Things I'm glad someone told me (or wish someone had) when I started.

Whether you get your start in the desolate, isolated chaos of Bourke or the apparent, but false chic of Newtown, there are many things about this profession that are useful to know but you don't always get told about. What follows is a list of things I have learned both the easy way and hard way over the last few years that I regularly try to remind myself of.

Views expressed in this paper are of course mine alone, and though you may think it comes across as didactic (which it does), and though you might think of me as a hypocrite (which I am), and though you have oppositional defiant disorder (which you do – you are an ALS lawyer), I hope you will find it useful anyway as you plunge head first into the depths of this wonderful, paradoxical, and bemusing world of criminal defence.

1. Don't do this for the thanks. You will both win praise from, and get criticised by, clients when it is totally and utterly unwarranted. True satisfaction can only come from within – when you know you have given all that you can and have done the work with as selfless an attitude as possible. Doing this job for the thanks is a mug's game.

2. Don't try to save the world. You cannot. You are not the master of the universe. The sooner you realise this the better. The social problems underlying the criminal behaviour of your clients existed long before you got here, and will continue to exist long after you leave. Which isn't to say you shouldn't try your best for each client – you should, and indeed you must. But don't try, for instance, to get a client to do D&A counselling if they're not keen to do so. Don't take it personally when all your efforts to get a client a bed in rehab, or a suspended sentence etc. get laid to waste by further offending. It is inherent in the social problems we deal with that the blunt instrument of the criminal law is ultimately an imprecise and often misguided means of trying to "rehabilitate" an individual or a community. The inability to "save" them is not your fault. And it never will be.

3. Do not compromise your ethics. There will be opportunities and there will be temptations, often borne out of a genuine and understandable sense of injustice at your clients' plight. Don't. No one client and no one matter is worth your practicing certificate. Know your role, and operate within the bounds given to you.

4. Do not allow yourself to be bullied. There are people who work within the system, including but not limited to, correctional officers, police officers, sheriffs, police prosecutors, court staff, and yes, even magistrates, who think of our role as being inconvenient at best, and illegitimate at worst. There is then a tendency on their part, whether intentional or inadvertent, to bully you into being meek

and compliant with the way they want you to do things. It is most marked in country practice where we come across the same people week in and week out. It is generally insidious and not directly perceptible, but discernable nonetheless in some of the following things: attempts to get you to rush client conferences, or put undue pressure on your clients to plead guilty to everything as charged/not run defended hearings; it will sometimes manifest itself in snide remarks about your ethics or even morals, a refusal to involve you in conversation at morning tea, "friendly" advice to not take yourself or your job too seriously. Bear in mind that a good relationship with all these different parties is essential to running an effective practice for our clients, so do not pick fights with any of them save in the most exceptional circumstances. But do not allow such subtle forces to guide your forensic decision making. Our clients deserve better than that.

5. You are not your client's mouthpiece. Don't allow yourself to simply relay information from your client to the court or other parties such as police or probation and parole. You must subject your instructions to your critical thinking. In appropriate circumstances, you should cross-examine your client in conference and/or insist upon independent verification of an assertion before accepting it as something you can put to the court. If the client seems confronted or alienated by this, it is worth explaining that this is simply a precursor to what could happen in court, so it's better that it comes from you than from a magistrate or prosecutor. A lot of our clients seem to think that if they can pull the wool over our eyes, we will somehow be able to pull the wool over everyone else's eyes for them. The classic example of this is the "explanations" often provided for why an offence took place. It is amazing how so many practitioners, even after years of practice, continue to take their client's instructions at face value and end up irritating the bench to such a degree with ridiculous explanations for offending behaviour that what little good submissions they have get drowned out. This is terrible advocacy, does clients a terrible disservice and should be avoided.

6. Be completely across all the material in your file. Nothing is more likely to win a client's confidence than a lawyer who is clearly on top of the case. Never conference a client without having read every single piece of paper in the file beforehand. For fresh custodies, it means total mastery of the facts and record before you enter the cells. In a defended hearing, it is mastery over the full police brief of evidence. This will allow you to take charge of the conference and extract all relevant information from the client efficiently.

Whilst you're at it, it's always a good idea to take brief instructions about current subjectives (where the client is living, any new courses or employment they're doing etc.) – we often get asked these sorts of questions by magistrates and excusing our backs constantly during the proceeding to get this information we should really know is not awe inspiring advocacy. Similarly, "I don't know, it's not my matter, my colleague has carriage of this" are some of the most pathetic words you'll ever hear in court. Watch how magistrates react every time you hear a lawyer say that. Try to ensure you never have to utter those words. Know your file.

