

AFFIDAVITS AND WITNESS STATEMENTS

Presented by Nicholas Newton¹

Introduction

1. When you are drafting an affidavit or a witness statement you should keep in mind its function as a written statement of a witness' evidence in chief. Each is an alternative to the traditional process of the witness giving her evidence in chief in answer to questions. Importantly, the same rules of evidence apply to an affidavit or a witness statement as apply to oral evidence in chief.
2. As a barrister or a litigation solicitor, you are regularly required to prepare and settle affidavits and witness statements. As such, it is important that you apply skill and care when drafting those documents to ensure they are persuasive. They should be written concisely, in the witness' own words without using unnecessary jargon or slang. You should ensure that there are no grammatical mistakes, spelling errors and that all of the formal requirements imposed by the court's rules are complied with.
3. In this paper I concentrate on drafting affidavits and witness statements in the Supreme, District and Local courts and accordingly I refer to the Uniform Civil Procedure rules (***UCPR rules***) throughout the paper. The rules that apply in other courts and tribunals are similar. However, where proceedings are being conducted in another court, you should consult the specific provisions of the rules that apply in that court.²
4. Affidavits and witness statements are used in a wide variety of proceedings in the Supreme, District and Local courts. Unless the court otherwise orders, all interlocutory proceedings and final hearings of matters commenced by summons must be given by affidavit (UCPR r 31.2). In proceedings commenced by statement of claim, or in proceedings where a statement of claim has been filed,

¹ Barrister, 13 Wentworth Selborne Chambers. In drafting this paper I have referred to the following papers, *Affidavit Evidence* 02/13 by Alan Hogan, CLE Centre Pty Ltd; *Workshop: Preparing and Drafting Compliant and Effective Affidavits and Witness Statements* by Christopher Wood LexisNexis Professional Development; and *Affidavits* by Mr. Justice Bryson, Australian Bar Review (1999) Vol 18, pp 166-172.

² For proceedings in the Federal Court see Order 14.

witnesses generally give their evidence in chief orally (UCPR r 31.1). However, this remains subject to the court ordering evidence be given by either affidavit or witness statement (UCPR r 31.1(2)). An example of the increasing use of affidavits is in the Supreme Court Professional Negligence List, where the evidence of the parties and all witnesses of fact is by affidavit, which must be served by the plaintiff at least 2 months before trial and by the defendant at least 6 weeks before trial (Practice Note SC CL7).

5. My purpose in preparing this paper is to provide an overview of the matters which a practitioner needs to take into account when preparing an affidavit or a witness statement. Those matters include:
 - 5.1 the difference between an affidavit and a witness statement;
 - 5.2 the formal requirements that must be satisfied when preparing an affidavit or a witness statement; and
 - 5.3 some general drafting considerations, such as admissibility and tips on drafting a persuasive affidavit.

Difference between affidavits and statements

6. An affidavit is written evidence that is either sworn on the bible or is affirmed to be true (a non religious alternative to swearing).³ A statement on the other hand is simply signed by the person making the statement (UCPR r 31.4). The importance of a statement not being sworn is that before the contents of it can become evidence, the person making the statement will have to attend court at the hearing, take the witness box and attest to the truth of the statement in the witness box. If the witness testifies to the truthfulness of the statement, the statement stands as the whole of the witness' evidence in chief, unless the court gives leave for further oral evidence to be adduced from the witness (UCPR r 31.4(5)).
7. An affidavit can be read in court without the witness attending as the witness has already testified to its truthfulness. That is subject to the witness not being required for cross-examination (UCPR r 35.2). Practically a judge will usually read the affidavit herself, however sometimes the judge will require the advocate to read the affidavit aloud in court.

³ See *Oaths Act 1900*, ss 11A-15 for provisions relating to taking an oath or affirmation.

Formal requirements for affidavits and statements

8. There is very little difference between the substance of an affidavit and a statement; however it is important, particularly with an affidavit, that the formal requirements are met. The UCPR rules say a lot that is obvious about drafting an affidavit (most of which should also be applied when drafting a statement) and although much of it may seem trivial it is very important that the rules be followed.

