PREPARING FOR A HEARING IN THE LOCAL COURT

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This paper is written for the benefit of junior ALS practitioners in their first 12 months of practice.

This paper does not represent a complete "everything you need to know" dissertation on the topic. Getting good at hearings in the Local Court is something that takes considerable time, perseverance and experience to achieve. What follows is a simply a discussion of some of the more obvious "tips" that new practitioners may want to take on board for the purpose of getting started on the road to learning through experience.

Read the Brief Well in Advance

The realities of ALS work are such that sometimes your hearing will be allocated to you later than you would have liked. However, often you will know (reasonably) in advance where you are allocated and what matters you will have carriage of.

Reading the brief well in advance will give you the opportunity to think about the issues. Often the best "insights" will come to you after you have given the evidence and the issues time to "percolate" in your mind. Further, you will have more time to conduct any relevant legal research that might be required, and a healthy chance to confer with colleagues, ask questions and clarify issues.

It is important that you develop good habits early in your career. Do not fall into the habit of reading the brief on the morning of the hearing on the way to court. Sometimes a case will turn on one piece of evidence. Do not permit yourself to fall into the habit of phoning a colleague at 3 minutes to 10 and asking them if they "have 5 minutes" to help you nut out issues you should have considered well before you got to court.

Read Everything in the Brief- "The Devil is in the Detail"

Again this may sound terribly obvious. "Everything" includes custody management records, evidentiary certificates, criminal record, etc. etc., the entirety of all statements – even those of police who are apparently "saying the same thing".

A couple of examples of the "devil in the detail" include:

1. Checking the time that the accused left the charge dock (noted in the custody management records) and the time that the ERISP interview started – have the police spent some time pressuring your client to participate in an interview?

2. Was the client affected by alcohol or drugs at the time of arrest? Check the standard questions and any comments in custody management records in this regard.

Make Sure You Have Everything

Often only a partial brief is served. Depending on what is missing there it may or may not be important to contact the officer in charge and seek the balance of the material.

A couple of examples of things that you might want to get include;

I. Copies of exhibits referred to in witness statements.
II. A diagram drawn in the course of the ERISP interview but not included in the brief.

An example of something that you may not want to ask for includes:

a. Evidentiary certificates that the informant may have forgotten to obtain – e.g. a certificate to the effect that a vehicle was unregistered at a particular date (as failure to tender such a certificate may lead to the absence of a prima facie case re Drive Unregistered).

Getting Instructions – List Day

ALS solicitors are often faced with very busy lists. When you are doing the list, in the event that the client wants to plead not guilty, get enough information on to the file such that it will be apparent to anyone who "picks up" the matter what the nub of the defence case is. Even if you are regularly rostered on to a particular court, you cannot absolutely guarantee that you will be there for the hearing date allocated in the future. Whilst ALS solicitors have to be efficient time managers on list days, this need for efficiency should not substituted with a race to finish the day's work and get back to the office or go home.

"PNG" written on a file does not constitute a set of instructions. Nor does "I didn't do it".

You should record at the very least:

- the substance of the client's instructions,
- contact details (mobile phone numbers are a big help) for the client
- names and contact details of prospective defence witnesses
- Other notes that reflect the basis on which you maybe contemplating running the case as a factual contest e.g. "the victim is lying because we are in the middle of bitter family law proceedings" and /or;
- Legal Issues that you may consider having been raised by instructions, or contemplated by you on the available evidence e.g. "Self defence" or "Admission not recorded contrary to s.281 Criminal Procedure Act – changes to weak Crown case reliant on single witness." Not only does this give the person who ultimately does the hearing some insight into why the matter has been set down for hearing and how it might be run, but will also help foster a consistent approach with the client who has likely been told something about his or her prospects.

Conferencing the Client in Advance

Ideally you will have sufficient time to contact the client and arrange an appointment for them to come in and see you to provide detailed final instructions, as well as conference prospective defence witnesses. If you get the opportunity to take this "ideal" option you should obviously do so.

Some clients are not good at keeping appointments to come in and give more complete instructions. Do not simply leave it to the morning of court if the client misses an appointment. A telephone discussion undertaken by ringing the client's mobile phone (out of their work hours), and/or a message to call you back between nominated times so that you can get instructions, whilst not ideal, is certainly a great improvement on nothing. It also places some level of responsibility on the client to assist in the preparation of their own case, as well as demonstrating to the client that notwithstanding your busy working life you have a commitment to doing a proper job on their behalf.

