THE AFFIDAVIT AS A TOOL OF PERSUASION
DRAFTING AN EFFECTIVE AFFIDAVIT AND USING AN AFFIDAVIT EFFECTIVELY

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By The Honourable Justice Henry

Introduction

[1] Your aim in acting as litigation lawyers is to secure, within ethical and legal bounds, the best possible outcome for the client. Whether that outcome is the settlement of a dispute or a successful result in court it is inevitably achieved via persuasion. The array of tools of persuasion in your armoury is broad. It ranges beyond arguments or submissions about a case and includes the way in which your facts are presented.

[2] For instance the manner in which the evidence in chief of a witness is presented during a trial can be persuasive even though it is an exercise in advancing fact, not argument. Evidence in chief is at its most persuasive when it is advanced in a logical sequence, is clear and easy to understand, is appropriately complemented by the use of exhibits and is free of the distraction of irrelevant or inadmissible content. So it is with affidavits. They are akin to evidence in chief and they too are more persuasive when they have those qualities. As with evidence in chief, an affidavit is unpersuasive when its content is jumbled, difficult to understand, complicated by unnecessary or confusing reference to exhibits and includes irrelevant or inadmissible content.

[3] The potential persuasive force of an affidavit may be more readily appreciated when thought is given to the audience it is designed to persuade. The primary audience is the judicial officer who will preside in the proceeding in which you have filed the affidavit. It is that audience you should have in mind in effectively drafting and using your affidavit. It is that audience I will focus principally upon this evening. When I repeat the mantra of persuasion, "Remember your audience", it is the judge I am referring to as your audience.

[4] Do not overlook though that there is a secondary audience: your opponent. Your opponent's advice to a client as to whether it is better to settle than to fight will invariably be influenced by the apparent force of the case to be met. If the affidavit you provide to your opponent is effectively drafted it will send two messages, both helpful to your client's cause. The first is that your client has a competent lawyer. That lends credibility to what you assert. The second is that the evidence in the affidavit is comprehensible and admissible. That lends credibility to the facts you rely on. Think how much less likely it is that your opponent will take you and your settlement overtures seriously in the face of an affidavit that is incompetently drafted and has imprecise or irrelevant content.

[5] Those latter qualities will of course make a very poor impression upon the judge. Judges do their best to control and subdue their natural human reactions. However, even if only at the sub-conscious level, it is inevitable that an incompetently drafted affidavit will infect the judge's perception of your competence and your deponent's evidence. Every time a judge is troubled by the distraction of incomprehensible, inadmissible, argumentative or erroneous content in an affidavit the prospect of that affidavit being useful in persuading the judge of the worth of your case is diminished.

[6] As we will see this evening the effective drafting and use of affidavits derives largely from doing elementary tasks correctly, as is true of so much of the art of persuasion. Avoiding error and incomprehensibility reduces distraction. It maximises the opportunity for the true worth of your evidence to be understood.

Obey the rules

[7] We begin with the most elementary of all tasks in drafting an affidavit: obey the rules. Your affidavit must be drafted in accordance with the rules of the particular jurisdiction in which it will be filed. I will refer this evening to some rules from the *Uniform Civil Procedure Rules 1999* (Qld). The principles of drafting which they enshrine are similar in most jurisdictions, but take care to obey the rules which apply to the jurisdiction in which your affidavit is filed.

[8] Occasionally solicitors file affidavits that do not comply with the relevant rules. The fact that the registry staff may not have detected the non-compliance will not mean your opponent or the presiding judge will miss it. Even where it involves a seemingly trivial matter of form, for instance the type print is too small, the non-compliance may annoy and distract the judge. Annoying and distracting your audience is anathema to persuasion.

[9] The rules go beyond mere matters of formatting to content. It is a characteristic of many rules that they adopt important elementary principles of effective affidavit drafting. Consider r 430(1):

> "Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally." (emphasis added)

[10] Consider the consequence of this rule for the content of your affidavits. Is a witness giving evidence orally permitted to give irrelevant evidence? No. Is a witness giving evidence orally permitted to give inadmissible evidence? No. The mere fact that you draft an affidavit in your office, where your opponent cannot object and the judge cannot uphold the objection, does not permit you to include evidence which you could not adduce if asking questions of the witness in evidence in chief. Far from helping your client's cause, such conduct will detract from the persuasiveness of the affidavit and your broader case.

[11] There exists an exception to r 430(1) to allow hearsay in proceedings where final relief is not being sought. Rule 430(2) provides:

> "However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief."

[12] Approach this rule with caution. Merely because you can include hearsay evidence because the pre-requisites of this rule apply does not mean you should. If your circumstances are not urgent and you are in a position to take an affidavit directly from the source of the information you seek to advance then it is obviously preferable that you

do so. Such an affidavit will be perceived as more reliable and thus more persuasive than statements based on information and belief.

[13] Further if you must really draft an affidavit containing statements based on information and belief then comply with rule 430(2). The sources of the information and the grounds for the belief must be stated in the affidavit. A failure to include this information, if it survives objection, will make the hearsay even less persuasive than it already is.

[14] Failures to comply with the rules are particularly common in the presentation of exhibits to affidavits. If a judge cannot easily locate an exhibit in the course of reading an affidavit it makes the affidavit more difficult to understand and thus less persuasive.

[15] My frustration at having to wade through poorly assembled exhibits to affidavits prompted my practice notice on the topic last year to the local profession (see annexure), reminding practitioners of r 435's requirements, such as the pagination and indexing of exhibit documents and the elementary yet often breached requirement of r 435(10) that:

> "The documents are to be presented in a way that will facilitate the court's efficient and expeditious reference to them."

