

STUNNING CONSTABLES

- How to Cross-Examine Police

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This paper is written from an ALS defence perspective.

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The art of cross-examination is one which consumes professional advocates throughout their careers. Police officers, as trained professional witnesses, are often the most difficult class of witnesses to cross-examine. It is a task which junior practitioners may initially find daunting.

There is no simple means by which such cross-examination can be taught. Ultimately, experience will be the best tutor. The aim of this paper therefore, is not to provide a comprehensive solution to one of advocacy's more difficult tasks, but rather aims to afford an opportunity for "accelerated learning".

The first obvious proposition, is that the greater one's knowledge of the law of evidence, and the law pertaining to the offence with which your client has been charged, the greater guidance that knowledge will give you in formulating your cross-examination. Understanding which questions and answers are admissible and which are not, as well as understanding the issues within the available evidence is of invaluable assistance. A good knowledge of the law will provide a practitioner with many of the "signposts" as to where to go in cross-examination.

An obvious example is the law pertaining to possession in drug matters. The case of *Filipetti* (1984) 13 A Crim R 335, for example, may provide guidance in not only giving advice and seeking instructions from a client, but will also enable an advocate to pursue a theme or an issue within cross-examination.

Filipetti (1984) 13 A Crim R 335 is a decision of the NSWCCA concerning possession of prohibited drugs. The factual scenario was that police executed a search warrant on a residential premises that at the time was occupied by six people. The residence had three bedrooms. During the search the appellant's mother sat on a chair in the lounge room, and started to sort through some washing. She was asked to get up from the chair. Police removed the cushion from the chair and found a quantity of cannabis concealed in the spring section of the chair. The Crown case alleged possession by Mr Filipetti on the basis that he had exclusive physical control of the cannabis. The evidence that all occupants of the house had apparent equal access to the lounge room was held to be insufficient to establish exclusive physical control by any individual occupant of the premises. Mr Filipetti's conviction was quashed by the NSWCCA.

Below are few examples of questions which might be asked of police but a practitioner who understands *Filipetti's* case and wishes to pursue the issue whilst cross-examining police:

1. How many people were in the lounge room when you located the drugs?
2. You informed the court that you are familiar with the residence. How many people live there?
3. You were aware that person A and B were house guests at the premises at the time the search warrant was executed?
4. The garden shed where the drugs were found was not locked was it Constable?

The above are just a few simple examples of questions where knowledge of the law can play a significant role in helping to shape the cross-examination undertaken by an advocate concerning a given factual scenario.

Do You Need To Cross-Examine The Police?

Prior to embarking upon a hearing, an advocate needs to make a decision, based on a thorough reading of the brief, as well as the client's instructions, as to whether the evidence of police witnesses (as opposed to civilian prosecution witnesses) is in issue. As a practitioner, you may well have a number of themes or issues to pursue in cross-examination depending on your instructions. **The evidence of police may or many not be in issue.** If it is not, it may not be necessary to cross-examine police at all, or to only cross-examine on limited issues, as their case may essentially turn on the evidence of civilians.

Turning Police Witnesses Into Witnesses Who Assist the Defence – The Race For The “Independent Evidence”

Police are often useful witnesses for the defence. In cases where police evidence is not in issue, it may well be advantageous to cross-examine police or use police evidence as a source of independent objective evidence. For example, a civilian may allege they have been brutally assaulted, but police have observed no injuries. Police may have surveyed or searched the scene of an incident but have failed to locate some frightful weapon that an alleged victim says was used against them (and your client denies having or using at all). Police may have observed certain features of the layout of a place or premises which are such as to suggest that another (civilian) prosecution witness is untruthful or unreliable e.g. where identification is in issue, police evidence might be that the area was poorly lit and the alleged victim was staggering and incoherent, obviously affected by some substance. The alleged victim may dispute such things and claimed to have made a clear identification of your client whilst perfectly sober and unaffected by anything.

If one is able to make a final submission to the effect that the tribunal of fact would “prefer the independent evidence of the police” or “believe the police” in some respect rather than the “unreliable evidence of...” a civilian prosecution witness (where it is in conflict), this will often give the defence considerable assistance in achieving its aims. It will often have a devastating impact on the overall credibility of the prosecution case.

Where police evidence is generally not in issue, experienced prosecutors will often seek to utilise the “independent police officers” to impeach the credit of civilian defence witnesses or the defendant. Beware of this issue as it can present powerful material for the purposes of final submissions either for or against the defence case.

Many summary hearings that would otherwise be characterised as “word against word” cases quickly descend into a race for the “independent evidence.” The party who wins that race will very often win the case.

