

Bar Course – May 2022

Affidavits and Witness Statements

(Outline of seminar conducted on 04 May 2022)

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What is an affidavit and what is a witness statement? Key points:

- *Both are written statements of evidence by a witness*
- *An affidavit is sworn or affirmed – see also COVID provisions*
- *A witness statement is signed (but see Rule 31.4(3) UCPR)*
- *An affidavit is read (sometimes tendered)*
- *A witness statement is tendered*
- *Affidavits are sometimes filed*
- *Witness statements are not filed*
- *An affidavit can be used (in certain circumstances) even if the deponent is not available*
- *Witness statement is produced – witness does not give evidence – WS can only be put into evidence with the leave of the court (Rule 31.4 UCPR)*

AFFIDAVIT OF [NAME] [DATE]

COURT DETAILS

Court

#Division

#List

Registry

Case number

TITLE OF PROCEEDINGS

[First] plaintiff [name]

#Second plaintiff #Number of
plaintiffs (if more than two)

[First] defendant [name]

#Second defendant #Number of
defendants (if more than two)

FILING DETAILS

Filed for [name] [role of party eg plaintiff]

#Filed in relation to [eg plaintiff's claim, (number) cross-claim]
[include only if form to be eFiled]

#Legal representative [solicitor on record] [firm]

#Legal representative reference [reference number]

Contact name and telephone [name] [telephone]

Contact email [email address]

[on separate page]

AFFIDAVIT

Name

Address

Occupation

Date

I [#say on oath #affirm]:

1 #I am [role of deponent].

2 [state information to be included in the affidavit in numbered paragraphs].

#SWORN #AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner
for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
#I have confirmed the deponent's identity using the following identification document:

Identification document relied on (may be original or certified copy)[†]

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[[†] "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see [Oaths Regulation 2011](#) or refer to the guidelines in the NSW Department of Attorney General and Justice's "[Justices of the Peace Handbook](#)" section 2.3 "Witnessing an affidavit" at the following address: <http://www.jp.nsw.gov.au/Documents/jp%20handbook%202014.pdf>]

WITNESS STATEMENT OF [NAME] [DATE]

COURT DETAILS

Court
#Division
#List
Registry
Case number

TITLE OF PROCEEDINGS

[First] plaintiff **[name]**
#Second plaintiff #Number of
plaintiffs (if more than two)

[First] defendant **[name]**
#Second defendant #Number of
defendants (if more than two)

FILING DETAILS

Filed for **[name]** [role of party eg plaintiff]
#Filed in relation to **[eg plaintiff's claim, (number) cross-claim]**
[include only if form to be eFiled]
#Legal representative **[solicitor on record] [firm]**
#Legal representative reference **[reference number]**
Contact name and telephone **[name] [telephone]**
Contact email **[email address]**

[on separate page]

WITNESS STATEMENT

Name
Address
Occupation
Date
I state:

- 1 #I am [role of witness].
- 2 [state information to be included in the witness statement in numbered paragraphs].

Signature of witness _____

Uniform Civil Procedure Rules 2005 (NSW) – Part 35 – Affidavits

UCPR	Notes
Rule 35.1	<p>Irregularity does not invalidate affidavit</p> <p>Requires leave</p>
Rule 35.2	<p>Deponent may be required for cross examination – not always, but you should always assume that the deponent will be required</p> <p>Written notice of such requirement – notice to be given a reasonable time before person required</p> <p>If witness does not attend for cross examination – affidavit may not be used unless the witness is dead (such person would also be “taken not to be available” pursuant to Clause 4(1)(a), Dictionary, Evidence Act OR unless the Court orders otherwise (for such an order to be made there would likely have been an assertion that the witness is “not available” in the manner required by the Evidence Act 1995 – see Dictionary; sections 62-68)</p> <p>Subsection (4) confirm the right to re-examine if a deponent is cross examined (see also sections 28 and 39 of the Evidence Act)</p>

UCPR	Notes
Rule 35.3	<p>Persons who may make affidavits (there may be more than one possibility, see (2A))</p> <p>Under legal incapacity – tutor</p> <p>Corporation – member or officer or liquidator</p> <p>Body of persons – in the name of body, member/officer, other associated person – by member/officer</p> <p>Crown/officer of the Crown – officer of the Crown</p> <p>Conducted by person other than party (e.g. subrogation/insurance contract) – by that person or if a corporation as above</p> <p>Subsection (2) relates to Local Court proceedings</p> <p>Subsection (3) The knowledge of the facts(subject to any order of the court)</p> <p>Subsection (4) Affidavit must set out facts that qualify the person to make the affidavit</p> <p>Subsection (5) compliance with requirement of the Rule may be achieved by separate affidavits</p>
Rule 35.3A	Heading must include name of deponent and date
Rule 35.4	Format – paragraphs – each matter in separate paragraphs – numbered consecutively