Understand the Elements of the Offence

When starting out it is useful to draw up a table where you write out the elements of each offence charged down the table, and then a table of witnesses across the table. An example of such a table is set out below:

	Victim	Eyewitness 1	Police Officer 1	Police Officer 2
ASSAULT				
Immediate fear/apprehension	Y	Y		
Unlawful violence	Y	Y		
Without consent of Victim	Y			
HINDER POLICE				
Substantial interference			N	N
Police			Y	Y
In execution of duty			N	N
DRIVE M/V UNREG				
Driver			Y	Y
Public Road			Y	Y
Vehicle unreg			N	N
DRIVE DISQUAL				
Driver			Y	Y
Public Road			Y	Y
DQ at time of offence			N	N

Tables such as the above (which can be done in pen on a rough piece of paper) may help you to analyse the brief and find weaknesses and technical defences. The above example discloses that the hypothetical "Hinder Police" charge does not reach prima facie as there is not any evidence capable of sustaining an inference that the interference alleged made the officer's duty "substantially more difficult" – see cases referred to in Butterworth's commentary to s.546C of the Crimes Act in this regard. Similarly, the informant has neglected to obtain and serve relevant evidentiary certificates re unregistered vehicle and disqualified driver.

Read the Butterworths Commentary

Butterworths loose leaf commentary "Criminal Practice and Procedure NSW " should be your first port of call for a junior solicitor seeking to research foundational issues. Whilst there are other loose leaf services available, this is the one that is standard issue for judicial officers at all levels in NSW from Children's Court to NSW Court of Criminal Appeal. It is better to read what the bench reads.

If you don't have access to a copy of this service to take with you to court, at least photocopy the relevant pages from it to take with you.

Take a Copy of the Evidence Act With You to Court

Always take a copy of the Evidence Act with you to court. If you don't have access to such a copy, buy a CURRENT copy of Odgers "Uniform Evidence Law". True it is expensive, however so were all those years at university. You are unlikely to be taken seriously or gain a good reputation in the broader profession if you are caught standing in court in a defended hearing without the Evidence Act with you, or an obviously out of date copy (you can tell which edition of Odgers you are holding by the colour of the cover).

Read the Most Relevant Cases

Whilst you can't be expected to know everything about the law right from the day you start, it is helpful if you can obtain and read the cases that touch upon those matters that you anticipate will be central to the conduct of the matter.

Take Three copies of Cases You Intend to Refer to in Submissions

If you think it likely that you will have to refer the bench to a particular case law authority it is considered a minimum professional courtesy to have 3 copies with you given you when you anticipate relying upon it. One copy is for the bench, and the second is for your opponent. Both copies should be unmarked, and preferably in the reported form in the event that the case is reported. You may well have your yellow highlighted copy with you (the yellow having photocopied out) such that you have a quick advantage over your opponent and the bench that you can immediately focus upon the "purple passages".

Subpoenaing Documents

If you need to subpoena documents, make the subpoena returnable on a day reasonably PRIOR to the day of hearing. This will save annoying the arse off the bench while you ask for time to rummage through a pile of documents. It will also give you adequate time to properly consider the material. Further, in the event that the subpoenaed party does not comply, there is an opportunity to rectify the situation prior to the matter proceeding.

Note that it is considered a professional courtesy to provide your opponent (in a timely fashion) with a copy of any subpoena for documents that you have had issued and served. Failure to do so is not only a professional discourtesy, but your opponent is within their rights to draw the matter to the attention of the bench, saying they have been taken unawares, are at a forensic disadvantage, etc. Expect to be roundly criticised by the Bench if you allow this situation to occur.

Reply to s.177 Certificates in a Timely Fashion

s.177 of the Evidence Act permits the statement of an expert witness served in the appropriate form to be tendered into evidence, if served not later than 21 days before the hearing, or some other period as substituted by court order. If you require this witness you must provide notice in writing – see s.177(5).

Identify the Issues in Advance- Have a "Case Theory"

Identify to yourself the issues of fact or law that you intend to rely upon in order to win your case BEFORE the hearing commences. This will help you focus and prepare to a significant degree the manner in which you wish to cross-examine prosecution witnesses, whether you wish to make a submission at prima facie, and what, if any evidence you wish to call in the defence case, as well as what you want to say by way of closing address.

Some who write and teach advocacy refer to this as having a "case theory".

Whilst it is true that sometimes the course of the evidence will throw up new and unexpected issues, and you might be required to be somewhat nimble in adapting to new developments (which takes experience), at least having a "game plan" or "case theory" at the start will minimise the degree to which you get caught off guard.

Do I Have a Technical Defence??

Technical defences are often present a more reliable road to victory than relying solely on "the facts". As a DPP trial advocate once said to me in this context: "Just because your client is an arsehole doesn't mean that he is a guilty man." Further, notwithstanding our reactionary political masters, the law still has not reached the stage that it changes faster than your client's evidence may change "under the gun" from a capable cross-examiner.