Talking Informally to Police

An informal chat with police involved in the case is often a valuable source of information. This is particularly so for practitioners who work in country or suburban locations and deal with the same police with such monotonous regularity that a degree of familiarity develops over time. The Officer In Charge (OIC) of the matter is often the most valuable source of information. A telephone call to the OIC that amounts to a vigorous interrogation shortly after the word “hello” is unlikely to yield valuable information. However, a chat outside court, while waiting for the matter to “get on”, or in other circumstances (when they come to your office to serve the brief, or on a day when you are at court dealing with a different matter) will often deliver the information that makes the difference. I have experienced situations where police will tell you frankly that they doubt the truthfulness of their key civilian witness, and proceed to give you “chapter and verse” of why they feel that way. Similarly, a general comment about the matter designed to invite a general discussion will often induce police to disclose (sometimes unwittingly) some fundamental weakness in their case. Police are often perfectly bored whilst waiting outside court for a hearing to be called on and more than happy to pass a few moments with idle chatter. Countless times I have received valuable additional information from police in the moments before a matter “gets on.”

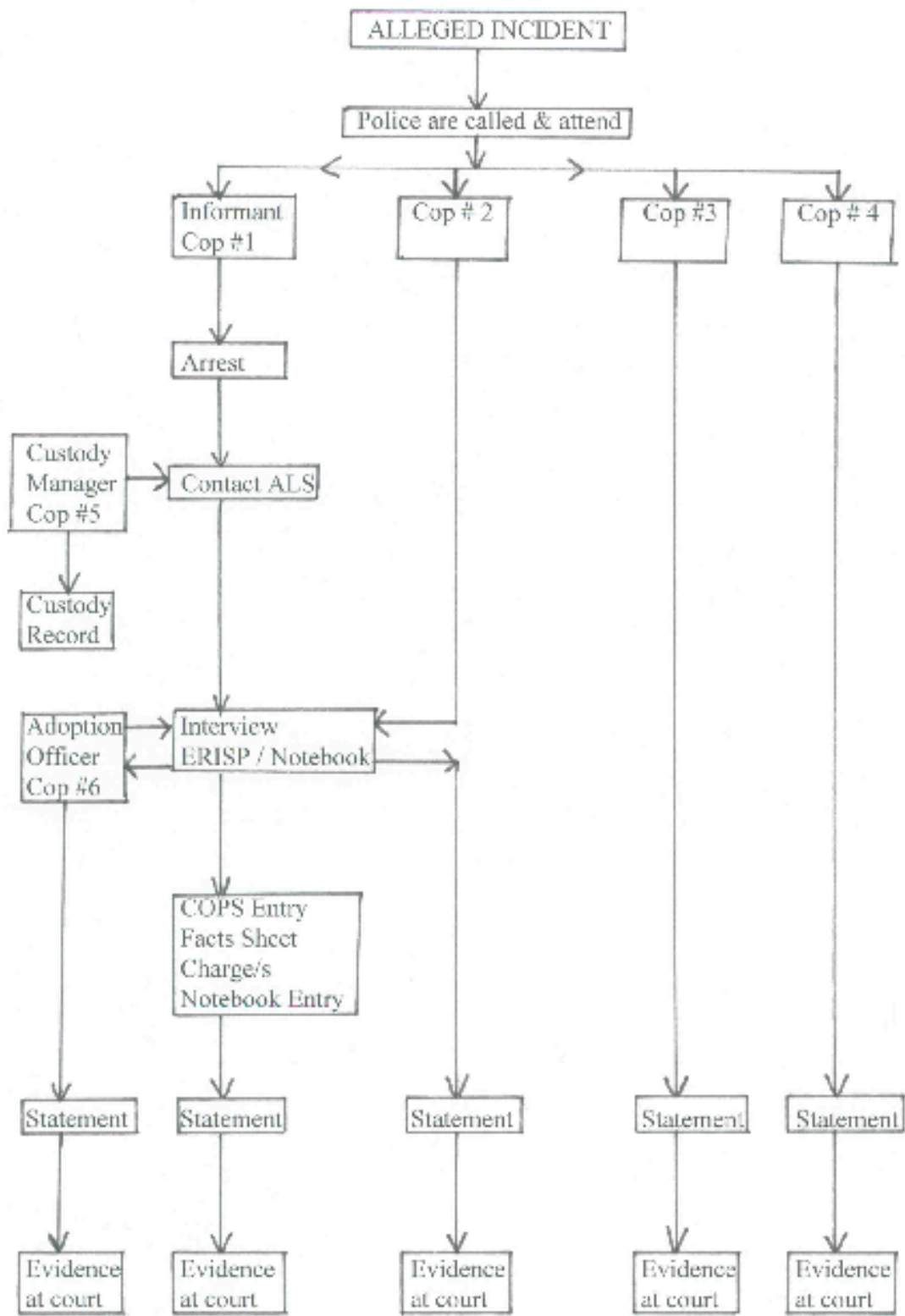
One example I encountered was where a civilian witness claimed to have been beaten all over with an iron bar and thrown through a window. In only a few minutes, I ascertained from police that they had not observed any injuries, the victim had not pointed out any injuries to police, nor complained immediately of the use of an iron bar, no iron bar had been found by police at the scene, and much of the broken glass from the window was on the “wrong” side of the window given the direction in which the alleged victim was said to have been thrown. Additionally, police confirmed instructions already obtained that they had knowledge of a possible motive for the alleged victim to be lying (which was the breakdown in a relationship between the accused and the alleged victim). Much of this information was not apparent from the brief. It is appropriate to use this information in the hearing by asking police questions which adduce into evidence the information you already know (from talking to them). The impact on the credibility of the alleged victim in such a case can be devastating. Cross-examination of police in such a case helps significantly. The police in such a matter can in effect be excellent witnesses for the defence, and made so through cross-examination.

