

Drafting Persuasive Affidavits

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Format

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What is an Affidavit?

Lat – he or she has sworn; he or she has made an oath

A written statement, made by a person who has sworn or affirmed, before a person authorised to administer the oath, that the contents of the statement are true, which may be used to support certain legal applications or as a substitute for oral testimony in court proceedings. (Encyclopaedic Australian Legal Dictionary)

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Statutory Declaration vs Affidavit?

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Substance – before you start drafting ...

Parties

Deponent

Audience

Purpose –

- What do you seek?
- Interlocutory? Final?
- Consistency with case theory
- Test? For example, summary judgment – “no real prospect of success”

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Substance

Facts within the deponent’s own knowledge

- Exception, an affidavit may contain statements of fact based upon information and belief on an interlocutory application, if the grounds of the belief and source of the information are stated

Do not plead (e.g. “I don’t admit.”)

Avoid submissions

Structure? Chronological

Exhibits

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Procedural requirements

SCV: 043 *Supreme Court (General Civil Procedure) Rules 2015* (Vic)

CCV: 043 *County Court Civil Procedure Rules 2018* (Vic)

MCV: 043 *Magistrates' Court General Civil Procedure Rules 2010* (Vic)

VCAT: no specific rules in the *VCAT Rules 2018* (Vic); use instead the SCV Rules

FC: Part 29, rr 29.01-29.09 *Federal Court Rules 2011* (Cth)

Family Court: Part 15.2, rr 15.05-15.15 *Family Law Rules 2004* (Cth)

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Procedural requirements

SCV, CCV and MCV similar

1st person

Residence (professional or personal)

Capacity

Consecutively numbered paragraphs

Paragraph – confined to a specific subject

Every page signed by deponent and witness (unless person is illiterate or blind)

Jurat completed, signed by deponent and witness

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Procedural requirements

Witness – legibly, write type or stamp below the person's signature in the jurat:

- their name
- address, and
- their capacity to take the affidavit

Should be: "confined to facts which the deponent is able to state of the deponent's own knowledge" – r 43.04(1)

However, in an interlocutory application – may contain a statement of fact based on information and belief; adduce evidence of source: s 75, EA; set out grounds: r 43.03(2)

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Procedural requirements

Annexures and exhibits – r 43.06

Document referred to in an affidavit shall not be annexed to the affidavit but may be referred to as an exhibit

Exhibit to an affidavit should be identified by a separate certificate annexed to it

Certificate should:

- Bear the same heading
- Signed by the deponent
- Signed by the witness
- Form 43A
- Bottom right hand corner – bold type, font 20 points, distinguishing mark of the exhibit (e.g. "MA-1") and a brief and specific description of the exhibit

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Procedural requirements

Irregularity – “of form” – CT has discretion to allow an affidavit to be used in evidence notwithstanding irregularity

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Evidence – Relevance

Relevant? If so, presumption = it's in: s 56 of the EA

Unless it is objectionable for some other reason

Opinion – conclusions

Hearsay evidence – communications/conversations

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Evidence – Opinion

Opinion – “saw, heard or otherwise perceived about a matter or event”

For example –

“I was the primary caregiver”

“He was angry”

“I looked after the children, on my own, between the hours of 7 am to 7 pm, Monday to Thursday. I looked after the children from 7.00 am to 7.00 pm on Sundays.”

“His face was red. He stood up and threw the books across the room.”

Put the facts forward and let the CT draw the conclusion

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Hearsay

Previous representation used to prove the existence of a fact

Admissible in an interlocutory context if you adduce the source

- Approach with caution
- If you have time, take the affidavit from the source – reliability and persuasiveness enhanced

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Conversations: *Hamilton-Smith v George* [2006] FCA 1551 – Besanko J [79]

“In theory, evidence of a conversation may be given in any one of three forms, namely, by recounting the actual words used by the parties to the conversation, or by recounting the substance or effect of what was said, or by recounting the witness’s conclusions as to the effect of the conversation. At common law, evidence of the conversation given in the first form is admissible and evidence of the conversation given in the third form is not. At common law, evidence in the second form is routinely admitted. Often a witness will be asked if he or she can remember the actual words used and if (as is often the case) they are not able to, they are invited to recount the conversation in terms of the substance or effect of what was said. When I use the word ‘effect’ here, I mean the effect of what was said, not the witness’s mere conclusions or impressions of the conversation.”

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Hamilton-Smith v George [2006] FCA 1551 – Besanko J [83]

"In my opinion, there is a rule of practice at common law that requires a witness to recount the actual words used in a conversation if he or she is able to do that ... If the witness is unable to recall the actual words used, he or she can give evidence of the substance or effect of what was said. A witness might say he or she cannot remember the actual words used. I think that as a matter of practice it is also open to the Court to infer that that is the case."

