CITY OF SYDNEY LAW SOCIETY

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EFFECTIVE ADVOCACY IN THE LOCAL COURT

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Local Court Of New South Wales

CONTENTS

Introduction

The rule of law and the dispassionate administration of justice by independent courts and tribunals are fundamental to democratic government and a free society. Otherwise, disputes would be resolved by the power of physical force, money, influence or media pressure. Competent, efficient and ethical legal practitioners have a critical role in the administration of justice.

The vast majority of citizens of New South Wales who come into contact with the criminal justice system, whether as a defendant, complainant, or witness, will do so in the Local Court. The Local Court hears criminal matters from the relatively trivial, such as traffic offences, to the extraordinarily serious, such as allegations of murder, either to finality or as committal proceedings, together with a wide range of other types of matters of considerable significance. The importance of that jurisdiction, both to the administration of justice in this State and apropos its capacity to have an impact on the lives of the individuals who receive their experience of justice within its walls, cannot be overstated: *DPP v Rugari and the Local Court of New South Wales* [2016] NSWSC 630 [59]-[60].

In the 2019 Local Court Annual Review, the immediate past Chief Magistrate of NSW, his Honour Judge Graeme Henson AM said:

“It is not uncommon for a magistrate to find themselves dealing with dishonesty or money laundering offences involving sums of money in the hundreds of thousands of dollars. Offences in which the amount of money involved exceeds $1 million are well known within the Court’s experience, to the point of being commonplace. When you add drug supplies up to a commercial quantity, acts of violence involving grievous bodily harm, robbery, aggravated breaking and entering, sexual assault offences and many other serious crimes it takes little thought to conclude that the intrinsic nature of the Local Court has changed beyond recognition over the last 20 years.”

It is evident from the 2021 Local Court Annual Review that during 2021 the Local Court of New South Wales finalised 351,407 criminal matters and 47,561 civil actions. It also made 41,115 final domestic violence orders and 6,682 final personal violence orders. Each year the Local Court determines over 100,000 bail applications. It deals with over 90% of all criminal matters in the State. The Local Court of NSW is the busiest jurisdiction in Australia. The Chief Magistrate of the Local Court is his Honour Judge Peter Johnstone.

On 1 February 2023 in his opening of law term address, “The State of the NSW Judicature 200 years on from the Bigge Report”, the Chief Justice of New South Wales, the Hon A S Bell, said at [34]:

“In the Local Court in 2021, 358,109 criminal matters were commenced and 351,407 criminal matters were finalised, representing a 27.75% increase in the jurisdictional

caseload since 2011 and this comparison does not take into account that 2021 was, of course, a Covid year. This represents a huge volume of work."

As at 31 December 2021, there were 147 full-time and part-time magistrates who presided in the Local and Children's Courts and NSW coronial jurisdiction, at 153 locations throughout NSW. The Local Court is now at gender parity.

Magistrates do not have associates and get modest chamber time. Most judgment writing and preparation for part-heard cases is done in private time.

Consequently, in a courtroom when the Local Court is sitting, there is a premium on time that is even greater than in the higher courts. In the Local Court, time is very much of the essence. The most successful Local Court advocates prepare their cases thoroughly and present them economically. They do not consume scarce resources being gratuitously contentious.

The following suggestions are made to enhance your efficiency and efficacy as a Local Court advocate. References to sources of substantive law and procedure are given. However, the emphasis in this paper is on timely preparation and on conduct in the courtroom, the former tending to facilitate success in the latter. The paper also is intended to help you manage your clients' expectations so that the results you obtain are better appreciated by them.

For brevity, many of the suggestions are expressed in the imperative. Due to the large number of potential topics, most of those selected have been touched upon only lightly and most relate to criminal cases. In the time available to update this paper, I have endeavoured to recall and record those points where there is room for improvement or where perceptions or understandings appear to be wide of the mark.

Principal References

Know the legal framework in which you are practising.

The main NSW statutes and rules include the:

- Bail Act 2013
- Civil Procedure Act 2005 & Uniform Civil Procedure Rules 2005
- Crimes Act 1900
- Crimes (Appeal and Review Act) 2001
- Crimes (Domestic and Personal Violence) Act 2007
- Crimes (Forensic Procedures) Act 2008
- Crimes (Sentencing Procedure) Act 1999
- Criminal Procedure Act 1986 (CPA)
- Drug Misuse and Trafficking Act 1985
- Evidence Act 1995 (EA)
- Law Enforcement (Powers and Responsibilities) Act 2002

- Local Court Act 2007
- Local Court Rules 2009
- Mental Health and Cognitive Impairment Forensic Provisions Act 2020
- Road Transport Act 2013 (and Road Rules 2014 and related road transport and heavy vehicle regulations)
- Summary Offences Act 1988

Start by reading the tables of provisions at the front of the statutes.

Legal practitioners can access the Bench Books of the Judicial Commission of NSW free of charge. They are invaluable. Magistrates often consult them. Frequently they are a good guide to what magistrates understand to be the law, in contrast with unbalanced selections that sometimes are provided by parties.

Be familiar with, and start by reading the tables of contents of, the:

- Local Court Bench Book (LCBB)
- Criminal Trial Courts Bench Book (CTCBB)
- Sentencing Bench Book (SBB)
- Civil Trials Bench Book (CTBB)
- Equality Before The Law Bench Book

The Local Court Practice Notes prescribe the ways in which matters progress through the Court. Read especially:

- PN 2 of 2012 – Domestic and Personal Violence Proceedings
- PN Crim 1 – Case Management of Criminal Proceedings in the Local Court
- PN Comm 2 and PN Comm 3 – Procedures for Committal Hearings in the Local Court
- PN Civ 1 – Case Management of Civil Proceedings in the Local Court

The practice notes have been referred to as “the Court’s friends”. They facilitate order, the progress of cases and adverse rulings by reason of the defaults. Make them your friends as well by consulting and complying with them. Otherwise they may become your enemies.

The latest annual softcover annotated criminal legislation, and civil procedure legislation, are a most useful (and tax-deductible) investment.

Australian Solicitors' Conduct Rules

Be familiar with the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. Some are as follows:

Rule 2.1:

The purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.

Rule 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.

Rule 17.1 – 17.3:

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 or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:

> 17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;
>
> 17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or
>
> 17.2.3 inform the court of any persuasive authority against the client's case.

17.3 A solicitor must not make any submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

If your client tells you that s/he will give evidence that s/he believes to be false, seek leave to withdraw. If your client gives evidence that you know to be false, ask that the matter stand in the list, and either obtain instructions to correct the false evidence or seek leave to withdraw. In each situation, advise the court that leave to withdraw is sought because an ethical issue has arisen.

Communications with the Court

The Australian Solicitors' Conduct Rules include:

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

> 22. 5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or
>
> 22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22. 5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

A party's solicitor must not send direct or indirect representations to a judge behind the back of the other party: *R v Lazarus* [2017] NSWCCA 279 [88]-[92]. Communication by one party with a court without notice to other parties is not acceptable: *Enterprise ICT Pty Ltd v Pham (No 1)* [2018] NSWCA 180 [31].

There should be no communication between a judge and the legal advisers of a party otherwise than in the presence of or with the previous knowledge and consent of the other party. Once a case is under way, or about to get under way, the legal representatives of a party should not act so as to expose a judicial officer to a suspicion of having had communications with one party behind the back of or without previous knowledge and consent of the other party: *Charisteas v Charisteas* [2021] HCA 29 [13].

Where judgment has been reserved after the conclusion of submissions, it is impermissible for a party to provide a court with supplementary written material, without leave: *Wollongong City Council v Papadopoulos* [2019] NSWCA 178 [49]-[52].

Communications must be sent to a Local Court registry, not to a magistrate. Letters and emails to a court registry must always be copied to the other side, including the prosecution.

See also, Lilley and Carter, "Communications with the Court" (2013) 87 ALJ 121.

In an email or letter (e.g., enclosing written submissions pursuant to court orders) include a heading indicating the next court date, e.g., "*P v Smith*, FH: 25.6.22".

Magistrates do not have an associate and get modest chamber time. Chamber time is precious; there is always another case to work on. So advise as soon as possible if a plea of not guilty will (definitely) be changed to guilty or if a civil case (definitely) has settled.

Bail Applications

Read LCBB [20-000]ff carefully.

In some cases there is a two-stage process comprising a "show cause requirement" and an "unacceptable risk" test [20-300].

Where a represented accused previously was refused bail, the accused can make another release application if there is new material information to be presented to the Court or if the circumstances relevant to the grant of bail have changed:s.74 [20-420]. The new information does not have to be decisive or convincing, but it must be capable of influencing the decision: *R v Fesus* [2014] NSWSC 770 [12]. However, the purpose of s. 74 of the Bail Act "is not to give an applicant the right to a second hearing of a bail application simply because a lawyer thinks that they might put a better or more persuasive argument to the Court than that put on the earlier occasion": *R v BNS* [2016] NSWSC 350 [42]-[43].

In *R v Fallon* [2017] NSWSC 1796 [15], Campbell J said:

> "…It is also well to emphasise that the word "material" where it appears in the expression "*material* information relevant to the grant of bail" in s 74(3)(b) and also in s 74(4)(a), for that matter. The additional information sought to be presented will be *material* if the applicant satisfies the court that the outcome of the previous release application might have been different had the additional information been presented then: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33 at 353, by Mason CJ. This is an objective legal standard involving a mixed question of fact and law. It requires an understanding of the reasons for the refusal of bail and an assessment of whether the additional information might have made a difference to that result…"

The Local Court is the starting point for all bail applications. It will take a few months to have a release application listed in the Supreme Court. Some experienced practitioners consider that in some cases it may be in an accused person's interests to remain in custody for a few days while a release application is being prepared properly, and then to make a thorough, well argued application in the Local Court without having to fit within the potentially narrow gateway of s.74.

To save court time in the hearing of a release application, prepare a written set of proposed bail conditions, give a copy to the prosecutor as soon as possible and hand up a copy to the Court at the start of the bail hearing. As much evidence as possible should be written and served on the prosecutor as soon as possible.

Applications to vary bail should be in writing and served on the prosecutor. Any intended oral application to vary bail should be discussed with the prosecutor before court or in a break during the day before it is made in court, so that the prosecutor can attempt to get instructions. The less notice you give the prosecutor, the less likely s/he will be to be able to obtain instructions and so the more likely the variation application is to fail or be adjourned. In a busy list, do not hold up cases behind you by dropping a bail variation application on the prosecutor in court without notice.