7. Always refer back to the elements of the offence and have a quick look at the commentary on the section when trying to assess the strength of the prosecution case – even for offences that you have become familiar with. You never know what ideas can come up.

8. Read case law relevant to a matter that you have. Some say you should read a case a day. And you should, if you can. But if you can't commit to that, read cases relevant to some issue you are trying to figure out as you go along. This will ensure you have a frame of reference when trying to understand the case, and you will be less likely to forget those principles the next time you encounter the same issue.

9. Know more about your case than every other person in that court room or do not stand up. This won't happen for at least the first six months of your practice but it is something to aspire to. Out-researching and out-investigating the prosecution is not as hard as you might imagine. One example of how to do this is (time permitting of course) is to have a view of the scene of the alleged crime. You will, without exception, learn something new about your case, or see it in a different light. Watch effective lawyers in action – they are invariably more on top of the case than everyone else in court. No surprise then as to why they are so effective.

10. Be across the law and ethical rules that apply to convenience pleas. Convenience pleas should in principle be avoided wherever possible but it is a reality of ALS practice that a significant number of your clients' pleas of guilty are on a convenience basis. Let's be honest— almost always, our clients are not actually agreeing to plead guilty to something they didn't do – they are refusing to admit guilt to something they did do but for various reasons (denial, embarrassment etc.) won't to their legal representatives or the world at large, and we as lawyers accommodate this charade by taking the plea on a "convenience" basis. See Peter Hidden's paper "Some Ethical Problems for the Criminal Advocate" and ensure you know *Wong v DPP* (2005) 155 A Crim R 37 and *Meissner v The Queen* (1995) 184 CLR 132 - both well summarised by Johnson J in *R v Wilkinson* (No. 4) [2009] NSWSC 323 (21 April 2009).

This is a tricky area, and it is essential that you understand the ins and outs of it— what consequences it has for your clients, the need for clear signed instructions, the efficacy of a full pre-sentence report where a client is not admitting guilt, what submissions you can and can't make in such circumstances, what evidence you can and can't call etc.

11. Manage your clients' expectations. You are not a magician. The clients need to know this. People have funny ideas about what it is that we do, probably from watching too much TV or reading or hearing things in the media where it seems that you can buy acquittals by the quality of legal representation you can afford. There's no doubt that effective legal representation can make a big difference in a case, even a spectacular difference, but these are the exception and not the rule. Regular doses of reality checking is essential to keeping a client happy and reducing the likelihood of a complaint.

12. Complaints are inevitable and unavoidable. It is the nature of the type of law we practice and the kinds of people we deal with that we are soft targets when things go wrong. Don't take it personally. But cover your backside by being professional at all times. Keep good file notes, and get signed instructions when and where possible.

13. Develop an interest in improving your advocacy. There's no use knowing any of this stuff if you are unable to translate it into advocacy in court. The good news is that virtually all advocacy books and courses tell us that it is a skill that can be improved with practice. It is analogous to cooking – you can learn the basics from books, watching others, and getting pointers from those more experienced. But after that, you need to actually do it, stuff it up, do it again, stuff it up again, and so on until you get it right. And you will get it right – but it needs time, it needs thought and plenty of effort. Despair not.

14. Do not raise your voice at the bench. It almost always gets you nowhere. I learned this the hard way, though I have to say, nothing is more likely to win your client's total confidence than a good old-fashioned stoush with a magistrate. That said, don't back down from a submission that you have constructed after careful consideration – chances are, you are right, and if (and only if) it is crucial to your case, ask the magistrate to state reasons if they disagree with it. Similarly, err on the side of pressing an objection and asking for a ruling rather than withdrawing it if a magistrate or prosecutor seems to be bullying you into backing down and you are not persuaded that you are wrong. But you must not, under any circumstances, be anything but polite and courteous, even and especially when the bench is being anything but.

15. There is no such thing as a stupid question. Truly there isn't. When you start, it is often the simple procedural things that are the most daunting – when do I sit down and when do I stand up? When do I make submissions? When do I get to call my client? Much of this you learn simply by doing and almost all magistrates are forgiving enough to tolerate little procedural errors in your first few months. However, there is no harm in asking your colleagues these sorts of questions before you walk into court.