Always scour the brief for a technical defence before you get to court. The NSW Police have within their ranks a plentiful supply of lazy cops who think that the matter is at an end when the charging process is complete. There is many a victory available as a result of lazy and incomplete police work

at either the investigatory stage, or in preparing, compiling and serving the brief, or marshalling key witnesses.

What if Material is Served Late?

This topic is worthy of a paper in itself. (I have a very outdated paper on the topic. If anybody wants to read it – send me an email and I will send it back to you. I have forwarded it for updating by somebody in-house at the ALS).

You should familiarise yourself with the provisions of the Criminal Procedure Act 1986 (NSW) ss. 183-188 inclusive as well as the following cases:

- DPP v West (2000) NSWLR 647; [2000] NSWCA 103
- DPP v Sounthorn [1999] NSWSC 786
- DPP v Webb (2001) 52 NSWLR 341; [2001] NSWCA 307

Check the Continuity of All Exhibits

In order to tender an exhibit the prosecution must strictly prove how the exhibit got from where it started (e.g. the alleged crime scene or point of arrest) to the court room. This will typically be done by way of producing exhibit registers, property seizure documents, drug exhibit registers etc.

Look initially in the brief for this material. If it is not there you may have a technical defence. It is no answer for the prosecution to say that they had no notice of the issue. This is the equivalent of the prosecution saying that they were unaware they would have to prove the matter beyond reasonable doubt.

Not much is written on this topic. A worthy discussion, however, can be found in the book "Drug Law in New South Wales" 2nd Edition by Zahra et.al (Federation Press) at pages 279-283 inclusive. I suspect this book is out of print, but is highly likely found in any reputable law library or specialist criminal chambers. If you were to read one only case on this topic it should be Young v Commissioner for Railways [1962] SR (NSW) 647 – again available in law libraries and criminal chambers.

Check all Evidentiary Certificates

Examples of things that are proven by way of evidentiary certificates include:

- Unregistered Motor Vehicle
- Uninsured Motor Vehicle
- Disqualified Driver on the date of the subject driving
- That something is a firearm
- That something is a prohibited weapon or prohibited article
- That something is a prohibited drug
- Blood alcohol content for the purposes of PCA matters

The policy rationale for evidentiary certificates is that it saves the prosecution the time and expense of hauling up a whole bunch of people and/or primary records to prove something simple. The

enabling legislation for such certificates often states something to the effect that the certificate will be regarded as proof of the matter unless the contrary is shown blah blah. An assertion from a police officer that "a check of records indicated that.." is hearsay and inadmissible. Further, some matters must necessarily be proven by expert opinion.

Check firstly, whether such a certificate has been served in time.

Check secondly whether the person who signed it is authorised to do so (this may take some legal research).

Check thirdly if the certificate strictly complies with its enabling legislation. A couple of examples in this regard:

i. PCA blood alcohol certificates are only admissible if the breath analysis at the station has been taken within two hours of the alleged driving. If you check EVERY certificate you will find that one in every few hundred has been messed up by the police. Persistence and discipline can bring a benefit to your client ☺.

ii. Drug analysis certificates for quantities greater than the traffickable quantity are only admissible if the substance is delivered by police for analysis no later than 14 days after seizure – see Regulation 13 of the Drug Misuse and Trafficking Regulations 2006 (NSW). It is not uncommon for lazy and / or dumb police dealing with minor drug matters to mess this up. If the certificate is inadmissible and alleged prohibited drug cannot be proven to be a prohibited drug, then it is "Tilt - Game Over" for the prosecution ☺.

Learning How to Cross Examine

You will spend your entire career trying to perfect this art. DO NOT bash yourself up if you feel that you are not highly expert in the early stages of your career. This is the hardest part of advocacy. You will make mistakes, ask dud questions you wish you hadn't, and think of questions later that you wished you had, etc. for as long as your practice as an advocate. This monkey will stay on your back forever, no matter how good you get. Get used to the presence of that monkey, and don't let it bother you to the point of losing confidence and faith in your ability to develop your skills in the longer term. The ability to cross-examine effectively is a work in progress that will not finish until the day you retire from professional advocacy.

Many people starting out in their first few hearings write out each and every question they intend to ask. This is a perfectly legitimate approach for somebody who is new and feeling a little challenged in terms of self confidence (I certainly did it). However, you should not rely on this technique beyond your first few defended hearings, as it will not generate higher quality cross examination in the longer term. When you are on your feet in those first few hearings, experiment with "departing from the script" occasionally for the purpose of clarifying answers, or pursuing a particular theme further.

