Aspects Of Advocacy: The Effective Presentation Of Evidence

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The effective forensic conduct of litigation involves two main aspects: proof, and persuasion. Even in jurisdictions in which the tribunal of fact is a judge, the importance of persuasion should not be under-rated, but it is rarely decisive. Proof, on the other hand, is always critical.

Proof of facts is achieved through the tender of evidence. The main categories of evidence with which our courts are concerned are real, documentary and testimonial evidence. In this paper I consider techniques for the effective presentation of evidence at trial. While the emphasis is on financial matters, the principles are of general applicability. In particular, I propose to cover the following topics:

- Documentary evidence
- Affidavits
- Oral evidence in chief
- Cross-examination: purposes and principles
- Cross-examination: *Browne v Dunn*
- Cross-examination: myths
- Cross-examination: objections
- Cross-examination: previous representations
- Cross-examination: credit
- Cross-examination: preparation, structure and conduct
- Re-examination
- Preparation of witnesses
- The expert witness

Documentary evidence

Although documentary evidence is not infrequently encountered in children's cases – where, in particular, correspondence, diaries and medical records may be tendered – in financial matters it is often crucial. Financial information can be complex and confusing. Financial information is usually presented in documentary form, typically through the Financial Statements of the parties and the primary evidentiary documents – such as tax returns and bank statements – which are tendered as exhibits. The art of presenting it is to do so in a way that facilitates understanding, focuses attention on the issues, minimises the scope for effective cross-examination of the client, and highlights the points important to your case.

The Financial Statement is a fairly comprehensive document, covering most heads of income, expenditure, property, liabilities and resources that arise. Preparation of a Financial Statement requires detailed analysis of a party's income and expenditure. Whenever possible, reliance should be placed on source documents – such as pay advices for income, and invoices and receipts for expenditure. Notes should be used to explain the basis of estimates and to provide supplementary explanatory information.

Primary evidentiary material. The primary evidentiary material will include some that is historical – proving past financial transactions and contributions – and some that is current – proving the current financial position. You should ensure that the important points are highlighted and not lost in the sea of paper. This can most effectively be done by the logical arrangement and summary of financial information. Evidence of the contents of two or more documents may be adduced in the form of a summary, if application to do so is made before the hearing concerned and the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume and complexity of the documents, and if a copy of the summary with details of its author, and an opportunity to inspect each of the relevant documents, has been given to each other party. [1] But even where this procedure is not invoked, summaries are still very useful as aides-memoire.

Proof of income contributions. Bundles of income tax returns are often tendered to prove a party's income contributions during the marriage. But in anything other than a short marriage, they are unwieldy and cumbersome, and often contain far more information than necessary. Their effect can be enhanced by use of a simple covering schedule, which summarises the client's income year by year. If the income contributions are an important part of your case, a document which, on an annual basis, summarises your client's income and contrasts it with the other party's (much

lesser) income in the same period, will highlight the significance of your client's income contribution. On the other hand, if a current disparity in earning capacity is important, a summary showing your client's very low income over the last few years, in contrast to the other party's very high income, will assist to demonstrate your case in a simple but powerful way.

Proof of current financial position. Your client's vulnerability to cross-examination on his or her statement of financial circumstances will be much reduced if it is supported by primary documentation, to which he or she, and the court, can refer. A useful technique is to arrange the current primary documents in a folder in the sequence of the Financial Statement, so that, if for example telephone expenditure is challenged, the telephone accounts can be found behind the appropriate tab.

Proof of corporate structures. Sometimes cases involve extensive empires of companies and trusts. While their inter-relationship might be formally proved by company searches and the like, an organisation chart provides a much more readily digestible format.

Proof of past transactions. Where it is desired to prove past financial transactions or other aspects of financial history, a chronological approach is usually most helpful. Often the preparation of a chronological bundle of documents – with an index that summarises each document – is a useful way of demonstrating, in an easily understandable sequence, what has happened. The same applies to correspondence.