Senior lawyers often have been around for so long that they forget how much anxiety little things can cause junior lawyers. Thus they simply don't think to tell you about them. All that means is that the onus is on you to seek out the answers to these questions. The same goes for questions on legal issues, or how to manage a client or family member, or how to approach a prosecutor to negotiate a plea and so on. There is nothing more worrying for a supervising lawyer than a junior solicitor who doesn't ask questions. Don't be afraid to ask them.

16. Workshop your defended hearings and trickier sentence matters with colleagues. Even from other offices. You will almost always get better ideas on forensic decision making and tactics from discussing your case with someone else. I suspect other organisations in our profession do not have the same level of collegiality that we have and it is there for you to take advantage of and

contribute to. The more you discuss your cases with others, the more people will want to discuss their cases with you too – this exchange of information and ideas is probably the most satisfying and interesting part of our job. Many a 2 AM on a weekday of mine has been spent on the phone with a colleague in an office hundreds of miles away analysing some esoteric aspect of the Evidence Act for an upcoming defended hearing. Those are my favourite memories of my ALS experience thus far and have brought me some of my closest and most important friendships.

16. Always have a case theory. Doesn't matter if what you're doing is a bail application, a forensic procedure application, a sentence submission or even just a mention. Know what you want, why you want it, and how you propose to get it. On the topic of mentions, remember that a mention is never just a mention. All sorts of things can happen when a matter is "just a mention". Just ask anyone who has asked for a PSR without preparing for sentence in Dubbo on a day when a matter was "just in for mention".

17. Ensure you own the following three books: the latest edition of Odgers's *Uniform Evidence Law*, the latest edition of Howie and Johnson's *Criminal Practice and Procedure*, and a recent edition of David Ross's *Ross on Crime*. If you are really keen, get Pearce and Geddes's *Statutory Interpretation in Australia*. We paid thousands as uni students for ridiculous textbooks we never used. Surely, even on the meagre salary we are on we can afford these. Tax deductible as well mind you. *Ross on Crime* incidentally is highly entertaining in its own right. Read it for fun. I'm being deadly serious.

Make sure you also have the Legal Aid *Criminal Law Solicitor's Manual* and/or the NSW Young Lawyers' *The Practitioners Guide to Criminal Law* (now a bit out of date). Both these texts are available online to be printed free of cost and they are goldmines of practical tips.

18. The bench sees nothing until you have had a chance to see it first and raise an objection if necessary – PSRs and Justice Health reports excepted of course but even there you have the right to object to material contained therein. Train everyone in court including the court officer, prosecutor and magistrate to know that you will insist on seeing each and every single document handed up to the magistrate. Eventually, they will adjust their ways. It matters not whether it is a Queensland record you were unaware of, a subpoena to give evidence or a facts sheet on a sentence matter – if it doesn't cross your eyes first, it does not go up.

19. Use the Legal Aid library to help you find obscure cases or other materials if they are not readily available on our LexisNexis subscription or traditional shelf resources. The library staff are the unsung heroes of Legal Aid - consummate professionals and thoroughly helpful, even at very short notice. They are remarkably quick too. A wonderful resource – only a phone call (9219 5844) or email (library@legalaid.nsw.gov.au) away.

20. Think carefully before writing representations. It is always beneficial to all parties involved in a criminal prosecution if a plea agreement can be reached by negotiation. However I personally err on the side of not writing representations, unless I am satisfied that: a) the proposal I have in mind is the outcome that I in fact want; b) it is the only sensible way of procuring it. It is important to understand the official process of how representations are dealt with by the prosecution. It is often the case that a prosecutor will consider his hands tied on the day if representations have been considered and rejected. But equally, it is often the case that a headstrong officer in charge will get told what's what by a Crime Manager or Senior Police Prosecutor if reasonable representations are put in. However, be aware that the official process is sometimes superseded by local custom depending on where you are practicing. Plea negotiation is often most fruitful in a circuit court on a Friday morning when there are several hearings listed and there is nothing wrong about taking advantage of this fact if you are acting within your ethical boundaries.

In all circumstances however, do not ever disclose your instructions when writing representations, and always consider whether or not your representations could cause the police to fix a weak case by having their weaknesses pointed out to them.

