember that a prior inconsistent statement is still a hearsay document since it has been made out of

[60] Evidence Act 1995 section 60
[61] Graham v The Queen 1998 102 A Crim R 438

court, and unless the contents of that statement are adopted in court by the witness, any representations made by a 3rd party to the witness (whether admissions by an accused or inculpatory statements by someone else) will be considered 2nd hand hearsay and thus outside the exception contained within section 60.

Simply put, the court will be allowed to rely on previous representations made *by* a witness for the truth of them, but not representations made *to* a witness.

Useful closing submissions to consider:

- The evidence within the prior statement should be subject to a warning under section 165 of the Evidence Act[62]
- The sworn evidence before the court is contradictory
- The prior statement was not made under oath
- The prior statement was made in circumstances which otherwise make it inherently unreliable

The thrust of any submissions should be towards leaving the court with a doubt in relation to the quality of any damaging evidence.

The standard of proof is beyond reasonable doubt; and following the evidence from the witness and the prosecutor's subsequent cross examination under section 38, consider what has been elicited; the prosecutor's questions are not evidence, only the responses.

Prosecution Seeks an Adjournment

Sometimes, usually when the prosecutor cannot secure a witness' attendance at court, an application for adjournment will be made.

It may be appropriate to consent to the application in some situations, either because the circumstances are clearly beyond the control of the prosecution and the circumstances otherwise trend in the direction of an adjournment overwhelmingly, or for other reasons the prosecution will undoubtedly be successful in their application anyway.

It's important not to be seen to be unreasonable in those instances but objection should be taken where the adjournment would be detrimental to your client, or the reasons for the request are clearly the fault of the prosecution.

[62] Evidence Act 1995 section 165(1)(a)

Consider the following submissions:

- Your client is in custody in relation to this matter only and any further delays should be avoided because of this
- The defence is ready to proceed (if witnesses have been procured let the court know also whether they have travelled some distance)
- The bail conditions are restrictive
- The proceedings are of some age
- The allegations are objectively not that serious (be careful not to quantify the offences as 'not that serious' when they clearly are)
- Whether an adjournment will cure the prosecution issue (if a witness knew of the court date how can the prosecution reliably assume another date will secure their attendance?)

Maker Unavailable

It is far from uncommon for important witnesses in domestic violence prosecutions to fail to attend court, either because the police have been unable to subpoena them or they have been served and have elected to defy the subpoena.

The prosecutor may seek to have a witness declared unavailable so as to tender their statement:

There are two reasons why the prosecutor would seek leave pursuant to section 65(2) of the Evidence Act:

1. The witness is not at court
2. The witness is at court but refuses to be sworn or answer questions

At this point a defence counsel has a series of submissions they may make in seeking to prevent the application being granted:

1. Have the prosecution given notice to the defence?

The mandatory terms of section 67 mean that the court must consider this issue before granting the application.
Reasonable notice does not include informing the defence of the intended application on the morning of the hearing.

2. Is the witness unavailable?

The witness must first be declared unavailable, the definition of which is found in clause 4 of Part 2 of the Dictionary[63]. Note the legislation's use of the words "all reasonable steps".

3. Was the prior statement made in reliable circumstances?

Once declared unavailable the prosecutor must seek to subvert the hearsay rule under section 65(2).

4. Should the evidence still be admitted giving consideration to section 137 of the Evidence Act?

Also in mandatory terms a magistrate must refuse to admit the evidence should the probative value of it be outweighed by the danger of unfair prejudice.

Consider submissions such as:

- The evidence is unable to be tested under cross examination
- The witness had reason to make a false allegation
- There is a lack of corroborative evidence

If the prosecution are successful in having a witness declared unavailable and the statement is admitted there is still a submission to be made at the close of the case that due to similar reasons noted above, it would be unsafe to convict on potentially unreliable evidence.

Compellability

In criminal proceedings, section 18 of the Evidence Act deals with compellability of spouses and others to give evidence.