Many clients leave it to the last minute in court to advise you that they want a bail variation. So take them through their bail conditions before court to check how compliance is going and thereby flush out any requests for bail variations at an earlier stage.

Mentions and Adjournments

Read and follow PN Crim 1, para 5.4 - 5.8, in relation to progressing criminal proceedings. Read also ss. 183-188 of the CPA and commentaries on them in leading texts and services, and *DPP v Webb* [2001] NSWCA 341.

The Local Court aims to finalise cases as expeditiously as possible. That involves trying to avoid the churning of cases from mention to mention due to inattention to their cases by accused persons, dilatory or deficient preparation by legal representatives or the prosecution, covert forum shopping, etc. Every time a case is adjourned, it expands the list it is put into and holds up the cases behind it in that list.

Upon application, a prosecution that is in the list for the first time normally will be adjourned for two or three weeks to enable an accused person to obtain legal advice and/or representation, preparation of evidence for sentence or other good reason.

The Court discourages multiple adjournments. A solicitor who is first instructed in a case after it already has been adjourned several times may not throw a veil over the past and insist on an adjournment because s/he is new to the matter. The solicitor must ascertain what previously has happened and address it. A ‘Groundhog Day’ submission may be rejected and the case may be moved along to the next stage, or even finalised. Be prepared for all contingencies.

Where a party or witness has failed to appear and has asserted illness, before granting an adjournment the Court usually will require a medical certificate that applies to the day in question, states the specific medical condition being suffered by the person and opines that the person is unfit to attend court (rather than unfit for work or study). See *Magjarraj v Asteron Life Ltd* 2009 [NSWSC] 1433 [22]-[23]; *Woodhouse v Thalis* 2018 NSWCA 97 [23]; *Stratton v State of NSW* [2019] NSWDC 19.

In *UTSG Pty Ltd v Sydney Metro* (No 5) [2019] NSWLEC 107, Pepper J said:

"[42] While each case turns on its facts, the medical evidence should, at a minimum, answer the central question of why – and not just whether – the medical condition will prevent a litigant from participating in a court hearing either in person or by some other means (for example, by telephone). It is this nexus that is critical.

[43] To be sufficient, the medical evidence should identify in broad terms the medical condition that the person is suffering from, the symptoms of that condition insofar as they are relevant to a litigant's participation in a court hearing, the severity of the condition, and its expected duration. The doctor providing the certificate must be clearly identified and the certificate must be signed and dated."

Most medical certificates are deficient and do not properly ground an adjournment.

Adjournments solely to make representations to the police about the charges, the facts, or the whole prosecution, have been abolished. Provision for such adjournments was removed from PN Crim 1 several years ago. The making and considering of representations must occur simultaneously with, rather than hold up, the stages prescribed in PN Crim 1.

Most principals do not adequately instruct their agents, who often are given a "hospital pass". However, you will have to take responsibility for what happens in court, albeit as an agent. If you are instructed to appear as an agent, be bold and ask your principal questions about what detail you need to know and what the magistrate may wish to know. This paper and the references in it may assist in determining the questions to ask an under-instructing principal. Obtain a copy of the court attendance notice (the "CAN"). Ascertain how many times the matter previously has been in the list, what has happened so far, and what stage has been reached.

Have an abundant list of suitable dates. If you are appearing to have a matter fixed for hearing, ascertain the range of months that the court is up to in setting down hearings and obtain extra suitable dates if necessary. If you are asking the court to fix a date for sentence, ensure that you have ascertained whether there are breached CROs or breached CCOs to call up, and tell the court.

Agents should take care to advise their principals of all deadlines ordered by the court, for example, for filing and serving evidence for s.14 applications.

Practitioners' AVL Appearances

Chief Magistrate's Memorandum No. 28 – Covid-19 was the last such memorandum. That memorandum, and the last Chief Magistrate's Court Security Act order, have expired.

The Local Court's Civ 1 and Crim 1 practice notes now apply as follows:

Local Court of NSW technology attendances	Civil small claims, including final hearing:	By telephone unless leave is granted for in-person attendance	Practice Note Civ1
	Civil general division claims:	By telephone in interlocutory matters, unless leave is granted for in-person attendance. Final hearings are in-person unless leave is granted for AVL evidence	Practice Note Civ1
	Crime:	Except for in-custody accused in interlocutory matters, all attendances are in-person unless leave is granted for AVL evidence.	Practice Note Crim1

In criminal matters, essentially legal representatives must appear in person including at mentions. However, there is a (very narrow) residual discretion to permit a legal practitioner to appear via AVL in exceptional and compelling circumstances.

Since the pandemic began in 2020, although the conduct of most practitioners in preparation for and during AVL appearances has been exemplary, the conduct of some has been most unsatisfactory. The following guidance may assist:

1. The standards of dress and conduct are the same as when appearing in person.
2. In order to save court officers' scarce time trying to locate a practitioner appearing via AVL, such practitioner must be readily available up to the time that the practitioner's matter is reached by the Court.
3. Appearance by AVL is not as of right. Practitioners must not use prior knowledge of a court's AVL link particulars to "dive bomb" into a court's list without notice and without leave. Doing so is discourteous, disruptive and impermissible.

Preparation Before a Hearing

Half a century ago, High Court Justice Sir Harry Gibbs said to a conference of Australian supreme court judges:

"At present unfortunately some cases are conducted by counsel as though they were sea discoverers of a bygone age, setting sail in the hope of ultimately coming to haven but with no charts of the shoals that may cause them to become stranded and no forecasts to enable them to take advantage of the favouring breezes that might hasten them on their way."

Unfortunately, the same approach often still occurs in the Local Court.

To avoid a forensic shipwreck, thorough and precise preparation of a hearing or sentencing proceeding in the Local Court is critical. In my view, at least 80% of the result in a case comes from preparation.

Read the passages in the Bench Books and commentaries in the leading services and texts on potentially relevant law. Before a defended hearing, thoroughly research and prepare submissions on potential admissibility of evidence issues.

Clients frequently are unreliable about what witnesses will say and the nature and terms of other evidence. So diligently take statements from witnesses, and gather other evidence, yourself.

Views by a party's legal representative (not by a magistrate) usually are worthwhile. They will enhance your understanding of the evidence. Usually they yield additional useful information and enable doubtful aspects of the available evidence (e.g., in the prosecution brief) to be identified.

If more than one witness (including the accused) attends a view, they should be kept separate from each other and told not to discuss the events. Each should be interviewed separately. Otherwise, there may be successful cross-examination to the effect that each witness has contaminated the recollections of the others.

If appropriate, apply for the issue of subpoenas. Subpoenas should be issued as soon as possible after the hearing date has been fixed (i.e., soon after the reply date). Do not neglect subpoenas for months after the reply date and then issue subpoenas at relatively short notice before the hearing date.

Allow much more than the statutory time for production by large organisations, including the NSW Commissioner of Police. Subpoenas should be returnable well before the hearing date. This allows time for issues arising from non-compliance or partial compliance, and objections of no legitimate forensic purpose and privilege and public interest immunity claims, to be resolved without imperilling the viability of the hearing date. It also allows time for a second round of subpoenas as a result of the documents produced in the first round.

All inspection of produced documents should occur before the hearing day, not during court sitting time on the hearing day. You must be ready to start the hearing at 9.30 am on the hearing day, not at some later point after protracted inspection of documents and belated requests for photocopies. Applications to vacate hearings, as a result of subpoenas not being issued as soon as possible, are at risk of being rejected.

Prepare three copies of all authorities, legislation and other documents to be relied on in submissions – one each for you, your opponent and the Court. The same applies to documentary evidence that you intend to tender, but prepare a fourth copy for any witness whom you propose to ask about a document. Ensure that the Court and that witness do not have to share a proposed exhibit or other document. Make sure that the magistrate can look at it simultaneously with a witness being asked questions about it so that the magistrate can follow the dialogue precisely. This avoids waste of court time if it becomes necessary for the court officer to go to the registry to copy a document; it also avoids the magistrate losing the assistance of the court officer inside the courtroom.

Often a prosecutor is allocated to a hearing well before the hearing date. Consider embarking on early negotiations with the prosecutor. If you contact the prosecutor's office, you will be told who the allocated prosecutor is. In the event of a successful plea negotiation, civilian and police witnesses will not have to attend court, provided charges, pleas and amended facts have all been fully agreed, and the court can be notified in advance and be able to free up time in its diary for other matters.

Over many decades an enduring reality has been that, although most hearings proceed in a similar manner, magistrates have different styles of presiding and of ordering and conducting lists: Reg Bartley AM, *The Court Is Open*, Redfern Legal Centre Publishing, 5th edn 2000, pp.224-225. Novice solicitors would benefit from sitting in the courtrooms of the magistrates headquartered at their local courthouse and observing how things are done. This will ease you into your first of each kind of case.

Civil Proceedings

The Local Court Act 2007 divides the Court's civil jurisdiction into a General Division and a Small Claims Division. The jurisdictional (or monetary claim) limit is $100,000 in the General Division and $20,000 in the Small Claims Division: s.29. When the Court is sitting in its General Division, its money claims jurisdiction can be increased to $120,000 by consent: s.31. However, in the General Division the Court's jurisdictional limit in relation to a claim for damages for personal injury or death is $60,000: s.29(2).

Read PN Civ 1, and *Aon Risk Services Ltd v ANU* [2009] HCA 27 in relation to delay and the increased weight now given to case management considerations. Consult the CTBB.

At all stages, bear in mind ss. 56-58 of the Civil Procedure Act 2005 as set out below.

	Civil Procedure Act:
s56:	The overriding purpose of the Act is to facilitate the just, quick & cheap resolution of the real issues in proceedings.
s57:	Proceedings are to be managed having regard to the:
	• just determination of the proceedings
	• efficient disposal of the court's business
	• efficient use of judicial and administrative resources
	• timely disposal of these and all other proceedings at an affordable cost to the parties.
s58:	When making any order for the management of proceedings the court must apply the dictates of justice. In determining the dictates of justice the court **MUST** have regard to s56 & s57 and **MAY** have regard to the following factors:
	• degree of difficulty or complexity of the issues in the proceedings
	• degree of expedition with which the respective parties have approached the proceedings, including interlocutory activities
	• has any lack of expedition been beyond their control

	• degree to which the parties have fulfilled their duties to the court to:
	  ○ achieve the overriding purpose
	  ○ participate in the court's processes and
	  ○ comply with directions

	• use that any party has made of any opportunity available in the course of the proceedings (rules or PNs or procedures)
	• degree of injustice that would be suffered by the respective parties
	• any other matters relevant to the circumstances of the case

A prospective plaintiff's instructions should be tested by taking a statement from as many witnesses as financially and otherwise practicable and by obtaining other evidence that is necessary to draft an accurate pleading. Then give the plaintiff advice and only then, if appropriate, file a statement of claim. The same applies to acting for the defendant. Do not file first and begin to find justifying evidence second.

