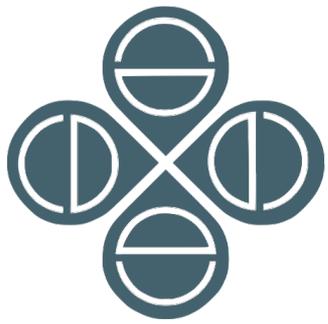


Assisting clients to prepare to cross-examine & to make submissions

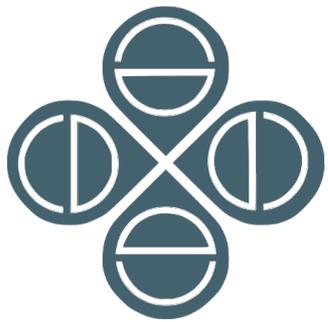
Clare Dart – Barrister

With thanks to Matt Taylor - Barrister who
has previously co-presented this paper
2 August 2019



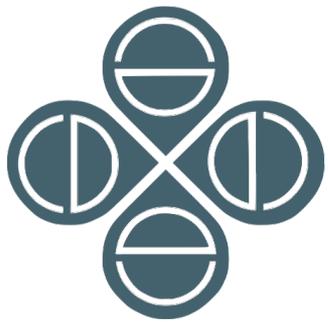
Where to start

- What are the issues in dispute?
- What findings of fact do you/your client want the court to make?
 - If your client is making allegations, are they relevant to the dispute?
 - Do not speculate. Is there evidence to support the allegation of abuse?



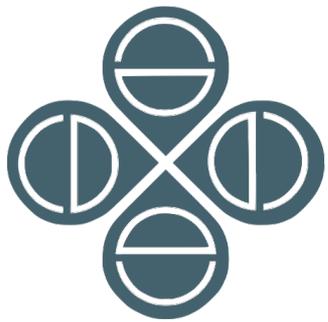
Where to Start

- What do you want the court to do?
 - What are the orders your client is seeking?
- Can the court do it?
 - What is the court's power to make the order/s sought?
- Why should the court do it?
 - What is the admissible evidence that supports the orders you/your client are asking for?



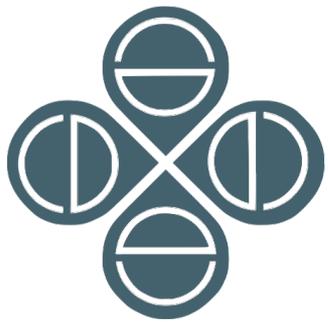
What is Admissible?

- Is it relevant?
 - Irrelevant will never be admissible.
- ss 55 – 58 – *Evidence Act 1995* (Cth)
- Is there a logical connection between the evidence and a fact in issue?
 - If not, don't include it.



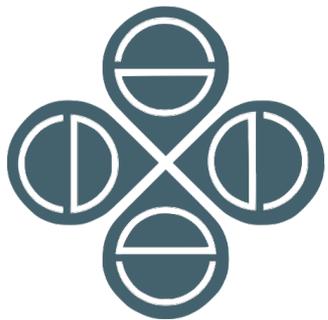
Section 69ZT

- Certain rules of evidence not to apply to child-related proceedings unless the court decides.
- Rules which do apply are:
 - Section 26 - court's control over questioning of witnesses.
 - Section 30 - about interpreters.
 - Section 36 - relates to examination of a person without subpoena or other process.
 - Section 41 - about **improper questions**.



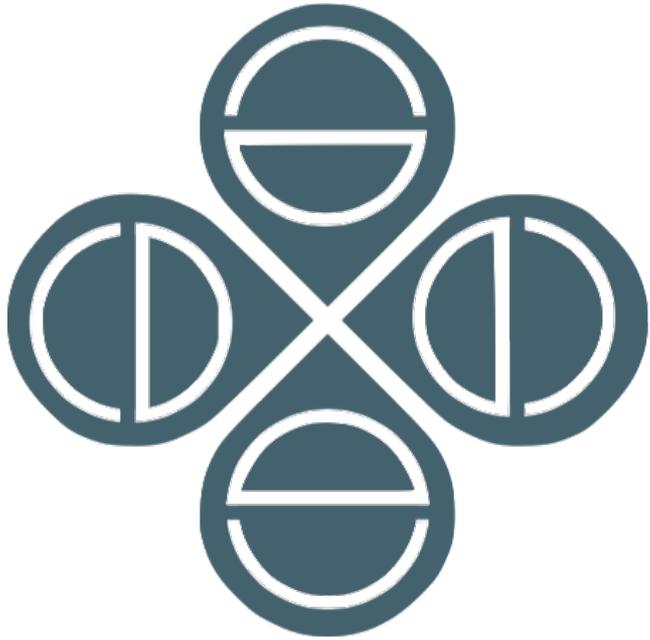
Section 69ZT cont.

