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The ten commandments of evidence in chief:

How to do the best for your client when calling evidence

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Many advocates will have seen Irving Younger's famous film "The Ten Commandments of Cross-Examination". Anyone who invariably followed those ten commandments would soon get a reputation as a cross-examiner of considerable ability. Effective evidence in chief is at least as important as cross-examination. Yet advocates have looked in vain for a similar set of rules regarding evidence in chief.

Sometime ago, therefore, I formulated the ten commandments of evidence in chief. I have since presented them to students and practitioners throughout Australia. In my presentations I use examples of good and bad advocacy I have seen through my work in the Court of Criminal Appeal and Court of Appeal. These examples are primarily from the jurisdiction in which I practice, namely crime, but the lessons that we can learn from them apply to all jurisdictions.

In many courts now there is much less evidence in chief than there used to be, with affidavits being used in place of oral evidence. Paradoxically, this has made simple rules such as the ten commandments of evidence in chief even more necessary, because when an advocate encounters a situation where oral evidence in chief is required, he or she will not be able to rely on "match fitness" in order to do the job effectively.

A preliminary question

Before reading on, answer this question to yourself: What is the primary purpose of evidence in chief? Whenever I ask this question at the beginning of a presentation I usually get answers such as "to get material out favourable to your case" or "to establish the building blocks of my case". These answers are correct, but have the wrong focus. My answer to the question is: "To persuade".

Many advocates seem to think that real, persuasive advocacy only comes at the time of final address - that eloquence, rhetoric and all the tools of persuasive advocacy are used only at this stage of proceedings. However this assumes that the tribunal of fact (whether it be a judge or a jury) is a passive listener throughout all of the proceedings, only beginning to form an opinion as to the outcome of the case when the advocate is ready to be persuasive during his or her final address. We know that this is not true, as the following example illustrates.

Earlier this year at a workshop on jury trials conducted by the Australian Advocacy Institute (AAI) we asked laypeople to spend a day as members of a jury hearing a fictitious case. The case was presented in every way as though it were a real trial. At the end of the trial we asked the jurors when they began to form an opinion as to the outcome of the case. In most cases ▶

jurors began to decide whether the accused was guilty or not guilty during the Crown Prosecutor's opening, the very first piece of advocacy the jurors heard. All jurors had made a preliminary assessment as to how they would decide the case by the end of the defence opening, the second piece of advocacy they heard and before any evidence at all had been called.

This shows just how early in a trial the tribunal of fact begins to form an opinion as to the way the case will ultimately be decided. Therefore any advocate who thinks that he or she will leave their persuasive talents until final address may find that they have the very difficult task of convincing the tribunal of fact that their preliminary view is wrong.

So that is why our task as advocates when leading evidence in chief is to do it as persuasively as possible. It is to that end that I now present the ten commandments of evidence in chief.

1. The Primary Purpose of Evidence in Chief is to Persuade

I have already explained the fundamental importance of this commandment. It is something that the advocate must keep in mind at all times, not only when actually in court but in preparation too.

The plaintiff's advocate has a great advantage which should not be squandered. The first evidence that the tribunal of fact will usually hear is evidence in chief from the plaintiff, or a witness called on behalf of the plaintiff. Getting the tribunal of fact thinking the way the plaintiff's advocate wants them to, through persuasive evidence in chief, makes the task of those who have to cross-examine the witness that much harder. If the tribunal of fact has already formed a favourable preliminary view about the credibility of a witness, the cross-examiner who seeks to demonstrate that the witness should not be believed has a far more difficult job on their hands.

The next nine commandments will give you some ideas as to how to perform evidence in chief persuasively.

2. A Good Start Is Important

This commandment is related to the first in that it flows from the importance of making a good impression from the very beginning. When a witness begins to tell his or her story it is essential that it is done in a way which makes the listener interested and wanting to hear more.

However, most advocates are locked into a strictly chronological way of eliciting evidence and have never thought about deviating from this set pattern. But often the most interesting aspect of a witness's evidence is not to be found in the beginning. Often information elicited to "set the scene" for what follows is a bit dull, and has the effect of making the tribunal of fact not terribly interested in what is to come.

