I'm New Here, What Do I Do?

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This paper addresses specific situations that are encountered by junior western zone Aboriginal Legal Service lawyers in circumstances where you have limited experience and limited access to practical assistance at court. That said it is useful for all junior solicitors practicing anywhere.

It is not meant to be an in-depth analysis of underlying legal principles, but something which gives practical advice that can be used either in court, with a prosecutor, with a police officer, or with your client.

It is based on lessons learnt by being in these situations ourselves and frantically ringing various people to see who would take our call for some advice. It will address:

I. **What to do when a prosecutor is refusing to call an exculpatory witness or an exculpatory ERISP – Pg 2**
II. **What to do when your client is psychotic – Pg 7**
III. **Common ethical quandaries – Pg 11**

I – It's the hearing day and the prosecutor is refusing to call a material witness or refusing to play your client's exculpatory ERISP

It is all too common to arrive at court for a hearing and be told by a prosecutor that:

> "*I'm not going to play your ERISP in my case because it doesn't help my case. Oh, and by the way I'm also not calling the mum who was in the house at the time because I don't think she's reliable.*"

Police Prosecutors are bound by the same ethical duties and obligations as solicitors, barristers and crown prosecutors.

For those of us admitted as either solicitors or barristers, our ethical obligations are written in statute[1]. However, the prosecutorial duties in particular are derived from the common law and there is no reason or authority to suggest that they do not apply to police prosecutors, who are officers of the court with a statutory right of appearance.[2]

Confronted with this situation, there are a number of practical ways to address it.

Arrive early and have a conference with the prosecutor about how they propose to run their case

The reality of my practice has been that on an average hearing day, a prosecutor will not have read any (or most) of their matters until that morning. Arriving early provides the opportunity to resolve these issues and avoids you attempting to force their hand in court. Do not allow the non-calling of evidence to arise halfway through the hearing. This will only annoy the bench, cause you to become flustered, and create the added difficulty of being part heard in the event the matter is adjourned.

Ask the prosecutor which witnesses they propose to call and what documents they propose to tender. If they do not know, ask them directly to play your client's ERISP/call a particular witness.

If they tell you they are not calling a witness or playing the ERISP, ask them why and ask if they have conferenced a particular witness they are refusing to call.

Make a note of this conversation.

[1] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015, r 83 and 89; *Legal Profession Uniform Conduct (Barristers) Rules* 2015.
[2] s 36 of the *Criminal Procedure Act* 1986.

Refer the prosecutor to the law

If it becomes apparent that the prosecutor is not intending to lead the exculpatory ERISP or witness remind them of their duties articulated in the case law:

Nguyen v The Queen [2020] HCA 23

The prosecutor has an obligation to tender an ERISP containing admissions and exculpatory statements (a "mixed ERISP") by an accused.[3] A tactical decision not to adduce a mixed ERISP is not an acceptable reason not to tender it.

The court stated at [36] that:

> "*But there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence*."

Despite the submissions of the Crown, the Majority found that the caselaw that applies to the calling of material witness[4] applies by analogy to an ERISP and "all evidence":

> "*They apply to the tender of all evidence which may properly and fairly inform the jury about the guilt or otherwise of the accused. As Dawson J said in Whitehorn [citation omitted], the prosecutorial obligation to call all witnesses is but an aspect of "the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused*."

A related issue discussed in *Nguyen*, and one that a prosecutor may raise in response, is whether or not an ERISP that is entirely exculpatory would be the subject of the duty articulated above. The mixed ERISP was admissible as an admission pursuant to s 81(2) of the *Evidence Act*, as the entirety of the ERISP was necessary to understand the context of the admissions. However, this exception to

[3] *Nguyen v The Queen* [2020] HCA 23, [45]:

> *… A prosecutor is to be expected to act to high professional standards and therefore to be concerned about the presentation of evidence to the jury. It is to be expected that some forensic decisions may need to be made. It is not to be expected that they will be tactical decisions which advance the Crown case and disadvantage the accused …Whilst the creation of a tactical advantage might be permissible in civil cases, in criminal cases it may not accord with traditional notions of a prosecutor's function, his Honour said. In Whitehorn, Deane J said that the observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. It will be obvious that a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence falls into this category.*