UCPR	Notes
Rule 35.5	<p>Alterations</p> <p>Any interlineation, erasure or other alteration in body or jurat</p> <p>Affidavit may not be used</p> <p>Except with leave</p> <p>Unless before before whom the affidavit is made initials the alteration or rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them</p> <p>Before making the affidavit</p>
Rule 35.6	<p>Annexures and exhibits</p> <p>(2) Annexure – endorsed on its face (not a separate page); (4) Exhibit certificate “attached”</p> <p>(3) Consecutively number affidavit and annexure (last page of affidavit is page 10, first page of annexures should be page 11)</p> <p>(5) Do not file exhibits – these are tendered at trial</p> <p>(6) “document is an exhibit” – requirements for production of the exhibit if requested by another party</p> <p>Note: remember section 50 of the Evidence Act relating to summaries of complex or voluminous documents – this may assist in case preparation and limit time in Court if used properly</p>
Rule 35.7	<p>Affidavits by persons who cannot read – certificate under section 27A of the Oaths Act or the Court is otherwise satisfied the affidavit was read to the deponent in the presence of the person before whom the affidavit is made and it appeared to that person that the deponent understood the affidavit</p>

UCPR	Notes
Rule 35.7A	Name of legal practitioner or commissioner for affidavit to be included on the affidavit
Rule 35.7B	Each page to be signed by deponent and person before whom it is sworn Particular provisions apply in the COVID environment – see Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020
Rule 35.8	Affidavit of service not to annex copies of filed documents
Rule 35.9	Except with leave, affidavits must not be filed unless In accordance with the rules In accordance with other rules In accordance with a practice note

Rule 10.2 – a party intending to use an affidavit that has not been filed must serve it “not later than a reasonable time before the occasion for using it arises”

Note: specific rules relating to expert evidence in Part 31

Uniform Civil Procedure Rules 2005 (NSW)

– Rule 31.4 – Witness Statement

- (1) The court may direct any party to serve on each other active party a written statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing (a **witness statement**).
- (2) A direction under subrule (1)—
 - (a) may make different provision with regard to different questions of fact or different witnesses, and
 - (b) may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection.
- (3) Each witness statement must be signed by the intended witness unless the signature of the witness cannot be procured or the court orders otherwise.
- (4) If an intended witness to whose evidence a witness statement relates does not give evidence, no party may put the statement in evidence at the hearing except by leave of the court.
- (5) If the party serving the statement calls as a witness at the hearing any person whose witness statement has been served pursuant to a direction under subrule (1)—
 - (a) that person's witness statement is to stand as the whole of his or her evidence in chief, so long as that person testifies to the truth of the statement, and
 - (b) except by leave of the court, the party may not adduce from that person any further evidence in chief.
- (6) A party who fails to comply with a direction given under this rule may not adduce evidence to which the direction relates, except by leave of the court
- (7) This rule does not deprive any party of the right to treat any communication as privileged and does not make admissible any evidence that is otherwise inadmissible.
- (8) An application by a party for an order that the party not be required to comply with a direction under this rule in respect of any proposed witness or witnesses (whether or not such a direction has been given) may be made without serving notice of motion.

When to use an affidavit or witness statement?

- Rule 31.1 – proceedings commenced by Statement of Claim or in which a Statement of Claim has been filed – (2) subject to (3)-(5) and the Evidence Act – evidence at trial “must be given orally before the court”
- Rule 31.2 – subject to Rule 31.1 – evidence in chief “must be given by affidavit” unless the court orders otherwise
- Rule 31.4 – Witness statements
- In excess of 340 uses of the word “affidavit” in the UCPR
- Affidavits are used for a wide variety of purposes before, during and after proceedings: e.g. privilege claims (Rule 1.9), preliminary discovery (Rules 5.2-5.4), proving authority to commence proceedings (Rule 7.2), service (substituted service, proof of service e.g. Rules 10.14(6), 11.16, 11A.16), verification of pleadings (Rule 14.23), default judgment (Part 16), discovery (Rule 21.4), enforcement of judgments (Part 39)
- There is more limited use of witness statements - see Rule 31.4, but it really depends on the court and the particular list of the court

Check the Practice Notes – different expectations for different courts/lists

- Suite of new Practice Notes published in May 2020 – you will be expected to know them well and comply
- [SC Gen 4](#) – Affidavits – [8] (affidavits must be filed)
- [SC Eq 1](#) – Case Management – [7], Annexure A
- [SC CL 1](#) – General – [27(d)], [32], [33], [42], [43], [71], [77], Annexure A subpara [(e)]
- [SC Eq 3](#) – Commercial/T&C – [5], [25(1)], [33]-[36], Annexure 3