21. Spend some time gaining mastery over the following areas of law: s 32/33 and fitness to plead; call-up of s 9 and s 12 bonds – most practitioners and prosecutors, and many magistrates do not understand these areas well, and it is your responsibility to do your best to educate all those involved during the course of the proceeding on how they work.

Also, ensure that you understand thoroughly both limbs of the "Bourke Defence". You will hear lots of people advise you that if a witness does not turn up in a hearing, then it is game over for the prosecution. Often, that is indeed the case. But it is not a given. You need to understand the different things that can happen if a witness does not turn up or does turn up but is unfavourable to the prosecution. See Tom Quilter's paper "Dealing with Absent and Unfavourable Witnesses".

22. You will make mistakes. Lots of them. Even twenty years from now. Get used to it. Use them as opportunities to reflect and get feedback, and try harder next time.

23. You are not expected to know everything and be a perfect practitioner within a few months of practice. This is an absurd expectation. The profession is diverse and interesting enough to sustain a lifetime of learning. It is as challenging or boring as you make it. Life experience more than anything seems to dictate how quickly someone catches on in this profession. We all have to learn at our own pace. Our clients on the whole would much rather have an enthusiastic, but attentive lawyer with little experience, than a knowledgeable

but disinterested lawyer with more experience. So would I. Your inevitable lack of knowledge in your first few months is not the handicap you think it is.

24. Be open to new experiences both within and without the law. As mentioned, life experience is essential. As you take on more responsibility with indictable cases, it becomes increasingly crucial that you are able to know what's going to wash and what's not going to wash with a tribunal of fact. Step outside your comfort zone and learn a bit about yourself and the world around you.

25. Take breaks and holidays. You need them. Regularly. Everyone benefits from you being refreshed and happy.

26. Know that this profession is full of crazy people and addicts. Look around you. Can you name yourself ten people who have been in this profession for more than twenty years who are not in some way insane? I can count them on one hand. In all seriousness, whether this is correlative, causative or both is anyone's guess, and obviously what you do in your personal life is a matter for you. It's not my place to lecture you, or anyone else for that matter, on how to behave and what to consume, but there can be little doubt that the criminal defence community is rife with people who drink too much, smoke too much and/or have dysfunctional personal lives in one way or another. More than just occasionally, I have walked away from court or come to the end of a particularly gruelling week, and thought to myself that I could use a rather stiff drink or seven and a bunch of smokes thrown in for good measure. Fortunately thus far, it has not become a habit. But a habit is never far away if you're not watchful. None of us are immune.

27. You are not alone. Help is but one phone call away. Criminal defence lawyers are a small community and are by and large keen to lend you their time. This can be a stressful and lonely experience. It doesn't have to be. Whether your problem is legal, personal or otherwise – do not be shy to ask for help.

28. Don't count your wins and losses. This is a completely meaningless exercise. I counted my win/loss record for the first six hearings because I lost all of them. But in time, you realise that there are innumerable variables, most of which are beyond your control, that go into a win or loss. When you analyse most wins or losses closely, you'll find that in the end you probably had very little to do with the ultimate outcome. Some cases win themselves, some cases lose themselves – there's little point getting too proud or too cut when a matter wins or loses. Win or lose, after any hearing, ask yourself if you could have done anything differently or better. The answer to this question will be much more telling than the simple fact of the win or loss. That said, it probably does pay to observe a general trend (assuming that you have a fair minded magistrate who has a doubt) – if you win almost all your hearings, you are probably not running enough, and if you're losing a great deal, maybe you're running too many.

On a similar note, you will on occasion have to run a dead loser because your client simply will not plead in the face of an overwhelming case. As long as the

client is making an informed decision and you find this is not happening to you all the time, there's nothing wrong with this. You are much less likely to draw a complaint from a client who loses a defended hearing, than a client who is dissatisfied with a sentence after pleading guilty. And besides, you never ever know what might happen in a defended hearing. Quite literally, anything can happen.

29. Try to not let your ego dictate whether or not you do something. This probably applies to everything you ever do in life, but as a lawyer, I mean specifically the decisions you make to cross-examine a witness, or lodge an appeal, or argue for a suspended sentence etc. Notions like "if I do it, will I look like a turkey?" or "what if my colleagues will read the transcript?" are not sound bases for decision making. Equally, it is ill advised to run a matter because you think it might be fun, or you want to stick it to a prosecution witness. Your client's best interests must always be your paramount concern.