Importantly not all witnesses in domestic violence proceedings are caught by the exemption from the general compellability rule contained within section 279 of the Criminal Procedure Act. While generally speaking there will not be a compellability issue in relation to domestic partners there will be often in relation to siblings, children and parents.
It is important to ensure that witnesses are made aware of their right to object and often to remind the court of their obligation under section 18(4) of the Evidence Act to ensure the witness is aware.

[63] Evidence Act 1995

Generally any application will require some evidence from the witness seeking to exercise their right. Practitioners could potentially seek to call evidence from other sources in appropriate circumstances.
The Magistrate may wish either to ask questions of the witness seeking to exercise the objection themselves or practitioners might be asked to adduce the evidence. It is important that advocates are prepared in any event with the right questions and even if the court seeks to adduce the evidence, that the defence plays an active role in assisting the Magistrate where possible.

Of primary concern is the likelihood of any harm to the relationship between the parties and the extent to which that harm may outweigh the desirability of having the evidence given[64]. Section 18(7) contains a non exhaustive list of matters the court must consider when deciding the objection.
Bear in mind there is no requirement to show that actual harm will be caused to a relationship; the section specifically refers to the '<u>likelihood</u> that harm would or <u>might</u> be caused'.

On occasion, where a prosecution witness successfully exercises their right under section 18, the prosecutor may try and submit the witness is now unavailable and attempt to tender any previously made representation as an exception to the hearsay rule.

Practitioners should be aware of two authorities on this subject:

DPP v Nicholls [2010] VSC 397; based on similar provisions of the Evidence Act 2008 (Vic), this was an appeal heard in the Supreme Court from the Victorian Magistrate's Court regarding whether a witness who successfully objected under section 18, could be held to be 'unavailable' (defined in clause 4 Part 2 of the Dictionary) for the purposes of tendering their previously made statement into evidence (under section 65).

Beach J upheld the DPP's appeal on the basis that a successful objection under section 18 did not limit the application of section 65 or the operation of clause 4 of Part 2 of the Dictionary of the Evidence Act 2008 (Vic).

The argument is persuasive (at [18]-[25]) but an important point is made by Judge Haesler in the later case of:

R v B.O. (2012) NSWDC 195; the Crown had sought to call evidence from the accused's two sons (aged 7 and 11) during his second trial. An objection under section 18 of the Evidence Act was raised

[64] Evidence Act section 18(6)(a)-(b)

by both sons and upheld by Judge Haesler on the basis that there was a likelihood of harm to the relationship, and the potential for that harm outweighed the desirability of having the evidence given. The Crown then sought at trial to adduce the previous interviews the children had made pursuant to section 65.
Judge Haesler rejected the Crown application on the basis that section 65 provided "the hearsay rule does not apply to evidence of a previous representation that is given by a person ... if certain conditions are met". On his reasoning, when evidence is allowed pursuant to section 65 it is still evidence *given* by a witness whose prior representation it is. His Honour construed the wording of section 18 to mean a properly raised objection under section 18 precluded the witness from *giving* evidence and thus precluded the operation of section 65.

This point of distinction is an important one for defence advocates to be aware of should the prosecution at hearing seek to adduce a previously made police statement from a witness who has successfully raised an objection under section 18. But this would not be the only point of distinction to consider in such a situation; clearly, there are several ways to skin a cat when it comes to interpreting the Evidence Act.

Failure to Particularise

The principle of duplicity prevents the prosecution from particularising more than one offence in any one indictment[65].

The rule exists out of fairness to an accused person enabling them to know what they have been charged with, and the opportunity to defend that charge accordingly or offer a sensible plea in mitigation. Tactically insisting on the rule being applied is important because in the absence of particularisation the police can simply throw all the evidence 'in the air' and wait to see what exactly is proved. Whatever is proved will then becomes the charged offence.