There are a number of other potentially relevant Practice Notes depending on the List

For example:

SC Eq 4 – Corporations List

SC CL 6 – Possession List

SC Eq 7 – Family Provision

SC CL 7 – Professional Negligence List

Federal Court – Affidavits

- Part 29 of the *Federal Court Rules 2011* (Cth)
- Used before, during and after proceedings: e.g. cross claim (Rule 15.06), discovery (Rule 20.22, answers to interrogatories (Rule 21.04), enforcement (Rule 41.63)
- Time for filing – Rules 29.08 and 35.21

Form and formalities

- Rule 29.02
 - Form 59
 - Contents page
 - First visible page – deponent’s description and date
 - Unless original or dimensions do not allow it – annexure, otherwise exhibit
 - No subsequent annexure or exhibit can have the same number
- Rule 29.08 – must serve at least 3 days before occasion for using the affidavit arises

Form 59
Rule 29.02(1)

Affidavit

No. _____ of 20

Federal Court of Australia
District Registry: [State]
Division: [Division]

[Name of First Applicant] [if 2 or more add "and another" or "and others"]
Applicant[s]

[Name of First Respondent] [if 2 or more add "and another" or "and others"]
Respondent[s]

Affidavit of: **[deponent's name]**
Address: [deponent's address]
Occupation: [deponent's occupation]
Date: [date affidavit sworn/affirmed]

[*Insert table of contents if affidavit (including annexures) exceeds 10 pages] **Contents**

Document number	Details	Paragraph	Page
1	Affidavit of [deponent] in support of [application] for [insert details] [sworn/affirmed] on [date]		
2	Annexure "[AB1]", being copy of [brief description]		
3	Annexure "[AB2]", being copy of [brief description]		

I [name address and occupation] [*either]say on oath [*or]affirm:

- [*] I am the [role of party eg Respondent] [*or] I am the [position of officer eg director] of the [role of party eg Respondent] and I am authorised to make this affidavit on the [role of party eg Respondent]'s behalf. [*or] I am a witness.

Filed on behalf of (name & role of party) _____
Prepared by (name of person/lawyer) _____
Law firm (if applicable) _____
Tel _____ Fax _____
Email _____
Address for service
(include state and postcode) _____

- 2. [State which answers are true based on your own knowledge and which are true to the best of your knowledge, information and belief based on your inquiries of relevant persons].

[Insert headings to identify subject matter in paragraph(s).]

3.

(a)

4.

Sworn / Affirmed by the deponent)
at [place])
in [State or Territory])
on [date])
Before me:

)
)
)
)
)

Signature of deponent

Signature of witness

[Name and qualification of witness]

[* Delete if inapplicable]

Pros of written evidence

- Efficiency
- No ambush – “cards on the table” approach
- Promotes early settlement (which is expressly recognized in SC CL15 at [27(d)])
- Whole “story” can be told and is not reliant on effective XN by counsel
- Context:
 - Traditionally the CL showed a marked preference for oral evidence
 - Civil juries have virtually disappeared (some exceptions – e.g. defamation)
 - Modification of evidence rules to admit documents more easily – e.g. business records
 - The common use of affidavits/WS is picking up the Chancery practice

Cons of written evidence

- Straight into XXN – witness has no time to settle in, witness demeanour in XN vs XXN is important, if counsel was not involved at drafting stage of written evidence you might learn something important in XN
- Decline of skill of XN
- See comments on Pembroke J in *Thomas & Ors v SMP (International) Pty Ltd & Ors* [2010] NSWSC 822
- Recognised on many occasions that written evidence in chief as a costly legal drafting exercise undertaken by lawyers – 1975 NSW LRC “... more evidence of the legal advisor than the witness”
- Bathurst CJ reviewing 10 years of the Civil Procedure Act – “in some instances, the utility of preparing witness statements will either be negligible or inefficient, compared to simply leading the evidence orally in court”

Affidavit preparation - tips and hints

- Bryson J – “Affidavits” (1999) 18 ABR 166; “How to draft an affidavit” (1985) 1 ABR 250
- An affidavit is not a record of the lawyer’s evidence or what the lawyer thinks occurred – it is the witness’ evidence – use the witness’ language
- You may or may not be involved at evidence preparation stage – if you are not involved, you are briefed with the evidence and you see an issue that needs to be fixed – fix it – give consideration to a correcting affidavit, seeking leave to adduce evidence in chief orally, Notices to Admit, Notices to Produce, discovery – what may assist? – can be a difficult conversation if the solicitor has drafted the evidence