- The court may give such weight (if any) as it thinks fit to the evidence admitted. (ss(2))
- The court may still decide to apply one or more of the rules of evidence to an issue in the proceedings, if:
 - (a) the court is satisfied that the circumstances are exceptional; and
 - (b) the court has taken into account (in addition to any other matters the court thinks relevant):
 - (i) the importance of the evidence in the proceedings; an
 - (ii) the nature of the subject matter of the proceedings;
 - (iii) the probative value of the evidence; and
 - (iv) the power of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

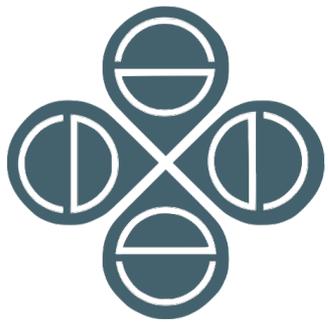


Discretion to exclude

- Probative value v prejudicial value (s135)
- Discretion to limit use of evidence (s136)
- Discretion to exclude improperly or illegally obtained evidence (s138)

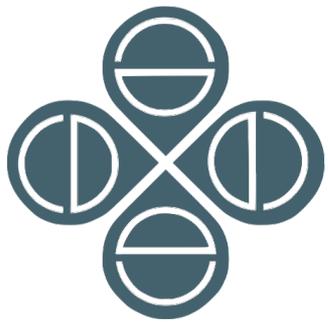


Preparing to
cross-
examination



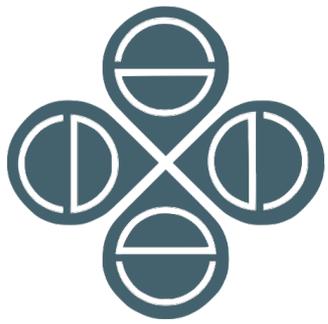
Preparing to cross-examine

- Preparation is key.
- What is your/your client's case theory?
 - What story does your client intend to present and ultimately prove?
- Work out the legal issues that your client and their ex-partner cannot agree on.
- Think about the submissions you/your client wants to make at the end of the case.
 - Do you have evidence of those matters?



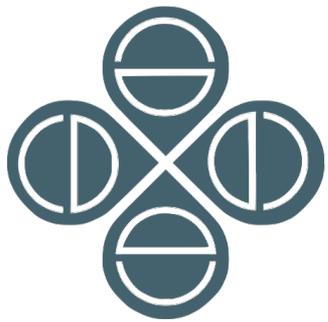
Why cross-examine?

- Don't just cross-examine for the sake of cross-examining.
 - Must have a purpose.
- Aims:
 - To obtain evidence favourable to your client.
 - To weaken evidence that has been given against your client.
 - To weaken or destroy the value of the evidence by attacking the credibility of the witness.



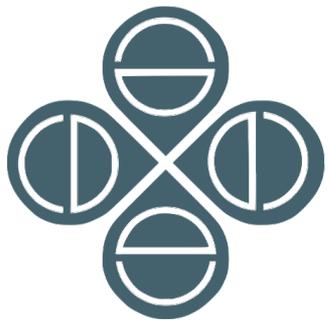
Rule in *Browne & Dunn*

- Two aspects to the rule:
 - To put in issue that which is not accepted by your client; and
 - To put in issue that which will be contradicted.
- The duty is to merely put as much of your client's case as applies to that witness.
- Don't have to say "I put it to you".



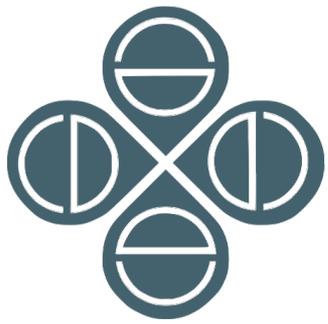
What do I cross-examine about?