An advocate at an AAI workshop once demonstrated a particularly effective way of starting well. The case concerned a woman, Mrs Sun, whose husband was alleged to have burned down their matrimonial home after he had moved out. Most advocates begin by tracing the history of the relationship between Mrs Sun and her husband, and it is some time before we hear about the most interesting part of her evidence - namely that her house has been burnt down. However, this particular advocate began very effectively like this:

Q *Mrs Sun, where were you living six months ago?*
A 6 Smith Street Smithfield.

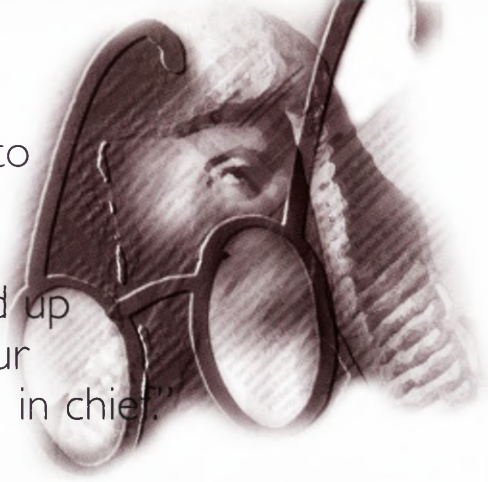
Q *Are you living there now?*
A No.

Q *Why not?*
A The house got burnt down.

Q *When the house got burnt down, what were you left with?*
A Just the clothes I was standing up in.

Q *Well let's just see how that came about...*

Of course, the time to plan a good start is not as you stand up to begin your examination in chief. When you are in your office or in chambers preparing the case you must prepare not only what you are going to do but how you are going to do it. Part of that latter preparation involves choosing an interesting and enticing way of commencing the examination in chief.



3. Organisation and Structure Should Be Planned in Advance

As I listen to advocates, or read their efforts in transcript, I am convinced that they use their proofs of evidence (prepared by others usually) as a script, and that they think that if they can go from the top of the first page to the bottom of the last page, eliciting all the information in the proof of evidence without too many objections, that they have done a good job. They haven't.

Think about it this way. When the proof of evidence was prepared, it was not created with advocacy in mind. It contains all the relevant information (well hopefully anyway) plus undoubtedly a bit of irrelevant information. It usually contains information in a strictly chronological order. As we have seen a strictly chronological way of eliciting evidence is not necessarily the most effective way of persuading. And certainly irrelevant evidence should not be elicited simply because it appears in a proof of evidence.

In fact, the person who prepared the proof of evidence would no doubt be quite surprised to learn that a (usually highly paid) advocate has used the proof as a script, without putting any thought into the possibility of reordering the sequence in which evidence is elicited in a more persuasive way, and without giving too much thought to whether the information is relevant in the first place.

Again, the time to plan the organisation and structure of evidence in chief is as part of preparing how to present the case, not when the advocate is on his or her feet.

4. You Can't Persuade If You Can't Communicate

Another way of thinking about this commandment is: if you communicate badly your persuade badly. This is just plain commonsense really - in order to persuade somebody you have to communicate with them. Yet it is surprising how many advocates are so good at creating barriers to communication.

Of course, communication is required both with the tribunal of fact and with the witness from whom you are leading evidence in chief. Yet advocates continually ignore some basic rules of communication. Let's look at some of these.

First barrier to communication

The first barrier to communication concerns the language which the advocate chooses when attempting to communicate with a witness. Lawyers almost invariably reject words which are most likely to be understood in favour of words which a significant proportion of the population is unable to interpret.

Take as an example the words "prior" and "before". Which of these two words is most likely to be understood? Of course the answer is "before" (anyone who answered "prior" can stop reading now, give up advocacy and become a dentist). Now ask yourself another question - which word is most used by lawyers when in court when addressing a witness? Strangely enough, the answer is "prior". Why should this be? Why do lawyers reject ▶

a simple, easily understood word, which all of the adult population can understand, in favour of a word that is misunderstood by a significant proportion of the population?