[16] The frustration that drove me to issue that practice note is experienced by many judges. An English judge, the Honourable Sir Stephen Sedley was driven by the same frustration to publish "Sedley J's Laws of Documents" [1996] JR 37. Sedley's eleven "laws" are:

> "First Law
> Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.
>
> Second Law
> Documents shall in no circumstances be paginated continuously.
>
> Third Law
> No two copies of any bundle shall have the same pagination.
>
> Fourth Law
> Every document shall carry at least three numbers in different places.
>
> Fifth Law
> Any important documents shall be omitted.
>
> Sixth Law
> At least 10 percent of the documents shall appear more than once in the bundle.
>
> Seventh Law
> As many photocopies as practicable shall be illegible, truncated or cropped.
>
> Eighth Law
> At least 80 percent of the documents shall be irrelevant.

> Counsel shall refer in court to no more than 10 percent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.
>
> Ninth Law
> Only one side of any double-sided document shall be reproduced.
>
> Tenth Law
> Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.
>
> Eleventh Law
> Documents shall be held together, in the absolute discretion of the solicitor assembling them, by:
> a) a steel pin sharp enough to injure the reader,
> b) a staple too short to penetrate the full thickness of the bundle.
> c) tape binding so stitched that the bundle cannot be fully opened, or,
> d) a ring or arch-binder, so damaged that the two arcs do not meet."

[17] Published versions of his Honour's Laws of Documents vary slightly. In one version, for instance, the Eighth Law is: "Significant passages shall be marked with a highlighter which goes black when photocopied."

[18] In his book *Ashes and Sparks, Essays on Law and Justice* 2011 Cambridge University Press, his Honour said of his Laws of Documents:

> "When I became a Judge in 1992, what had seemed at the Bar to be occasional glitches in the documentation of cases turned out to be a never ending nightmare. Sarcasm seemed a cheap way of letting off steam about it.
>
> I gave these Laws of Documents…to the editors of the Judicial Review for its first issue. It seems to have rung bells all over the English speaking world, where—if the communications I've had from Commonwealth Judges are any indication—an orderly and economical set of documents is as rare as it is in the UK.
>
> It is a tribute to the legal profession that, although they have been widely disseminated, the Laws of Documents have had no effect whatever."

[19] Most of you might think a litigation lawyer wanting to persuade a judge of the merit of his or her case would present documents in a way that would facilitate the court's efficient and expeditious reference to them. As to the recalcitrant amongst you I remind you this is what r 345(10) actually requires.

[20] If you must exhibit documents then, as the rules require, present them in the way that will best facilitate the court's efficient and expeditious reference to them. Indexing, pagination and tabbing are all useful devices to allow the judge, when reading the affidavit or hearing submissions, to quickly go back and forth between the affidavit and the exhibits so as to properly comprehend what is being advanced.

The solicitor should draft the affidavit

[21] Drafting an affidavit is a task for a lawyer, not a witness. The deponent will not know what the legal purpose of the document is. The deponent will not know what is relevant or irrelevant, admissible or inadmissible. Nor will the deponent know how to sequence the content of the affidavit in the most advantageous way.

[22] By all means encourage your deponent to note down his or her recollections and gather potential exhibits as soon as practicable. That is a prudent guard against fading memory and the loss of evidence. However when such notes and potential exhibits are received by you, they ought not be handed to a secretary or clerk to be transposed to affidavit format and then be sworn or affirmed.

[23] You should sit down with the deponent and ask questions and note, type or dictate the information provided. Your questioning should be thorough; probing the deponent's memory to ensure relevant evidence is not missed. Begin by letting the deponent tell his or her story to gain a general overview of the evidence a deponent can offer. Then tighten your questioning to focus on and clarify the relevant evidence the opponent can give, ensuring that relevant evidence is not missed.

[24] The product generated by you during this process will serve as your working draft. You should review the draft with an eye to the layout of the document – sequencing, headings and the like. Also refer back to the foundational documents such as the pleadings or the affidavits of your opponent to ensure the content of the affidavit is relevant, and that you have not overlooked an issue the witness can relevantly address.

[25] A less active drafting role may be taken with expert witnesses. Often their affidavit is short, exhibiting their report and deposing to its truth and accuracy. Nonetheless, experts should not be left entirely to their own devices. "Expert reports as evidence" is a substantial topic in its own right, deserving of its own session. For present purposes I emphasise that expert witnesses should be given a clear written explanation of what is required of them. Further, particular care should be taken with expert witnesses who are not used to drafting reports for use in court. An expert new to the task will find it helpful as a guide to drafting to be provided with good examples of expert reports from unrelated cases.

Use the words of the witness

[26] It may be your role to take the affidavit but it is the deponent's affidavit, not yours. Use the language of the witness in recounting events in the affidavit. It will make the information deposed to more credible. In reading the affidavit the judge will of course expect a lawyer has probably taken the affidavit but will see that the affidavit uses the language of the deponent. This makes it more likely the judge will regard the information as "straight from the mouth" of the witness and thus find it more persuasive than the language of a drafting lawyer.

[27] Where the lawyer taking the affidavit infects it with his or her preferred method of expression there is also a heightened risk the deponent when cross-examined will not "own" the lawyer's interpretative refinements when cross-examined. Responses such as "No I did not mean that, that's just what my lawyer wrote" are self-evidently damaging to the persuasive force of the affidavit.

Be accurate

[28] Ensure your deponent reads the draft and that any corrections or clarifications by the deponent are included. Proof read the end product thoroughly. Mistakes reflect badly on you and the deponent.