- Start at The End
- Prepare your submissions.
 - Eg, Consider section 60CC.
- What is the submission you will want to make on each of the section 60CC factors?
- What orders are you seeking?
- Is there any evidence on those points/matters before the court?
- What evidence needs to come out, or be highlighted or be refuted in order to allow you to make the submissions you intend?



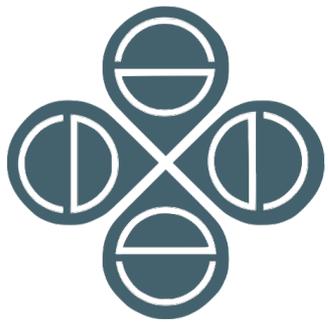
What do I cross-examine about cont.?

- Make a plan.
 - Write out questions; or
 - Topic areas you want to cover and what the key point you want to achieve by cross-examining on that topic is.
- Include in your notes references to where the relevant evidence is eg F [14] or FR [2]



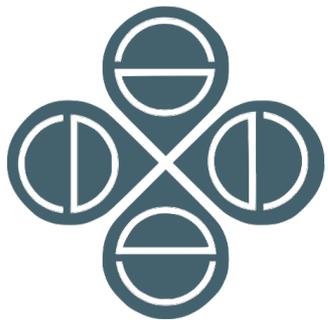
What order do I ask questions in?

- Deal with any areas where the witness is likely to give helpful evidence first.
 - The witness is less likely to help you after you have attacked her/his credit or put a series of propositions with which she/he disagrees.
- Broadly chronological sequence under topics/subjects.
- Complete each subject before moving onto the next.
 - NB the topic may be covered in several different documents.
 - Make a note of where it is dealt with eg witness' first affidavit & the family report.
 - It is your job to assemble the material.



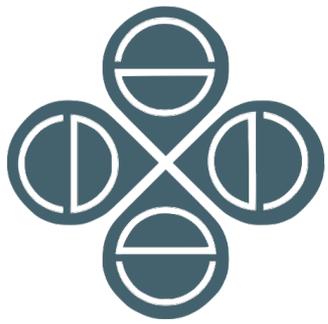
How do I cross-examine?

- Ask questions.
 - One simple question at a time.
 - It is not an opportunity to give speeches or to argue with the witness.
- Ask leading questions.
 - Keep control of the flow of the evidence.
- Have an internal logic to your questions.
 - Know where you are going with your questions



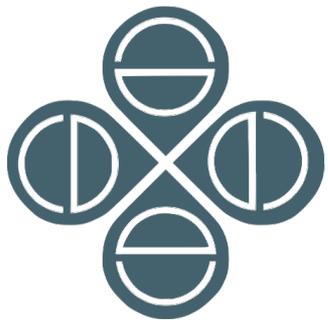
How not to cross-examine

- Don't express personal views.
- Don't attack the witness.
- Don't engage the witness in argument.
- Don't respond to questions from the witness.
- Don't remind the witness they are on oath or of the penalty for not telling the truth.



Be flexible

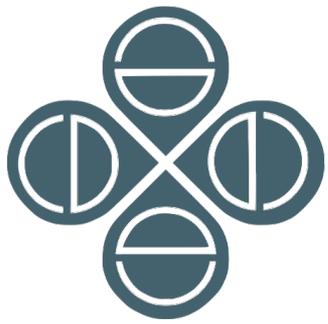
- Be prepared to go off script.
 - Listen to the answer the witness gives.
 - If there is something of significance in the witness' evidence, write it down word for word. Why?
 - You might want to cross-examine on it ie to test it.
 - You may want to make submissions about it.



Some deadly sins

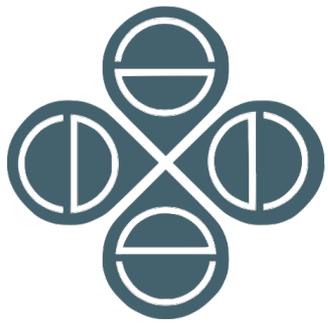
according to Glissan

- Looking for trouble.
 - Know the answer before asking the question.
- Going fishing.
- Dropping your guard.
 - Inviting explanations.
 - Allowing the witness to repeat their evidence in chief.
- Don't try to improve a good answer.
 - You have made your point. Move on.
 - Run the risk of the witness retracting it.
- Don't argue with the witness.
- Save the final point for submissions.