30. Don't run anyone down. This includes clients, prosecutors, colleagues, other lawyers, magistrates— anyone. From a purely pragmatic point of view, you just never know who knows who, and who might get insulted. And you just never know who might come in handy for you one day when you need their help – be that an emergency listing for bail, an adjournment application, or help locating a client. As Dale Carnegie says in *How to Win Friends and Influence People*: "If you want to gather honey, don't kick over the beehive."

31. Keep good files. This isn't hard. Fill them out whilst the magistrate is mentioning all the unrepresented matters or calling through the AVO list and you're stuck at the bar table. We all know that feeling of gratitude when picking up someone else's file that has been well noted up and you can figure out what's going on in a matter within seconds. It doesn't take much to return the favour. Also keep legible file notes so your colleagues don't have to scratch around taking hopeless instructions on bail and looking for access to bench papers to see if there's a 22A issue. Good, concise file notes can make a remarkable difference to our clients' confidence in us when a new lawyer comes into a matter and doesn't require the client to repeat the instructions already given.

32. Don't feel compelled to drive at odd hours or at less than safe times. This applies mainly to the country practitioners. People have different opinions about this, but I think it's better to stay a night in a dodgy motel somewhere rather than run the risk of being scraped off the Mitchell Highway after hitting a roo like so many ALS lawyers have been before us. You're no good to your client tired. You're even less good to your client dead. The ALS is not so devoid of funding these days that you can't apply for travel allowance in the appropriate circumstances.

33. Get to court early. Even though your clients may not. The time between 09:00 – 09:30 is the most valuable you have at court. Whether it is because of the registrar's call over on a list day, the availability of the prosecutor to negotiate a plea agreement on a hearing day, the opportunity to clarify your

instructions or simply get a bit organised – the earlier you get there, the less stressful your day is likely to be.

34. Always know what you want to say in closing, but know that things rarely ever go according to plan in a defended hearing. When preparing for a hearing, after having mastered all the materials in the file and the relevant case law, you should to start with writing out your closing argument. Only when you know what you want to stay in closing can you possibly know what to cross-examine on and what evidence to call yourself if any. You should keep refining your closing during your preparation until you have a game plan that you know can carry the day. Yet, you ultimately need to be flexible enough to drop your game plan if necessary during the course of the hearing if, as it inevitably does, something unexpected happens. This confidence can only come with experience, but thorough preparation and extensive consultation with your colleagues should ensure that you are not completely off track when you start out.

One useful technique when preparing a hearing is to map out what you would argue as a prosecutor at the close of the case. This will make the weaknesses and strengths of the prosecution case evident to you, and thus also the obverse – the strengths and weaknesses of the defence case. Knowing the parameters of *why* a case is strong or weak is essential to being able to persuade a magistrate that he or she should have a doubt and is essential to being flexible when the unexpected happens and the case you've prepared to meet changes.

Incidentally, none, and I really mean absolutely none, of the conventional wisdom, contained in advocacy books and courses, applies to domestic violence hearings. Domestic violence hearings occur in an inverted world of their own.

35. Consider the viewpoint of the person you want to persuade. Be it a magistrate on penalty, a prosecutor in fact negotiations or a client on a plea offer— having the empathy to understand where another person is coming from is half the battle in figuring out what to say, if anything, on a given topic. Remember, no one ever really does anything unless they want to do it. Your job as a professional persuader is to figure out what it is that another person wants, and tailor what it is that you want, to appear to fit within what it is that they want. For example, a client might instruct you to offer a certain residential address on bail, or make a particularly provocative submission about a victim on sentence, that you, through your good common sense, have determined is a counterproductive. Most clients will accept your judgment on this if you can get them to understand that it is not in their interests to get the magistrate offside. "Think of it from the magistrates point of view…" is a fairly safe way of dissuading a client from strongarming you into a ludicrous submission.

36. Attitude is everything. Much of this paper has been about attitude. Your experience of this profession, like much else in your life depends on the attitude you bring to it. People who are successful in this profession, and by successful, I mean, motivated, competent, empathetic and not cynical even after having done it for many years, are without exception people who approach their work and their life with the right attitude. The world you experience is nothing but an echo

of your thoughts, feelings and emotions. If you want to see despair and bleakness everywhere, whinge about everything, and ultimately burn out, you can. If you want to see hope and potential everywhere, get on with it cheerfully, and have a fulfilling experience, you can do that too. The choice is yours.

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