Case outline document. The Case Outline Document is, of course, not evidence, but it can be a useful aide in developing understanding of the financial information. Insofar as it contains a table of assets, liabilities and resources, it can usefully identify agreed and disagreed issues by setting out, in respect of each asset and liability, the competing valuations of each party – thus highlighting what is in dispute.

Affidavits

The general rule, of course, is that evidence-in-chief is given by way of affidavit, [2] except where a witness refuses to swear an affidavit, and notice to that effect has been given, setting out a statement of the evidence sought to be adduced, [3] unless the court otherwise orders. [4]

Affidavits are a form of testimonial, not documentary, evidence. They must focus on proof of facts, not conclusions, and this means proof of acts, or words – written or spoken. Conversations must be set out in the first person, although it is prudent to include a paragraph stating that the words used are, if not the very words, to the same effect. Documents should be annexed – not extracted and quoted in the body of the affidavit.

Proof of relevant facts in the matrimonial context, where they are controversial, usually requires descent to considerable detail. In a financial matter, the affidavits must address relevant aspects of the financial history of the relationship, the respective contributions of both parties, and the matters relevant under s 75(2). Bare assertions of contributions and needs are inadmissible; the facts that constitute each relevant contribution must be proved. In a lengthy marriage, some resort to summary may be necessary and appropriate, but it should be expressed in terms of practice – what the parties, or one of them, *used* to do as a matter of practice.

Under the present rules, providing in effect for the exchange of affidavits of evidence-in-chief, [5] there is no scope to answer the other party's affidavit by an affidavit in reply. There have been different practices as to how this should be dealt with. In my view, the appropriate course is to seek leave to adduce oral evidence in answer, in chief. In a respondent's case this is reasonably clear. In an applicant's case there is some controversy as to whether it should be done in the case-in-chief or in reply, but as a case in reply is properly limited to a reply to an affirmative case made by a respondent, and should not involve splitting of one's case, and as the applicant will be on notice, from the affidavits of the respondent's case, the proper course is to adduce that evidence at the outset. It is prudent to give notice of the evidence to be led; this can be in the form of an affidavit, leave to file which could be sought at the trial, with a consequent saving of time.

Counsel are often tempted to take every conceivable objection to an affidavit. This practice is not to be commended: only objections which matter should be taken. For example, often, the precise words used in a conversation do not matter, or indirect speech sufficiently summarises the conversation. Objection should not be taken on formal grounds to evidence of matters in respect of which there is no *bona fide* dispute. But that exhortation does not detract from the obligation to ensure that affidavits are drafted in admissible form.

Evidence-in-Chief

Leading questions. It never cases to amaze that even relatively experienced advocates persist in asking leading questions in chief. Sometimes it is said that this saves time in uncontroversial matters; that is rarely true. But not only is the practice impermissible under the laws of evidence, perhaps more importantly it much diminishes the value of the evidence. A Judge is not likely to be much influenced by a witness acceding to propositions coming out of the mouth of Counsel who calls the witness.

In appropriate circumstances, leave can be granted to cross-examine a party's own witness. [6] Although, particularly in

the area of criminal law, a relatively narrow view has been taken of this power, it has the effect that where it is necessary to call a witness who declines to co-operate in giving an affidavit, and that witness does not give favourable evidence, the witness may by leave be questioned as if under cross-examination.

***Prior consistent statements*.** A previous representation of a witness is admissible where it was made when the facts were fresh in the memory of the witness, and the witness is to be called to give evidence. [7] Except with leave, a document containing such a representation must not be tendered before the conclusion of the examination in chief of the person who made the representation. [8].

Cross-examination: purposes and principles

Cross-examination has essentially two purposes:

- First, to obtain relevant evidence, which weakens the opponent's case or strengthens the cross-examiner's case. This may include filling gaps in the cross-examiner's own case. In the case of cross-examination of a party, it includes obtaining informal admissions of fact, which are adverse to that party's case, or which reinforce or fill gaps in the client's case.
- Secondly, to reduce the credibility of the witness' evidence. This includes cross-examination on matters not directly relevant to the proceedings but relevant to credit.