[29] Accuracy is inevitably easier to attain the sooner the deponent's account is taken. Lawyers should ordinarily take proofs of evidence at an early stage regardless of whether or not an affidavit yet needs to be taken and filed. That practice is an elementary means of a litigation lawyer knowing what the facts are and knowing what the client or witness can say in evidence. If an affidavit later needs to be taken from such witnesses then the hard work has already been done and done at a time when the witness' memory is likely to be more accurate.

[30] The importance of being truthful should of course be explained to the deponent but so too should the need to be accurate. Ensure the deponent is not pressured by the nature of the exercise into overstating the limits of his or her recollection. If the witness qualifies a recollection, indicating some uncertainty as to the detail, then that qualification should be included. Where, for instance, a witness cannot recall the precise words but has a confident recollection of their meaning, the witness can honestly depose, "I cannot recall her precise words but she said words to the effect of …"etc.

[31] Include the whole truth. You should not withhold information from an affidavit where to do so would cause the content that has been included to give a misleading impression. If it is relevant to include a deponent's account of a specific event, then it would be misleading to omit part of that account because it appears to be unhelpful to your client's cause.

[32] In the long run the necessary inclusion of facts that happen to be unhelpful to your cause will probably make the deponent's evidence more persuasive. It allows the unhelpful evidence to be included in context amidst otherwise helpful information, so that its unhelpful effect is tempered. In comparison, the emergence in opposing affidavits or cross-examination of facts which should have been included in the first place will devastate the persuasive value of the deponent's evidence.

Easy to understand

[33] The easier an affidavit is to read and comprehend the more persuasive it is likely to be. Your affidavits should be as coherent, brief and precise as possible.

Configuration

[34] The configuration of the affidavit must of course conform to the rules. Thus it must conform to r 431 regarding the form of affidavits as well as r 961 regarding layout of filed documents.

[35] Beyond these rules however there is much left to the discretion of the person drafting the affidavit. Think about the layout of the document. Is it pleasing to the eye? Does it flow well? Consider the use of headings and subheadings to better direct the reader through the affidavit's content. Do the sentences seem too long? If so break them down into shorter sentences. Do the paragraphs appear to be too long? If so break them down into shorter paragraphs.

[36] It is a general rule of good writing that paragraphs should only deal with one issue or idea. Short paragraphs transitioning to fresh paragraphs each time a new concept, idea or event is introduced are easy to follow. Lengthy paragraphs containing a diverse mix of information are invariably hard to absorb. They are a barrier to effective communication and, it follows, a barrier to persuasion. Hence the general rule: new topic, new paragraph.

[37] Rule 431(5) reflects that elementary concept:

> "The body of an affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible <u>confined to a distinct portion of the subject</u>". (emphasis added)

[38] There will occasionally be instances where a single but lengthy event is being described. It will be difficult for a reader to grasp the factual progression of the event if its description appears in a single paragraph that is many lines long. There will inevitably have been stages during the event when there were transitions or new developments. Try to identify these stages and use them as triggers for paragraph breaks. It will inevitably make the account easier to comprehend.

Structure and Sequence

[39] Plan the structure of your affidavit. Think about the sequence that will flow most coherently. The easier the document is to understand the more persuasive it will be.

[40] Think about the case from the perspective of the judge's role. The questions in the judge's head from the outset will be "What are the key issues to decide?" and "Where is the information which will help decide those issues?" Sequence and structure the affidavit to steer the judge through those preliminary questions and it will be more likely that the judge will better understand and be more favourably disposed to act upon the factual content of the affidavit.

[41] If there exists a series of legal considerations the judge must engage in, they can usefully guide your structure and be reflected in headings. For example, an affidavit in support of an injunction might structure its content through the use of headings such as "Serious issue to be tried" and "Balance of convenience". From bail applications to family law property disputes, there are lists of standard applicable legal tests or considerations to be applied by the judge. They provide logical lists of headings into which your affidavit might be divided.

[42] Chronological sequence is ordinarily the best sequence in which to structure a factual account of events. If an affidavit adopts a heading structure that prevents the overall affidavit being sequenced chronologically, it still remains useful for information under each heading to be advanced chronologically.

Expression

[43] Use direct speech. Indirect speech creates ambiguity. It makes it difficult to discern whether content is a statement of witnessed fact or is only an opinion.

[44] Word your affidavit in the first person. It is simple to understand and reduces risk of ambiguity. Moreover r 431(3) expressly requires it:

> "An affidavit must be made in the first person." (emphasis added)

[45] Be specific rather than general. Be as precise as possible. Always include contextual detail such as location, time and persons present.

[46] Non-specific language can result in overstatement or understatement of the true position. It is also less persuasive than specific language. For example, saying "Then he just lost the plot" is not as persuasive as "Then he yelled 'I've had it with this', took off his clothes and ran naked out the front door".

[47] Where information is advanced obscurely and details are not included, problems inevitably follow. Your opponent may raise legitimate objections. Your witness may encounter difficulty coping with cross-examination. The judge may misunderstand the evidence you are advancing.

[48] The affidavit is not a pleading. Its manner of expression is not supposed to be like or responsive to a pleading. Assertions in the nature of pleadings should be avoided unless circumstances exceptionally require it. Similarly, the inclusion of responses that read in the style of responses to pleadings or allegations in other affidavits is to be avoided. Simply state the true position as the deponent recalls it.

Exhibits

[49] The exhibiting of documents with an affidavit may often be unavoidable. It ought be appreciated, however, that the greater the number or volume of exhibits the more onerous the task of comprehending the affidavit and its exhibits will be.