[4] *Richardson v The Queen* (1974) 131 CLR 116; *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Kneebone* [1999] NSWCCA 279; *R v Soma (2003)* 212 CLR 299 at 309-310 [30]-[31].

the hearsay rule would not apply to an ERISP that is entirely exculpatory. On that topic, five of the justices stated in *obiter*:[5]

> *…The provisions of the Uniform Evidence Act respecting exceptions to the hearsay rule facilitate the tender, but they do not determine whether the evidence should be tendered. There is another provision of the Uniform Evidence Act which permits the prosecutorial duty to be discharged where the provisions relating to the hearsay exceptions are not met.*
>
> *It will be recalled that ss 59(1) and 81(1) and (2) appear respectively in Pts 3.2 and 3.4 of the Uniform Evidence Act. Section 190(1) provides that the parties to a proceeding may dispense with the application of provisions of those and other Parts in relation to particular evidence or generally. In criminal proceedings s 190(2) requires that an accused's consent must be the subject of legal advice. In a case where a record of interview does not meet the requirements of s 81(2) there seems no reason in principle why a prosecutor ought not properly resort to this provision with the consent of the accused.*

Accordingly, despite a wholly exculpatory ERISP being hearsay and subject to the hearsay rule, the prosecutorial duty would still require its tender and s 190 provides a lawful avenue for that to occur.

<u>*R v Kneebone* [1999] NSWCCA 279</u>

This case involved the failure to call mother who was supposedly an eyewitness to the sexual assault of the complainant, but denied any assault occurring when spoken to by police:[6]

1. The duty to call a witness who may be exculpatory is a corollary of the prosecutor's duty to ensure that the crown case is properly presented and that it is presented with fairness to the accused and to the court – [57]-[61]
2. Whilst it is a matter for the prosecutor to decide which witnesses will be called in their case, their duty to the court and accused is **not** achieved by avoiding evidence just because it does not accord with a theory of the accused's guilt – [50] and [57]-[58].
3. A prosecutor may refuse to adduce evidence that they view as unreliable, however there must be a principled basis for coming to this view, not simply that their evidence is favourable to the accused. In *Kneebone* no conference was conducted between the prosecutor and the witness, and the court stated:

[5] *Nguyen v The Queen* [2020] HCA 23, [42]-[43].; see also [60]-[61] per Edelman J.
[6] *R v Kneebone* [1999] NSWCCA 279; See also *The Queen v Apostilides* (1984) 154 CLR 563, at 575

> "[49]… *it is necessary that a prosecutor whose decision is under examination be able to point to identifiable factors which can justify a decision not to call a material witness on the ground of unreliability: see* ***Apostilides*** *(supra, at 576); DPP Guidelines (supra), at least if the suggestion of attempting to obtain an improper tactical advantage is to be avoided. It is therefore necessary for the prosecutor to take appropriate steps, including, where necessary interviewing witnesses to be able to form the opinion.*"[7]

4. At [102] Smart AJ helpfully lists the duties of a prosecutor in this area – see annexure 1.

See also *Whitehorn v The Queen* 152 CLR 657.

Cause the prosecutor to put their decision and reasons on the record

In the event the prosecutor continues to refuse to adduce the evidence, neither you nor the court can compel the prosecutor to do so. However, the court is entitled to:[8]

1. Question the prosecutor about their reasons for not calling a witness.
2. Invite the prosecutor to reconsider their decision; and
3. Make comment as it thinks to be appropriate with respect to the effect that failing to call the witness may have on the trial.

If you are instructed to continue with the hearing in the absence of the evidence and are subsequently convicted, the absence of exculpatory evidence is a critical submission on any appeals bail application.

Further the Evidence Act would not apply[9], and you could put the evidence before the Magistrate in whatever form it is available.

Attempt to admit it in another way

The case law reflects that you should not be put in the position of having to call the witness in your own case however, practically speaking, if you are instructed to proceed with the hearing on the day, calling the witness yourself is an option.