Applying s.56, at an early stage the Local Court sets a timetable for the exchange of evidence and allocates a trial date, and also a review date approximately 4 weeks before the trial date. The Court focuses on minimising the number of attendances at court in order to minimise costs. Research has shown that the allocation of hearing dates focuses parties' attention on the real issues in dispute and assists in achieving settlements, which almost always are better for parties than an adjudicated outcome.

Sections 56-58 will be applied to determine applications (notices of motion). Generally, applications must be made by notices of motion, including applications to vacate hearing dates. See Part 18, Uniform Civil Procedure Rules 2005.

Calderbank letters and offers of compromise can be very effective in helping to settle cases.

As only 10% of all civil proceedings in the Local Court get a final hearing date, and as only 1% of all claims lodged get a judicial decision (by a magistrate or registrar), practitioners have been very effective in negotiating settlements. However, there is still scope for further improvement. Most courts offer free mediation services by skilled registrars and others such as community justice centres. At the least, the issues in dispute could be narrowed.

Parties' affidavits and witness statements must be served 6 weeks before the review date: PN Civ 1 Annexure A, General Division – Standard Directions 2, 3. Affidavits and witness statements with annexures should be continuously numbered.

A signed civil listing advice must be filed with the Court on the review date: PN Civ 1 cl.16.2; Annexure B. Each party also must file a written summary of the case, including a reference to any relevant case law or statute: Annexure A, General Division – Standard Directions, 8. At least 7 days before the trial the plaintiff must file a statement of agreed facts and issues but, if the parties do not agree about the facts and issues,

then each party must file a statement of facts and issues at least 7 days before the trial: Annexure A, 11.

Practitioners need to improve greatly their compliance with timetables and directions, including meeting dates for evidence, case summaries and statements of facts and issues.

The Court is unlikely to commence a General Division hearing without filed case summaries and requisite statements of facts and issues.

Immediately before the first day allocated for a trial, the lawyer for a party must provide the party with a written notice specifying the actual and estimated costs and expenses required in PN Civ 1 Part F cl.35.2.

On the first day of a defended civil action many magistrates, when calling the case over, give a “settlement speech”. Having read the pleadings and having scanned the filed summary documents and evidence, a presiding magistrate may ask legal representatives questions to size up the case, and then outline the potential course of the matter, including part heard days, and/or written submissions, and/or an oral submissions day followed by a reserved judgment day. Each party’s solicitor then may be ordered to advise his/her client of the costs incurred to date and likely future costs, and also those of the other side. The magistrate may suggest that the parties consider a number of things, including putting those costs towards a compromise. In practice, recovered ordinary, and also indemnity, costs usually are well short of 100% of actual costs. So on the first hearing day, be ready with your past and future costs estimates.

Where relevant, legal representatives also should advise their clients that PN Civ 1 clause 38.2 provides:

“Unless the Court otherwise orders, the following orders are taken to have been made when the defence is filed in the proceedings:

(a) If the plaintiff is successful and the claim is for an amount between $20,000 and $50,000, then the maximum costs that can be awarded to the plaintiff is 25% of the amount awarded by the Court plus any amount that might be allowed in relation to costs incurred up to the filing of the first defence in the proceedings.

(b) If the defendant is successful and the claim is for an amount between $20,000 and $50,000, then the maximum costs that can be awarded to the defendant is 25% of the amount claimed by the plaintiff.

(c) Where the proceedings were transferred from the Small Claims Division to the General Division, then the maximum costs that can be awarded to the successful party is $2,500.”

More frequently, practitioners applying for costs are asking for gross sum costs – a discounted sum that avoids the costs assessment process. That option is always worth considering.

Solicitors wishing to sue for their fees must first comply with prerequisites prescribed by s.194 of the Legal Profession Uniform Law 2016.

Solicitors and barristers who represent themselves in their own personal cases (including when suing for fees) are not able to recover professional fees through costs orders: *Bell Lawyers Pty Ltd v Janet Pentelow and Anor* [2019] HCA 29.

Withdrawing a Plea of Guilty

Read s. 207 of the CPA and SBB [11-505].

SBB [11-505] states, in part (omitting most citations):

"An accused seeking to withdraw a guilty plea after conviction must demonstrate a miscarriage of justice has occurred… The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered…

An accused seeking to withdraw a guilty plea before conviction must demonstrate whether the interests of justice require it… The "interests of justice" test is broader than the "miscarriage of justice" test and may focus on matters beyond the integrity of the plea, although this will often remain the inquiry's focal point…In *White v R* [2022] NSWCCA 241 [65] [the Court of Criminal Appeal] set out the following non-exhaustive list of factors affecting the interests of justice:

- the circumstances in which the plea was given;
- the nature and formality of the plea;…
- the time between entry of the plea and the application for its withdrawal;
- any prejudice to the Crown from the plea's withdrawal;
- the complexity of the charged offence's elements;
- whether the accused knew all of the relevant facts intended to be relied upon by the Crown;
- the nature and extent of legal advice to the accused before entering the plea;
- the seriousness of the alleged offending and likely penalty;
- the accused's subjective circumstances;
- any intellectual or cognitive impairments suffered by the accused;
- any reason to suppose that the accused was not thoroughly aware of what they were doing;
- any extraneous factors bearing on the plea when made, including threats, fraud or other impropriety;

- any imprudent and inappropriate advice given to the accused affecting their plea;
- the accused's explanation for seeking to withdraw the plea;
- any consequences to victims, witnesses or third parties that might arise from the plea's withdrawal; and
- whether there is a real question about the accused's guilt."

The onus of persuading the court to permit the withdrawal of a plea of guilty is on the accused: *White v R* [68].

A transcript of the occasion when the plea of guilty was entered should be obtained. An affidavit by the accused usually would be helpful (*White v R* [67]) and an affidavit by the legal representative who entered the plea of guilty may be necessary: *Wong v DPP [2005] NSWSC 129* [14], [16].

Distilling *White v R* [70], the Court of Criminal Appeal said that each case will necessarily turn on its own facts but examples of cases where the interests of justice will warrant the withdrawal of a plea of guilty include cases where:

- the nature of the charge to which the plea has been entered is not appreciated;
- the plea is not a free and voluntary confession;
- the plea is not really attributable to a genuine consciousness of guilt;
- there has been a mistake or other circumstances affecting the integrity of the plea as an admission of guilt;
- the plea has been induced by threats or other impropriety and the applicant would not otherwise have pleaded guilty;
- the plea is not unequivocal or is made in circumstances suggesting it is not a true admission of guilt; and
- the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt.

Annulment Applications

Sometimes accused persons do not show up at court. The incidence of food poisoning, "gastric" illness, flu, migraines, and severe depression or anxiety, on court days is remarkable. Some accused do not attend because they subordinate attending court to their employment.

If an accused does not attend court without demonstrated good reason, the accused may be convicted and sentenced in his or her absence: s. 196, CPA. If an offence is too serious for an ex parte sentence, a s.25(2) warrant may be issued.

Eventually you may find yourself acting in an application to annul the conviction and/or sentence so that the status quo ante can be restored. Such an application is made and determined under ss. 4 and 8 of the Crimes (Appeal and Review) Act 2001.

The Court must grant an annulment application if there is just cause for doing so: s.8(1). Read the available grounds in s.8(2). Courts are careful to consider an accused's section 4 annulment application as there has been no hearing on the merits of the case.

As in most applications, separate evidence and submissions. Don't give the Court an intermingled mixture of alleged facts and submissions from the bar table. Do have an affidavit sworn by your client thoroughly and precisely stating his/her reasons for not attending court. That enables the prosecutor to form a view in advance and avoids unnecessarily delaying cases behind you in the list. Often the prosecutor will not cross-examine the applicant, in which event you can submit that his/her unchallenged evidence should be accepted (depending on the nature of other evidence and any inherent unlikelihood).

You may need a medical report to prove medical grounds for your client's absence (see Mentions and Adjournments above). This may be difficult if s/he did not consult a doctor on or shortly before the court date in question.

A court is more likely to grant an annulment application if the accused's non-appearance was at an early procedural stage rather than on a hearing day when prosecution witnesses were at court, especially if the prosecution was for a violent offence or any domestic offence. Justice is a two-way street; it is not all about the accused.

Section 4A empowers the Local Court to annul 'on its own motion'. This may occur when it is later evident that on the court date the accused was in custody, or both in hospital and incapacitated for court. (Some accused appear to attempt to avoid court by getting themselves into an emergency ward or admitted to hospital and nothing ever emerges from a medical practitioner establishing incapacity for court.)

Applications to Vacate a Hearing

When a matter has been set down for hearing, substantial scarce court time and other resources have been set aside for it. Witnesses have organised their lives to fit in coming to court and giving evidence. They have psyched up for the stress of doing so. Vacating a hearing is not a mere adjournment.

Read PN Crim 1 6.1-6.2. Ordinarily, such an application to vacate must be made at least 21 days before the hearing date.

In an application to vacate a criminal trial the onus rests upon the party seeking to vacate a hearing and there is a strong public interest that once a date is fixed for

hearing on the basis of parties being ready to proceed, a criminal trial should ordinarily proceed with expedition… Moreover, it is essential to the orderly disposition of the work of the courts and the administration of justice that trials are not adjourned unnecessarily: *Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd*; *Greentree; Merrywinebone Pty Ltd; Harris (No 5)* [2021] NSWLEC 6 [24]; *Chief Executive, Office of Environment and Heritage v Turnbull* [2019] NSWLEC 125 [12]-[16].

An adjournment of a criminal trial is not justified where an accused is unrepresented because of his/her unreasonable conduct: *Philopos v R* [2008] NSWCCA 66 (cf. *Croke v R* [2020] NSWCCA 8).

Generally, a court must give a party a reasonable opportunity to present the party's case and be heard, not two, three or four such reasonable opportunities. The months between the reply date and the hearing date usually constitute such reasonable opportunity. As most applications to vacate are unsuccessful, be ready to proceed as best you can. Sometimes a party who has been unsuccessful in an application to vacate runs out of witnesses during the afternoon and then an application for adjournment is successful as less time is thrown away.