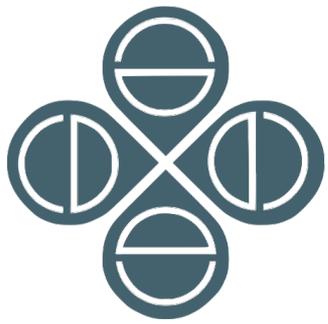
Objections

- Leading
- Non- specific/too general
- Confusing, misleading, vague etc
- Compound
- Argumentative
- Calling for a conclusions
- Unfounded attack on credit



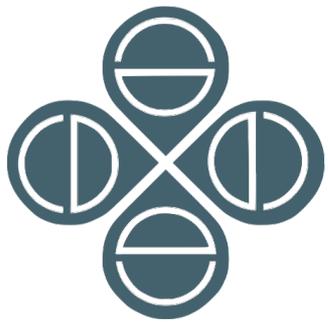
Objections Cont.

- As to content:
 - Relevance
 - Assuming facts not in evidence
 - Mis-stated evidence/misquoting of witness
 - Speculative



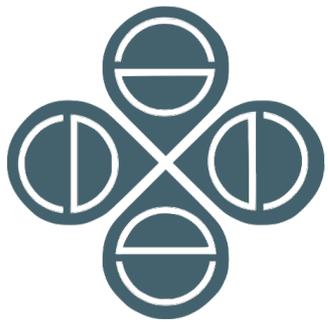
Objections Cont.

- Privilege
- Hearsay
- Unresponsive or volunteered answers
- Prejudice
- Opinion evidence



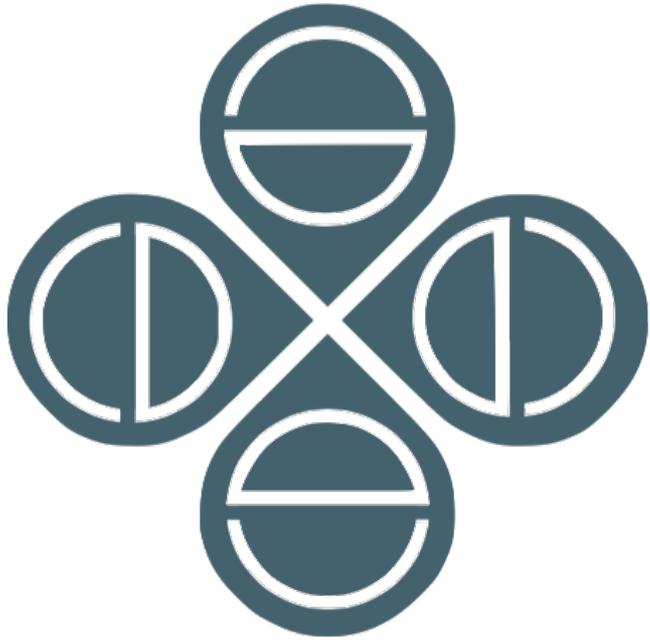
Objections Cont.

- Only object when the question falls into one of the categories mentioned.
- Do so immediately. “I object”
- Once the question has been answered it is too late.
- Distinguish between an objection to the question and an objection to the evidence being given as a result.

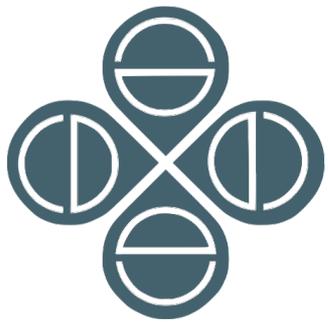


Re-examination

- To allow a witness to put in context, to complete or to explain answers he/she has given during cross-examination.
- Not to open up a new line of examination in chief; or matters which don't arise from cross-examination.
- NB – can't lead the witness!

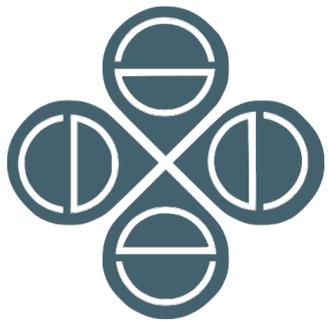


Preparing Interim Submissions



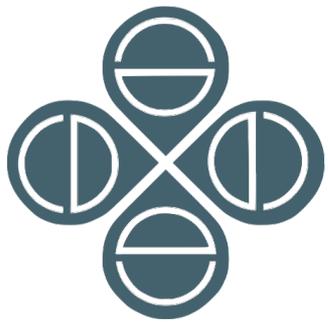
Interim submissions

- Follow the legislative pathway: *Goode v Goode* (2006) FLC 93-286
- *Banks and Banks* [2015] FamCAFC 36:
 - Full Court reaffirmed the principles for determining interim parenting applications set out by the Full Court in *Goode and Goode* (2006) FLC 93-286 at 80,903
 - Subject only to what had been said in *SCVG and KLD* (2014) FLC 93-582.