This example comes from a murder trial held in Wollongong:

Q *Now at some stage prior to the disappearance of Annette you went down to Melbourne, is that right?*
A No she hadn't disappeared then. She rang me up.

This answer doesn't make sense, but the fault is not that of the witness, but that of the advocate. Fortunately the trial judge recognised the problem:

His Honour *Lawyers never use English if they can find Latin, when he says "prior to" he means before?*
A Yes

Advocate *Before Annette had disappeared, you went down to Melbourne?*
A That's right.

No harm was ultimately done because the trial judge recognised the problem. That will not always be the case. If an advocate continues to use words such as "prior" rather than words such as "before" then there will be occasions when he or she gets the wrong answer. The evidence in chief will convey information which is just plain wrong, simply because the lawyer has chosen to use a fancy word rather than a simple one.

There are many other examples of pairs of words: see/observe, after/subsequent, live/reside. Here is another genuine example:

Q *Where do you reside?*
A Beg pardon?

Q *Where do you reside... where do you live?*
A Walgett.

Can you imagine meeting up with a long lost friend and asking, "Where are you residing now?"

I would hate to imagine how lawyers who are married to lawyers talk at home, perhaps: "Can you tell me where in relation to the sugar I would find the coffee dear?"

Second barrier to communication

The second basic rule of effective communication which many advocates ignore is the need to actually look at the person with whom you are communicating. I am sure that many witnesses see only the top of the head of the advocate. This is because the advocate continually refers to whatever notes he or she has on the bar table.

Now this probably doesn't happen to you, but occasionally when I am at a party I start talking to someone, but it soon becomes apparent that they do not really want to talk to me. Instead of looking at me, the person is looking around the room, or over my shoulder, and I get the impression that they are trying to find someone more interesting to talk to. I begin to feel uncomfortable and say as little as possible. I stop communicating because of the lack of eye contact. Now think how a witness feels when there is a similar lack of eye contact with the person asking them questions – uncomfortable, doubting whether they are saying the right thing or not.

What the advocate is usually doing is trying to think of the next question whilst listening to the answer. The advocate thinks that he or she can do three things at once, namely, listen to the answer, read his or her notes, and think of the next question. The advocate doesn't want there to be any significant silence between the answer from the witness and the advocate's question. Yet silence is actually a desirable thing, something to be encouraged.

Psychologists tell us that before something can be encoded in memory it must be processed in the brain. That processing cannot take place if there is no opportunity to reflect on, to think about, what has just been heard. If the question follows immediately upon the answer then the listener must choose between processing information and listening to the question. Both cannot be done effectively. The result is that the absence of a gap between answer and question results either in the tribunal of fact having poor recall of the answer, or being unable to understand the significance of the next answer because the question which led to the answer has been missed.

The correct sequence of events is as follows: ask the question whilst looking at the witness; listen to the answer whilst looking at the witness; when the answer is finished look down at your notes if necessary; formulate the next question; look up and ask the next question.

Third barrier to communication

A final barrier to communication is the failure of the advocate to listen to the answer the witness gives. This is a further result of the desire of the advocate to avoid silence. When the advocate tries to listen to an answer at the same time as thinking of a question the advocate will often completely miss what the witness says.

A startling example of this occurred at an AAI workshop at which I was teaching. We were doing a case involving a man called "Cohen", and the person playing the role of the witness was being asked about him. The witness answered the question he was asked, and then added (unprompted by anything else): "He is just a Jew anyway". The effect in the courtroom was electric. Everyone appeared stunned by what he or she had just heard. To my surprise, however, the next question asked by the advocate was as if those words had never been said. When the evidence finished, I asked the advocate what he thought of when he heard the words "he is just a Jew anyway", to which the advocate responded: "what?" He had completely missed those words, because he had been thinking of his next question whilst the answer was being given. If he could miss words as powerful as

that, think how easily it is to miss subtle, but nevertheless highly important, answers given by a witness.