In *Cockburn v GIO Finance Ltd* [2001] NSWCA 155, the then President of the Court of Appeal, Justice Keith Mason, said:

> "6. The Court of Appeal has an extremely crowded docket of cases…The Court now operates under tight time standards which reflect its own determination and the public expectation that appeals and other applications in this Court will proceed with dispatch. It goes without saying that the resources of the Court are limited and that to vacate a hearing date at short notice will mean that it is impossible for alternative matters to be put into the list. The consequence will be that the body of cases awaiting hearing will be imperceptibly but definitely shifted further down the line due to the fact that a vacated matter will have to come back into the list seeking a later date.
>
> 7. I think it vital that the profession understand that the Court list is not a fixture sheet at a suburban golf club in which players can add or remove their names according to their interests at the time. A fixture is a fixture and it will remain unless it is vacated on proper application and for good cause. It is not open to the parties to file consent orders or to seek directly or indirectly to have matters taken out of the list simply because it is inconvenient to the counsel originally retained."

When the appropriate changes have been made, the same applies in the Local Court. The same also applies to other avoidable and unmeritorious reasons for seeking to vacate.

The length of the delay involved, waste of court resources and prejudice to the other party are all considerations militating against granting an application to vacate: *Atanastovic v Birketu Pty Ltd* 2021 NSWCA 11 [17], [21],[24].

In the civil case of *Edwards v State of NSW* [2022] NSWCA 144 [7]-[8], Leeming JA said (omitting citations):

"7…. There is a "heavy burden" of vacating the hearing date shortly before the hearing…

8. The reason for that is that this Court is bound in accordance with sections 56 and 59 of the Civil Procedure Act 2005 (NSW) to implement its procedure having regard to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute and to implement its practice and procedure with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination."

DPP v Ozakca 2006 NSWSC 1425 provides several strong grounds on which to oppose a prosecution application to vacate, commencing with the entitlement of an accused to "expedited justice". The seriousness of the alleged offence and strength of the prosecution case may be considerations in appropriate cases.

Preparation at Court

Most accused persons do not give complete and accurate instructions as to their criminal and traffic records. A copy should have been served on your client with the Facts Sheet. If you do not have a copy, arrive at court early on the day on which you are appearing and obtain a copy from the police prosecutor. If s/he does not have a spare, usually the court officer or registry will make a copy for you.

Magistrates presiding in busy lists do not have the time to do the work of you or your legal clerk and look through court files to ascertain and advise what happened at court on previous occasions, what your client's bail conditions are, what submissions were made on bail last time or what the current provisional or interim AVO conditions are. Arrive at court early and ask the court officer for the court file to inspect it in the courtroom. If the magistrate has it in chambers, usually s/he will not need the file at the time of request and the court officer can bring it to you for inspection.

Some common abbreviations on bench sheets and other documents in court files are on the list attached to this paper.

Negotiations on the Hearing Day

Make contact with the police prosecutor and initiate any plea negotiations yourself. Don't wait for the Court to do so (e.g., by asking whether any discussions are proposed). As to negotiations in prosecutions for domestic offences and AVO applications, see "Domestic Offence Prosecutions and Apprehended Violence Orders" below.

Essentially, s. 33 of the EA permits a police officer to read his/her statement if it was made "at the time of or soon after the occurrence of the events to which it refers". That "contemplates days rather than weeks as being the permissible time which is allowed to elapse in order to allow a statement to be read": *Orchard v Spooner* (1992) 28 NSWLR 114 at 119D. Generally, it may be thought that the permissible time (whether or not the accused consents) is less than two weeks. However, in practice most police statements that are not made "soon after" the alleged offence are read by consent.

In order to save hearing time and the magistrate much longhand handwriting, consider whether to consent to statements by police officers being read. Often, for this purpose, the police prosecutor will agree to statements being amended to delete obviously inadmissible material such as hearsay. Sometimes, contentious sentences or words can be identified (e.g., by putting a red bracket around them) and their admissibility can be the subject of submissions and a ruling after the great majority of the evidence has been read. Objections to the reading of police statements should be for specific forensic reasons, e.g., the statement was made a long time after the event and important contents of it are disputed. Putting a police witness to a speculative, directionless memory test usually does not result in discrepancies or inconsistencies that are central rather than secondary, and usually is a waste of precious court time. That may not impress the Bench. Taking the more constructive approach advised above will be appreciated by the presiding magistrate, i.e., the person whom ultimately you will have to persuade.

If you have reached an agreement with the prosecutor about police officers reading their statements, advise the Court of this at the earliest opportunity in the hearing. At this time, also advise the Court concisely what is and is not in issue (having by now worked this out!).

Domestic Offence Prosecutions and Apprehended Violence Orders

Read the Crimes (Domestic and Personal Violence) Act 2007 (as amended by the Stronger Communities Legislation Amendment (Domestic Violence) Act 2020), and the new Division 5 (ss. 289T-289V) and s. 306ZR of the Criminal Procedure Act. Those changes are extensive and beyond the scope of this general paper.

Read PN 2 of 2012, Part C cl.10 of PN Crim 1, and the LCBB [8-000]ff and [22-000]ff.

DV/AVO lists usually are very busy. Commence liaising with the Domestic Violence Liaison Officer ("DVLO") as soon as possible. This may help accelerate your matter through the list. Usually there is one prosecutor with the entire list. As s/he may not have time to discuss your case in depth with you, be as concise as possible with the prosecutor and "cut to the chase". To save the court's and everyone else's time, ensure that your client is in the courtroom by the time his/her matter is mentioned.

By the time the court has commenced sitting, you should be very clear about the provisional/interim order conditions, and bail conditions, imposed on your client. Any variation application should keep them consistent. Discuss proposed variations with the prosecutor before you stand up to mention your matter. Reduce lengthy variations to writing and hand them up to the presiding magistrate.

In a DV/AVO list, often plea negotiations in relation to alleged domestic offences can be conducted expeditiously on the first mention date as the PINOP usually is in attendance or able to be contacted. Provide the DVLO and/or prosecutor with a written copy of the proposed amended facts. Usually the DVLO or prosecutor will be able to discuss the proposed changes with the PINOP. This may save preparing and forwarding representations to the police and avoid the need for an adjournment your client's matter. This approach may enable your client's matter to be finalised on the first list date, thereby saving your client's time, your time and court time.

The senior prosecutor at a metropolitan multi-court complex has advised:

"Representations in domestic violence matters often are not successful. The NSWPF holds a very strong position in the continuation of DV matters, so consider this when advising your client, especially when the underlying purpose of the representations is the "reluctance" of the PINOP."

Legal practitioners appearing in applications for apprehended domestic violence orders and apprehended personal violence orders usually should attempt to negotiate a compromise, and consent orders.

In many cases where an application for a domestic violence order is made by a police officer and there is no accompanying criminal charge, the police may be willing to "settle" the application by reducing the duration of the order originally sought and/or by compromising the terms sought. Consent orders could be prefaced by "without admissions".

In some cases at some courts in past years, another option has been a joint application for consent orders to adjourn the application for several months on the basis that, on the adjourned date, the application will be dismissed if no further incidents have been alleged. However, this option has fallen into disfavour as an inappropriate, and perhaps unlawful, use of the legislation: see ss. 16, 17, 19, 20 and 22 (especially s.22 (5)), Crimes (Domestic and Personal Violence) Act 2007 and PN 2/2012, Part 6.

Police will not settle an ADVO application by way of undertakings, but that is a real option in private applications for apprehended personal violence orders.

Proposed property recovery orders should be in writing, precisely tailored to the individual case, and complete. The Court does not have power to make such an order after it has made a final AVO: s.37. An application for a property recovery order should be made no later than the time when the Court is considering making a final AVO.

Section 32 Applications

Section 32 of the Mental Health (Forensic Provisions) Act 1990 applies to offences allegedly committed on or before 26 March 2021.

Section 32 applies to accused persons who are cognitively impaired, suffering from a mental illness, or suffering from a mental condition for which treatment is available in a mental health facility, provided that the accused is not a mentally ill person within the meaning of ss. 4(1) and 14 of the Mental Health Act 2017.

Section 32(1)(b) gives a magistrate a discretion to deal with an accused by sending him/her along a diversionary route of treatment rather than dealing with the accused otherwise in accordance with law. The object is to ensure that the community is protected from the conduct of the accused. The magistrate must consider whether proceeding in accordance with s.32 will produce a better outcome both for the individual and the community: *DPP v El Mawas* [2006] NSWCA 154 [71], [74],[77],[79].

Mental Health and Cognitive Impairment Provisions Act 2020

Read:

- LCBB [30-000] ff and SBB [90-050].
- *DPP v El Mawas* [2006] NSWCA 154.
- *Mantell v Molyneux* [2006] NSWSC 955 [38]-[52].

This statute applies to offences allegedly committed on or after 27 March 2021. It replaces s.32 and related provisions.

Section 12 is the successor to the “former” s.32, in conjunction with ss. 13-17. Applications under this legislation have become known as “s.14 applications”.

A major change is that a s.14 final order is made for twelve, not six, months. Otherwise, generally the relevant legislation, including the balancing exercise, appears to be essentially unchanged.

Section 15 provides:

“In deciding whether it would be more appropriate to deal with a defendant in accordance with this Division, the Magistrate may consider the following –

(a) the nature of the defendant’s apparent mental health impairment or cognitive impairment,
(b) the nature, seriousness and circumstances of the alleged offence,
(c) the suitability of the sentencing options available if the defendant is found guilty of the offence,

(d) relevant changes in the circumstances of the defendant since the alleged commission of the offence,
(e) the defendant's criminal history,
(f) whether the defendant has previously been the subject of an order under this Act or section 32 of the Mental Health (Forensic Provisions) Act 1990,
(g) whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan,
(h) whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public,
(i) other relevant factors."

There may be a change in the law in s.4(3), which provides:

"A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by –

(a) the temporary effect of ingesting a substance, or
(b) a substance use disorder."

However, the case law cited below in relation to s.32 remains applicable.

A nexus between the mental condition and alleged offence assists a s.14 application, but is not decisive in its favour. The absence of a nexus is not decisive against a s.14 order being made. Conversely, generally the more serious the alleged offence the less likely it is that a s.14 order will be made, but seriousness is not decisive against a s. 14 order. Similarly, reduced seriousness of an alleged offence is not decisive in favour of a s.14 order being made.

Practically in a s.14 application, the evidence must include "a clear and effective treatment plan and one which [is] likely to ensure that there would not be a repetition of the incident in question or the occurrence of some other unfavourable incident": *Perry v Forbes and Storey*, unreported, Smart J, 31 May 1993; *DPP v Saunders* [2017] NSWSC 760, [34], [36], [37].