- Check the rules/practice notes
- Start with the court proforma, where available
- Start with the documentary evidence – there is no point in drafting an affidavit about person X's ownership of the property if person X does not own the property

- Do not copy and paste
- Identical affidavits are not automatically inadmissible but there are issues of collusion, weight, ripe ground for XXN, embarrassment, section 135
- *Rosebanner Pty Ltd v EnergyAustralia* [2009] NSWSC 43; 2 ARLR 374 at [320]-[342] – critical conversations; solicitor and client; see authorities cited
- Critical discussions that are recalled in exactly the same terms in two different affidavits will cause concern (*Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 – “totally destructive 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”

- Remember – “any document or thing” referred to in an affidavit/WS (and pleading) can be called for by a Notice to Produce (UCPR, Rule 21.10; FCR 20.31) – think about it: is there is a reason that the document is not being annexed or exhibited – consider whether there is prejudice to your client in referring to it in a way that makes it vulnerable to a Notice to Produce – possible ground for cross examination? *Jones v Dunkel* inference available? If you need to adduce the evidence but do not want to expose the document or thing to an NTP, craft the evidence with care to not “refer to” the document or thing so as to not engage Rule 21.10

- Avoid dealing in absolutes: e.g. “never”, “always”
– there may be that one time the witness forgot
- Separate paragraphs
- What is the best structure? Chronological?
Chronological is usually the best structure. But at least turn your mind to the alternatives, would it assist the court to have the evidence by themes?
What is the best way to tell the story?
- Use headings to delineate topics where possible – it aids reading of the affidavit/WS – it will help you be able to find things quickly in court
- It is sometimes helpful to refer to the content of documents even if is objectionable – it can help tell the story – some judges do not seem to mind

- Paginate – remind your instructors this is prescribed – you will be the one on your feet saying “if Your Honour could turn to about 2/3 of the way through the bundle ...” – it is not fun and it is a waste time
- As a barrister – avoid being the person before whom the affidavit is made – witness box scenario – they will verbal you
- Make the witness accept responsibility for their evidence – make sure you/your solicitor make good notes of the discussions about the importance of the affidavit being correct, truthful, your evidence etc
- Point out to the witness that they are likely to be crucified if they leave something out that that “remember” later
- Avoid language such as “shocked”, “horrified”
- Avoid definitions

Rules of evidence and common issues

- Do the rules of evidence apply in the forum? If at interlocutory stage – section 75 applies
- Affidavits and WS need to be prepared so the evidence contained therein is in admissible form
- Common problems: hypothetical evidence, contents and effect of documents, state of mind of third parties, direct speech (“words to the effect of”)
- Responsive affidavits – how to do this effectively

Swearing/affirming

- Evidence Act
- Oaths Act
- Make sure the affidavit reflects the witness' choice
- The witness should give oral evidence on the same basis as the written evidence
- COVID-19 regulations for swearing/affirming over AVL (see also Practice Notes, e.g. SMIN-1 in the Federal Court relating to affidavits)

Using the affidavit

- Read the affidavit – identify it properly for the transcript:

”The first affidavit I read is the affidavit of Joe Bloggs sworn 7 March 2020”

OR

“In support of the notice of motion, I read the affidavit of my instructing solicitor Josephine Bloggs sworn 7 March 2020”

- Tender any exhibits (make sure you have the original exhibit to hand!) – mark the exhibit nomenclature on the exhibit (e.g. “Ex P1”)
- Mark off the affidavit on your “to read” list and mark off the exhibit on your “to tender” list
- Call your witness (“I call Josephine Bloggs”) – the oath or affirmation is taken by a court officer then you ask identifier questions of a witness – your name is? Your address is? you are a? you have sworn one affidavit in these proceedings? Dated? If there are corrections that need to be made, this is the time to do it
- You sit down and your opponent then gets to XXN
- If an affidavit has not been read by a party – it can be read by another party but note the witness is then open to XXN by your opponent – alternatively, you may wish to tender the helpful part of the affidavit - if the witness is called because he/she has made other affidavits, you can XXN on the unread affidavit
- Make sure there is a clean version of the affidavit available in court for the witness

Objections

- Find your style – e.g. pencil for the first pass, highlight for the final objections, red pen for the rulings
- Mark up with ruling as you go – this can help avoid XXN the evidence back in and assists in submission writing and on appeal (so you do not refer to parts of the evidence that were not read/struck out etc)
- After objections, take a moment, do you need to seek leave to ask any questions in chief to fix the evidence after objections?

Affidavit drafting exercise

- Make it as much like a real affidavit as possible
- What are the issue of fact you need to prove?
- That will depend on what you have pleaded
- On which issues do you bear the onus?
- Work out the essential ingredients and establish them by affidavits/documentary tender

Questions?

Anything to add?