Many advocates and teachers of advocacy have sought to formulate principles of cross-examination. I claim no particular status for mine, but I suggest that effective cross-examination depends at least on the following:

- Selection and maintenance of the aim of the cross-examination.
- Acquisition of the knowledge of the facts to cross-examine.
- Preservation of surprise and uncertainty.

Cross-examination: *Browne v Dunn*

Every trial lawyer knows of the rule in *Browne v Dunn*; many fewer understand it. The rule has two aspects. *One* is a rule of fairness: that a party is entitled to have put to it the contrary case, in order to be able to answer it. As Hunt J said in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 (at 16):

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67.

The *other* aspect is concerned with weight: if a witness' evidence is unchallenged, then its weight is generally the

greater. As his Honour further explained (at 18):

> Firstly, there is a rule of practice or procedure, based upon general principles of fairness, which is designed to achieve fairness to witnesses and a fair trial between the parties; and, secondly, there is a rule relating to the weight or cogency of the evidence.

Where proceedings are conducted on affidavit, the first aspect of *Browne v Dunn* will often not be applicable. Each party will be on notice of the case that the other party seeks to make. There is no obligation to raise such matters in cross-examination in circumstances where it is perfectly clear that the witness has had full notice that there is an intention to impeach the credibility of the story that he or she is telling.

Usually, it will be the second aspect of the rule that is relevant in the Family Court. It has the consequence that, ordinarily, evidence that is not challenged should be accepted unless it is inherently incredible. The second aspect of the rule in *Browne v Dunn* means no more than that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, then that circumstance would often be a very good reason for accepting the evidence of that witness upon that matter, although there is no requirement in law that the tribunal of fact must accept that evidence, and no basis in law upon which the other party is precluded from leading evidence in contradiction to it.

The former rigours of the rule have been mitigated, in that leave may now be granted to a party to recall a witness to give evidence about a matter raised by another party on which the witness was not cross-examined. [9]

Cross-examination: Myths

Some supposed rules of cross-examination have become so well known and established over the years that they have achieved a status that they do not deserve. I refer to now to three of them. While there is an element of accuracy in each of them, in my opinion they are often accorded too much significance.

- Avoid asking the one question too many. It is often thought that once a concession has been obtained it should not be pursued for fear that the witness might qualify or escape from it. The unstated corollary of this supposed rule - expressed in terms of Murphy's Law – is that if you don't ask the question, then the re-examiner almost certainly will. At least if you ask it and get an unfavourable answer, that can be further tested in cross-examination. If elicited in re-examination, it can't.
- Never ask a question to which you do not know the answer. In reality, the cross-examiner will often not know the answer, although adherence to my second principle will assist. Cross-examination can be exploratory as well as confirmatory, and while the idea of being possessed of information – preferably documents – capable of demonstrating the correct answer is entirely correct, the suggestion that questions should not be asked unless the answer is known is quite wrong.
- Don't allow the witness to give an explanation. Again, the author of this rule forgot about re-examination. Particularly if the witness is trying to give an explanation, you can be sure that a competent re-examiner will elicit that explanation, which you will then not be in a position to test. And even if the witness is not offering one, consistent with the view that you should seek to ascertain the witness' rationale for the purpose of demonstrating its illogicality, it is often very important to ascertain a witness's reason for an answer.

Cross-examination: Objections

Generally speaking, in cross-examination a liberal view is taken of relevance.

A question in cross-examination may be disallowed if it is misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. *Evidence Act,* s 41(1). Further, the court shall forbid the asking of or excuse a witness from answering a question that it regards as offensive scandalous, insulting, abusive or humiliating, unless satisfied that it is essential in the interests of justice that the question be answered. The court must also forbid an examination that it regards as oppressive, repetitive or hectoring unless satisfied that it is essential in the interests of justice. [11]

There is a discretion to disallow leading questions in cross-examination. [12] This is relevant in particular where the witness is sympathetic to or aligned with the party conducting the cross-examination.