It is common for legal representatives of an applicant/accused to focus unduly on the usually undisputed condition of the applicant and insufficiently on other considerations. Some of the latter are noted below.

The more serious the offending, the more important will be the public interest in punishment being imposed for the protection of the community and the less likely will it be appropriate to deal with an accused pursuant to s.14: *Confos v DPP* (NSW) [2004] NSWSC 1159 [17]; *DPP v El Mawas* [7],[63],[78]. Extensive criminal antecedents are relevant to protection of the public: *DPP v Lopez-Aguilar* [2013] NSWSC 1019 [23]. The court can take into account the need for general deterrence: *Quinn v DPP* [2015] NSWCA 331 [6],[33].

The greater the causal contribution of an applicant/accused's mental condition to an alleged driving offence, generally the more likely a court will be to proceed under the criminal law because of the greater risk of the accused endangering other drivers, passengers and pedestrians. It would be erroneous to make a s.14 order simply to avoid a licence disqualification: *R v Stephenson* [2010] NSWSC 779 [66]-[67]; *R v Mauger* [2012] NSWCCA 51 [21]; *Babineau v R* [2016] NSWDC 354 [31].

In a s.14 application, relevant considerations include the adequacy of the 12 month period of mandatory treatment under s.14 and, in the alternative, realistically available sentences in the event of conviction (e.g., a long supervised conditional release order, or community correction order, with conditions mandating treatment): *Mantell v Molyneux* [40],[45]-[48]. In *Mantell v Molyneux*, the accused was under close supervision pursuant to a pre-existing s. 9 bond. Adams J said that it was open to the magistrate hearing the s. 32 application to adjourn it to see how the accused was coping with the regime pursuant to the bond so as to extend the six-month limit under s.32. However, the magistrate decided to deal with the accused according to the criminal law and that was held not to be erroneous: [43]-[48], [51].

I suggest that the overall legislative scheme is not one that routinely puts the cart before the horse, so that proposed treatment plans are to be trialled over several months, and reported on perhaps more than once, and argued about in respect of success or compliance perhaps more than once, after which determinations required by s.14 are then belatedly made. The legislative scheme requires that, generally, the proposed treatment plan be assessed prospectively, not retrospectively. However, that does not preclude an adjournment for particular reasons in particular cases, e.g., incomplete supervision and/or treatment under a pre-existing conditional release order.

In a s.14 application the Local Court must consider the qualifications and expertise of the author of a tendered report, together with the contents of the report, to determine what weight should be given to it: *Jones v Booth* [2019] NSWSC 1066 [55].

Most reports by long-term treating mental health professionals and courthouse clinical nurse consultants are dispassionate and balanced. However, notwithstanding the expert witness code of conduct, sometimes courts may be more circumspect in their consideration of reports by one-off consultants engaged on behalf of an applicant for the purpose of a s.14 application and/or sentence (cf. *Wood v R* [2012] NSWCCA 21[715]).

Even where a psychiatrist's report is tendered without objection and the psychiatrist is not required for cross-examination, a court is not obliged to accept that expert's conclusions if it is open on the evidence to find otherwise: *Toman v R* [2018] NSWCCA 51 [17],[18],[24],[27],[32]. A court may be cautious in evaluating an expert's opinion that is largely informed by information provided by the person with the most to gain from providing it, especially if that person is a recidivist offender whose knowledge

from previous engagement with the criminal justice system creates an insight as to just what might be convincing*: DPP v Mikulic* [2020] NSWLC 1 [24], [33].

Untested self-serving statements made by offenders to psychiatrists and psychologists, and contained in their reports that are tendered on sentence, may be treated with a considerable degree of caution and be given limited weight: *R v Ghazzawy* [2017] NSWSC 474 [35]-[38]; *Imbornone v R* [2017] NSWCCA 144 [57]; *R v Rampling* [2018] NSWLC 7 [17] per Chief Magistrate Judge Henson. The same approach may be appropriate to statements by applicants for a s.14 order in consultants' reports. However, the decision of the Court of Criminal Appeal in *Lloyd v R* [2022] NSWCCA 18 appears to have qualified and confined such an approach.

Lloyd v R considered a decision of the District Court where there is much more scope than in the Local Court for the Crown to challenge the contents of mental health expert reports. District Court Criminal Practice Note 20, clause 15, requires any report prepared by a mental health expert to be served in advance of the sentencing hearing. The clear purpose of that practice is to afford the Crown the opportunity to consider whether to accept or challenge the contents of such report: *Lloyd* [46]. In that District Court sentencing context, the Court of Criminal Appeal enunciated the following:

- Uncorroborated facts asserted by an offender and included in an expert report that was tendered without objection and admitted without qualification are not required to be accepted by the judge without critical analysis. However, in the absence of any objection by the Crown, the court must identify facts which it considers doubtful so that the offender has an opportunity to address on them: *Lloyd* [42].

- The weight to be given to particular kinds of evidence in proceedings on sentence cannot be pre-emptied as a matter of principle. The weight and cogency of the evidence is always a matter for the individual assessment of the sentencing judge: *Lloyd* [45].

As sentencing under the criminal law is the alternative to a s.14 order for a court to consider, see SBB [10-460]. In some circumstances, an increased sentence may be imposed because an offender's mental illness means s/he presents more of a danger to the community: *R v Stonestreet* [2020] NSWCCA 212 [44]. It follows that, in some other circumstances, a sentence of some kind (albeit not increased) may provide more community protection than a s.14 order. For a brief summary of the ways in which a mental disorder or abnormality or an impairment of mental function may be relevant to sentencing, see the *Queen v Guode* [2020] HCA 8 [8].

It is clear that *DPP (NSW) v Saunders* [2017] NSWSC 760 still applies. The following can be distilled from it and applied in determining a s.14 application:

- a treatment plan must be reasonably specific in detail [34]-[37].

- The decision whether to divert [the applicant] in any of the permissible ways is discretionary and is based upon a consideration of a variety of factors. Those factors include the seriousness of the alleged offence, the purposes of punishment, the public interest in diverging mentally disordered persons from the criminal justice system, and the proposed treatment plan [39].

- Both the "responsible person" in s.14 (1)(a) and the "person" or "place" "specified by the Magistrate" in s.14(1)(b) must be identified with some precision in the s.14 order and therefore in the antecedent evidence: [40]-[43].

- "In some cases it might not be possible to name a particular person but in those circumstances, specification of a particular place would avoid doubt: for example, a condition requiring a person to undergo assessment and/or treatment by a psychiatrist at a named mental health facility" [44].

- A failure to name a particular person or a particular place renders the enforcement provisions in relation to a conditional discharge under s.14 virtually nugatory [47].

Where appropriate, practitioners should arrange, and include in the evidence in support of a s. 14 application, written consent from the clinician to act as the responsible person under s.14(1)(a) and/or person treating under s.14(1)(b).

For Commonwealth offences, the corresponding provision is s.20BQ, Crimes Act 1914 (Cth). See LCBB [18-140].

The Hearing

As soon as possible tell the Court up front what sentence or what order in an application you are seeking on behalf of your client or, in any other case where it is not clear, what you want.

By all means give a concise objective opening. Do not make a gratuitous, inflammatory pre-emptive verbal attack on the main opposing witness or witnesses. What is the point? The magistrate is not a jury, and will consider all the evidence and submissions before determining the outcome.

In a domestic violence assault or contravene apprehended domestic violence order prosecution, usually the Court will try to confine evidence to the incident alleged to comprise the criminal offence. Resist pressure from the accused to litigate all incidents and grievances in the prior relationship of the complainant and the accused. In particular, in nearly all cases, alleged past misconduct concerning access to and contact with children is not relevant. Often such evidence about past events is allowed

to be given generally and briefly, not as to the truth of the asserted facts but only as to current beliefs or fears.

Questioning Witnesses

Read ss. 26-29, 37, 39, 41, 42 and 46 of the EA and the commentaries on those sections in the leading texts and services.

There are many wise texts and articles on questioning witnesses. Here are a few tips arising from common mistakes.

If it is most likely that unfavourable evidence will be elicited from one of your witnesses in cross-examination, adduce such evidence in examination in chief. In cross-examination, such evidence would be elicited in most unfavourable terms. So adduce it yourself so that it can be presented as "sweetly smelling" as possible.

In cross-examination, confine questions to a single proposition. Do not ask questions with a long preface. Do not repeat the same question several times.

In cross-examination, it is time-wasting and counter-productive to attempt to elicit evidence in chief all over again in an opportunistic search for inconsistencies. Apart from being displeasing to the decision-maker, it may be disallowed under s. 135(c) of the EA because any probative value is substantially outweighed by the danger that it will result in undue waste of time. So zero in on the evidence that you wish to challenge. Any "closing of the gates" and other lead-ins to key points should be as economical as possible.

Ultimately, squarely put an allegation or major competing fact. It is insufficient to have done no more than allude to it elliptically. You can attempt to sneak up on a witness incrementally or crab-like, but eventually you must explicitly put the major competing allegations so that the witness squarely is given the opportunity to respond to them. See *O'Neil-Shaw v R* [2010] NSWCCA 42 [27]' [51]; *Hofer v R* [2021] HCA 36 [27]-[28].

When cross-examining, do not misstate the evidence that the witness already has given by using stronger words or omitting qualifying words or phrases. Otherwise, you may be viewed as an unreliable advocate and lose the confidence and trust of the Court.

Cross-examinations should be as concise as possible, not gratuitously protracted. A courteous cross-examiner usually will elicit more helpful material than a belligerent cross-examiner.

In *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 [123] Adamson J said:

"Procedural fairness requires more than merely giving each party an opportunity to be heard. It also requires that each witness be permitted to answer questions without

being abused in the process. This is not to say that cross-examination cannot be robust, but it must be fair. The latitude commonly afforded to cross-examiners does not amount to a licence to offend, ridicule or vilify. Fairness requires that no proposition, particularly one which is damaging to the witness, be put without a basis. It also requires that questions be asked one at a time and that cross-examination not be peppered with gratuitous and, as in the present case, insulting, commentary to the witness. It requires that the witness be permitted to finish his or her answer and not be cut off or needlessly interrupted."

When re-examining your own witness, you still cannot ask leading questions.

Your client does not have a right to have a second round of cross-examination on additional evidence properly adduced in re-examination (because it arose out of cross-examination). "Procedural fairness" does not justify re-opening cross-examination when the original cross-examination opened up the issue. A cross-examiner must make a considered tactical decision in advance as to what to cross-examine on, knowing that his/her opponent will have the last bite of the cherry in re-examination.