Know Something About How Police Do Their Work

Another matter which will be of considerable assistance in cross-examining police is having a good understanding of how police work, and what steps they take (in general terms) in the investigation and apprehension of a defendant and then going on to present their evidence to the court.

On the following page there is a diagram which is offered as a generalised “road map” or “skeleton” of how things are done. The hypothetical incident below is one which is attended by four police officers. One defendant is arrested. He is taken back to the police station and offered an opportunity of being interviewed. He is charged by the OIC. The defendant later attends court and enters a plea of not guilty. The matter is set down for hearing. Police prepare their statements and they have been served on the defendant’s legal representative.

Note that the following diagrams use the term “informant”. This is an historical term which pre-dates online charging and has since been replaced with “Officer in Charge / OIC”. My apologies, however the diagrams were first drawn in 1999 for a much earlier edition of this paper.



So Who's Who and What's What in the Police Station?

In order to understand the diagram more fully, it is necessary to have some understanding of whom some of these people are and what their role is. What follows are a few brief explanations:

The Office in Charge (OIC) ["Informant" in the diagrams] is the person who initially charges the defendant. S/he initially brings the case against the defendant and has primary responsibility for the investigation. The OIC will be named on the Court Attendance Notice as well as the "Police Facts Sheet." In purely summary matters, a police prosecutor will appear on behalf of the OIC. In some Table 1 matters and all strictly indictable matters the Director of Public Prosecutions will ultimately assume carriage of the matter during the course of Local Court proceedings.

The Adoption Officer is the person who speaks to the defendant at the end of any interview. His/her function is "to ensure fairness" and provide a defendant with an opportunity to voice any complaints or concerns as to the manner in which they have been interviewed. The defendant has an opportunity of notifying or complaining of any threat, promise or inducement (officer of advantage) that may have been held out to the defendant to participate in the interview. The Adoption Officer should be a person who is not connected with the matter about which the defendant has been interviewed.

The Custody Manager is the police officer who has the primary responsibility for the safety and well-being of the defendant whilst s/he is in police custody. It is the responsibility of the Custody Manager to complete a record which includes a number of matters including time of arrest, information as to the health, medical and psychological history and current state of the defendant. Times of contacting lawyers, family, medical practitioners etc. should also be noted.

Contacting an ALS (i.e. Aboriginal Legal Service). Under Regulation 33 of the Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW), the Custody Manager is required to notify the Aboriginal Legal Service (NSW / ACT) Limited that an Aboriginal person is in custody. It is implicit that this should be done prior to an Aboriginal person being interviewed by police, as the regulation only exempts the Custody Manager if s/he is aware that the Aboriginal person has arranged for a legal practitioner to be present during questioning. Also, Aboriginal persons are vulnerable persons under Regulation 24 and are therefore entitled to a range of entitlements concerning "support persons" and the roles which such a person may take. Note that a child is also a "vulnerable person."

What is a "COPS Entry"? "COPS" stands for Computerised Operational Policing System. This is a very large database where police type in information about "Events". The computer gives each occurrence an "Event Number". As your client has been arrested and charged, police should complete such an entry. Usually this is done by the OIC.

Police Notebooks. All operational police are required to carry and use an Official Police Notebook. Detectives are required to fill out a "Duty Book". These are conceptually similar to a work diary and records incidents and events attended by police. It may also record interviews conducted by police with suspects / defendants. The OIC will usually make entries in their notebook in relation to the alleged incident. Other police may also make their own entries in their own notebooks.

ERISP. ERISP stands for Electronically Recorded Interview with Suspected Person. An ERISP machine simultaneously records an interview on two DVD's and one audio CD. Of the three audio recordings, one DVD is retained by the police, the audio only CD is given to the defendant, and one DVD is signed and sealed to be produced before the court in evidence. The DVD remained in the custody of the OIC but can be viewed by the defence prior to court by arrangement with the informant.