After you have had a few goes, abandon the "write out every question" approach. Make notes on the sorts of questions you want to ask. Make headings of the "themes" you want to pursue. Make "sub notes" beneath these headings of matters you want to pursue within that theme. A further non-exhaustive list of tips (in no particular order) includes:

- Try to progressively build you skills in “departing from the script / notes” where necessary in order to pursue or challenge unfavourable evidence as it emerges.
- Keep a memory bank in your head of what worked and what didn’t work. In the future you will be able to pull things out of your memory bank as required when you are on your feet.
- Incorporate techniques and styles of other advocates that you believe were effective. Don’t be shy about learning from experienced police prosecutors in this regard.
- Make a mental note of poor advocacy that you have seen, and resolve not to copy it.
- Always have a purpose to your question; there is no point to a pointless question (obviously), or long winded guff about nothing.
- Practice cross-examination in your head. Choose key words (to be inserted into questions) in advance for their effect. Play out in your mind scenarios of what the witness might say. Build counter scenarios for cross-examination to effectively deal with the hypothetical scenario that you first contemplated.
- If you want to “trap” a witness’ evidence within certain boundaries, “close all the exit gates” to that “paddock” or set of boundaries BEFORE you go in for the kill. This will require some prior contemplation of possible “exits” or escape routes for the witness.
- When you hit the bullseye – move on – do not give the witness the chance to move the target that has already been hit.
- Don’t cross-examine about matters not in dispute, or irrelevant to the issues at hand.
- Ask leading questions.
- Watch the witness. Good magistrates and prosecutors will watch the witness, and in particular their demeanour or “body language” and tone in order to assess their credibility. You should do the same throughout the hearing, as well as when you cross-examine. Over time you might learn to “smell the lie” in the evidence.
- An eminent Queens Counsel once advised me (when I was still a fairly junior solicitor) to “look for the thing that is contrary to human nature”. This is the best single piece of advocacy advice I have ever received.
- If you give a witness a choice of blaming themselves, or blaming someone else, they will almost always blame someone else. Cops are especially good at letting themselves off the hook at the expense of their civilian witnesses.
- People believe documents before they believe people – use documentary records to prove facts wherever possible.
- Recruit independent witnesses to your cause. (Often the police are your best friends in this regard).
- Highlight the reasons why a biased or self interested witness would be biased or self interested.
- Every case has an underlying emotion. Identify it and deal with it appropriately – for example child sexual assault is a terrible thing –don’t jump all over the little child’s head; apart from anything else it is counter-productive. Pursue what you are looking for in a friendly tone (like you are an infants’ school teacher). Have a few warm up questions to establish a rapport. Children are agreeable and open to suggestion –so use leading questions that end in “...that’s right isn’t it?” or some such put in a very friendly way. Children believe that adults are presumptively good people. A Brown v Dunne question will signal to the child

that you don't believe them. This will upset the child and set them against you. Leave such questions to last and be very crisp and succinct before sitting down.

- Knowing the law will help you to shape your cross-examination and select your "themes". Cross examine with a view to "steering" the evidence away from elements that are essential proofs for the prosecution and /or try to "steer" the evidence towards an available defence, or into a dark shadow of (reasonable) doubt as to an essential proof.
- Read my paper "Cross Examination of Police" on the ALS intranet (he said with extreme immodestly) ☺.
- Remember that this list is far from exhaustive.

How Will I Know When to Object?

This is a challenging area for newcomers. It is particularly difficult given that you haven't had the time to master the Evidence Act (which is also a work in progress that will last your entire career).

Start with the following basic concepts:

"I object on the grounds of....":

1. "Relevance" – see Evidence Act s.55

2. "Leading" – see Evidence Act s.37 – see the Evidence Act Dictionary for the definition of leading question. "The car was red, wasn't it?" is a leading question. "What colour was the car?" is not. Do not object to the prosecutor leading in relation to matters that are not in dispute and / or are introductory.

3. "Hearsay" – see Evidence Act s.59 for a definition and sections 60-75 inclusive for exceptions to the hearsay rule. Also ss.81-90 re admissions (which are also hearsay). If you find the Evidence Act definition convoluted, think of the definition offered in "Cross on Evidence" some years ago to the effect that "Hearsay is an assertion made by someone other than the person giving evidence." Examples include:

   "I didn't see the accident but the bus driver told me years later that..."

   "I heard that everybody was really drunk that night"

4. "Fairness" – the question may be misleading or confusing – see Evidence Act s.135(b)

5. "Unfair prejudice" – see Evidence Act s.137 – evidence is not prejudicial because it is probative. "<u>Unfair</u> prejudice" is about the danger that the evidence will be given undue weight (more weight than it deserves); or to put it another way that it will be taken as proving more than it rationally does. An example would be "I can describe the accused as ..blah blah... *she had a really mean looking face*...". OR "I saw this guy who was *dressed like a drug dealer* in a tracksuit with a bum bag around his waist"

6. "Badgering the witness" – see Evidence Act s.41

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I hope that the above has been of some help.

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