Confine objections to your opponent's questioning to where a significant forensic advantage will result, where a significant forensic disadvantage might be averted, or where time-wasting irrelevance is being embarked upon. Do not waste time taking arid objections when it would be quicker simply to let the case flow on.

No Case to Answer

In *DPP(NSW) v Elskaf* 2012 NSWSC [47] Garling J summarised the legal principles applicable by a magistrate at the conclusion of the evidence in a summary prosecution as follows (authorities omitted):

a) at the end of the prosecution evidence it is open to a defendant to make a "no case" submission, which is determined by the Court as a matter of law.
b) the standard of proof to be applied in a no case submission is proof beyond a reasonable doubt.
c) the question to be determined is whether on the evidence the defendant could be lawfully convicted of the offence charged.
d) the determination of a no case submission is based upon all of the prosecution's evidence, if accepted, and taken at its highest and strongest; even if it is tenuous, inherently weak or vague; unless the evidence is inherently incredible; and unless the evidence is manifestly self-contradictory or the product of a disorderly mind.
e) a no case submission should not be rejected even if the prosecution case is a weak one, because the finding that there is a prima facie case calls upon the defendant to make an answer to that case. There is no reason why a weakness in the prosecution case may not be eked out by something in the case for the defence;

f) a no case submission is to be kept distinct from any subsequent decision involving a question of fact, namely whether to accept the evidence of the prosecution witnesses or any of them, beyond a reasonable doubt. This distinction is no empty formality.

When the Hearing Becomes Part-Heard

If you are appearing in a hearing and it is adjourned part-heard for three or four months, or longer because of the post-pandemic delay in hearings, make rough notes about the future conduct of the case as soon as possible – preferably before you go to bed that same night or, if not, no later than the next day - before the sharp detail begins to slip from your memory. Note the strengths and weaknesses of each side's case, factual and legal issues to be addressed, any additional evidence to be obtained and other tasks that should be carried out. Also make rough notes about the submissions you may wish to make in relation to the demeanour of witnesses and their performance in the witness box.

If written submissions or an outline of written submissions has been ordered, do a rough draft on the basis of your notes, memory and existing documentary evidence, with a view to it being completed and settled once the transcript becomes available (usually after approximately eight weeks). Such an approach would greatly assist in meeting the deadline for submissions, even if a truly unavoidable problem occurs during the few weeks before the deadline.

You will be expected to take on future professional commitments only if they are compatible with meeting your pre-existing professional commitments, realistically assessed. It often is unimpressive that a case that you are involved in during the few weeks before a deadline from an earlier case has "completely unforeseeably blown out" so that you can no longer meet the deadline. Usually such a risk is foreseeable at the time of assuming the extra, later commitment.

If a real risk emerges that you will become jammed on the part-heard date then, in good time, organise a replacement rather than "winging it", hoping that everything will work out and, if it does not, then attempting to obtain a vacation of the part-heard hearing date. (See "Applications to Vacate a Hearing" above).

Submissions

Before a hearing, have draft dot point submissions prepared in advance, and refine them where possible as the case goes along. It would be prudent to minimise reliance on hopefully brilliant "top of the headers" at the time of submissions, as such sudden instantaneous thoughts really may not be so brilliant.

The Court may engage you in Socratic dialogue in order to test and evaluate submissions and for this purpose may express provisional views for your response. Squarely answer the Court's questions. Don't be evasive or try to generate a cloud, or articulate an extensive "package", before giving your actual answer. If appropriate, provide context or qualifications to your response after first directly giving it. Such dialogue is a central opportunity to persuade the court to a view contrary to the provisional view put for a response.

If, during an exchange with the presiding magistrate, the magistrate makes a point that cannot realistically be answered, the point should be conceded without undue delay and without the magistrate having to extract the concession like a tooth. Having made the prompt concession, put whatever mitigating points might assist in relation to the point conceded.

It is bad advocacy to interrupt or speak over a presiding magistrate.

Also listen for cues from the Bench. For example, "I don't need to hear you on X issue" means that issue will be resolved in your favour and so you may safely progress to the next issue.

In an interview with the *Bar News*, published in its Winter 2022 edition, Chief Justice Bell said the following of barristers (which applies equally to solicitors):

"As individual barristers presenting arguments, the secret to being a good barrister is preparation. A well-prepared barrister is going to help a judge or the court best. I like to see counsel who are discriminating in their choice of argument, who have plainly thought through what are the strong arguments, what are the weak arguments and don't insist on throwing in the kitchen sink but are properly selective as to their arguments. And, of course, all judges place great store on being able to trust barristers in their submissions, to make proper concessions, not to take cute or sharp points, and not conceal arguments or points of evidence which are against their interests."

See also, "Conduct and Advocacy in the Courtroom", below.

Drawing Inferences

Appellate courts want trial courts to be careful about making adverse findings as to the credit of witnesses. Rather than giving significant weight to the demeanour of witnesses, they prefer other, less subjective, ways of deciding cases. For example, see *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 [26]-[27]. These include:

- whether evidence is corroborated
- whether witnesses are consistent with each other
- whether the evidence of a witness is internally consistent
- whether a witness is independent or partial

- giving weight to the near-contemporaneous account of a witness because the event was fresh in his/her mind, the witness has had minimal opportunity to tailor or fabricate evidence, all of the consequences of the witness recounting his/her best recollection have not yet been thought through and so there is less appreciation of incentives to adjust evidence, the processes of wishful thinking and imagination of a more favourable account are less likely to have taken place, and the witness has not had time to devise a co-ordinated set of lies to account for other known unfavourable evidence.
- motives for conduct or giving particular evidence, e.g., anger, personal advantage, avoiding criticism, loyalty or affinity, or fear.
- contemporaneous documentary records, and evidence of context: (*ET-China.com* [28],[29]).
- contemporaneous audio and/or video evidence, e.g., CCTV, BWV or ICV
- photographs
- fingerprints and DNA evidence
- other physical evidence
- a party's failure to cross-examine an opponent's witness on the different evidence of a witness called later by that party (one aspect of the rule in *Browne v Dunn* 1893 6 R 67 which is conveniently extracted in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 17; *R v Birks* (1990) 19 NSWLR 677 at 686-692; cf *Scaysbrook v R* [2022] NSWCCA 69 [89]-[107]). In a civil case, but not usually in a criminal case, there may arise a question of whether the later, different evidence that was not put in cross-examination was recently invented or recently imagined*: Hoper v R* [2021] HCA 36 [27]-[37]. One corollary of the rule in *Browne v Dunne* is that courts should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it: *MWJ v The Queen* [2005] HCA 74; (2005) 80 ALJR 329 [39].
- consideration of an accused's clean criminal and/or traffic record as a factor affecting the likelihood of the accused having committed the alleged offence, the credibility of the accused's accounts and his/her veracity as a witness.

Justice P W Young's article, "Fact Finding Made Easy" 2006 80 ALJ 454, provides excellent advice.

See also CTCBB [2-500]ff in relation to circumstantial evidence.

The burden of proof often is very important. The moving party may fall short of proving its case beyond reasonable doubt in a criminal prosecution or on the balance of probabilities in a civil action.

The criminal standard of proof beyond reasonable doubt is a decidedly exacting standard: *Douglass v R* [2012] HCA 34 [48].

No adverse inference may be drawn from an accused's failure to give evidence or to call a person as a witness: *Dyers v The Queen* (2002) 210 CLR 285;[2002] HCA 45; *GBF v The Queen* [2020] HCA 40 [23].

Where an accused exercises his or her right to silence and does not give evidence during the hearing of the prosecution, a court may give less weight to the accused's exculpatory assertions in a record of interview (including an ERISP interview) and more weight to the accused's inculpatory admissions: *Mule v R* [2005] H CA 49.

Where there are facts that are within the knowledge only of the accused and the facts thus cannot be the subject of evidence from any other person, and the accused remains silent, then hypotheses consistent with innocence may cease to be rational or reasonable: *Azzopardi v The Queen* [2001] HCA 25 [61]; *The Queen v Baden-Clay* [2016] HCA 36 [46]-[54]; *GBF v The Queen* [2020] HCA 40 [21]; cf. *Strbak v The Queen* [2020] HCA 10.

A failure by the prosecution to call a material witness that is not satisfactorily explained may give rise to, or contribute to, a reasonable doubt about the truthfulness and reliability of the evidence of a prosecution witness: *Mahmood v Western Australia* (2008) 232 CLR 397 [27], *Louizos v R* (2009) 194 A Crim R 223 [56]-[57].

As to when evidence in relation to central allegations may prevail over discrepancies and inconsistencies, see:

- *M v The Queen* (1994) 181 CLR 487 at 534
- *Reed v R* [2006] NSWCCA 314 [64]
- *Regina v XY* [2010] NSWCCA 181 [71], [98]
- "Who is Telling the Truth? Psychology, Common Sense and the Law", Justice McClellan (2006) 80 ALJ 655
- "Problems with Fact-finding", Justice Ipp, (2006) 80 ALJ 667.
- "Truth and the Law", the Hon JJ Spigelman AC, Bar News, Winter 2011, p.99ff.

In relation to remembering old conversations, see *Watson v Foxman* (2000) 49 NSWLR 315 at 319.

Judgments

Before commencing submissions, both legal representatives should have researched the law and thoroughly considered their own and their opponent's factual strengths and weaknesses. Fallback submissions must be made at the same time as primary submissions. You must put your plan A, plan B and plan C all at the one time.

A courtroom is not a place for a round-table conference. A court is not a marketplace. Generally, there is a sequential, linear procedure, although legal representatives may be allowed a succession of replies to each other's submissions on a complex or difficult issue.

Submissions are the parties' opportunity to have their final say. During submissions, often magistrates may engage in Socratic dialogue. They may ask questions, and bowl up propositions for a response, in order to test and evaluate submissions, but every limb of provisional judicial thinking does not have to be exposed. That stage of dialogue often is the acid test of how well you have prepared your case. After submissions finally have concluded, that is it.

Judgments may not be interrupted, or canvassed afterwards. If some obvious error is expressed in a judgment, such as a magistrate incorrectly stating the maximum penalty, then at the end of the judgment that can be pointed out: *R v Bottin* [2005] NSWCCA 254 [12]. However, it is improper to use "saving your Honour from an error of law" as a cover for addressing issues or points that ought to have been addressed in submissions. A judgment is not a free of charge preliminary Opinion or Advice on Evidence which may be responded to with another round of submissions that address points overlooked during the submissions prior to judgment.