[50] In deciding which exhibits you will include you should go beyond asking whether the exhibit is relevant. Consider whether it is necessary to the purpose for which you are filing the affidavit. To take a simple but common example, copious pages of bank account statements are often exhibited to affidavits. Some of the content thereof may be relevant but such documents are often inessential. If an exhibit is unnecessary then do not make the judge's task of understanding your materials more demanding by including it.

[51] If you want to rely on content in a particularly lengthy potential exhibit consider whether it is necessary to exhibit the entirety of the document. If only a few pages of a very long document are relevant and if they are comprehensible without the need for the entirety of the document then give consideration to merely exhibiting those few pages. If you take that course you need only ensure that your affidavit explains the pages are an extract from a broader document and that you have disclosed that document to your opponent.

[52] There are competing considerations about the extent to which the written part of your affidavit may refer to the content of the document it exhibits. In the body of an affidavit a deponent proves and identifies documents being exhibited with the affidavit. Unfortunately this sometimes involves no reference to the general nature of the documents so that the affidavit is incomprehensible without great inconvenience and delay in the reader going back and forth between exhibits and the paragraphs of the affidavit. As against this the evidentiary principle is that the document is the evidence and it must speak for itself without inadmissible irrelevant commentary on the part of the deponent as to what the document says. These considerations are not irreconcilable.

[53] Consider for example:

> "On 1 September 2013 the managing director of the defendant company handed me a letter. Exhibit JDH1 to this affidavit is a true copy of that letter."

[54] Compare that with:

> "On 1 September 2013 the managing director of the defendant company handed me a letter addressed to me headed "Notice of termination of your employment". Exhibit JDH1 to this affidavit is a true copy of that letter." (emphasis added)

[55] The problem with the former set of words is that it is meaningless without the reader being put to the trouble of going immediately to the exhibit to find out what the letter was about. The latter, more informative form of words, identifies the apparent significance of the letter without the need for the judge to interrupt reading the narrative. It is difficult to imagine objection being made to the inclusion of the deponent's brief reference to the letter's content, particularly given the letter is exhibited. However, such an objection could readily be met with the submission that the inclusion is only relied on for the purposes of identifying the apparent nature of the document that the managing director

handed to the witness, and that it is the exhibited document which is relied on to prove the letter's content.

Relevant and admissible content only

[56] Affidavits should only contain relevant and admissible evidence. The presence of irrelevant or other inadmissible material will only damage the persuasive value of the affidavit to your case.

Admissible

[57] This is not the occasion to revisit all the evidentiary rules of admissibility but it is useful to warn of an area of particular difficulty about opinion evidence. Lay witnesses tend to drift into giving inadmissible opinion evidence by injecting interpretation into their observations. Sometimes the distinction between interpretative opinion and admissible evidence is a fine one. Compare for example:

(a) "He was angry."
(b) "He looked angry."
(c) "He looked angry because his eyebrows were low, his teeth were clenched, his face was red."

[58] Minds (and some evidence statutes) may differ as to the admissibility of each of these examples but clearly (c) is the less controversial because it imports the evidentiary foundation for the witness' conclusion that the man looked angry. When a deponent tells you something that appears to involve an element of opinion, you should ask questions like, "What did you see or hear to make you think that." Try to identify and include the facts that founded or prompted the deponent's inference or interpretive conclusion. By so doing you will not only avoid admissibility problems, you will give rise to a more persuasive affidavit.

[59] Another miscellaneous difficulty arising with admissibility is the inclusion of submissions. Other than in exceptional circumstances submissions have no place in an affidavit. Nor do personal attacks or commentary calculated at discrediting an opponent. They are inadmissible. Moreover, their inherent partiality diminishes the persuasiveness of the affidavit.

Relevant

[60] As to relevance, the purpose for which the affidavit is being filed will determine what should be included in it. Ask yourself what it is you are trying to achieve. What orders or outcomes are you seeking? Constantly hark back to your purpose in assessing what evidence you require and what evidence is relevant.

[61] Do not overlook your opponent's likely evidence. Not all relevant evidence led by your opponent will be favourable to your case. Think about what that evidence is likely to be and you will be less likely to overlook evidence that tends to diminish or qualify the force of the evidence likely to be led by your opponent.

[62] If you already have the benefit of your opponent's affidavits you should have regard to them in considering what evidence is relevant to include in your deponent's affidavits.

[63] When your deponent's account is at odds with an account advanced by an opposing deponent, the relevant evidence to include in your deponent's affidavit is your deponent's account of the true facts. Unfortunately, deponents sometimes assert in their affidavits that they disagree with the content of another affidavit. Their evidence of agreement is irrelevant other than in exceptional circumstances, for instance where affidavits are substituting pleadings. What matters is your deponent's account of the evidence, not your deponent's irrelevant assertion that he or she disagrees with someone else's account.

[64] In a similar vein it is usually irrelevant for a deponent to assert, as sometimes happens, that the content of the affidavit of another deponent is true. Such an assertion is not evidence of what your deponent remembers and it is therefore not supportive or corroborative of anything. Your deponent's account will only have that quality if the deponent actually recounts the deponent's own recollection of events. If that recollection happens to accord with the account of another deponent then that will be self evident.

[65] Take care, however, to avoid the cutting and pasting of slabs of one deponent's account into the affidavit of another deponent who happens to give a similar account. Where the judge sees that accounts are identically written it will be obvious that such cutting and pasting has happened. The corroborative or supportive value of the accounts will be diminished.