[7] See also *Nguyen v The Queen* [2020] HCA 23,[44]-[45].
[8] *The Queen v Apostilides* (1984) 154 CLR 563 at [575]; *Nguyen v The Queen* [2020] HCA 23, [35].
[9] s 31 of the *Bail Act* 2013

If the witness is at court, subject to s 36 of the *Evidence Act*, the court can compel them to give evidence absent a subpoena. If you wish to cross examine them, you can do so if the court grants leave.[10]

Where you only have a statement of a witness it is *prima facie* inadmissible for its hearsay purpose.[11] Similarly, representations in an ERISP that are not admissions are also caught by the hearsay rule.[12]

The hearsay rule does not apply to evidence admitted for a non-hearsay purpose.[13] The most common non-hearsay purpose I have come across is establishing the deficiency of the investigation with a view to asking for a Mahmood direction. The non-hearsay purpose is to show there are witnesses who could have given material evidence who the prosecution has declined to call. A *Mahmood* direction allows the court to take this into account in assessing whether the prosecution has discharged the burden of proof.

Once the evidence is in for its non-hearsay purpose, it's in for its hearsay purpose.[14] Whilst a prosecutor may seek to limit the use of the evidence under s 136 (for example to its non-hearsay purpose only), you would have a strong argument resisting that where the prosecution is refusing to put the exculpatory evidence before the court.

Apply for a temporary stay of proceedings

It is acknowledged that this is not particularly practical advice. The law of stays is complex, cannot be adequately canvassed in this paper, and generally requires a significant amount of preparation. This route will most likely end in the matter being adjourned.

A court would likely require a Notice of Motion and supporting affidavit. An application for a stay in the circumstances discussed in this paper may lead to the proceedings being adjourned as you and the prosecutor are likely to become witnesses.[15]

In brief, the court has the power to stay proceedings that are an abuse of process.[16] There are two aspects to an abuse of process:[17]

[10] ss 37 and 192 of the *Evidence Act* 1995.
[11] s 59 of the *Evidence Act* 1995.
[12] See *Nguyen v The Queen* [2020] HCA 23 for discussion of admissibility of purely exculpatory ERISP and ERISP with admissions and exculpatory representations in it.
[13] s 60 of the *Evidence Act* 1995.
[14] s 60 of the *Evidence Act* 1995.
[15] r 27 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015
[16] *Jago v District Court of NSW* (1989) 168 CLR 23.
[17] *Rogers v The Queen* (1994) 181 CLR 251, 256.

1. An aspect of vexation, oppression and unfairness to a party; and
2. That it will bring the administration of justice into disrepute.

In criminal matters two considerations affect claims of abuse of process:[18]

1. The public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by both State and citizen; and
2. Unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.

The argument is that the accused cannot receive a fair trial in circumstances where the prosecutor refuses to adduce exculpatory evidence. A court permitting a proceeding to continue in circumstances where the state was actively preventing that court from receiving exculpatory material into evidence could do little BUT bring the administration of justice into disrepute.

This should be argued in the context of the prosecutorial duties discussed above; and that the cases referenced above demonstrate that the failure to adduce known exculpatory evidence may amount to a miscarriage of justice.

[18] *Moti v the Queen* [2011] HCA 50, 57.

II – My client is psychotic, what do I do?

On any given day, you may be called upon to appear for a fresh custody, list day walk-up, or a current client who, for whatever reason, is in some kind of mental health crisis.

This part of the paper is designed to provide practical advice for dealing with clients in summary proceedings who are in the midst severe mental health issues and are unable to provide coherent instructions. It is not targeted at matters where a person may be permanently unfit.

All decisions should be informed by the peculiar circumstances of each client, eg can they provide you with any instructions? Are they in custody? Do they have a diagnosis? Are they medicated? Do they have support workers? Is the issue drug related? Are they known to the court?

Conference

The first step is to conference the client and find out what if any instructions they are capable of giving you. A person may be incapable or unwilling to provide you with fulsome instructions in relation to a charge, however, they may be capable of giving you bail instructions; or instructions to be dealt with under the Mental Health legislation.

If there is a Mental Health Nurse available at court, you should get your client's consent to be assessed by them.

Sometimes giving the client time and coming back for a second or third conference may yield better results than simply giving up after the first interaction.

Consider appropriate options under Mental Health Cognitive Impairment Forensic Provisions Act ("MHCIFP Act")

The three most common options in summary proceedings exist under Part 2 of the MHCIFP. If it appears to a magistrate that a person has a mental health impairment and/or a cognitive impairment,[19] they can be dealt with under:

1. s 13 – adjournment of proceedings. This may necessitate a bail application.
2. s 14 – discharge unconditionally, or into care of responsible person with or without conditions.