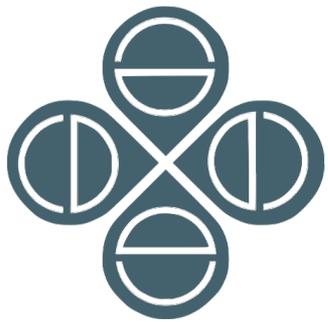
Interim submissions cont.

- What are the competing proposals?
- What are the issues in dispute at the interim hearing?
- Identify agreed or uncontested facts
- Address the s60CC factors that are relevant
- ESPR & the s61DA presumption



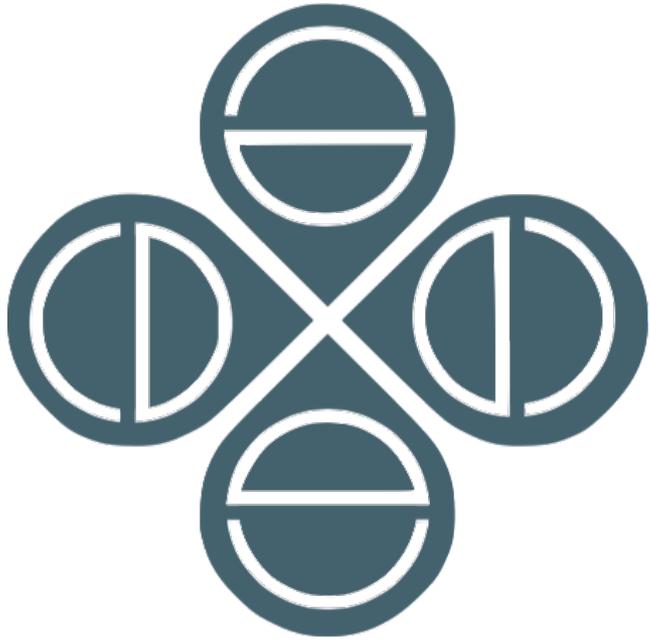
Interim submissions cont.

- Once an order for ESPR is made the court is obliged to consider:
 - equal time; and, in the alternative,
 - substantial and significant time, if the court is satisfied that it is in the child's best interests and it is reasonably practicable – section 65DAA
- Is it reasonably practicable?
- Summary

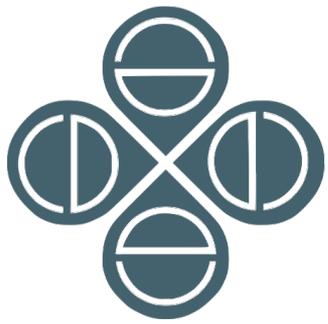


Interim submissions Tips

- Look at what the other party says in their material. Is there anything you can use to support your case?
- Is there any independent evidence available? Use it!
 - Subpoenaed documents
 - s11F report or family report.
- Think about your format/presentation.

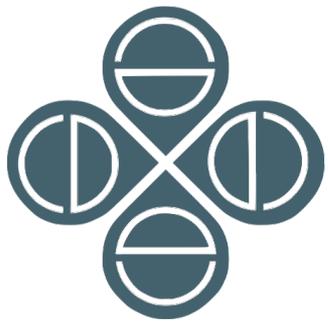


Preparing
Final
Submissions



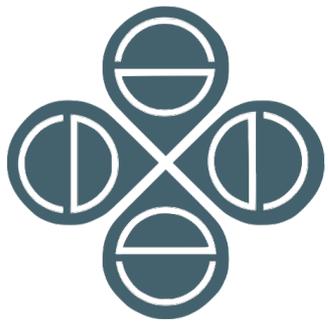
Final submissions Objects

- To summarise and collate the evidence which relates to your/your client's case.
- To argue the evidence in relation to each issue the court has to determine.
 - Why the evidence supports the finding you are asking the court to make?
- To damage the other party's case sought to be made.
- Address any issues in your case head on.
- Give the Judge a pathway to find the way you want His/Her Honour to.