For example, the evidence outlines an assault at 10am and then another at 7pm. The CAN specifies one count of common assault between the hours of 10am and 7pm. In this situation, even if they involve the same victim, the evidence clearly outlines 2 offences and the prosecution must elect as to which particular conduct they rely upon in satisfaction of the charge. This should be asked of the prosecution in front of the Magistrate before the hearing commences. Failure to demand this will mean if one is proved and the other not the prosecutor will be able to choose. However, failure

[65] S v The Queen 1989 168 CLR 266

to do so may also render any conviction bad for latent duplicity if both acts are proved.
Most Magistrates will require the prosecutor to elect after the defence bring it to the court's attention.

However, the rule will be applied in a practical way and where a number of criminally similar acts are so connected (whether temporally or through a continuous nature) so as to be regarded as the same transaction (i.e. a flurry of punches) a single indictment will be appropriate[66].

Be aware this may cause a more astute prosecutor to seek a brief adjournment while a further charge is laid against your client (as has been the author's experience) to which potentially there may be little recourse considering your argument.

This issue therefore poses fundamentally difficult issues for the defence which can only be resolved through assessing carefully the various factors including, whether the hearing will proceed that day (if not, then you are simply alerting the police to the need to lay further charges), whether the Magistrate would countenance a further charge being laid on the hearing day, whether the Magistrate would allow the prosecutor an adjournment to lay further charges.

In most instances however the prosecutor will simply elect and the point has been well raised.

Do I Call My Client?

In criminal proceedings the prosecution always bear the onus of proving the guilt of the accused beyond a reasonable doubt.
A defence advocate must decide whether upon the close of the prosecution case they believe the charges against their client have been proved to the requisite standard.

If the advocate believes, upon consideration of the evidence presented and the nature of the offence, the case does not meet the required standard, one of three submissions should be made. These are known as the "half-time submissions" and will be briefly discussed:

[66] DPP v Merriman 1972 3 All ER 42

1. No Prima Facie Case

At the end of the prosecution case a Magistrate will either find a case to answer or find there is no case to answer.
Finding a case to answer or "a prima facie case" means the prosecution have presented enough evidence to lawfully convict the accused. That is to say, the prosecution have presented evidence which, if accepted by the court, would prove every element of the offence charged[67].
So, as a matter of course, if the prosecution fail to provide evidence as to one or more of the elements of the offence charged, it would not be possible even if all the evidence was accepted to maintain a finding of guilt on that offence. Therefore in such circumstances a defence advocate would submit that the prosecution have not proved a prima facie case.
An unsuccessful "no prima facie case" submission will not disentitle the defence from calling evidence[68].

Even if the prosecution have presented a prima facie case, there are still 2 submissions to make before the defence would be required to present a case in reply.

2. Prasad Direction

Such a direction may be asked of a Magistrate following the close of the prosecution case in circumstances where the evidence, although capable of supporting a conviction, is insufficiently cogent to justify a finding of guilt[69].

In practice, Prasad directions would usually be asked in situations where for instance, it can be successfully submitted a witness's high level of intoxication at the relevant time makes their account inherently unreliable (assuming there is no corroborative evidence). The same could be said of a witness whose credibility has been seriously impeached.

Magistrates who are invited to give themselves such a direction will usually ask the inviting practitioner to point to specific parts of the evidence and explain the difficulties the court might have with finding a conviction based upon it.

[67] Zanetti v Hill (1962) 108 CLR 433
[68] Evengiou (1964) 37 ALJR 508
[69] R v Prasad (1979) 2 A Crim R 45

3. 2nd Limb May v O'Sullivan Submission

A Magistrate who finds a case to answer may nevertheless refuse to convict an accused person following the close of the prosecution case by virtue of a finding the evidence does not prove the offence/s to the required standard of beyond reasonable doubt[70].
This is commonly referred to as a "second limb submission". Defence practitioners submit at the close of the prosecution case that the evidence cannot support a conviction.