Cross-examination: Previous Representations

Some of the most effective cross-examination is based on prior inconsistent statements – now called previous representations of the witness – particularly those made on occasions when there was an obligation to tell the truth. Proceedings conducted on affidavit provide fertile opportunities for the investigation of prior inconsistent statements. Other sources include correspondence emanating from the parties in happier times, speeches made by them on earlier occasions, and, very commonly, the pleadings in previous Family Law proceedings.

The Witness' own previous representations. A witness may be cross-examined about a prior inconsistent statement

whether or not complete particulars of it have been given to the witness, or a document containing a record of it shown to the witness; but if the witness does not admit that he or she has made the statement, evidence of it cannot be adduced from another source unless in the cross-examination the witness is informed of enough of the circumstances of its making to enable the witness to identify it, and the witness's attention is drawn to so much of it as is inconsistent with the witness's evidence. [13]

Previous representations made by others. If evidence of the representation has been admitted, or the court is satisfied that it will be admitted, then a witness may be cross-examined about it, notwithstanding that it was not made by the witness. [14] If those conditions are not satisfied, then, if the representation is contained in a document, the only permissible course is to produce the document to the witness, and ask whether having examined it, the witness stands by the evidence that he or she has given, and the document must not be identified. [15]

Cross-examination: Credibility

Cross-examination is an exception to the credibility rule – that evidence that is relevant only to a witness's credibility is not admissible. The credibility rule does not apply to evidence adduced in cross-examination if the evidence has substantial probative value, as to which it is germane that the evidence tends to prove that the witness knowingly or recklessly made a false representation when under an obligation to tell the truth, but having regard to the period that has elapsed. [16]

If it is intended to adduce evidence that a witness is biased or has a motive for being untruthful, or has been convicted of an offence, or has made a prior inconsistent statement, or was unable to be aware of matters to which his or her evidence relates, or has knowingly or recklessly made a false representation while under an obligation to tell the truth, and to do so from a source other than the witness in question, the witness must first have denied the substance of that evidence. [17] It follows that such matters must first be put in cross-examination.

Because proof of those matters does not form part of a case in chief, such rebuttal evidence may be adduced orally at the trial.

Cross-examination: Preparation, structure and conduct

Each cross-examination must be designed for the witness in question, and there are no hard and fast rules. What is suggested below is no more than a starting point.

- First, and foremost, determine the objectives of the cross-examination. What is it that you wish to achieve? Do you wish to secure particular concessions or admissions from the witness? Or do you want to destroy the witness's credibility? If the witness makes the admissions that you seek, it might be entirely counter-productive then to destroy his or her credibility. So what you want to achieve out of the particular cross-examination must be at the forefront of its planning and conduct.
- Select the topics for cross-examination of the witness. Usually, these will involve:
    - Matters deposed to by the witness which need to be challenged;
    - Often overlooked, matters not referred to by the witness relevant to the case, on which the witness can give favourable evidence. The topics for such evidence might for example include any of the matters referred to in the relevant sections of the Act: in a financial matter, s 79(4) and s 79(2).
    - Matters pertaining to the credibility of the witness.
- Sequence the topics. Again there are no hard and fast rules, but the following should be considered:
    - A chronological sequence is logical, and easy for a Judge to follow.
    - If you are hoping to get some useful evidence from the witness, then it is wise to deal with the matters that will be less confrontational and more conciliatory earlier in the cross-examination. The witness may then be far more inclined to assist and less distrusting. Matters that are likely to involve confrontation are better left until the more conciliatory aspects are covered. That also allows the opportunity to make a judgment whether to proceed with matters pertaining to credit. There is no point in destroying the credit of someone who makes all the admissions you want. It is often useful to leave the major thrust of the contrary case, which you wish to put to the witness under *Browne v Dunn*, until the end.
    - It is often useful to intersperse the cross-examination on the substantive matters with episodes relevant to credit.