5. Remember the Listener

Sometimes in court you see great communication. The advocate knows about the importance of looking at the witness, listening to the answer, using simple language, and the witness and the advocate are getting along like a house on fire. But the judge or a juror is thinking about golf, shopping, getting the car repaired – basically, just not paying attention. It's a hard job listening all day and judges and jurors can be forgiven if their attention wanders from time to time. It is the task of the advocate, when eliciting evidence in chief, to make sure that the judge, and all jurors, are listening, especially to those bits of information which are crucial. After all, the witness is not the person who is going to decide your case - the judge or the jurors are. It is the advocate's task to make the tribunal of fact listen to the evidence in chief.

So how is that done? It's surprisingly easy. Whenever the advocate sees the attention of the tribunal of fact waning it's a simple matter to overcome. Simply commence the next question with the words "tell his/her Honour...". What happens when you use that way of introducing a question? Well, the first thing that happens is that the judge will look up. The judge hears the words "his/her Honour" and thinks "that's me - why is someone referring to me?"

The next thing that happens is that the witness will tend to look towards the judge (after all, the advocate has told the witness to "tell his/her Honour"). The judge sees the witness looking at him or her and, being polite, watches the witness as the answer is given. The advocate then knows that the witness is communicating with the judge - that the information which the witness has to impart is being conveyed to the judge.

Of course, this should not be over done. Many of us will remember police officers giving evidence where, after every question, the police officer would turn and face the jury before giving their answer. It looked contrived. That is not what the advocate should aim for.

6. Use Non-Leading Questions

Of course, the rules of evidence require that we don't use leading questions in evidence in chief. That doesn't stop us however. What should stop us is the consideration that eliciting evidence in chief through leading questions is a very unpersuasive way of doing things.

The most common example that I come across in my practice concerns evidence called from a person about to be sentenced. The advocate asks a question such as "do you tell her ▶

Honour that you are a changed man, that you are very, very sorry, and that you will never do anything like this again?" Not surprisingly the answer is "yes" but also not surprisingly no person in the courtroom is really persuaded that the witness means it. This is because all the witness has done is agreed to a proposition put to him by his lawyer.

Sometimes a judge warns the advocate that he or she is not being persuaded. In this next example (again from a genuine transcript) the judge intervenes after listening to a series of leading questions from the advocate. He encapsulates well what I'm trying to say when he tells the advocate:

"Mr X (I won't embarrass him by using his name) you can ask as many leading questions as you like, as I understand it the idea of calling your client is so I can make an assessment of your client, I'm prepared to concede that you are eloquent and can seize on the right turn of phrase to describe a situation, but it's not you I'm sentencing."

Most judges don't say such things as this. They just sit there, being unpersuaded by leading questions. Do not think that the fact that the judge is silent when you ask a leading question means that the judge is being persuaded.

7. Use Physical Things As Much As Possible

What I mean by physical things are such things as plans, photographs, objects, anything in fact which allows for a different form of communication from mere words. As was discussed above, it is a difficult job being a passive listener from 10.00am to 4.00pm with breaks for morning tea and lunch. The wonderful thing about physical objects is that they allow the listener to use their eyes, and sometimes their hands, rather than just their ears. Even in the appellate courts, where esoteric principles of law are often discussed, a change comes over the courtroom when exhibits from the court below are produced. The judge's eyes light up at the opportunity of looking at something rather than listening.

So an advocate conducting a trial can make the job of the tribunal of fact easier by introducing a change in the method of communication. Physical things also make it much easier for the witness to address the tribunal of fact directly, that is, for the witness and the tribunal of fact to communicate (the subject of our fifth commandment above). If the judge is not paying attention, or if the witness is about to refer to something very important, the advocate should use something physical; put it in the witness's hands and get the witness to point out things on the photograph to the judge; get the witness to trace the path that he or she took on the plan; get the witness to demonstrate some feature of the object to the judge. The judge cannot help but look at the witness as he or she points out what the advocate asked to be pointed out. The advocate knows that the information is getting across to the judge.

