Affidavits – Tips on Preparation

Introduction

In line with the overriding purpose embodied in the ***Civil Procedure Act*** 2005 of the just, quick and cheap resolution of the real issues in litigation, the only way a party can put forward evidence in civil litigation in most of the higher Courts is by way of affidavit. Even where evidentiary statements are used, as is the case in, for example, the Commercial List of the Supreme Court of New South Wales, these are subject to most of the same rules.

An affidavit is a summary account of the deponent's recollection of events relevant to the issues in proceedings. The reason why drafting affidavits is regarded as an art form is because of the complex restraints and forces acting on the process. The purpose of this paper is to identify the methods that produce good results and the common errors that are repeated frequently as legal representatives struggle to balance the varied requirements.

The drafter must balance the requirements of the law of evidence, accuracy, relevance and narrative against the need for persuasion. These elements are often irreconcilable and the legal draftsman must make choices.

The Ten Basics

1. Cases are usually won or settled favourably by evidence in chief rather than brilliant cross-examination or final address. Another way of saying this is that the Judge will make sense of the evidence by arranging the evidence in his or her own mind to produce a narrative of the facts. The Judge will then apply legal principles to that narrative to produce the answers. Importantly, the Judge often determines much of his own narrative from the affidavits as these are all he or she has to work with until the hearing begins.

2. Judges are fond of saying that most cases decide themselves when the facts are ascertained and arranged in chronological order. The task of the draughtsman of an affidavit is to put forward material that will assist the Judge in that task, hopefully in a way that advances the client's case.

3. The preparation of an affidavit involves setting out in chronological order admissible evidence that can be given by the witness about these facts and that is helpful to the client's cause.

4. The job of extracting the documents and the witnesses' recollections and setting them down in affidavit or statement form is the most important role in the case.

5. Almost all judges proceed to find facts by first working out the 'firm ground'. By this I mean the facts that the Judge can rely upon as correct. These include the operation of the laws of physics, facts established by third party documents of known reliability (for example bank statements), facts that are overwhelmingly likely given basic knowledge of human nature and, to a lesser extent, facts that the contending parties agree on and contemporary documents.

6. Judges then assess differences in the parties' accounts of key conversations and events by reference to the 'firm ground'. Generally the Judge in a civil case will prefer the evidence that is most likely to have occurred given the firm ground.

7. This means that the first step in preparing an affidavit is to determine the "firm ground". In practice, this means that the draftsman should get the relevant documents early, read them and understand the firm ground. Generally I prepare a chronology of dates and events drawn largely from unassailable documents before I take instructions to prepare an affidavit of any complexity.

8. If the account given by the witness contradicts the firm ground then the draughtsman should ask why. It is unethical to suggest what evidence a witness should give. It is ethical and necessary when a witness tries to tell you something that appears to contradict the firm ground to point out the contradictory evidence and ask how the witness can explain it.

9. The draftsman should then determine the theory of the case or narrative of events that the Judge will be asked to accept. The affidavits will be a collage of individual viewpoints of the deponents which the Judge will put together to form his or her own theory of the case. The draftsman is in the position of a historian putting together facts with the intention of advancing a view of events which will produce a favourable outcome for the client within the bounds of honesty, accuracy, ethical duties and what is realistically possible.

10. With this in mind I proffer some 'Top Ten' lists.

    Top 10 Things to Do

    1. Identify the issues. These will come from the pleadings, the statutory text, the elements of the equitable doctrine or the elements of the tort you are trying to establish or defeat. If you know what your affidavit is trying to achieve you are more likely to achieve it.

2. Collect the documents from the deponent first. These will go some way to establishing the firm ground and reduce the waste of time that can occur when a deponent has a feeble grasp of timing of events.

3. At a higher level, it is never too soon to begin to develop your theory of the case. You can then think about how the deponent can help establish the key points you need, even where the deponent doesn't think to tell you about them. By theory of the case I mean a narrative story of what happened with details selected to support the argument. This narrative must be supported by the evidence, make sense and must win the case for the client or at least do the best that can be done. It must also be realistic. A Judge once told me that most submissions he heard were completely wasted because they were so far away from the realities of the particular case that they could not ever affect anything that he was thinking. In this regard, the deponent's theory about why the other sides' witnesses disagree with the deponent is often that they are black-hearted liars. Try to minimise this in your theory of the case. Look for how they may have become confused. Judges know that real life involves misunderstanding more often than deception and a theory of the case that allows for this is more likely to carry the day.

4. Train yourself to ask about what the deponent heard, saw and did. Question formats such as "Did she say anything in answer to that?" will help get evidence in a form you can use. Otherwise the deponent will tell you what he or she knew, was aware of or thought. You will have to go digging for useable material and will waste your time because the witness will think that you have already been told.

5. Get the witness to talk. This involves the task of asking a short question and then shutting up. By way of example, if you are dealing with a conversation forming part of a contract, you might use close-ended questions to establish the parameters "Were you still outside the house?" "Who was there?" and "What time did it happen" and then open the texture of your questions "What happened?" or "What did everybody say?"