- Lapse in time between the conversation and the swearing of the affidavit
- Length and complexity of the conversation

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Conversations

Deponent recounts actual words used – direct speech: admissible

Deponent recounts the substance and effect of what was said – routinely admissible

Deponent recounts their conclusions of the effect of the conversation or a summary of the conversations – inadmissible

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Conversations

Avoid summaries of a conversation

E.g. "I spoke to Gerald about the money and we decided that it would be best if I transferred it to Thomas and Gerald said he would send me half of what he owed me."

Direct speech is preferable (but not always possible)

I said: "Gerald, we owe Thomas \$10,000. I have \$10,000 and I am going to transfer it to Thomas."

He said: "Yes. That's fine. I will arrange to transfer \$5,000 to you."

Note – your object is to persuade.

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Conversations

Avoid:

- “she explained”
- “we discussed”
- “it was confirmed”
- “we agreed”

Evidence may still be excluded under s 135, EA:
discretionary rejection

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Taking an affidavit

Oaths and Affirmations Act 2018 (Vic), s 25

Deponent in front of an authorised witness:

- sign or initial any alteration to the affidavit
- sign each page of the affidavit
- sign the affidavit (jurat)
- if the affidavit refers to a document, sign a certificate attached to the document identifying the document as an exhibit to the affidavit;
- take the oath or make the affirmation in accordance with Part 2 of the Act:
 - s 8, form of oaths/affirmations;
 - s 9, oath or affirmation must be said aloud
- must swear or affirm the affidavit by saying the prescribed oath or affirmation aloud in the presence of the authorised witness, unless the deponent has a disability that prevents them from doing so

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Taking an affidavit

Oaths and Affirmations Act 2018 (Vic), s 26

- sign or initial any alteration to the affidavit
- sign each page of the affidavit
- administer the oath or affirmation to the deponent in accordance with Part 2 of the Act;
- comply with s 27 (requirements in the jurat)
- if the affidavit refers to a document, the authorised witness must attach a certificate to the document identifying the document as an exhibit to the affidavit and sign and date the certificate; and write, type or stamp below the affidavit taker's signature on the certificate the details referred to in s 27(1)(c)
- must ensure the affidavit is dated

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Taking an affidavit

Illiterate, blind or cognitively impaired person – authorised witness must certify in or below the jurat that the affidavit was read to the deponent by the authorised witness: s 28(1)

Failure to comply with s 28(1) – evidence must not be used unless, the CT is satisfied that that the affidavit was read to the deponent: s 28(2)

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Taking an affidavit

Minor non-compliance will not affect the validity of the affidavit: s 29; nor will irregularity of "form"

DPP v Marjancevic [2011] VSCA 355

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Drafting tips

Headings – SCV, CCV, MCV, FCC etc
• Which list? Managing judge

Tram tracks

Consecutive numbering

1st person, deponent, capacity

1 theme per paragraph

Chronological evidence, headings, sub headings

- Questions are powerful
- E.g. injunction – prima facie case? Balance of convenience? Damages inadequate?

Use the words of the deponent:

- authenticity
- survive cross examination

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Drafting tips

Page numbering

Abbreviations are acceptable but make sure they are consistent throughout

Defined terms

Not submissions or pleadings

Opinion, hearsay and conversations

- Avoid conclusions – put the facts forward
- Go to the source
- Direct speech is preferable

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Drafting tips

Don't shy away from including facts which are unhelpful to your case

Brief and easy to understand

General vs specific

- Location; time; date; who was present?

Exhibits:

- Relevant?
- Is it necessary for what you are seeking to achieve?
- Consider only using extracts from a lengthy document
- Make sure the numbers in the affidavit are consistent with the exhibit certificate
- Is the description in the certificate helpful?

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Drafting tips

Exhibits – avoid causing the reader the inconvenience of flipping from the affidavit to the exhibit to see what the exhibit actually is.

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."

Contrast:

"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."

(Henry J. *The Affidavit as a tool of persuasion: Drafting an effective affidavit and using an affidavit effectively*, Paper delivered at the Cairns Judiciary CPD Series 4 February 2015)

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Drafting tips

Avoid affidavits where the deponent adopts the language of another witness

Avoid inflammatory, emotive and argumentative language – irrelevant and inadmissible and will distract the reader

Meet with the deponent – face to face is best

Give the witness time to read the draft

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Final remarks

Cross examination

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Civil Procedure Act 2010 (Vic)

Overarching purpose – s 7

- Just, efficient, timely, costs effective resolution of the real issues in dispute

Overarching obligations are engaged – ss 16-26

- Paramount duty to further the administration of justice – s 16
- Costs reasonable and proportionate – s 24
- Take steps to narrow issues in dispute – s 23
- Minimise delay – s 25

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