[66] Rule 432(4) contemplates that an affidavit might be made by two or more persons. The persuasive force of the joint account of two witnesses is weak because of their collaboration and the cross-contamination of memory that may cause. Joint affidavits ought be reserved for those instances where a coincidence of account is of no moment because the affidavit is directed at proving a mere formality.

[67] As to exhibits, the inclusion of a significant volume of exhibits, or of exhibits that are of only borderline relevance inevitably detracts from the reader's ease of understanding of the affidavit. You should therefore only include exhibits that are essential to the purpose for which you are filing the affidavit. If it transpires that an unexhibited document does become important in the course of a proceeding it can always be exhibited through a further affidavit or tendered as an exhibit. Judges will generally be tolerant of such belated advancing of evidence when they hear an excuse like, "We were conscious of not weighing your Honour down with too many exhibits in the affidavit material".

[68] Take care in omitting evidence you know to be relevant but which you believe the parties have reached common ground about. Unless that common ground is recorded in writing between the parties and the court is to be informed of it, there is obviously a risk the court may misinterpret the significance of the absence of reference to a factual topic in an affidavit. When in doubt, the safer course is to include the evidence or expressly note the topic will not be dealt with in the affidavit.

What purpose will its use serve?

[69] It will be apparent from what I have said that the purpose for which you intend to use the affidavit informs the nature of the content you include in it. In drafting the affidavit you

should be asking, "What is my aim? What do I want to use it to persuade my opponent to do? What do I want to use it to persuade the judge to do?"

[70] Such questioning does not cease upon completion of drafting. You should continue to consider whether you should actually file the affidavit in the proceeding. The question of what you want to use the affidavit to persuade the judge to do remains a live question even after you file and serve the affidavit. Remember, the affidavit will not be acted upon as evidence in an application until a party "reads" it before the judge. Hence the importance at the outset of an application in saying "I read document 1, the application filed 4 February 2015, document 2, the affidavit of … etc" (or alternatively "I read the materials listed in part 1 of my outline of submissions").

[71] In some instances the most effective use you might make of an affidavit is not to use it at all. For instance, you may conclude the affidavit of a particular deponent is likely to be regarded as unreliable. Or you may conclude there is no longer any legal purpose in using the affidavit. Relying on purposeless affidavits will annoy the judge and detract from the persuasiveness of your other evidence. Remember your audience.

[72] The Family Court has long used affidavits instead of evidence in chief in trials. The practice has become increasingly common in the Supreme Court's civil jurisdiction although it remains the exception rather the rule. Practitioners in civil trials considering seeking directions for evidence in chief to be given by affidavit should give serious consideration to whether that course is more likely to persuade the court towards a favourable outcome. The following observations of Callinan J in *Concrete Pty Ltd v Parramatta Design* (2006) 229 CLR 577, 635 reflect sentiments shared by many judges:

> "The justifications for the provision of written statements in advance of trial have been thought to be the avoidance of surprise and the shortening of hearing time. These advantages will often be more illusory than real. The provision of written statements by one side will afford to the other an opportunity to rehearse in some detail his or her response. It is also impossible to avoid the suspicion that statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, rather than of the unassisted recollection and expression of them and their witnesses. This goes some way to explaining the quite stilted and artificial language in which some of the evidence is expressed in writing from time to time, as it was here. Viva voce evidence retains a spontaneity and genuineness often lacking in pre-prepared written material. It is also open to question whether written statements in advance do truly save time and expense, even of the trial itself. Instead of hearing and analysing the evidence in chief as it is given, the trial judge has to read it in advance, and then has the task of listening to the cross-examination on it, and later, of attempting to integrate the written statements, any additional evidence given orally in chief, and the evidence given in cross-examination."

[73] To those observations I add that evidence in chief by affidavit surrenders a significant opportunity for your witness to become used to answering questions in the court room under "friendly fire" before being cross-examined. It also surrenders the opportunity prior to cross-examination for the trial judge to develop an impression of the witness and

a gradual understanding of the account of the witness as it unfolds in real time in court rather being pressed to first read and absorb a documentary account in chambers, often under pressure of knowing the parties are waiting to start in court.

Do not assume the judge has grasped the detail of your affidavits

[74] Whether you are relying on affidavits at a trial or in an application remember the judge will be unlikely to have grasped the detail of your affidavits to the same extent you have in your preparation. The judge may have had insufficient time to peruse the affidavits. The affidavits may have been filed late. The file may have been delivered to the judge late. The judge may have been interrupted by other work. The judge may have delayed reading, anticipating the matter would resolve. The affidavit might only be filed with leave at the outset of the day's hearing.

[75] Even if none of these difficulties have arisen there remains the reality that most judges will be unlikely to read an affidavit more than once before the proceeding starts. A single reading will seldom confer the command of materials the judge will eventually need to decide the case. That reality informs how you should use affidavits in court.

[76] Instead of charging straight into submissions that assume the judge has read, understood and remembered the content of your affidavits, you should use them in a way that will assist the judge towards a favourable grasp of your affidavits. In an application, this might be achieved by reference to your affidavits in your written outline but remember, as with affidavits, it is unlikely the judge will have read your written outline more than once before oral submissions ensue.

Plan to take the judge through the affidavit evidence

[77] It follows you should plan how you intend to use the affidavits when addressing the judge.

[78] It is helpful to use the affidavits as if you were opening your evidence, regardless of whether you are using affidavits in an application or as your evidence in chief at trial. An effective opening does not proceed in summary form through what each witness is likely to say. An effective opening integrates the key evidentiary information of all witnesses into a narrative style, using appropriate reference to the critical legal elements of the case.