Of course, your client has rights of appeal including, in a criminal case, 28 days to appeal to the District Court.

Road Transport Prosecutions

A common defence to charges of drive whilst disqualified and drive whilst suspended is honest and reasonable mistake of fact. Such a defence is available: *El Hassan v NSWDPP* [2000] NSWCA 330 [14]. However, do your research. Some mistakes by accused are mistakes of law. The case law is not particularly clear on what are mistakes of law and what are mistakes of fact. See Angelov and Britts, *Traffic Law NSW*, 17th edition, Law Book Co. 2017, pp.408-409.

Furthermore, there is an important distinction between the sending and the receiving of Transport for NSW ("TfNSW") notices of suspension and cancellation. TfNSW must give a driver notice of suspension or cancellation: cl. 69, Road Transport (Driver Licensing) Regulation 2017 (NSW). Such notice may be sent by post: s.276(1)-(2), Road Transport Act 2013; cl.154, Road Transport (General) Regulation 2021. This may be proved by a certificate issued under s.257(2), Road Transport Act 2013. If it is proved then, four days after posting, service is deemed in law (Road Transport (General) Regulation 2021, cl 156(1)(c),(2)) and any denial of actual receipt by the driver is to no avail.

Alternatively, a failure by a driver to notify TfNSW within 14 days of a change of address (pursuant to cl.122(1), Road Transport (Driver Licensing) Regulation 2017), as a result of which TfNSW notices were sent to the vacated address, may render a mistake of fact unreasonable.

In most cases where a speeding charge is based on radar or LIDAR evidence, you need to engage and call an expert to be successful, even if the defence is focused on

whether the device was operated correctly or properly: s.141, Road Transport Act 2013; *RMS v Addario* [2012] NSWCA 412 [34]-[38], [40]-[41], 50 [54].

Sentencing Options

Read LCBB [2-000] and [16-120 - 16-480], and SBB [3-000]-[8-200].

Sections 267 and 268 of the Criminal Procedure Act 1986 prescribe the maximum fines for Table 1 and Table 2 offences.

See LCBB [18-000]ff and SBB [16-000]ff for Commonwealth offences.

Appearing on Sentence

Read all parts of the SBB and LCBB on the relevant or potentially relevant issues that may arise in a sentencing proceeding in which you are instructed to appear. The summary of the law on a particular issue in the SBB and LCBB is more likely to reflect the presiding magistrate's understanding of the law than a more narrow selection of case law, sometimes arguably slanted to one side, that a prosecutor or practitioner may prefer to focus on.

Essentially, an offender will be sentenced on the facts in the Facts Sheet. It is not an option to consent to the tender of the Facts Sheet and then in submissions contradict or qualify central facts. An accused person's options are to plead not guilty, to plead guilty but request a defended hearing on the facts for sentence, to negotiate the facts with the prosecutor with a view to amending the Facts Sheet, or to plead guilty on the facts in the Facts Sheet. Often the prosecutor will be prepared to amend the Facts Sheet in order to procure a change of plea from not guilty to guilty or in order to streamline a sentencing proceeding.

If only minor factual issues are in dispute, try to resolve them in advance with the prosecutor and have the Facts Sheet amended so that your plea in mitigation may proceed as smoothly as possible.

As advised above, obtain a copy of your client's criminal record as soon as possible. Identify any breached conditional release orders or community correction orders. Tell the Court of these as soon as possible as they will need to be called up, which will result in a delay before the sentencing proceeding can be resumed.

Ensure that you know the maximum penalties in the legislation (not simply the 2 years imprisonment limit of jurisdiction for a single offence or 5 years cumulative limit), the automatic and minimum licence disqualification periods and your client's net fortnightly income. Know your client's address.

So that a prisoner being sentenced can get “credit” for “time served”, have ready to tell the Court the exact dates between which the prisoner has been bail refused in the matter for which s/he is being sentenced. It is unprofessional and discourteous to expect a magistrate to delay the progress of a busy list while working out time spent in pre-sentence custody from the bench sheets and Facts sheet.

Decide whether to request a duty or a full sentence assessment report. If either is sought, make your request as early as possible and not at the end of your submissions.

Consider carefully whether to make a submission that involves kicking the sentence down the road, e.g., an adjournment to obtain references (are they really important?) or to fill in secondary gaps in a future treatment plan (when the CCS could require and organise this pursuant to a conditional release order after a finalised sentence). Churning a matter from list to list results in multiple handling of cases, which can include both increased legal costs and a magistrate re-reading material on the bench or in chambers on the adjourned day when there are always new sentences for the magistrate to read up on.

A defended matter will not be adjourned out of the court area in which the offence allegedly was committed. A magistrate will consider adjourning a sentence to another court to link up with sentences of the same offender in that other court, or where the offender resides near that other court, but first a plea of guilty should squarely be entered in court and not attempted by email. A plea of guilty may be foreshadowed by email.

It is difficult for a magistrate to exercise his/her discretion and give distinct leniency in the first sentence of the day in a crowded list court as many people to follow will want the same leniency when, in the circumstances of their cases, such leniency may be inappropriate. The more leniency that you are attempting to obtain against the odds, the more you should wait and let other sentences go ahead of you. Seeking a s.10(1)(a) dismissal or s.9(1)(b) CRO without conviction for a high range PCA as the first sentence of the day can be a kamikaze submission.

Just state how many references you are tendering; reading out the names of referees takes up unnecessary time.

When addressing the Court on sentence, state clearly at the beginning where you are headed. What sentence are you asking for? As the magistrate will have a provisional view at an early stage, it is worthwhile indicating any alternative option to be proposed so that your alternative can be evaluated during submissions.

In your plea, do not repeat the facts, the contents of your client’s records or what referees have said. Doing so unnecessarily consumes time. Simply address those aspects of the evidence about which you wish to make a particular submission. Be precise and concise.

Make appropriate concessions early. Acknowledge the elephants in the room, e.g., the seriousness of the offence, the gravity of the facts and/or your client's records. Such an approach eases the Court into your positive submissions and averts annoyance at major considerations and stark realities not being faced up to. A common opening submission by a skilled advocate is, "Your Honour will be concerned about X,Y and Z, and of course A,B,C aspects are relevant, but…".

Generally, a more impressive plea in mitigation is one that does not malign an absent victim but, instead, accepts full responsibility and apologises to the victim. This needs to appear genuine rather than a transient ritual incantation.

It is helpful if the offender has made constructive use of the time between commission of the offence and sentence by, e.g., embarking upon appropriate counselling or other rehabilitation. Consequently, the offender will have runs on the board by the time of sentence. This usually is more impressive than the situation of a "gunna", that is, an offender who is "gunna" do this and "gunna" do that, but has done nothing up to the sentence date, not even having made an appointment that can be proved.

In a sentencing proceeding, it is very common for much evidence to be adduced, and extensive submissions to be made, in order to avert a conviction. In *Babineau v R* [2016] NSWDC 354 [43], [54] and [57], Henson DCJ said:

"General deterrence and specific deterrence would be almost completely ineffectual if the penalties laid down by Parliament were rendered secondary to the personal desires of an offender…Courts would be doing less than their duty, especially where retribution, deterrence and protection of society are the predominant considerations if they place excessive emphasis on an offender's personal circumstances to the exclusion of society in general. To these considerations I would add the impact of the crime on the victim and the community…. If the impact of the crime on the victim, general deterrence and denunciation are to have practical meaning and effect they cannot simply be ignored because of the consequences of conviction. I reject the submission that the application of the provisions of s.10… is appropriate..".

In *R v Gordon* (1994) 71 A Crim R 459 at 468, Hunt CJ and CL said:

"What all of those principles make clear is that rehabilitation (or reform) - the hope that the offender will be released back into the community a better person than when he or she left it - is only one of the purposes of punishment and that, even when some measure of rehabilitation has been achieved, such a subjective consideration remains necessarily subsidiary to the need for the sentence to act as a deterrent to the public."

Sentencing for Road Transport Offences

See LCBB [4-000] for drink-driving impairments.

If disqualification of an offender is a risk, advise your client not to drive to court unless s/he is accompanied by someone who can drive the vehicle away. If disqualified, your client cannot move his or her car even if s/he is liable to receive a parking infringement notice.

As already advised, be very clear about the maximum penalty and disqualification periods applicable to the sentence in which you are appearing. See LCBB [2-000]–Specific Penalties and Orders, Road Transport Legislation.

If you are appearing on sentence in a matter where the offender did not pay the infringement notice penalty, there is a substantial chance that s/he will be fined a greater amount because different considerations apply in court. The infringement notice amount is simply a standardised amount to pay in lieu of coming to court. In court, the magistrate scales down from the maximum penalty having regard to the gravity of the facts of the particular case and then factors in the offender's traffic record and other circumstances.

The Court must take account of the consequences of licence disqualification: *Application of the Attorney General (HRPCA)* [2004] NSWCCA 303 [114]-[116]. Sentencing discretion is not controlled solely by an offender's need for a licence or the consequences of disqualification for a significant period [117]. There will almost invariably be hardship or at least inconvenience caused to an offender deprived of his or her license for such lengthy period as Parliament has prescribed. This may include severe impact on the ability of an offender to obtain or maintain employment [128].

Most people need their driver's licence for something very important – their job, their business, driving children around, driving themselves or others to medical or other therapeutic appointments, driving elderly people to their appointments or other commitments, because they are carers, driving to university or TAFE each day, because they do shift work when public transport is not operating, because they live remotely from public transport or, commonly, for more than one of those purposes. All of those purposes are within the usual range of consequences of loss of licence; they are not exceptional in most cases. Often such needs for a licence are not decisive in determining penalties for road transport offences.

It is not proper to dismiss a charge without conviction merely to avoid the operation of some other legislative provision that is otherwise applicable: *R v Mauger* [2012] NSWCCA 51 [21]; *R v Stephenson* [2010] NSWSC 779 [66]-[67]; *Babineau v R* [2016] NSWDC 354 [31],[43],[45]. For example, a disqualification.

Sentencing for Environmental Offences

Upon request, the City of Sydney Law Society can email to interested practitioners a copy of my paper, *Sentencing Environmental Offenders in the Local Court – Procedure and Evidence*, presented to the Young Lawyers Environment and Planning CLE Seminar on 14 March 2020.

The most commonly prosecuted environmental offence in the Local Court is development not in accordance with consent. The maximum penalty, which is reserved for a worst possible case and from which the Court scales down, is $2 million for a company and $500,000 for an individual. The Court's jurisdictional limit is $110,000 but, as with other criminal offences, that is simply a cut-off. It is common for Local Court penalties to be in 5 figures.