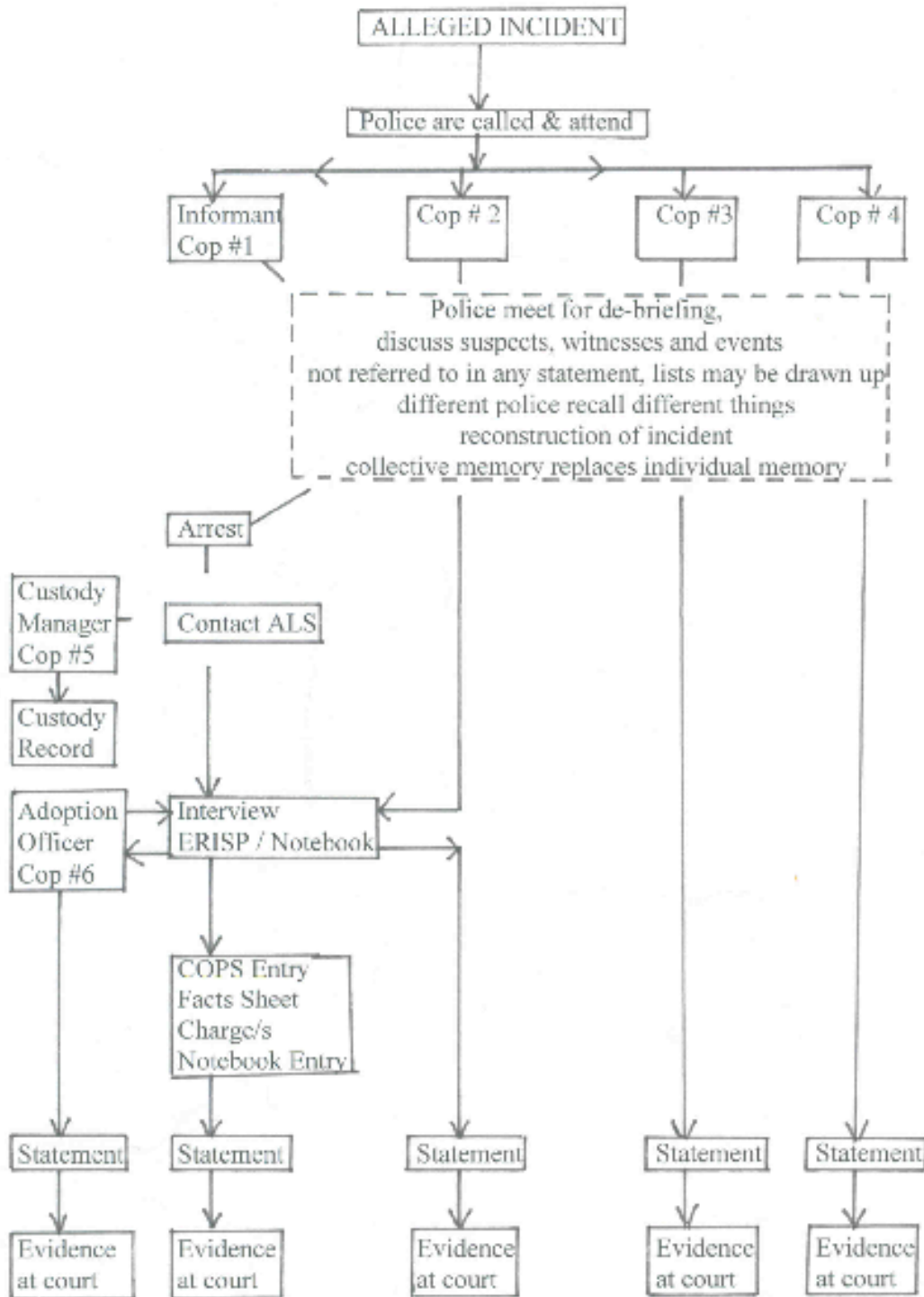
Police Facts Sheet. The "Facts Sheet" is summary outline of the charges and allegations that your client is facing. It should outline the facts and circumstances of the alleged incident that the police will be relying upon in the prosecution of the defendant. A copy of the Facts Sheet should be made available to the defendant during the course of the charging process. Police prosecutors will generally have a spare copy of the "Facts Sheet" to be made available to the defence on the first date the matter is mentioned before the Local or Children's Court.

So Where Do the Police Go Wrong? - "Crossing the Lines of Credibility".