Many Magistrates' are of the opinion that the making of a 2nd limb submission will, in the event it is unsuccessful, preclude the defence from calling evidence. In practice it would be wise to ask the Magistrate, if such a submission is made whether they hold the same view.

Being successful on one of the above three submissions at the close of the prosecution case is by far and away the best avenue for a defence practitioner at any hearing.

Sometimes there will be no question the prosecution have provided enough evidence to prove their case to the requisite degree and a decision to call your client or otherwise enter a defence case becomes elementary, but for defence advocates who surmise that there is certainly a case to answer but are unsure whether the evidence will satisfy a tribunal of fact beyond reasonable doubt face a crucial and important decision.

Do I make a second limb submission and risk not being able to call evidence if the submission is unsuccessful, or do I call my client to give evidence just in case?

Entering the Defence Case

Entering into a defence case is a final consideration for defence practitioners. The most favoured avenues are listed above. This is for several reasons, for instance; your client may not fare well under police cross-examination and in many instances having your client give evidence enables the prosecutor to prove certain parts of their case they would otherwise be unable to.
However, many times the prosecution case will require an answer from the defence in the form of evidence.

Should the possibility exist that your client or a defence witness may be required to give evidence make sure they are well aware of

[70] May v O'Sullivan (1955) HCA 38

it in advance. This will help to ensure any examination-in-chief runs as efficiently and effectively as possible.

Having said that, many clients will be eager to give a version at court or be in a position to provide credible witnesses for the defence at hearing.
The forensic decision for the defence advocate is to decide whether or not that is necessary.
The accused person's right to silence is a long standing principle and the decision not to give evidence can't be used by a Magistrate as an inference of guilt[71]. Be mindful however that should you decide not to call your client to give evidence, you will be precluded from calling fresh evidence at any subsequent conviction appeal without the leave of the court[72].

Directions/Warnings within Closing Submissions

During closing submissions, and where applicable, the following directions or warnings can and should be asked of the Magistrate:

Louizos Direction

In *Mahmood v Western Australia* (2008) 232 CLR 397, the High Court held that in a criminal trial:

"… where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, they should entertain a reasonable doubt about the guilt of the accused."

This was cited in R v Louizos (2009) 194 A Crim R 223. Where an adequate explanation for the failure of the prosecution to call a witness who might reasonably be supposed to be able to provide evidence cannot be given, the Magistrate should be reminded that a critical inference of the prosecution case may be drawn.

[71] Evidence Act 1995 section 20(2)
[72] Crimes (Local Courts Appeal and Review) Act 2001

Murray Direction

Where the prosecution seek to establish the guilt of an accused person based on the evidence of a single witness, the Magistrate should be reminded of the need to exercise a degree of caution in accepting a largely uncorroborated account[73]; that the evidence should be scrutinised before arriving at a verdict of guilty. This is known as a "Murray direction".

Warnings Pursuant to Section 165

Domestic violence offences are often committed and alleged by people under various levels of intoxication and recollections of events are sometimes impaired as a result.

Section 165 of the Evidence Act applies to evidence of a kind that may be unreliable and provides that such evidence should be subject to a warning as to its unreliability.

Such a direction has been held to extend to an account which may be unreliable due to the intoxication of a witness[74]. Other situations where a witness gives conflicting accounts or unfavourable evidence to a court would also attract such a warning.
Most Magistrate's will ask the advocate to draw attention to those parts of the evidence which are said to be unreliable, and why.

[73] R v Murray (1987) 11 NSWLR 12
[74] MITCHELL, Malcolm v R [2008] NSWCCA 275

PART III

ETHICAL CONSIDERATIONS

The nature of domestic violence proceedings often mean practitioners can become inadvertently mired in ethically precarious situations. A sound understanding of the Solicitor's Rules is essential.

The so-called "Bourke Defence"

The phrase "Bourke Defence" is used by some lawyers to describe an accused relying on their partner not attending court to give evidence about a domestic violence allegation. The phrase has become ubiquitous at least in western NSW.