Some tips for effective cross-examination include:

- Close the gates.
- It is generally wise to use closed, short questions that so far as possible compel a yes or no answer. However, in some cases an open question will be necessary or appropriate, and evidence given in answer to them is often of greater weight.
- Proceed one step at a time.
- Listen to the answer! Often it is not responsive or at least directly so, and you are entitled to insist on a direct

answer.

- Baldy putting to a witness that his/her evidence is false almost always achieves nothing. The *Brown v Dunn* challenge should be approached step by step, securing agreement to as many elements as possible, so that refusal to concede the final step appears improbable and unreasonable.

Re-Examination

It will be apparent from much of what has already been said that cross-examination cannot be viewed in isolation from the re-examination that may follow. Moreover, re-examination is rarely well done and is much under-utilised.

The purpose of re-examination is to explain or clarify matters raised in cross-examination. In re-examination, a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, but not otherwise without leave. Re-examination is not an opportunity to repeat, or rectify, evidence in chief – nor, where inconsistent answers have earlier been given, to say which of those inconsistent answers is correct; but it is an opportunity to explain why a particular answer was given. Re-examination provides an excellent opportunity to provide a witness's rationale for an answer given in cross-examination. Often questions will be asked in cross-examination that elicit a "yes" or "no" answer. The value of that answer can often be enhanced in re-examination by the simple question, "Why?".

The admissibility of re-examination and its usefulness is reinforced if each topic in re-examination begins with a reference to and statement of the relevant evidence given in cross-examination.

Leading questions are as inadmissible in re-examination as they are in chief, and even more self-defeating.

The credibility rule does not apply to re-examination, so that evidence may be adduced to re-establish credibility. [18]

Preparation of witnesses

A witness' ability to answer questions in a manner that produces admissible evidence will be enhanced if the witness is properly prepared. This involves helping the witness to understand *how* to answer, not *what* to answer. A guide for witnesses is provided as an appendix to this paper.

The expert witness

In financial matters, the expert witness is typically an accountant, who will be called as a valuer to express an opinion as to the value of the business or commercial interests of one or more of the parties, or a valuer of real or personal property. In children's cases, it will usually be a counsellor or child psychologist or psychiatrist. Medical practitioners may occur in either category.

Cross-examination of the expert. There are many ways of impugning the evidence of an expert witness:

- Challenge the expertise of the witness.
- Question the independence of the expert. Expose him/her as an advocate.
- Expose any errors of fact.
- Proceed from the general to the particular. Keep the witness away from the "comfort zone" of the report, and secure agreement on general principles. Use texts and articles – especially those written by the expert – to achieve this. Then deal with their particular application in the instant case.
- It is often useful to ascertain the witness's rationale. That enables the logic of his or her position to be examined – and rebutted by your own expert.
- Check, challenge and change the assumptions.

Re-Examination of the Expert. Particularly with experts, re-examination provides a very valuable opportunity to re-enforce your expert testimony by eliciting the rationale for answers given in cross-examination. Where, in cross-examination, your expert is asked to agree to propositions but is confined to "yes" or "no" answers, in re-examination you can – and usually should – ask "why?". In this way, bare assertion becomes supported by reason and all the more compelling and acceptable to a Judge.

Preparation of the expert. Preparation of – or better, with – the expert involves preparing your expert witness for cross-examination and re-examination, and preparing to cross-examine the opposing expert.

- *First*, and foremost, identify the likely lines of cross-examination of your expert, and your expert's response to them. These will also most likely be the concepts that you will have to challenge in cross-examination of the opposing expert. To do this, you should draw on your own experience and analysis of the issues, strengths and weaknesses of the accounting evidence on both sides; secondly on the opposing expert's report, which will

usually contain the theory underlying the opposing case; thirdly on your expert's own knowledge, because he or she will normally have some idea of the arguments which might be advanced against his or her position and the answers to them – which you need to know if you are to re-examine effectively; and finally, on the joint statement, from which your expert should have derived a good understanding of the opposing case.