By understanding the theory or "skeleton" of a police brief of evidence and how it is compiled, it is possible to identify events or circumstances where the credibility of police can be attacked. Very often, the police will present a brief which on the face of it implies that all police have made statement that reflect their own independent recollection of events, and therefore that the evidence of each individual police officer is independent evidence. This is often far from the truth. Each time a police officer has "crossed a line" in the previous diagram, their credibility may be in issue if it has not been disclosed in the brief of evidence. Just as a doctor needs to understand a skeleton to understand when a bone is weak or broken, so a criminal defence lawyer should learn the "skeleton" of a statement by a police officer in order to search for weaknesses.

The following diagrams show some common occurrences which are often not disclosed in a police brief of evidence but can be elicited through cross-examination.

“Crossing the Lines of Credibility” - Example 1



Example 1

In Example 1 police have attended a major street disturbance. Two days later your client has been arrested. Police have held a de-briefing (which is a very common after a major incident). no police officer has disclosed this in their statement (also common).

OIC (informant) Cop #1 is cross-examined. His evidence is as follows:

1. He acknowledges that he is in charge of the investigation and as such called a meeting to “de-brief” with all police who attended the incident. This meeting is referred to in his notebook but not in his statement.
2. He acknowledges that all other police who are to give evidence were in attendance at the meeting.
3. He agrees that they drew up a list of suspects wanted for charging on a whiteboard. In another column on the whiteboard was a list of prospective civilian witnesses who were to be spoken to for the purpose of obtaining statements and possibly giving evidence. He names three civilians, all of whom have made statements that are in the brief.
4. He acknowledges that as a result of the de-briefing he is aware that he and Cop # 2 did not see a certain part of the alleged incident (“Event A”). Only Cop # 4 saw Event A and it was on the basis of Cop # 4’s recollection that a decision was made to charge your client in respect of his behaviour concerning Event A.
5. He also claims that the Custody Manager rang the Aboriginal Legal Service immediately after your client was arrested. This was done in the presence of both himself and Cop # 2. You have subpoenaed the custody management records and telephone records of police. There is no record of any call. OIC Cop # 1 is unable to explain but insists that the call was made.

Cop #2 is cross-examined. His evidence is as follows:

1. He acknowledges that he attended the de-briefing organised by Cop #1.
2. He acknowledges that all other police who are to give evidence were present.
3. He acknowledges that lists were drawn up on a whiteboard. He recalls that in the Civilian Witnesses columns there were 5 names. He is unaware who was responsible for talking to them, but can recall their names. He does not know why no statement has been obtained from the other witnesses, saying “I was not in charge of the investigation, Cop #1 was.” The matter goes part heard. You track down one of the two remaining witnesses who confirms your client’s instructions that he was beaten senseless by Cop #1 using his baton. This civilian will come and give evidence for the defence.
4. Cop # 2’s evidence is that he saw Event A and that the content of his statement is as a result of his own memory of the matter. He denies the proposition that only Cop #4 saw this part of the incident, and maintains that it was seen clearly by all police. He states that all police agreed that this was the case during the de-briefing.
5. Cop #2 claims that Cop #1 and not the Custody Manager rang the Aboriginal Legal Service. When shown the custody and telephone records he agrees he is mistaken, that no call was made, and he agrees with the proposition, put to him in cross-examination, that he “may have confused this with another matter.”

Cop # 3 is cross-examined. His evidence is as follows:

1. Cop #3 is a young junior constable. He states at the outset of cross-examination that all of his evidence is a product of his own recollection. He denies having discussed the matter at all with other police, either before making his statement or before attending court to give evidence. You raise the issue of the debriefing. He suddenly “recalls” this meeting, which Cop #1 has said went for 2 hours. Cop # 3 says that the reason he forgot is because the meeting “was only short.” He clarifies this by stating that it went for