[79] So, identify what the most critical parts of your affidavits and their exhibits are. Think about the purpose of each affidavit and its most important elements. Focus on the pivotal content, the passages in affidavits and parts of exhibits that in combination tell the key features of your case's story and establish the key legal elements of your case.

[80] Your plan should identify the actual passages of affidavits and their exhibits that you wish to physically take the judge to, inviting the judge to turn up the court file, isolate the affidavit and the portion of it you want to refer to. Using the framework of an opening style analysis of the case will allow you to identify the sequence in which you plan to refer to those passages, along with what you might say to weave those references into a coherent overview of your case.

[81] Be selective about the passages you refer to. Every time the judge has to take time to physically locate an affidavit and a passage within it there will inevitably be an interruption to the flow of your submission, particularly if the affidavit material is logistically difficult to navigate. Bear in mind you can summarise the effect of much of the affidavit content in the case without requiring the judge to turn it up.

[82] Choose the most forensically critical passages. The forensically critical passages will generally be those which are essential to proof of the elements in dispute - the passages the judge would almost certainly need to refer to and understand in order to arrive at and give reasons for a decision in your favour.

[83] Remember, if the judge is to give reasons in your favour, the judge's reasons will have to explain why your opponent's arguments must fail. The forensically critical passages might not all be in your side's affidavits.

[84] You should plan to use the most forensically persuasive of your selected passages early in your sequence of references. There are two reasons why. Firstly, the judge's attention will be at its peak at the outset, so the sooner you highlight your best evidence the better. Secondly, the judge may interrupt during your opening or submissions and this may trigger a change in sequence or the extent to which you take the judge to the affidavits. It is best you refer to the most important passages early to ensure the judge is at least aware of them before the inevitable changes in plan which occur in response to questions from the judge.

Study the content of the affidavits

[85] Beyond planning how you will refer the judge to the affidavits in the course of your opening submissions, it is vital you are intimately familiar with the content of your affidavits and that of your opponents. Unlike the judge, it is to be expected you will have read and re-read the affidavit materials so you are well aware of where the evidence in them may be found.

[86] Mark up your own copies of the affidavits with tabs and highlighting and marginal notes so you can readily turn up where evidence on a particular point is to be found. Consider noting in your plan or elsewhere the reference locations of evidence on particular issues. Remember, you might only plan to take the judge to a single passage on a particular issue but if the judge shows unexpected interest, it will be useful to have a ready reference to other related passages you can also take the judge to.

Be flexible in your planned references to affidavits

[87] Be flexible in using your planned references to passages in affidavits once your submissions are underway.

[88] The sequence in which you refer to them and the extent to which you refer to them should take account of the response you are getting from the judge.

[89] It may become apparent the judge has a better grasp of the materials than you expected. If so, pare back the number of passages you plan to take the judge to; remove the less critical. It may become apparent the judge is favourable to a particular aspect of your case. If so, cull the further references you intended to make about that aspect.

[90] It may be the judge asks where evidence on an issue can be found before you have planned to take the judge to the relevant passage. If so, consider interrupting your planned sequence and turning to that passage forthwith. Generally speaking it is best to respond to a judge's questions immediately.

[91] Do not panic if the planned sequence or extent of your references to passages in affidavits is varied in the course of your dialogue with the judge. If you are intimately familiar with your materials you have nothing to fear from engaging with the judge rather than sticking rigidly to your plan. You will be able to take time before finishing your submissions to double check what you had planned to cover and assure yourself you have not overlooked something fundamental in an affidavit before concluding.

Articulate proper references to the materials

[92] If in your oral submissions you refer the judge to an affidavit, make sure you identify it properly to the judge.

[93] Court files will often have many documents (not all of which will be affidavits) accumulated within them by the time you are making your submissions. Merely asking the judge to turn up the affidavit of Luke Shaw will be of no assistance to the judge in turning up a court file of 20 or more documents unless, of course, you deliberately wish to antagonise the judge by compelling the judge to wade through all of those documents, hoping to stumble upon the affidavit of which you speak. Murphy's Law provides that when that occurs there will almost certainly be three affidavits by Luke Shaw and you will anger the judge even more by not identifying which of the three you meant to have the judge turn up.

[94] The latter difficulty can of course be avoided by identifying not only the name of the deponent but the filing date of the affidavit. The filing date is generally more useful than the swearing date in that the filing date is at least endorsed on the first page of an affidavit. However it is infinitely more preferable that you identify the court file number of the affidavit to which you are taking the judge. The number of filed documents in the court file appears in the document list available on line to parties by searching eCourts. Citing the document number given to the affidavit on the court file will enable the judge to leaf quickly through the chronologically numbered documents in the court file to isolate the numbered document to which you refer.

[95] In a similar vein, once you are confident the judge has isolated the affidavit in question, ensure you actually identify the paragraph of the affidavit to which you are taking the judge.

[96] The sequence of the information you give the judge should mimic the sequence of information the judge needs to find the passage. Thus you would <u>not</u> say, "Would your Honour turn up paragraph 15 at page 3 of the affidavit of Luke Shaw which is court file document 19." Start with the document number, then descend to more details about where in that document the information is located. Remember your audience.

[97] When you are referring the judge to an exhibit to the affidavit think about how the exhibits have been laid out. How do the exhibits present to your audience? How can you

help your audience locate the particular exhibit you are referring to? If each of the exhibits has been tabbed with a number then your task is at its most simple, you need only ask the judge to turn to exhibit tab 5, for example.