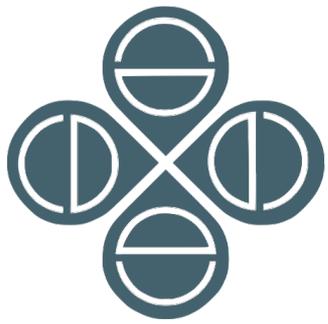
Final submissions

- Warn the client that they can be oral or written or a combination of both.
 - If a combo:
 - Don't just read out what you have written.
 - Don't just rely on your best points being in your written submissions.
 - Use the making of oral submissions as an opportunity to emphasise certain points.



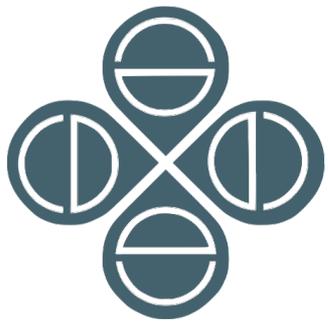
Final submissions

- Oral submissions
 - Have a structure
 - If the Judge is asking you about something:
 - Answer their questions.
 - Use it as an opportunity to persuade them of your point.
 - However, read the cues from the Judge.
 - If they are telling you to move on, do so.
 - If they are telling you they are not being persuaded, now is your chance to change their mind, or move on.



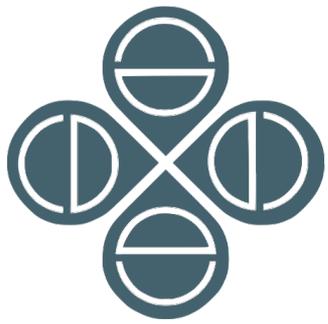
Final submissions

- Written submissions
 - Aim to make them like a template from which a Judge can write their Reasons for Judgment.
 - Use headings & numbered paragraphs. Page numbers too!
 - Footnote or include in brackets references.
 - eg paragraph numbers for affidavit, exhibit numbers.



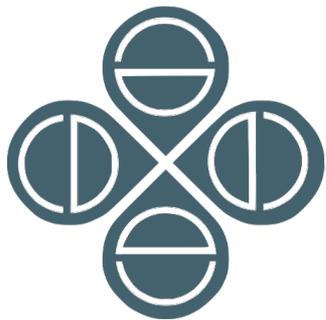
Final submissions Format

- Introduction:
 - What you are seeking and a summary of why.
- Legal principles
- Work out how you are going to present the information.
 - Topics; or
 - Relevant sections
- Set out facts in short form.
- Only refer to the evidence that is relevant to the court's determination.
- Conclude with a short summary pointing to the reasons why the relief ought be granted & the orders as sought by you ought be made.



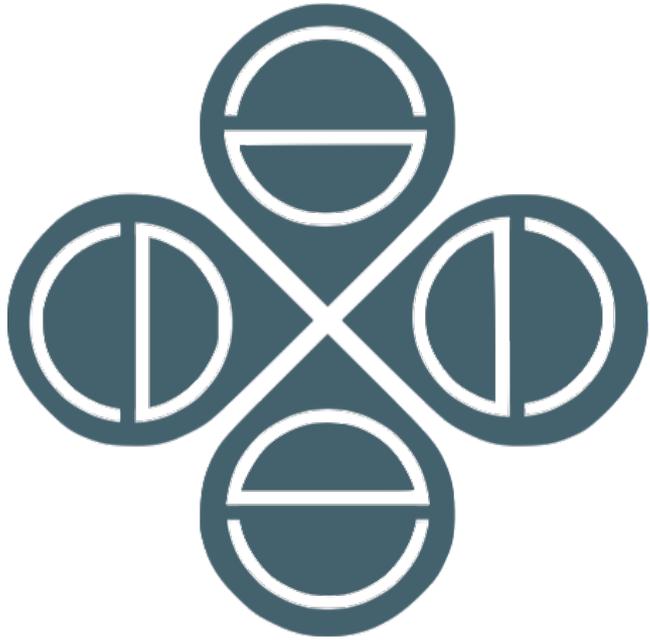
A final note

- Go back to the issues in dispute/orders sought.
 - Address each of them in your submissions.
- Do not interrupt another person's submissions.
- Do not use inflammatory language or make appeals to the personal interests of the Court.
- Answer the Judge's questions.



Useful Resource

<https://www.legalaid.vic.gov.au/financial-legal-answers/how-to-run-family-law-case>



Questions?