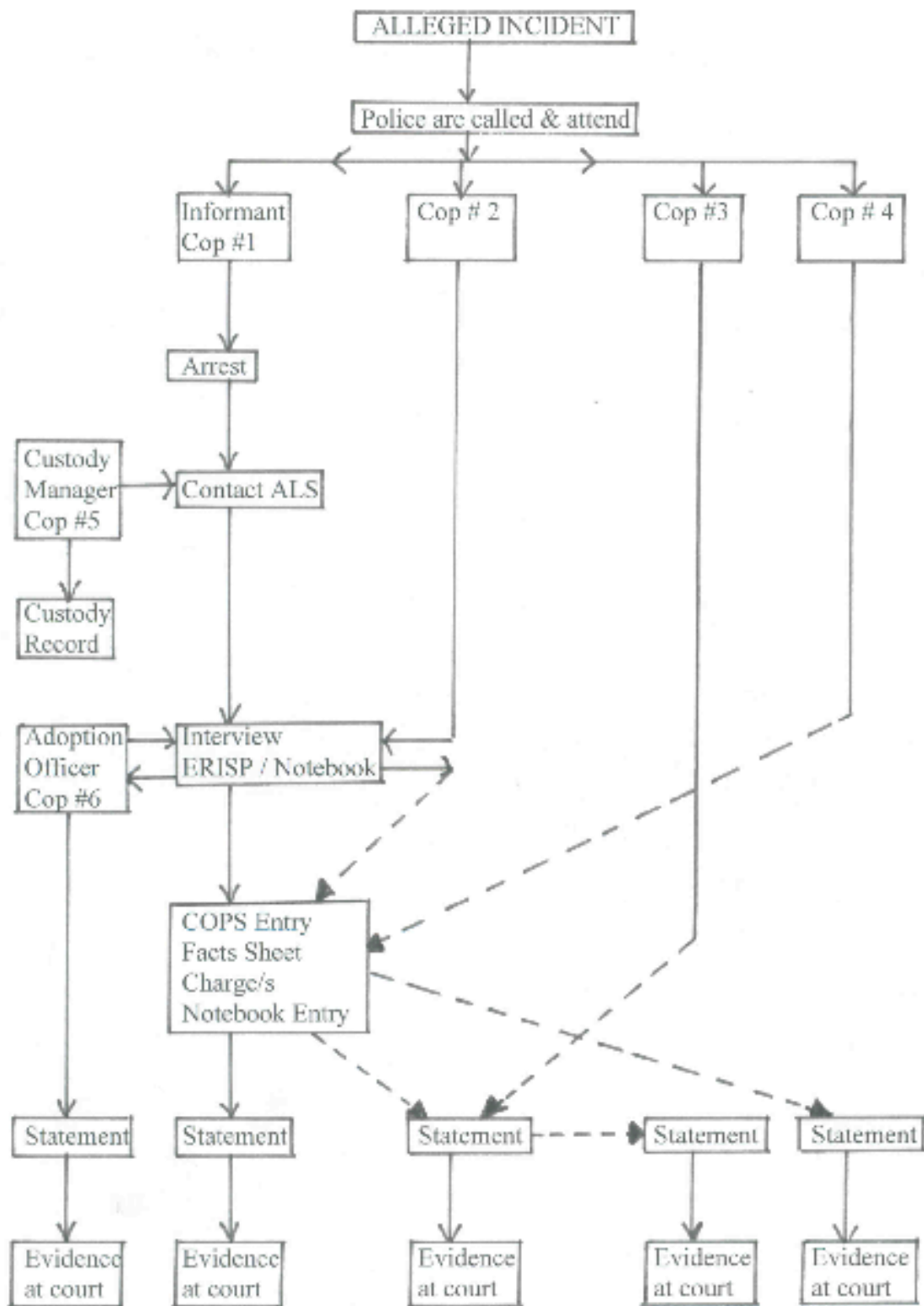
“only about 5 or 10 minutes.” You question Cop #3 as to which part of his evidence is false - the evidence that he conferred with other police at the meeting, or the evidence that he had not discussed the matter. He acknowledges that he has discussed the matter with other police. You put it to him that his evidence has misled the court. He does not agree. You put it to him that he has not told the whole truth, as required by his oath when entering the witness box. He does not agree.

2. He states that Cop #1, Cop #2 and himself were present at the de-briefing. You ask where was Cop #4. Cop #3 says that as best he can recall, Cop #4 was up at the hospital having some injuries attended to as a result of the incident.
3. He recalls lists of suspects and witnesses being drawn up. He does not recall any of the details of these lists other than the fact that your client was “definitely on the suspects list.”
4. He states that he has a clear view of Event A and was the person who brought Event A to the attention of OIC Cop #1 and Cop #2 at the debriefing. He maintains that Cop #4 was not there.
5. He does not know anything about whether the Aboriginal Legal Service was called.

Cop #4 cross-examined. His evidence is as follows:

1. He agrees that he was in attendance at the de-briefing meeting. He confirms that the meeting went for “about 2 hours.”
2. He agrees that all police officers who are to give evidence were present.
3. He agrees that a list of suspects and prospective witnesses were drawn up. He cannot recall how many names were in the prospective witnesses column. He remembers only two names (of civilians who are to be called to give evidence) but acknowledges that “there may have been more names.”
4. He states that he clearly saw Event A. At the debriefing he recalls that it was only he and Cop #2 who saw the whole of Event A. Cop #3 reported seeing the first part of Event A only. Other police had not seen Event A at all.
5. He does not know anything about whom if anybody rang the Aboriginal Legal Service. He was not on duty two days later where your client was arrested.