[19] s 12 MHCIFP Act

This is often difficult on a first meeting with someone due to lack of supporting material. Simply making submissions is not enough and any application must be supported by evidence of a diagnosis. If you are suggesting a discharge into care of a responsible person with conditions, further evidence from the responsible person and the basis for conditions is necessary, eg letter from support agency outlining attendance at support programs on a weekly basis.

If it appears to the Magistrate that the defendant is a mentally ill person or a mentally disordered person,[20] they can be dealt with under:

1. s 19 – order the defendant to be taken to and detained in a mental health facility for assessment, if not mentally ill to be brought back before the court; or discharge unconditional or subject to conditions, into the care of a responsible person.

Mental illness is defined in s 4 of the *Mental Health Act* 2007:

> "***mental illness*** *means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms—*
>
> *(a) delusions,*
>
> *(b) hallucinations,*
>
> *(c) serious disorder of thought form,*
>
> *(d) a severe disturbance of mood,*
>
> *(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).*"

A mentally ill person is defined under s 14 of the *Mental Health Act*:

> *(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary—*
>
> ***(a) for the person's own protection from serious harm, or***
>
> ***(b) for the protection of others from serious harm.***
>
> *(2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.*

[20] s 18 MHCIFP Act

Mentally disordered person is defined in s 15 of the Mental Health Act:

> "*A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary—*
>
> *(a) for the person's own protection from serious physical harm, or*
>
> *(b) for the protection of others from serious physical harm.*"

If a prosecutor opposes a finding that a person falls within s 14(1)(a) or (b), you might reasonably infer from that the prosecutor thinks the person is not a danger to themselves **OR** others and therefore has a compelling case for release on bail.

<u>Assisting the Court to the appropriate outcome</u>

The real difficulty for practitioners arises when you are faced with a client who fits into the category of a mentally ill or disordered person and who is practically unwilling or unable to provide with instructions to do anything. They may be irrational, abusive, aggressive, or simply incoherent.

It may be easy to say, "*I can't get instructions therefore I'm not going to do anything for this person*", however, in my view you should do all that you can within the confines of your ethical duties to assist the court and the person.

In your approach consider the wording of various enabling provisions in the act, the purpose of the act, and your ethical obligations to the court and client.

s 10 states that "*a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself*". Further ss 12 and 18 of the MHCIFP Act use the phrase "*if it appears to the Magistrate…*"

This language is more inquisitorial than adversarial and mirrors the therapeutic intention of the legislation to strike a balance "*…between the needs of victims and the safety of the community, and the mental health of the offender*".[21]

If the person comes into court unrepresented, the Magistrate will most likely enquire as to whether anyone from Legal Aid or the ALS has spoken to the person.

[21] Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, 2nd Reading Speech.

In my view, the circumstances would permit you to:

1. Express that you have tried to obtain instructions, however that has not been possible.
2. Tell the court that you do not appear for the person, however as an officer of the court can provide some general observations.
3. In making those observations it would be appropriate to confine yourself to physical observations, rather than disclosing contents of conversations, for example:
    a. The custody manager has told you that the person has emptied toilet water out in cell.
    b. They appear to be having a conversation with an invisible person.
    c. Unable to maintain a logical conversation.
    d. Experiencing auditory and/or visual hallucinations.
4. Remind the court of its powers under s 10, 13, 14, or 19 of the MHCIFP Act.

If they have spoken to a mental health nurse, you could inform the court of that fact. Mental Health nurses are not bound by confidentiality in the same way as a solicitor and they may be able to provide more information to the court. If you have a good relationship with correctives or police, you could suggest to the magistrate they call upon them to give some evidence.

You should exercise great caution in not disclosing anything that might be considered a confidential communication from the person to you.

It is acknowledged that this is treading a fine line, however "*A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty*"[22] and in my view this course is open to practitioners.

Be mindful that s 19 is a drastic measure and there is good reason not to be frivolous in its use. It is an order that deprives a person of their liberty and forcibly removes them to a mental health facility. This detention can be indefinite and may be longer than the period of incarceration they would receive for the matter they appear for, especially if it is a low-end offence.