6. Apply the golden rule to writing the affidavit: a deponent can only give evidence of what the deponent did or perceived through his or her five senses. This is not always true, for example sometimes the deponent's motive can be relevant, but thinking this way will lead to strong and admissible affidavits. This is the take home message of this paper.

7. Use the language of the witness in the affidavit. While you can moderate the use of "F*&!@" and the like (except in direct speech), the witness is going to use his or her own language in the witness box anyway. Judges are alert to whether the affidavit tells the story of the witness or the story of the legal representatives and they discount affidavits that have been 'polished'. At a master-class level, you should strive to present the authentic voice of the deponent, including his or her language and world-view. If you can manage this (without destroying the case) your client will not only resist cross-examination but will come out with enhanced credibility. Even superficial cross-examination often reveals the client's truth. Your affidavit must be built on the client's truth including his language, world view and beliefs about what happened.

8. Use your own (excellent) English style. Active voice rather than passive. Subject-verb-object sentence constructions. Short sentences. Prefer the word derived from Anglo-Saxon to the word derived from French. Read Strunk & White or Fowler for ideas. Style gives your narrative power.

9. Use direct speech. Although Barrett J. pointed out in ***LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd*** (2001) 53 NSLWR 31 that *"There is no rule of law, whether under the Evidence Act or otherwise, which makes inadmissible evidence of a conversation given in indirect speech,"* he went on to say "*but there are obviously very good reasons why courts have, over the years, been astute to regard the direct speech form as the best form."* Despite the first half of the sentence, the reality is that Judges often reject statements in indirect speech if they are objected to. If the statement is cast in direct speech, it is what the witness heard and passes the golden rule. Even if the direct speech has a hearsay effect (for example "Jane said to me "Joan told me that she saw Geoff take the cheque"), it will be allowed as evidence of what Joan said but be rejected only as to being evidence as to the truth of Geoff taking the cheque. Further, direct speech is precise. For example "I agreed with him" is indirect speech which covers the gamut from the direct speech "I said "I will say 'yes' even though it makes me feel ill to do it" to "I said "Yes! This is the best thing that ever happened to me!"" No wonder Judges want direct speech!

10. Swear affidavits together just before service. Ideally drafts should be prepared of the evidence of all witnesses. Sometimes a deponent to the final affidavit will say something that casts a different light on assumptions casually made and accepted in earlier affidavits. Sometimes your theory of the case will develop over time and conferrals with different witnesses. Sometimes you will save yourself embarrassment. A corollary is that you will serve affidavits together which is good.

Master Class! Top Ten Tips to Mavenhood!

11. To be an official affidavit ninja all you need to do is get 10 more things that Judges care about right. The Judge will develop respect for you and your case if you do. . It is the equivalent of cleaning soup stains off your tie in a world where 99% of affidavits have soup stains. Working through a standard NSW Supreme Court affidavit in order, to do better than 99% of the affidavits proffered to the Court all you have to do is:
    a. Download and use the right form. Use form 40 of the UCPR for general Equity affidavits. Downloading this will save you from most of the formatting errors that distract Judges. You do not need to know that side margins must be at least 25 mm and line spacing must be at least 3 mm. Life is too short to think about margins. It is built in and changes are accommodated if you download the correct form each time.
    b. Always put the name and date sworn at the top of page 1. This is often neglected in trying to meet deadlines. Don't be that guy!
    c. Get instructions whether the deponent is swearing or affirming and amend the form accordingly.

       Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197 at [98] per Young JA, at [99] Bergin CJ in Eq agreeing:

       [98] ... it must be clearly said. A person who signs a piece of paper "Sworn/affirmed" or a like expression, shows that the person did not really make an affidavit and indeed probably did not appreciate the solemnity of what he or she was doing. My practice at first instance was never to receive such documents and have the deponent reswear or give oral evidence. ...".
    d. Number each page of the affidavit including the annexures. This is also often missed in the rush to meet deadlines. It makes matters flow more easily in Court when you can take the Judge to page 47 rather than to the second page of annexure K *"about 13 pages back from the last page"*. This can affect the apparent force of the argument. Also Young AJ still lurks in the Supreme Court ready to deny costs awards to the careless.
    e. Obey Supreme Court Rule (Part 38 R 4(2)) that affidavits must not exceed 50 pages has not been carried over into the UCPR. The pedant will point out that this rule has been repealed and not carried over into the UCPR. Obey it anyway! In practice that usually means that on larger affidavits you should use a single exhibit rather than multiple annexures.
    f. Become an exhibit/annexure ninja. Get the exhibit notes and annexure notes right. This means:

i. Don't use a separate page for the annexure note. Put the annexure note on the first page of the annexure. This is not just about saving trees. UCPR 35.6 (2) actually forbids using a separate page.
35.6(2) 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.

ii. The certificate is in words to the following effect *"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 deponent of the affidavit.

iii. An exhibit to an affidavit must be identified by certificate: UCPR 35.6(4). The certificate should be entitled in the same manner as the affidavit. Where the parties are numerous it is often good practice to abbreviate the title.

iv. Number the exhibit running straight on from the last numbered page of the affidavit.