It is well understood as a phrase offensive to many Aboriginal people, and the term is only used here because the language is so intertwined in the criminal law community with these particular issues and no offence is intended in its use. It is obvious that the problems of domestic violence and witness attendance are common to all communities.

Often a client will ask their solicitor "what happens if my partner doesn't come to court?" or otherwise instructs a plea of not guilty on the basis that they expect the witness will not attend. The response and advice should be worded carefully.

Essentially there are 4 things that might happen if a victim of, or a witness to, domestic violence does not attend court to give evidence:

- Police offer no evidence or withdraw the charge (if their case relies solely on the evidence of the absent complainant/witness) and the charges are dismissed
- Police ask for, and are granted, an adjournment to procure the attendance of the complainant or witness on the next occasion
- Police apply for, and are granted, a warrant to arrest the complainant/witness in order to secure their attendance (following non compliance with a validly issued subpoena)
- Police are successful in making an application the complainant /witness be declared unavailable and (subject to other considerations) the prior statement to police is tendered in evidence[75]

[75] Evidence Act 1995 section 65

There is no issue with informing your client as to the potential (or likely) outcomes should a victim or witness not attend court. Problems arise where advice is given that may be construed as suggesting a client should advise the witness not to attend or could otherwise arm the client with information the lawyer believes they will use in an attempt to pervert the course of justice.

From a professional perspective it is not for the defence lawyer to take a view that the problems of domestic violence and witness attendance mean that clients should be encouraged to plead guilty. The role of the practitioner is to advise and facilitate the client's decision making process.

Conferencing Victims and Witnesses

Sometimes a police witness or complainant will approach the defence lawyer at court with a raft of questions some of which might (or should) cause a practitioner concern.

There is no property in a witness, so do not feel as though there is an ethical boundary to just speaking with a police witness however it is best practice to direct a witness' enquiries to the prosecutor instead. This is even more advisable in cases where you are approached by the complainant in a matter. For reasons which should be patently obvious DO NOT become involved in a conversation with a witness or complainant about their obligations under subpoena or otherwise to attend court for proceedings.

In cases where you become aware a police witness will proceed at the hearing to give evidence contrary to their original statement or it is likely to be otherwise unfavourable to the prosecution once called, it may be pertinent to conference such a witness in the presence of the Officer in Charge of the investigation (the OIC). It is imperative that in these types of scenarios an advocate does not appear to be influencing the witness in any way[76]; a good idea is to ask any questions in a non-leading fashion. It is imperative you seek to question such a witness in the presence of police not only for your own safety as a practitioner, but also, in the event the witness then backtracks in the witness box later from what was said in conference you will effectively be in a position to cross examine the police officer present during the conference rather than have to withdraw from the hearing because you have inadvertently become a witness in your own matter.

[76] Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules) rule 18

Client Admits the Offence

Sometimes – and perhaps not often where domestic violence is concerned – a client will tell their lawyer they have committed the offence(s) as alleged but they still wish to defend the proceedings.

Solicitors Rules – 20

20.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate -

20.1.1 Put a defence case which is inconsistent with the client's confession;
20.1.2 Falsely claim or suggest that another person committed the offence; or
20.1.3 Continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

20.2 A practitioner may continue to act for a client who elects to plead "not guilty" after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client

The rule is fairly self explanatory in terms of the types of questions which may be asked of witnesses and the limitations placed on submissions also. These limits of both cross examination and the types of submissions available to a defence lawyer in such a situation must be explained to your client in order to manage their expectations appropriately.

If ever there arises a legal or ethical situation where you are uncomfortable (even if you don't know why) I would advise you to ring or e-mail the Law society Ethics advice line on (02) 9926 0114 or ethics@lawsociety.com.au, who are always willing to assist practitioners with potential problems they might encounter.

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ABORIGINAL LEGAL SERVICE NSW/ACT
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