For the reasons given in the paper, you should advise any of your clients who are developers to see you urgently if they receive a penalty infringement notice so that you can give advice before the deadline for paying the amount of the infringement notice (often up to $6,000) has expired. For the reasons given in the paper, often the cheaper option is to pay the infringement notice amount. That also avoids a conviction.

Conduct and Advocacy in the Courtroom

Punctuality is important. If you are going to be a little late for court, send an email to the registrar with an estimated time of arrival, or if you will be delayed excessively send an adequately instructed replacement. Practitioners do not have authority to alter the time of their client's attendance (usually 9.30 am) to suit their own late arrival. Doing so could result in the issue of an arrest warrant for breach of bail conditions if the accused client is on bail.

The prevailing view of most magistrates is as follows: Court starts at 9:30 am. It is not a restaurant at which you can book a table at a time that is convenient to you. Being late is discourteous. Lateness has become an increasing problem. It has become an increasing trend to send an email unilaterally nominating a substantially late arrival time. This is now unacceptable, especially if a late practitioner has a relatively long sentence or other matter. Instruct a replacement to appear in one of the two courts in which you have become jammed. At least, have someone mention your appearance at 9:30 am.

Ensure you are professionally attired, whether appearing in person or via AVL. Men should have their tie properly done up. Ensure that no one on your "side" brings any food or drink into the courtroom, except water in a clear (not opaque) small plastic bottle.

Ensure that your client is in court with you so that the court officer does not waste time, and the magistrate does not lose the assistance of the court officer in the courtroom,

while the court officer is calling your client or searching for him or her outside the courtroom.

By the time that you are ready to mention your matter, it is essential that you have managed your client's expectations as much as possible. Your client should appreciate essentially that "everything is an application or submission" and that it is for the Court to decide the result. Your client may dogmatically, but unrealistically, expect or insist on a particular outcome. In many cases, you may have spent more time in firm dialogue with your client than with your opponent or the Bench. Much of the advice in this paper is directed at assisting you to manage your client's expectations. A good result, all things considered, then is more likely to be appreciated by your client.

Clients also should be advised to be calm and impassive in the courtroom and to avoid facial expressions, gasps and audible utterances.

Let the magistrate run the Court. Don't stand up immediately at the commencement of the list. See what the priorities are in that courtroom. In a non-custody list, adjournment applications may be called for first (including MERIT adjournments, s.14 applications needing a hearing date, and matters listed for reply which are ready for a hearing date to be fixed). Part-heard sentences or other short matters may be next. New short sentences and then longer sentences may follow in that order.

If you are a novice practitioner or a visitor from another region, do not "push" your way to the bar table in a crowded court. Senior solicitors often become most seriously displeased with aggression of this kind and other courtroom aggression from junior solicitors. Many senior solicitors consider that there is a loose form of hierarchy among legal practitioners, based on seniority, and they expect junior solicitors to observe it. Why not keep the peace?

When a magistrate has reached a stage in calling a list where s/he allows practitioners to help decide priorities, often seniority, the amount of time spent waiting, and the (reliably assessed) length of the matter, are considerations. Discretion is the better part of valour. Watch, wait and consult fellow practitioners. Definitely consult your colleagues if you wish to mention or conduct your matter ahead of theirs.

Be prepared to be at court until 4pm, depending on the Court's priorities and evolving contingencies during the day. Your paramount duty is to the Court, not to any employer who wants you to disregard etiquette and discourteously push to the front of the list so that you can return to the office quickly.

Conversely, if you need advice at the courthouse, most senior solicitors are very willing to assist you. So ask them. They remember when they once were fledgling legal eagles. There is no need to be isolated and rudderless.

If you are speaking with your client, your opponent or anyone else in the courtroom and the magistrate addresses you, immediately stop the conversation and respond to

the magistrate. Do not ignore the magistrate and continue the conversation until you get to a convenient point in it. Generally, communications along, from or to the bar table during a hearing should be by written notes.

In a list court the magistrate probably will have a pile of files in alphabetical order. State the name of your matter first before stating your own name, so that the magistrate can begin to look for your client's file while you are then stating your own name, i.e., "I appear for John Smith, my name is Jones".

As advised above, state early the nature of any application that you are making and what orders are sought. Get to the real issues promptly. Make your best points early. Do not make arid or facile points that are unlikely to be accepted; such points also may tarnish your good points.

Usually it is a mistake to see the courtroom as a battlefield and that you are there to wield a sword furiously. Aggression and squabbling may well be counter-productive. Your roles include assisting the Court. Respond squarely to questions or concerns expressed by the magistrate. Do not brush them off. Be concise and precise. Avoid grandiose verbiage. Above all, be frank. A bad reputation among your colleagues or magistrates is hard to shake. Happily, it is common for courtroom advocates to have long and successful careers. Safeguard yours.

When addressing the Court, do not put both hands on the bar table. If there is a lectern on the bar table, do not slouch or otherwise lean on it. The lectern is there to elevate and support your documents, not you. Project your voice. Enunciate clearly. Speak at a moderate, not a fast, pace. Give the Court time to absorb what you are saying.

Watch your language. Say:

- "I appear for XYZ" or "in the matter of XYZ", not "I'm in the matter of XYZ" or "I'm in that matter".
- "I tender", not "I seek to tender".
- "The witness box", not "the stand". (We are not in the United States.)
- "I submit", not "I think".

Resilience and Endurance

Courtroom lawyers conduct advocacy in open court, not in a closed office. They are continuously subject to scrutiny by the Bench, their colleagues, the media and everyone else who attends a courtroom. As noted in the Introduction to this paper, the role of legal practitioners is critical to the administration of justice. Legal practitioners can have a major influence on a court's decisions and a major effect on people's lives. In the course of their duties, legal practitioners often must meet strict deadlines for preparation.

It is especially prudent for a courtroom lawyer to stay “up to date” medically. Organise and undergo tests and other investigatory procedures promptly when advised by your doctor to do so. Then follow through expeditiously to any subsequent stage after receiving the results of the tests and investigations. Do not procrastinate. Such diligence minimises the risk of not meeting litigation deadlines and medical crises erupting during or shortly before court hearings. Consequent stress, expense, embarrassment because of the disruption to litigation, and disadvantage to your client (particularly in part-heard cases), thereby can be averted.

Understandably, it can be very stressful being a courtroom advocate.

So you need to pace yourself. Take regular breaks. For example, don’t save up most of your leave until shortly before retirement.

Develop and maintain those positive personal relationships that you have with your partner, relatives and/or friends (i.e., not with toxic people), and have as much social interaction as possible to avoid isolation: see Prof Trevor Waring, “A Balanced Life is Good for Business”, Law Society Journal, May 2002, pp 66-68. For balance, have some friends and interests outside the law.

Within the law, network sustainably, that is, at a gentle rather than intensive pace. This facilitates collegiate interaction which is beneficial for your morale, your knowledge of the law and your career. Choose the functions that most interest you. Attend at least a few of your regional law society’s events each year.

Exercise is a terrific anti-depressant and energiser: see Kate Allman, “What’s the Best Exercise for Mental Health?” Law Society Journal, October 2018, p.56.

Carefully consider your alcohol intake. See Joanna McMillan, “Skip the Booze Bus”, LSJ, December 2014, p.52. See also Kate Allman, “One Too Many”, Law Society Journal, September 2018, pp. 30-35.

The measures summarised above would be complemented by stepping up efforts to have a healthy diet and achieve and maintain a healthy weight.

Conclusion

You may be concerned that the advice in this paper is somewhat overwhelming. However, you will have more success than you may think. That is because often your opponent may well be underprepared and/or make the mistakes that are counselled against in this paper, whereas you will be forewarned and forearmed. Furthermore, on a positive note, this paper should go some significant way towards enabling you both to assist the Court and also to advance your client’s interests effectively. These purposes can be accelerated by thorough preparation.

The paper also should assist you to manage your client's expectations to a more realistic, or less unrealistic, level. That should result more often in greater client satisfaction and appreciation of your skilful and assiduous work.

The original version of this paper was presented on 17 October 2018. This is the fifth "edition". I would like to thank the many senior private and Legal Aid solicitors and police prosecutors, and counsel, colleagues and court officers, who provided valuable input for, or comments on, the successive evolutions of the paper. At some stage, I hope that there will be another edition of this paper. Corrections, comments, and proposed additions to the paper are welcome. They should be sent to Magistrate Glenn Bartley, care of one of the following Downing Centre Local Court addresses:

cmo@justice.nsw.gov.au

Chief Magistrate's Office
Level 5,
The Downing Centre,
143-147 Liverpool St,'
Sydney 2000

Abbreviations on Local Court Bench Sheets and in Court Files

@ - agent for

AVL – by audio-visual link

B/C – by consent

BDW – bail dispensed with

BG – bail granted

BNAFR – bail not applied for refused

BOB – balance of brief by

BR – bail refused

BTC – bail to continue

BAIL FORF – bail forfeited

BUNKF – bail undertaking not kept & forfeited

BSO – brief service order

CAQ – court appointed questioner

CCO – community corrections order

CCS – Community Corrections Service

CRO – conditional release order

CTO – community treatment order

DCLC – Downing Centre Local Court

DEF – defendant (i.e., accused)

DEILR – defendant excused if legally represented

DQ – disqualify

DV – domestic violence

DVLO – domestic violence liaison officer

EXC – excused

F & S – file and serve

FDO – for decision only

FH – for hearing

FMO – for mention only

FTA – fail to appear

G or PG – plea of guilty

H or HG – hearing

I/O – interim order

IC – in custody

ICO – intensive corrections order

IOTC – interim order to continue

IP – in person

LAC – Legal Aid Commission

LCLA – local court listing advice

LTW – leave to withdraw

NA – no appearance

NAD – no appearance by defendant

NBC – not before court

NFA – no further adjournments

NOL – notice of listing

NOP – notice of penalty

NR – not reached

P/M – for plea or mention

PH – part heard

PINOP – person in need of protection

PMBE – plea must be entered

PNG – plea of not guilty

Reps – representations

RND – registrar to notify defendant

S or FS – for sentence

SAR – sentence assessment report

SDG – standard directions given

TBS – to be served

TFHD – to fix a hearing date

TfNSW – Transport for NSW

TOP – traffic offenders program

UR – unrepresented

W/A – without admissions

W/D – withdrawn, or withdrawn and dismissed

With INT – with an interpreter

WPG – written plea of guilty

WPNG – written plea of not guilty

WMI – warrant may issue

WTI – warrant to issue

WWI – warrant will issue