v. If you have time, include an index.

g. Put dates, sums and other numbers in figures not words - UCPR 4.7(1) although months can be in words - UCPR 4.7(2).

h. Get the jurat right. If the witness is illiterate follow s. 27A *Oaths Act.* If the witness is unable to read English then he or she is illiterate even if they read and write German better than Goethe. Use an appropriate jurat and preferably get a NAATI interpreter present and doing his or her own certificate of translation (I use an adaptation of the certificate found on the JP website and tell people to have the interpreter swear the certificate). Plenty of people do not read English and I have been able to get Judges to throw out all affidavits of witnesses on this ground. Usually there has been an interpreter present for obvious reasons and the Judge has granted leave to examine in chief but the advantage is still there.

i. Read Parts 4 and 35 of the UCPR.

j. Serve the copy affidavits and keep a record of service, generally a copy of the cover letter. Also keep the originals and mark them.

The Top Ten Mistakes You Will Never Make

1. Avoid ethical 'own goals' in preparation of the affidavit. Practice 'defensive lawyering' so:
    a. Interview one witness at a time.

b. If the solicitor and the witness witnessed the same events, the solicitor should not prepare the affidavit of the witness. This question will be asked in cross-examination. This arises often in cases concerning testamentary capacity, a large and growing area of contention as medical advances leading to longer life spans are not matched by similar advances in combatting senility.
c. Never have one deponent simply read and agree with the account of another deponent. This ruins the value of the evidence of the second deponent.
d. Make it clear several times that the deponents must tell the truth. This reduces the chances of them trying to weasel out of some silly lie by blaming the legal representative.

2. Do not argue. Put forward the facts that are the premises of the argument you want to make but don't make the argument in the affidavit. Affidavits are for facts. Argument will be objected to and rejected. If you are a solicitor concerned that the barrister will not put the argument well or at all, shout at the barrister in Chambers, insist on reviewing the written submissions or get a different barrister but do not put forward an argument in an affidavit that will be objected to and rejected. The rejection dismays clients. They think the winning argument has been dismissed out of hand.

3. Avoid conclusions. Deponents often find it difficult to depart from their habit of presenting their conclusions as to the effect of conversations and their view of what people were attempting to achieve by their actions. Allowing the deponent to follow this course in an affidavit can lead to disaster in Court. In obtaining the witnesses' story you need to obtain the original observations from which the deponent drew the inference that the witness wants to present to the Court as a fact. In fairness many judges will admit inferences if the premises giving rise to them are stated but don't take the risk.

4. Don't let the witness 'mindread'. In fact you should avoid telepathy altogether. If you see the words "knew", "understanding" or "aware" or any suggestion as to what was going on in the mind of others or of the deponent then alarm bells should ring.

5. Do not present evidence of different witnesses about the same conversation in identical terms. Such 'cut and paste' tactics can seem logical to the uninitiated (after all, there was only one conversation and completely accurate recollections would have to be identical) but it can lead to disaster. In ***Rosebanner Pty Limited v EnergyAustralia*** [2009] NSWSC 43 Ward J. stated at [326]-[327]:

326 I am mindful that where there are in evidence substantially identical affidavits this may give rise to an inference of collusion between witnesses, which inference in turn may diminish the weight or credit accorded to the evidence of those witnesses.

327 In ***Macquarie Developments Pty Limited and Anor v Forrester and Anor*** *[2005] NSWSC 674 Palmer J considered the weight to be attributed to two affidavits dealing with critical discussions in virtually identical terms, in circumstances where the evidence was that the solicitor who prepared the affidavits had "copied and pasted" portions from each. His Honour noted that:*

> *[I]t is totally destructive of the utility of evidence by affidavit if a solicitor or anyone else attempts to express a witness' evidence in words that are not truly and literally his or her own.*
>
> *Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.*
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> *Where the identity of evidence is due to collusion, the devaluation of the evidence is justified but where, as in the present case, the identity of evidence is due entirely to a mistake on the part of a legal adviser, a witness' credit and a party's case may be unjustly damaged.*

6. Don't paraphrase documents. Attach or exhibit them.

7. Don't refer to diaries, file notes or records unless you have checked the whole thing and, in the case of diaries, the entirety of the diaries. If you have checked them then attach them. The other side will ask for them and related documents.

8. Don't include or attach evidence of settlement discussions, even if they are not marked without prejudice. Don't forget to consider using documents that are not true settlement discussions even if they are marked 'without prejudice.'

9. Don't use ridiculous honorifics and use defined terms when you have a very good reason and not otherwise. Don't make statements that are meaningless or that you don't understand. For example, let the other side be the ones who 'crave leave to refer to earlier affidavits.' This kind of error is often made by very good affidavit draftsmen because they were taught by experts of a previous generation. However Judges these days prefer a spare, taut and businesslike approach. We are in sales and we should use the language of the customer.

10. Don’t print out endless email chains 12 times. Print the whole chain once and check the email settings. You can get rid of the irrelevant security check information by setting without altering the emails. Most annexures of email chains are virtually unreadable because of this repetition but they do not need to be if the settings are correct.

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