Physical format

9. UCPR rule 4.3 sets out some basic rules which apply to all court documents and must be followed when drafting an affidavit or a witness statement:
 - 9.1 They must be on standard A4 paper of durable quality, capable of receiving ink writing.
 - 9.2 The affidavit may be on one or two sides of the paper as long as you are consistent (one side is better).
 - 9.3 The individual papers of the affidavit must be securely fastened.
 - 9.4 There must be a minimum of 25 mm on the left margin and 30 mm on the top margin. The pages of the affidavit must be consecutively numbered.
 - 9.5 The spacing between the lines must be at least 3 mm and the writing must be clear sharp and legible.
10. You should express all dates, sums and other numbers in the affidavit in figures not words, except that references to months may be expressed in words (UCPR r 4.7). For example a date reference may be 8 September 2007 or 8/9/07 but should not be the eighth of September two thousand and seven.

Substantive part of the affidavit or statement

11. The heading of an affidavit must include the name of the deponent and the date on which the affidavit is made (UCP rule 35.A).
12. Each document is broken into 3 parts, the introduction, the body and the jurat or signing clause.
13. In the introduction to an affidavit or a statement, the witness states their name, address and occupation. For example:

“On 14 December 2005, I Nicholas Newton, Barrister of 13/180 Phillip Street, say on oath/affirm:” [remove the oath or affirmation in a statement]

14. The body of an affidavit or statement contains the substance of the evidence that the witness gives. The rules provide that an affidavit must be divided into consecutively numbered paragraphs with each paragraph dealing with (as far as possible) discrete matters. (UCP rule 35.4). There is no equivalent rule for a statement but as a matter of good practice, that is the form a statement should invariably take.
15. Where there is an interlineation, erasure or other alteration in the body or jurat of an affidavit, the affidavit may not be used, except by leave of the court, unless the person before whom the affidavit is sworn initials the alteration and in the case of an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and the signs and initials them (UCP rule 35.5). Unless it is impractical it is preferable to make all necessary changes on the typed version of the affidavit before it has been sworn.
16. Where the deponent of an affidavit is blind or illiterate, the affidavit cannot be used unless the affidavit was read to the deponent and it appeared to the person taking the affidavit that the deponent understood the affidavit. Additionally, the affidavit must bear a certificate to that effect in or below the jurat by the person taking the affidavit and the deponent must subscribe the affidavit by signature or mark in the presence of the person taking the affidavit (UCPR r 35.7 and *Oaths Act 1900*, s 27A).
17. It is very important that the pages of an affidavit, together with the annexures must be consecutively numbered in a single series of numbers. This is a requirement of the rules (UCP r 35.6 (3)). It is also essential as a matter of good practice, because it greatly assists an advocate to identify the paragraphs and annexures to which the advocate is referring, both to the Judge and the other advocates appearing in the case.

Signing an affidavit

18. Each page of the affidavit must be signed by the deponent and the person before whom it is sworn (UCP r 35.7B). The person before whom the affidavit is sworn must write their name and address (usually their work address) together with the capacity in which they are entitled to take the affidavit such as “barrister”, “solicitor” or “commissioner for affidavits” as the case requires (UCP r 35.7A).

19. A witness statement must be signed (UCPR r 31.4). There is no specific rule relating to the signing of each page or for signing exhibits and annexures to a witness statement, but as a matter of good practice, the procedure relating to affidavits should be followed, subject to any necessary changes.

Exhibits and annexures

20. Where the deponent to an affidavit refers to a document or documents within the body of the affidavit, copies of the document or documents may be made an annexure to the affidavit or an exhibit to the affidavit (UCPR r 35.6).
21. An annexure to an affidavit must be identified as such by a certificate endorsed on the annexure (and not on a page separate from the annexure) signed by the person before whom the affidavit is made (UCPR r 35.6 (2)). A form of the certificate is:

“This and the following [number] pages is the annexure marked [letter] to the affidavit of [name of deponent] sworn/affirmed on [date] before me.”

There is no need for the annexure to be signed by the person making the affidavit.

22. Where a document or documents is exhibited to an affidavit, the exhibit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made (UCP r 35.6(4)). You should identify the exhibit by the initials of the deponent and by a number. For example:

“This is the exhibit marked NNI referred to in the affidavit of Nicholas Newton sworn/affirmed on [date] before me.”