Practically, hospitals send people back to courts on a routine basis saying that nothing is wrong with them. If you are invoking s 19 on a regular basis and the clients keep coming back, you will lose credibility with the bench, although I acknowledge this may be more of an indictment on the hospital than your judgement. Again, sometimes progress can be made with a client by leaving them for a short period of time and coming back to them later to try another conference.

[22] r 3.1 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015

III – Ethical Quandaries

Given the many and varied matters you will take on, you will undoubtedly come across situations that seem ethically dubious or murky. Generally, I subscribe to the view that if it feels wrong, it probably is, and you should seek some further advice.

The public defenders are always generous with their time and advice, senior colleagues in or out of the organisation will always try to assist, and the Law Society has a permanently manned Ethics Hotline – **9926 0114**.

Crucially, your professional integrity is something that once lost is not easily regained. You will practice in small communities with the same magistrates, prosecutors, DPP lawyers, police officers etc, and if you gain a reputation as someone who is sneaky, tells half-truths, or is ethically dubious, it will follow you for your entire career.

Further, having a reputation as an unethical practitioner is disadvantageous to your client. It will cause the Magistrate to constantly think "*what are they not telling me*?" or your opponents to not accept your word for things.

Below are a few examples of matters that regularly arise in the practice of a junior ALS lawyer.

It is important to set out a few of the more relevant solicitor's rules in order to frame the situations discussed below:

- 3.1 – A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
- 19.1 – A solicitor must not deceive or knowingly or recklessly mislead the court.
- 4.1.1 – Act in the best interests of a client in any matter in which the solicitor represents the client.
- 8.1 – A solicitor must follow a client's lawful, proper and competent instructions.
- 17.1 – A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client … and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's … instructions.
- 17.2 – a solicitor does not breach the solicitor's duty to the client…simply by choosing contrary to those instructions, to exercise the forensic judgments called for during the case so as to:
    - Confine the hearing to the real issues,
    - Present the client's case as quickly and simply as may be consistent with its robust advancement, or

    - Inform the court as to any persuasive authority against the client's case.
- 19.2 – A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.
- 19.3 – A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.
- 19.6 – a solicitor must, at the appropriate time inform the court of any binding authority…and any applicable legislation which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.
- 22.1 – A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).
- 23.1 – A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

The court does not know about my client's out of state criminal history

In the course of practice there may arise a situation in which the prosecutor tenders a clean/limited criminal record without the knowledge that your client has an out of state criminal history.

Pursuant to rule 19.3, you are not obliged to correct the prosecutor's submission that that is the extent of your client's record.

However, rule 19.1 would prevent you from making any positive submission that that document is the extent of your client's record, or something similar. You may choose to make no submission on the subject.

If you are asked directly by the court about the record, you cannot mislead the court in any answer you give.

Bail papers do not show the offences as being "show cause" but I know that they are

This scenario is similar, but importantly different to the situation of the missing out of state criminal record.

Whether or not a matter is show cause is a matter of law. This is distinguishable from a matter of fact or evidence. Rule 19.6 obliges you to inform the court of any legislation against your client's case.

Furthermore, if you make a submission that there is no unacceptable risk, or that such a risk can be mitigated, and therefore the court should grant bail, you are misleading the court and in breach of rule 19.1, because you know that the law requires the court to determine whether cause has been shown before assessing unacceptable risks. You would further be obliged to correct that statement pursuant to rule 19.2. asking for a grant of bail in these circumstances would be leading the court to make a jurisdictional error.

Your client instructs to run a fantastical and outlandish defence

r 8.1 states that "*A solicitor must follow a client's lawful, proper and competent instructions*".

From time to time, you will encounter a client who wishes you to run completely unavailable and outlandish defence, or put submissions to the court that are inappropriate or improper for example, sovereign citizens who claim the court has no jurisdiction over them.

r 8.1 is qualified by r 19.1 – that your paramount duty is to the court; r 17.1 – that you are not a mouthpiece for your client; and 17.2 – that in certain circumstances a solicitor can exercise forensic judgments contrary to your client's instructions.