[98] If there are no tabs, the mere reference to the exhibit number is unlikely to speed up the process. Sure, there may be an index identifying the nature of the exhibits and their exhibit number, along with a page number at which they can be found. But will the index be easily found? Almost certainly not. The probability is that it will be buried at the end of 15 pages of the written part of the affidavit, prior to another 30 pages of exhibits. Why force the judge to have to ferret out the exhibit page in order to then locate the page number for the exhibit when you can simply tell the judge the page number to turn to? Remember your audience.

[99] Sometimes you will inherit a case in which the filed affidavits have not laid out the exhibited material in an easily accessed manner. For example, the pages of the exhibits may not have been numbered. Consider when preparing for court whether the judge will appreciate being provided with a photocopy of such affidavits with the exhibits properly paginated and preferably tabbed. It may well be the judge has already been annoyed in trying to read the difficult to access material before coming into court but that annoyance may at least be dissipated by the provision of a properly marked copy. It might be avoided entirely all together if a properly marked up copy is provided well in advance to the judge's associate.

Observe the judge

[100] When you refer the judge to an affidavit watch the judge to make sure the judge is keeping up.

[101] If the judge is still visibly turning through the pages in front of him then, if you are watching the judge, you will realise the judge is yet to arrive at the page to which you are referring. Further, if you observe the judge you may notice that eventually the judge stops turning pages and appears to start reading. If so, why interrupt the judge? Pause and wait until the judge looks up. That is your signal that the judge has isolated the passage you want to take the judge to and is ready to hear what you want to say about it.

[102] Similarly when you are moving on from a passage, keep watching the judge. If the judge appears to be making a note, pause. Let the judge concentrate on making that note without interruption.

[103] It might be thought the notion of observing the judge is so obviously important that it does not need to be stressed. Yet some advocates become so caught up in their rush to get their case off their chests that they ignore the very audience they are hoping to persuade.

Only take essential objections

[104] Irrelevant or otherwise inadmissible content in an affidavit is objectionable. However, the mere fact that such objectionable content is contained in an affidavit of your opponent does not mean you should object in court. Consider the forensic and persuasive value of the material if it remains in evidence. Does it really help your opponent's case anyway? Is it inconsequential? Remember on a busy applications day that a string of objections

taken at the outset of the proceeding is unlikely to be greeted with enthusiasm by your judge. If there is no forensic advantage in taking an objection then why bother taking it?

[105] If it is important that an objection is taken, consider whether it is truly necessary for the judge to determine your objection at the outset. Unless the point is a particularly simple one the judge will likely be uncomfortable in determining it until the judge has absorbed more of what the case is about. Unless it is vital that a ruling be made immediately it may be preferable merely to state your objection without the supporting argument and indicate you are content to postpone argument or the need for a ruling until later.

[106] You might conveniently speed up that distracting process even more by simply tendering a written list of your objections. By the end of argument the importance of most objections identified at the outset of proceedings will often have faded, along with the need for you to bother pursuing them further.

[107] If you do intend to object in court to the content of your opponent's affidavit then you should, as a matter of courtesy, alert your opponent of your intentions in advance. Beyond courtesy there may be real forensic advantage in putting your opponent on notice. There is every prospect that by discussion with your opponent a concession will be forthcoming. Your opponent may agree to indicate at the outset of the proceeding that certain content which is objected to is not sought to be relied upon.

When the deponent is called as a witness

[108] The potential uses to which affidavits might be put in the examination or cross-examination of a witness are so varied and broad that I will tonight only make some brief observations on the topic.

[109] In the event that your deponent is to be called by you as a witness, whether because required for cross-examination in relation to an application, or because you are proceeding in a trial with evidence in chief by affidavit, you should ensure your deponent has refreshed his or her memory from the affidavit before giving evidence. Do not assume your deponent has done so or indeed still has possession of a copy of the affidavit. Ensure the deponent has a copy of the affidavit and has recently familiarised himself or herself with the content of it.

[110] When the deponent is called it will seldom be strictly necessary to produce the witness's affidavit to the witness in the witness box and ask whether it is the affidavit of the witness and is true and correct. Ordinarily the affidavit will already be a matter of record on the court file. If the matter is proceeding as a trial, it may already have been tendered and admitted as an exhibit without the need for the witness to identify it. Nonetheless, there is a forensic advantage in putting the witness's affidavit before the witness in evidence in chief. Once you sit down your opponent will be cross-examining the witness about the content of that affidavit. If you opponent asks your witness a question about what was said in the affidavit and the affidavit is still there in front of the witness in the witness box the prospect is the witness will turn to the relevant passage of the affidavit and thus be less likely to be confused or err in recollection.

[111] Your opponent is entitled to ask the witness to put the affidavit to one side and proceed to ask questions. However, if in the course of cross-examination the witness is asked

questions about the content of his or her affidavit, consider whether you should object or at least submit that the question can be more fairly dealt with by the witness if the relevant passage of the affidavit is placed before the witness. Advocates are generally cautious about the judge's impression of their fair dealing with the witness. A prompt of this kind, even if not advanced in a strict sense as an objection, is usually unlikely to encounter significant resistance.

[112] A final miscellaneous tip: when you are cross-examining one of your deponent's witnesses, you are entitled to cross-examine that witness about a prior inconsistent statement in an affidavit of the witness, regardless of whether or not it has been read, tendered or even filed in the proceedings. If it is relevant to bring out a prior inconsistent statement of this kind, unless some statutory provision precludes reference to the affidavit, it matters not whether your deponent has sought to advance that affidavit in the proceeding.

Conclusion

[113] In preparing this evening's session I drew upon my own experience as an advocate and now as a judge. I was also aided by reference to a number of articles I have listed for you as "Further Reading". The assistance I drew from them was predominantly the reassurance that issues relating to the drafting and use of affidavits commonly encountered by me are apparently encountered time and time again by others.