Filing and service

23. You no longer file an affidavit (UCPR r 35.9), unless you have the court’s leave or the rules of the court or a practice note otherwise provides. Practice Note SC Gen 4 at paragraph 16 contains a list of affidavits which must be filed, which is expressed to be non-exclusive. The affidavits listed are by and large formal affidavits such as affidavits verifying pleadings (UCPR r 14.23) and affidavits in support of an application for default judgment (UCPR r 16.3). An affidavit in support of an application to set aside a statutory demand pursuant to s 459G of the *Corporations Act* 2001, is an important exception to the rule that affidavits should not be filed.
24. An exhibit to an affidavit must not be filed (UCPR r 35.6 (5)).

25. In order to rely upon an affidavit or a witness statement you must serve them prior to the hearing. Generally, there will be a timetable for the service of affidavits or statements, which you will have to comply with in order to rely upon the affidavit or statement. Failure to comply with directions of this kind may result in you being unable to adduce the relevant evidence at trial: *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (No 2) (1992) 29 NSWLR 487. If there is no timetable ordered then you must serve the affidavit not later than a reasonable time before the occasion for using it arises, otherwise you may not read that affidavit except by leave of the court (UCPR r 10.2).
26. Where an affidavit has been served, a party may by reasonable written notice on the person who served the affidavit, require the person who made the affidavit to attend for cross-examination (UCPR r 35.2). Where such notice has been given and the deponent of the affidavit does not attend for cross-examination, the affidavit may not be used unless the deponent is dead or unless the court otherwise orders (UCPR r 35.2(3)).

General drafting considerations

27. Affidavits and witness statements are evidence. The *Evidence Act 1995* applies to the text of an affidavit, so that it is important that you keep in mind the rules of evidence when drafting an affidavit. An affidavit should be relevant and it should not contain opinions or hearsay evidence, other than in accordance with the exceptions to those rules contained within the *Evidence Act 1995*.
28. You should draft affidavits in the first person. This is no longer a requirement of the UCPR, however it remains good practice.⁴ You should draft in the active voice rather than the passive voice.

Hearsay

29. Hearsay evidence is inadmissible, (s 59 of the *Evidence Act 1995*), unless it is admissible under one of the various exceptions to that rule: for example because it is contained in a business record (s 69 of the *Evidence Act 1995*); or it is evidence of an admission (s 81 of the *Evidence Act 1995*).
30. As a general principle, in order to avoid an affidavit or statement containing inadmissible hearsay evidence, you should draft an affidavit or statement so that as far as possible the witness' evidence is confined to what he saw, heard, smelt or felt.

⁴ Formerly contained in SCR r 38.2(1); DCR 30.1(1).

31. An important exception to the hearsay rule applies in interlocutory matters, where section 75 of the *Evidence Act 1995* provides that the hearsay rule does not apply provided the deponent deposes to the source of the evidence given.

Opinion

32. It is a common drafting error to state the witness' knowledge or belief without laying the foundation for that belief, for example "*she agreed*", or "*we understood*", rather than setting out the words of a conversation from which the trier of fact can conclude there was an agreement, or the observations of the witness which provide the foundation for the opinion.
33. Conclusions or opinions may be admissible where they are based upon the personal perception of the deponent and the evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event: *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379; ss 76 & 78 of the *Evidence Act 1995*. However, that evidence will not be admitted where the court is in as good a position as the person expressing the opinion to draw the inferences made:

Direct speech

34. In order that the deponent avoid making conclusions about conversations it is a rule of practice in New South Wales to give evidence of conversations in direct speech. There is however no rule of law whether under the *Evidence Act 1995* or otherwise, which makes evidence of a conversation given in indirect speech inadmissible: *LMI Australasia Pty. Ltd v Boulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31. It comes down not to a question of admissibility but to the way in which evidence might most appropriately be tendered or adduced. Nevertheless, where a conversation is important and an objection is conscientiously taken, a court may reject affidavit evidence in indirect speech. In those circumstances the court would normally grant leave to adduce oral evidence of the particular matter.
35. Many deponents cannot recall the precise words used in a conversation even for a conversation that has occurred recently. Notwithstanding that, it remains good practice to draft the conversation in direct speech, acknowledging that the conversation is stating the substance of what was said rather than the exact words. This focuses the witnesses mind on who said what and when. For example:

“On 12 January 2007, I had a meeting with Stephen Jones of Cheap Seminars Pty Ltd. I made a brief file note following that meeting in my diary, a copy of which note is annexed

at page and marked “A”. During that meeting I had a conversation with Mr. Jones to the following effect:

Jones said: “Can you deliver a seminar tomorrow evening at 7 on affidavits and witness statements. You will have to speak for at least 20 minutes and you will need to prepare a written paper. The paper must be ready by tomorrow morning to give me time to make copies for the people attending. I’ll pay you \$1000.00”.