This should not be interpreted as allowing you simply set aside your client's wishes and instructions simply to be substituted by your own views. You should only consider acting in a way that is contrary to your instructions where you are making a forensic decision consistent with rule 17.2; or the instructions from the client are not lawful, proper, and competent.

In the latter scenario, you should strongly consider whether it is appropriate to continue acting.

The complainant in a DV hearing retracts their statement or isn't coming to court

It's 9am, you have a DV hearing today, and the complainant comes into the office and tells your field officer:

> "*I made it all up, he didn't hit me, I lied cause I was angry, and I was really drunk that night.*"

This is a situation you will encounter (in some form or other) time and time again. There is no property in a witness and there is absolutely nothing preventing you from speaking to prosecution witnesses including complainants (see r 23.1 which prevents you from stopping your opponent speaking to a witness). Be conscious of r 25.1 which sets parameters around conferencing more than one witness together (including if one is a client).

Any conference with a complainant should be done with the utmost caution and preferably with a witness present. The risk you run is the suggestion by someone that you have somehow improperly influenced a witness, or that you become a witness in the hearing. This might occur for example where the complainant abandons the retraction and goes back to their original version in the witness box leaving you as the only witness to the retraction.

However, finding out the complainant's version prior to them getting in the witness box is prudent, and crucial in allowing you to fully prepare the matter and take instructions from your client.

Accordingly, my preference is to have a discussion with the complainant in the presence of the officer in charge, and the police prosecutor. If possible, I would also have a colleague, field officer, or admin officer present and taking notes of the conversation. This means there are witnesses to, and a record of, the conversation and there can be no suggestion of impropriety on your behalf.

This approach protects you from any accusation of impropriety, and means that if required, there are other witnesses to the complainant's retraction.

A closely related situation may be when a complainant doesn't show up to court, and you've been told by your client, or the complainant that they are not ever going to come and they're holed up at their cousins house in Sydney.

In the course of an adjournment application or discussion with the prosecutor, you may be directly asked if you know where the complainant is. This situation should be approached subject to your ethical duties and instructions from your client.

It is perfectly acceptable to respond: "*I am not instructed to make any comment on that issue*", be prepared for the awkward silence that follows. Under no circumstances should you lie and say, "*I don't know where they are*". You have ethical duties not to mislead the court, and not to make a misleading statement to your opponent.

If you are approached by a complainant who tells you they are not coming I would tell them that you are not prepared to have a conversation with them about that, but they should attend the police station ask for the prosecutor and/or OIC and tell them that they are not coming.

You call your client and they tell you they are in breach of their bail, are on the run for new charges, and are not coming to court

This happens a surprising amount. You are sitting in your office preparing for court, or more likely squeezing in some prep whilst waiting for a hearing to get on, and you call your client. They proceed to tell you they have new charges, have left town and are staying at their cousin's house.

The solicitor's rules squarely deal with this in r 20.3:

> *20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must—*
>
> *20.3.1 advise the client against that course and warn the client of its dangers,*
>
> *20.3.2 not advise the client how to carry out or conceal that course, and*
>
> *20.3.3 not inform the court or the opponent of the client's intention unless—*
>
> *(i) the client has authorised the solicitor to do so beforehand, or*
>
> *(ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety*

Annexure 1

segment of the assault, namely the alleged sexual assault which occurred between the other assaults.

101 The principles relating to the calling or non-calling of witnesses by the Crown have been authoritatively restated by the High Court in *R v Apostilides* (1984) 154 CLR 563 at 575. As the court noted, it did not attempt to deal exhaustively with the responsibility of the prosecutor and it referred back to the Court's earlier decisions. The difficulty in the present case lies not so much in the statement of the principles but in their application.

102 At the risk of undue repetition these further principles should be noted:

(a) The Crown prosecutor in deciding how the Crown case will be presented and what oral evidence will be adduced has the responsibility of ensuring that the Crown case is presented with fairness to the accused: *Richardson v The Queen* (1974) 131 CLR 116 at 119.

(b) The Crown prosecutor will often have to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether it is credible and truthful, whether in the interests of justice it should be subject to cross-examination, amongst other matters: *Richardson* (at 119).

(c) The prosecutor should decide in the particular case what are the relevant factors and in the light of those factors determine the course which will ensure a proper presentation of the Crown case comformably with the dictates of fairness to the accused: *Richardson* (at 119).