- *Contemporaneously*, you will be preparing to cross-examine the opposing expert. With your expert, identify the arguments of the opposing expert, which you will need to confront, and the answers to them. It is important to master the underlying principles, so that you can cross-examine with authority and effect.
- Guidance to your expert will usually include, as far as possible adhere to the report. As the cross-examiner tries to move away from the report, the expert should try to adhere to it – "As I said in my report …".
- Preparation should not be limited to preparing for cross-examination – re-examination should not be overlooked. If you are to do this effectively, you need to understand, in advance, the principles and rationale upon which your expert's opinion is based.

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GUIDELINES FOR WITNESSES

Preparation

1. Before coming to Court, ensure that you are familiar with the contents of any affidavit, report or statement you have sworn or made in connection with the proceedings, and any contemporaneous notes you made at the time. Do not attempt to learn them by heart, but re-read them so that you remember what is in them. If upon re-reading them there is anything that you think is incorrect, inconsistent or misleading, let us know before Court so that we may correct it.

Oath or Affirmation

2. When you are called to give evidence and enter the witness box, you will be asked whether you wish to swear an oath (on the bible), or make a solemn affirmation (not a religious oath). This is entirely a matter for your choice: the legal effect is the same in that each binds you to tell the truth under penalty of perjury.

Examination-in-chief

3. Your examination as a witness is in three parts: examination in chief, cross-examination, and re-examination. Examination in chief is by the Counsel who calls you asking you questions, commencing with your name, address and occupation. If you have sworn an affidavit or affidavits you will simply be asked, "*Have you sworn an affidavit on [date]?*"
4. In examination in chief, counsel cannot ask leading questions which suggest the answer he is seeking or expects, and can only ask open ended questions, such as "*Where did you go?*", "*What did you do?*" "*What did you say and what did she say?*"
5. If you are asked to give evidence of a conversation, it should be given to the best of your ability in the first person – that is, direct speech. For example, if you are asked, "*What did you say and what did she say?*" –
Answer:

> *I said, "How are you today?". She said, "I would be better if I had not seen you". I said, "There is no need to be so rude".*
>
> **Do not answer:**
>
> *I asked her how she was and she said that she would be better if she had not seen me. I said that she should not be so rude.*

6. Always give honest answers, based on your best recollection and not on reconstruction. However, if you have a practice of doing something and the question is not framed at simply obtaining your recollection, you can say what your practice was, for example:

> Q: "*What did you do on 1 May 1976?*" A: "*I cannot recall*".
>
> Q: "*Did you clean your teeth that day*?". A: "*Well I have no actual recollection of that, but I clean my teeth every day, so I must have done that day*".
>
> Q: "*Do you recall cleaning your teeth on 1 May 1976*?". A: "*No*".

7. If you have no actual recollection, but there is a contemporaneous document – such as a diary or a letter – from which you could refresh your memory, say so, and ask the Court for permission to look at it.

Cross-Examination

8. After examination-in-chief, cross-examination is by opposing counsel, who will be seeking to gain admissions to assist the opposing case, and/or to damage your credibility.
9. Listen carefully to each question, and ensure you fully understand it before answering. If in any doubt, ask for the question to be repeated or rephrased.
10. Once you are satisfied that you understand the question, give the most direct and brief answer that you can, consistent with truth and accuracy. If you can answer a question "*yes*" or "*no*" without such an answer being misleading or incomplete, do so. If you genuinely do not know or cannot remember, say so; but beware that saying "*I do not know*" or "*I cannot remember*" too often may damage your credibility. If you are fairly sure one way or the other, but not absolutely certain, you can say, "*I think so, but I am not sure*" or "*I do not think so but I cannot be certain*".
11. Do not volunteer information that is not strictly responsive to the question. For example, if you are asked the date on which you were married, simply give that date – do not tell the questioner your wife's name, or the colour of the dress your mother was wearing. But do not be too literal, or you will appear deceptive. Thus if asked "*And from the proceeds of sale, did you buy a yellow Mercedes?*", a categorical "*No*" is misleading if in fact you bought a brown Mercedes. Say: "*No I bought a brown Mercedes"*.
12. If you believe that an answer requires an explanation or expansion, try to give that explanation or expansion. If a "*yes*" or "*no*" answer would be incomplete or misleading, then you must insist on giving an explanation or qualification. Even if you are cut off, that will act as a signal to Counsel calling you that it is a matter that needs to be revisited in re-examination.
13. In cross-examination, you can be asked leading questions, that is, questions that suggest the answer. If propositions or suggestions are put to you, particularly ones which contain more than one element, you must be very careful to ensure that by agreeing to a part you do not agree to the whole, unless the whole is correct; similarly by disagreeing with a part you must be careful not to disagree with the whole, unless the whole is incorrect. For example:

> Q: "*Weren't you in Newcastle with the Premier on New Year's Eve?*"
>
> A: "*I was in Newcastle on New Year's eve. I was in Sydney with the Premier on New Year's day*".

A "yes" answer would have been incorrect, and a "no" answer would have been misleading, as a response to the whole question. Precision and accuracy is essential to credibility.

14. Concentrate on answering the actual question asked of you. Do not try to anticipate what the questioner is getting at, or the subsequent line of questioning.
15. Do not try to fill in the silence between your answer and the next question by elaborating on the previous answer, unless you genuinely believe the previous answer was incomplete or inaccurate.
16. Remain polite at all times, even if provoked by the cross-examiner. Do not argue with the questioner; just answer the question. Don't try to be smart, or to score points off the cross-examiner. You are a witness, and not an advocate. It is important that you present, not as partial or biased or endeavouring to fight the case from the witness box, nor as defensive with something to hide, but as open and as if endeavouring to help the Court establish the truth of the facts.
17. Do not be afraid or reluctant to make an admission that is apparently against your interest, if it is the truth. Frank admissions enhance your credibility; denials that are unbelievable or disprovable damage it.
18. While under cross-examination, including during an adjournment or over-night, you must not discuss your evidence or the case with anyone, including lawyers, your family, other witnesses, or colleagues.

Re-examination

19. After the cross-examination is concluded, Counsel who calls you has an opportunity to re-examine you. You can be asked questions arising out of answers given in cross-examination to clarify anything that has arisen there. Generally speaking, the same rules apply as for examination-in-chief.
20. In particular, if in cross-examination you have answered questions "yes" or "no", and the reasons for your answers have not been explored, re-examination may be along the following lines:

> Q: "*My learned friend asked you whether you liked Ms Smith and you answered "no". Why did you not like her?"*.

21. Re-examination may also offer an opportunity to give any explanation or expansion that was cut off or disallowed in cross-examination.

General

22. If an objection is taken to a question which you are asked, do not answer it, or if already in the course of answering, immediately stop answering. Do not answer, or resume answering until the Judge has ruled on the objection.
23. If at any time you realise you have made a mistake in an answer you have given, say so and give a corrected answer. This also applies if, during an adjournment, you realise that you have previously given an answer that requires some modification or correction – raise the matter immediately after the adjournment when you go back into the witness

box.

24. When answering, address your answer to the Judge or jury. When addressing the Judge or answering questions from the Judge, call him/her “Your Honour”. If you want to address the cross-examiner by title call him/her “Mr X” or “Ms Y”, but there is no need to address him/her by name at all.

END NOTES

1. (NSW) *Evidence Act* 1995, s 50
2. (CTH) *Family Law Act* 1975, s 98; (CTH) *Family Law Rules* 2004 r 15.05
3. Family Law Rules, rr 15.05(2), 15.07(2)
4. Family Law Rules, r 1.12
5. Family Law Rules, rr 15.06(1), 15.07(2)(a)
6. Evidence Act, s 38.
7. Evidence Act, s 64(3).
8. Evidence Act, s 64(4).
9. Evidence Act, s 46.
10. Evidence Act, s 41(1).
11. Family Law Act, s 101.
12. Evidence Act, s 42.
13. Evidence Act, s 43.
14. Evidence Act, s 44(2).
15. Evidence Act, s 44(3).
16. Evidence Act, s 103.
17. Evidence Act, s 106.
18. Evidence Act, s 108(1).