“Crossing the Lines of Credibility” – Example 2



Example 2

OIC (Informant) Cop #1 is cross examined. His evidence is as follows:

1. He agrees that as the Officer in Charge (OIC) in the matter he was responsible for typing up the Facts Sheet and the COPS entry.
2. He has made certain errors in spelling and punctuation in the COPS entry and Police Facts Sheet. He chuckles at your cross-examination and agrees that he is responsible for these errors.
3. He denies showing his statement to any other officer. He acknowledges that he has received a Copy of Cop #2's statement prior to serving the brief on the defence. He acknowledges that Cop #2 has the same spelling mistakes as contained within the COPS entry. He acknowledges that he is aware Cop #2 has viewed the COPS entry before making his statement because he saw him do so on the night your client was arrested. He says Cop #2 typed up his statement on the night your client was arrested.

Cop #2 is cross examined. His evidence is as follows:

1. At the outset of cross-examination he states that his evidence is a product of his own memory. He has not conferred with any other police officer in any way for the purpose of making his statement, nor has he referred to any documents.
2. You point out the spelling mistakes in his statement. He claims them as his own.
3. You show Cop #2 a copy of the Facts Sheet with the same spelling mistakes. He concedes that he "forgot" that he has looked at the Fact Sheet prior to typing up his statement.
4. You ask him whether he looked at the COPS entry prior to making his statement. He says that he "cannot recall, but I may have."
5. He denies showing his statement to any other officer.

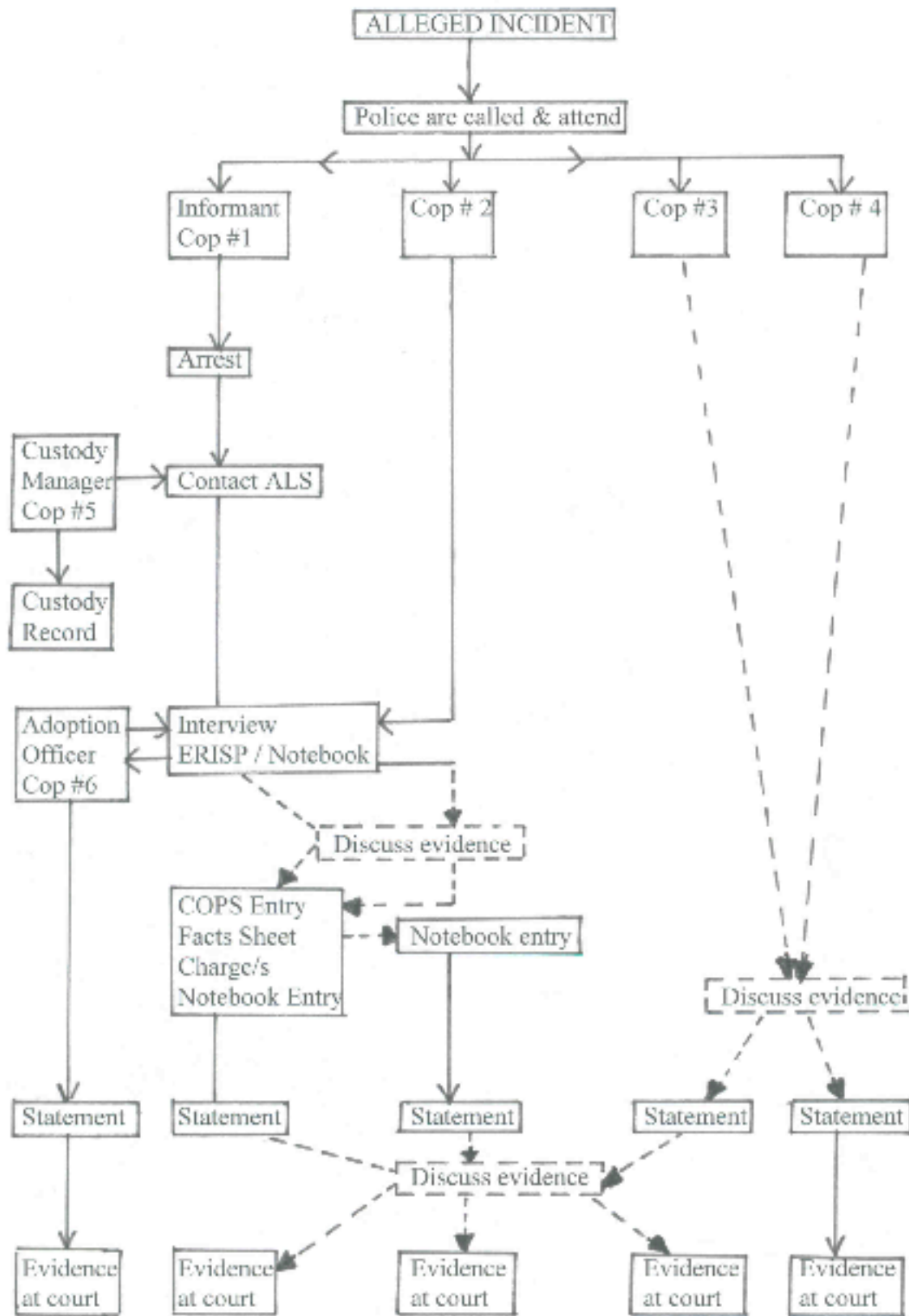
Cop #3 is cross-examined. His evidence is as follows:

1. He acknowledges at the outset that he has seen a copy of Cop #2's statement. He has done this because he requested a copy from Cop #2 who gave it to him. He did so because it was some weeks after the incident that he made his statement. He claims that the statement is nevertheless a product of his own memory.
2. He has corrected a spelling mistake contained in Cop #2's statement, but has made the same punctuation error. He agrees this error is copied from Cop #2's statement.
3. He denies showing a copy of his statement to any other officer. He then acknowledges that he gave a copy of his statement to the OIC so that it could be served on the defence.

Cop # 4 is cross-examined. His evidence is as follows:

1. You give Cop #4 a torrid time in relation to a number of other matters. His evidence is inconsistent with other police in respect of a number of issues not fully described in any of the statements.
2. Finally you confront him with a couple of spelling and punctuation mistakes. He states that he copied off the COPS entry for much of his statement. You ask him why. He acknowledges that he has a poor independent recollection of events.

“Crossing the Lines of Credibility” – Example 3



Example 3

OIC (Informant) Cop #1 is cross-examined. His evidence is as follows:

1. He acknowledges that he is the Officer in Charge (OIC) of the matter. He acknowledges that he was responsible for preparing the COPS entry and Facts sheet.
2. You ask him if he performed these tasks alone. He states that he was assisted by Cop #2 in that they discussed the alleged incident before Cop #1 formulated these documents. He asked Cop #2 to “double check” the documents. Cop #1 and Cop #2 agreed the documents were accurate.
3. You ask him whether he has discussed the incident since making his statement. He denies doing so.

Cop # 2 is cross-examined. His evidence is as follows:

1. He states at the outset of cross-examination that he has not conferred with any other officer prior to the preparation of his statement. He maintains that his statement is solely a product of his own memory.
2. You cross-examine further. You put to him that he “double checked” the accuracy of the Facts sheet and the COPS entry. He acknowledges that this is so, but denies that this is “conferring.” He says he and Cop #1 have the same memory of events because they saw and heard the very same things.
3. His notebook entry is in exact terms as part of the COPS entry. He denies he has copied from the COPS entry.
4. You ask him what exactly your client said or did immediately before a certain event referred to in Cop #2’s statement. He gives an answer inconsistent with the answer given to the same question when it was put to Cop #1. Suddenly their “same memory of the same events” is starting to look shaky.
5. You ask him whether he has discussed the incident with other witnesses since it occurred. He denies doing so.

Cop # 3 is cross-examined. His evidence is as follows:

1. Cop #3 is a Probationary Constable. He was in training when the alleged incident occurred and attended with other police.
2. He informs the court under cross-examination that this was his first day in the field and he has worked and studied hard to get there. This is only the second time he has given evidence in a matter.
3. You ask him what steps he has taken to prepare himself for court. He says that he has read over his statement several times last night and this morning whilst awaiting court. He says that Cop # 4 “helped me in the preparation of my statement.”
4. You ask him whether as part of his learning experience he has sought the assistance of other more senior police. He informs the court that he has had a lengthy discussion this morning with Cop #4 about court procedure, what to expect, and what the defence lawyer is like. He then volunteers that he has gone over his evidence a number of times with Cop #4 “to make sure I don’t forget anything important.” He is confident, however, that all his evidence is a product of his own memory.
5. You ask him if he has received the assistance of any other police. He says that there was a discussion between himself and Cop #1 and Cop #2 before court. He went through his evidence again, “just to make sure I hadn’t forgotten anything.”

Cop #4 is cross examined. His evidence is as follows:

1. Cop #4 is a crusty old Sergeant who has been a police officer for over 30 years.
2. You ask Cop #4 whether he has discussed the matter with any of the other police involved either before or after making his statement. He denies having done so.
3. You put to him that he had a lengthy discussion with Cop #3 before court. He acknowledges that this is so. You ask him what the discussion was about. He answers “Just court procedure and what to expect - stuff like that.”
4. You ask him if they discussed anything else. He says no.

The above are just a few (“jam packed”) examples of what to look for when cross-examining police.

By understanding the “anatomy” or “skeleton” of how a police statement comes to life, you will have a better chance of finding the weaknesses and inconsistencies which will destroy the credibility of police as witnesses should that be your objective.

Remember, cross-examining police is not easy - it takes time and experience to learn. Don't give up.

If you have a headache, call or email me – I do not bite ☺ - **0408 277 374** or dark.menace@forbeschambers.com.au

Good luck.

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