(d) To avoid a miscarriage of justice, a Crown prosecutor should call all available material witnesses. They include those whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye witnesses of any events which go to prove the elements of the crime and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case: *Whitehorn v The Queen* (1983) 152 CLR 657 at 674, per Dawson J. (An exception exists where there are many witnesses to prove the same point.)

(e) However, the Crown has a discretion not to call in the Crown case an eye witness if the prosecutor judges that there is sufficient reason for not calling the witness, as, for example, where the prosecutor concludes the witness is not reliable and trustworthy or is otherwise incapable of belief. This applies even to a witness who is essential to the unfolding of the narrative on which the prosecution is based: *Richardson* (at 121) and *Whitehorn* (at 674).

(f) The prosecutor's judgment must be based on more than a feeling or intuition. There must be identifiable factors pointing to unreliability or lack of belief in the proposed evidence of the witness. It is not enough that the prosecutor considers that the evidence may be unreliable. Suspicion, scepticism and errors on subsidiary matters will not suffice. The attention of the prosecutor should be on matters of substance and even on these there may be significant differences between the witnesses. It is for the jury to resolve these: *R v Apostilides* (at 576).

(g) "In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment" [or able to give material evidence] but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defendant and then, if necessary, be re-examined: *R v Apostilides* (at 576).

(h) Frequently, eye witnesses will be close or have been close to the accused

and possibly to the victim. That does not mean that they should not be called by the Crown. It is where it is apparent that the eye witness is so devoted to the accused and his cause that she will not tell the truth as to what happened that the question of the Crown not calling that witness will arise.

(i) Over-riding all the particular guidelines and formulations is the general obligation imposed upon a Crown prosecutor to act fairly in the discharge of the function which he performs. That is the guiding and fundamental principle to be kept in mind as new and unusual situations emerge: *Whitehorn* (at 675).

103 I have considerable doubt whether the mother is necessary to unfold the narrative and give a complete account of the events upon which the prosecution rely. On the complainant's evidence, the mother was an observer for a short period and uttered the words: "That's enough." The alleged rape commenced before she came to the door of the bedroom and continued after she left. It was the complainant who attributed the role mentioned to the mother. The mother denies acting as an observer or being aware of the activities of the appellant alleged by the complainant and for that reason her evidence, if true (or if there is a possibility that it is true), is important.

104 One consideration is whether in the interests of justice the mother's evidence should be subject to cross-examination: *Richardson* (at 119). Given the unsatisfactory features of her evidence as to other parts of the incident, it is difficult to see how that question can be answered other than in the affirmative. Section 38 of the *Evidence Act* 1995 then needs to be considered as it allows a party, who called witness, with the leave of the Court, to question a witness as though cross-examining her about evidence given that is unfavourable to the party. Under s 38(4) such questioning is to take place before the other parties cross-examine the witness unless the Court otherwise directs. Section 38 makes an important change in the law and removes restrictions which had the effect, on occasions, of making important evidence unavailable and preventing the adequate testing of evidence. The judge has the task of deciding whether the evidence is unfavourable (not favourable) and then whether in the exercise of his discretion he ought to grant leave to cross-examine. The careful exercise of that discretion is designed to ensure that there will be no unfairness. The prosecutor will need to bear this section in mind and also the appellant's desire that the Crown call the mother. The Crown prosecutor would have to consider the alternative course of simply calling the mother and allowing the mother to be cross-examined by the appellant. He could still do this if leave to cross-examine were refused.

105 On the material available to this Court, and it is at best doubtful if there will be further significant material, it is hard to avoid the conclusion that there will probably be a miscarriage of justice if the Crown does not call the mother. In practical terms the appellant cannot call her. In fairness she should be called despite the reservations about the evidence. The offence charged is particularly serious and the appellant received a long term of penal servitude (nine years with a minimum term of six years). Apart from the appellant and the complainant, she was the only other person in the house at the critical time. It was the complainant who said that the mother observed the rape and made the comment mentioned. Thus, the complainant rendered the mother's evidence in denial of importance to the appellant.

106 The circumstances taken as a whole are somewhat strange. I have assumed that any statement which the mother gives to the police will, in substance,