There is a third reason you should use exhibits. They allow the witness to tell the story more than once. There is no logical reason why it should be the case, but repetition is persuasive. One of Irving Younger's ten commandments of cross-examination is that you should never repeat the evidence in chief because the more someone hears a story, the more likely they are to be convinced that it is true. Advocates eliciting evidence in chief should be aware of this and should endeavour to get the favourable parts of their case repeated as much as possible (as long as it doesn't become obvious of course - we don't want to overdo things because they will lose their effectiveness). So an advocate who has a physical object, such as a plan handy, can elicit the evidence without using the plan, place the plan in the witness's hands and then get the witness to go through the story again, this time pointing out on the plan where events took place. Of course, some subtlety is required because we do not want it to look as though the advocate is simply asking for the evidence to be repeated, but by careful combination of evidence with and without the plan, the advocate is able to ensure that the important and favourable parts of his or her case are elicited more than once.

8. Use Piggy Back Questions

A "piggy back" question is one that incorporates in it some information from the previous answer. There are two reasons why these questions should be used. Firstly, they assist with narrative flow as the relationship of the question to the information previously elicited is made apparent. Secondly, piggy back questions are another way of telling the good parts of an advocate's case more than once. Both are illustrated in the following fictitious example:

A I walked to the side of the road.

Q *When you got to the side of the road, did you see what colour the light on the crossing which was facing you was?*

A Yes, it was red.

Q *What did you do when you saw that the light was red?*

A I waited for the green man.

Q *How long did you wait for the green man?*

A Less than a minute.

Q *What did you do when the green man light came on?*

A I began to walk across the road.

Q *When you began to walk across the road with the green man in your favour, what did you see?*

A I saw a car coming towards me...

You will see how each question incorporated some information from the previous answer, and that the fact that the witness crossed with the green man is repeated.

9. Fake Sincerity

Imagine that a friend of yours had something awful happen to him or her, perhaps they were the victims of serious crime, or suffered injuries in a motor vehicle collision. If you are asking your

friend questions about what happened the tone of your voice would convey that you were very interested in learning what happened. But now imagine that, for some strange reason, your friend insisted on telling you about this unfortunate event over and over again, and that you were required to ask questions in order to find out what you already knew. The tone of your voice would be quite different because you know what the answer is going to be when you ask the question.

Something similar happens in the courtroom. Advocates eliciting evidence in chief know (well they hope so) what the witness is going to say. The tone of their voice sometimes conveys the fact that they are not really interested in the answer. Things are just a bit dull, the advocate is flat and that affects the whole dynamic of the courtroom. No one is terribly interested in what the witness has to say because the advocate's tone of voice suggests that the information is unimportant.

We have to combat this by, it has to be said, faking it. We have to make it look as though we do not know what the witness is going to say. We have to make it look as though there is hardly anything more important than the information the witness has to present, whether we believe it or not. The witness will be encouraged by this show of enthusiasm, and anyone listening to the evidence in chief will get the impression that what the witness has to say is worth listening to.

10. Don't Ask Stupid Questions

There isn't really a tenth commandment, but "the nine commandments of evidence in chief" sounds a bit silly. Anyway, it gives me a chance to reinforce one of my hobby horses which concerns the poor choice of language which lawyers make when attempting to communicate with witnesses in the courtroom. Let me give you one final example of "lawyerspeak":

Q *During the night that you were there were things as far as you could see cordial between X and Y?*

A I don't understand what you mean.

Q *Do you know what the word cordial means?*

A Yeah, it is a drink that you buy from the shops.

Q *Would you agree with me that it has another meaning concerning relationships that are happy or on an even keel?*

A If so I have never heard, I am sorry.

To Conclude

When advocacy is done well it is great fun to do and enjoyable to watch. Our clients benefit too. Good advocacy wins cases, and we can go home in the evening happy in the knowledge that our skills have enabled our clients' cases to be presented as persuasively, and therefore as effectively, as possible. PL