I said: “Yes. That should be fine. I get the paper to you by 10 tomorrow morning.”

Jones said: “Great. There will be some food and drinks after the seminar, which hopefully you will be able to stay for.”

I said: “Ok. I’m not sure about staying, but I can definitely do the seminar. I’ll see you tomorrow.”

Other drafting considerations

36. You should draft an affidavit or a witness statement in a logical order. Normally this means drafting the affidavit or statement chronologically. Sometimes it may be convenient to order the matters set out in the affidavit or statement by topics, but generally that is not the case. Whatever order is adopted, you should keep in mind your aim of drafting a clear, logical and persuasive document.
37. When you are drafting an affidavit or a witness statement it is very useful to exhibit or annex documents which were created at the time of the events in question. Documents such as diary entries, letters and file notes are not only useful for the evidence contained within them, but they also act as an invaluable prompt for a witness’ recollections and provide a framework upon which the witness’ recollections can be based.
38. You should draft the affidavit or statement using language that the witness would use. The affidavit or statement should be as concise as a comprehensive coverage of all matters that need to be addressed will allow.
39. An affidavit is not a pleading. You should not draft an affidavit that simply admits, denies or not admits paragraphs in the other party’s affidavits. This is a common error when responding to another party’s affidavit.

40. Expressions such as “*I crave leave to refer to my previous affidavit*” and “*I respectfully request that this Honourable Court make the orders set out in the notice of motion*” are unnecessary and you should not include them in an affidavit or statement. If it is necessary to refer to another affidavit, you should simply refer to it. If you wish to make a submission, that should be done by the advocate appearing, not in an affidavit.

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29 NOVEMBER 2007.

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ANNEXURE “A”

Form 62 (version 2)
Rule 35.1

AFFIDAVIT OF [NAME] – [DATE]

COURT DETAILS

Court

**Division

**List

Registry

Case number

TITLE OF PROCEEDINGS

First plaintiff

**Number of plaintiffs

First defendant

**Number of defendants

FILING DETAILS

Filed for

Address

AFFIDAVIT DETAILS

Name

Address

Occupation

On date, I say on oath *OR* affirm:

1. I am [role of the deponent].
2. I believe that the information contained in this affidavit is true.

SWORN/AFFIRMED

At

Signature of deponent

Signature of witness

Name of witness

Capacity of witness

HOW TO COMPLETE THIS FORM

THESE INSTRUCTIONS ARE NOT TO BE FILED

Do not include any information about the proceedings on this part of the form.

** OPTIONAL INFORMATION

Some information in this form may not be relevant to your proceedings. An item marked with ** may be omitted if it is not relevant to your proceedings.

COURT DETAILS / TITLE OF PROCEEDINGS

Copy this information from the originating process.

FILING DETAILS

Include the role (eg. plaintiff) of the party or the name of the person who is filing this form.

Include the address for service of the party or person who is filing the form. For example, the following information should be included if the form is being filed by the solicitors for a party.

Address	[Name of firm] Solicitors [ACN if relevant] [Street address] [DX address] [Telephone number] [Fax number] [Email address] [Court user number if relevant] [Solicitor's file reference]
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AFFIDAVIT DETAILS

Include details about the name, address and occupation of the deponent.

Use numbered paragraphs. State the information to be included in the affidavit.

If you are making the affidavit on behalf of a party, replace paragraph 1 with the following information:

I am [give details of the capacity of the person making the affidavit and the facts that qualify the person to make the affidavit] and am authorised to make this affidavit on [his/her/its] behalf.

For example, if the party is a corporation, insert the words "I am an [officer eg director] of [name of corporation] and am authorised to make this affidavit on its behalf".

Each page of the affidavit must be signed by the deponent and by the person before whom it is sworn. A barrister, a solicitor or a Justice of the Peace must witness the affidavit. You may face serious penalties if you provide false or incomplete information.