[114] Justice Sedley commented of his Laws of Documents that they have had no effect whatever. I am not quite so pessimistic about this endeavour. I am not sure by what test the impact of this session can be measured. However, I assure you beyond my judicial mask of objectivity I will be happy on the inside when there is any sign in your affidavits or your use of them, that you remember your audience.

Further Reading

Bryson, J, 'How to Draft an Affidavit' (1985) 1 *The Australian Bar Review* 250

Young, P W, Practical Evidence – Affidavits – Part I (1992) 66 *The Australian Law Journal* 163

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Downes, Kylie, 'Back to Basics – Drawing an Affidavit' (2000) 20(5) *Proctor* 20

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Emmett, Arthur R, 'Practical Litigation in the Federal Court of Australia – Affidavits' (2000) 20 *The Australian Bar Rev* 28

Venus, Paul, 'Five Tips for Drafting Better Affidavits and Statements' (2002) 40(8) *Law Society Journal* 60

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Downes, Kylie, 'Formal Requirements for Affidavits' (2004) 24(9) *Proctor* 25

Downes, Kylie 'Affidavit Angst and How to Avoid It – Practical Tips for Preparation' (2012) 32(8) *Proctor* 34

Rose, William, 'To tell you the truth… witness statements and the odd affidavit' in Eastman(ed), *Pleadings Without Tears* (Oxford, 8th ed, 2012)

Roberston, Justice Alan, 'Affidavit Evidence' (Paper presented at the 2014 College of Law Judicial Series, 26 February 2014)

Supreme Court Cairns
Practice Notice
3 June 2014

Re: Exhibits to Affidavits in Applications

The need for timely decision making by the court is particularly acute in the applications jurisdiction. Affidavits exhibiting materials amongst which documents referred to in submissions cannot be promptly found frustrate the timely disposition of applications. Such affidavits breach the requirement of r 435 of the *Uniform Civil Procedure Rules* that documents exhibited to affidavits are presented in a way that will facilitate the court's efficient and expeditious reference to them.

Rule 435

Before filing affidavits containing exhibits practitioners should ensure they comply with *Uniform Civil Procedure* r 435, which relevantly provides:

> "**435 Exhibits**
> (1) A document to be used with and mentioned in an affidavit is an exhibit. …
> (3) A group of different documents may form 1 exhibit. …
> (5) An exhibit to an affidavit must have—
> (a) a letter, number or other identifying mark on it; and
> (b) a certificate in the approved form on it or bound with it. …
> (9) Subrules (10) and (11) apply if—
> (a) an exhibit to an affidavit is comprised of a group of documents; or
> (b) there is more than one documentary exhibit to an affidavit.
> (10) The documents are to be presented in a way that will facilitate the court's efficient and expeditious reference to them.
> (11) As far as practicable—
> (a) the documents are to be bound in 1 or more paginated books; and
> (b) a certificate is to be bound—
> (i) if there is 1 book—at the front of the book; or
> (ii) if there is more than 1 book—at the front of each book dealing with the exhibits in the book; and
> (c) an index to each book is to be bound immediately after the certificate.
> (12) If a document or other thing has been filed in a proceeding, whether or not as an exhibit to an affidavit, in a subsequent affidavit filed in the proceeding—
> (a) the document or thing must not be made an exhibit to the affidavit; and

(b) the document or thing may be referred to in the affidavit in a way sufficient to enable the document or thing to be identified."

Bind, Paginate and Index Exhibits

Rule 435(11) requires where an exhibit is a group of documents or where there is more than one exhibit that, "as far as practicable", the exhibits must be bound, paginated and indexed. The circumstances under which it will not be practicable to comply with this rule are likely to be rare. To remove doubt, the fact a deponent is exhibiting voluminous exhibits may make it more demanding to comply with this rule but it does not make it impracticable to do so. Moreover the more voluminous the exhibits the heavier the onus is on the filing party to assist the court by ensuring that the exhibits are presented in a way that will facilitate the court's efficient and expeditious reference to them.

In those rare cases where r 435(11) cannot practicably be complied with the facilitative obligation upon practitioners pursuant to r 435(10) means practitioners should adopt some alternative means of allowing the court to refer efficiently and expeditiously to the exhibits. For instance tabbing each exhibit with its exhibit number allows the court to be readily taken to the exhibit in the course of submissions. That practice is so helpful to the presiding Judge that I encourage practitioners to adopt it in any event.

Avoid Duplication of Exhibits

The effect of r 435(12) is that if a document has already been exhibited in another affidavit filed in the proceedings it should not be further exhibited by other deponents. The obvious purpose of this rule is to avoid burdening the court with the obligation to read multiple copies of the same document.

The same reasoning renders it undesirable that multiple copies of the same document are exhibited to the one affidavit. An increasingly common context in which this occurs is the exhibiting through multiple exhibits, of the same steadily increasing email trail. Where the juxtaposition of several emails within an email trail has evidentiary importance then it is likely to assist the court's efficient and expeditious reference to them if they are contained in the one exhibit as an email trail. However if the trail beneath an email which a party seeks to exhibit is of no relevance then the trail should not be included.

Single Certificate for Multiple Exhibits

Note that the approved form of the exhibit certificate, form 47, allows for multiple exhibits to be certified on the same form, making it unnecessary to generate multiple individual certificates where there are multiple exhibits.

Conclusion

I encourage practitioners to comply more closely with r 435 and its aspiration that documents should be exhibited in a way that facilitates the court efficient and expeditious reference to them.

Henry J
Far Northern Judge