



## GREENWAY CHAMBERS

### Litigation Essentials: Effective Affidavits

#### **A. Introduction**

1. Our aim is to provide you with a practical guide to the preparation of affidavits of lay witnesses.<sup>1</sup>
2. Affidavits are instruments of persuasion. Having effective (i.e. persuasive) affidavits is critical. It is trite to say that more cases are won on the facts than on the law.
3. The drafter of an effective affidavit must consider a number of factors, including: who is the audience; who should be the witness; when should the affidavit be prepared; and how do I prepare the affidavit within the framework of the Court rules, ethical obligations, the rules of evidence and the facts as presently known?
4. This paper is structured around the questions: Why? Who? When? What? How?

#### **B. Why?**

6. The affidavit is now the most common means of giving evidence in courts and tribunals.
7. The reason for the prevalence of affidavit evidence is the overriding concern in all jurisdictions to provide access to justice: it must be quick, cheap and just. The conventional wisdom is that affidavit evidence reduces surprise by giving advance notice of the parties' evidence (thereby also promoting settlement) and reduces the overall cost of justice by reducing the length of trials.
8. There are of course exceptions to the courts' general preference for affidavit evidence:

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<sup>1</sup> For those interested in a detailed analysis of the principles of law relating to affidavits, we have collected in Appendix 3 some useful articles and books on the topic.

- (a) in the Federal Court, evidence of contentious conversations is often required to be given orally; and
  - (b) in NSW, some judges have expressed a preference, from time to time, for evidence to be given orally rather than by way of affidavit.
9. It is for this reason that affidavit testimony (as opposed to oral testimony) is now the primary tool of persuasion at the disposal of lawyers.
  10. An affidavit tells your client's story, to an audience.

### **C. Who?**

#### Who is the audience?

11. The primary audience is the decision-maker (a judge or tribunal member) and any appellate tribunal.
12. However, your opponent and their client are also an important audience, particularly from the perspective of achieving settlement.
13. Place yourself in the position of the audience and consider how you react to the draft affidavit you are preparing. Keep this in mind at all times.

#### Who are the witnesses?

14. In accordance with the "best evidence rule", the best witness is an eyewitness who can describe what she or he said, heard, felt or otherwise perceived (eg the demeanour of another witness at a particular place and time).
15. Depending upon the context, factors to consider in selecting your witnesses include whether they are willing to give evidence (and, importantly, to be cross-examined), their personality and experience (how they are likely to perform under cross-examination), their seniority, and their likely appeal to the audience.
16. You need to think about the effect of not calling a particular witness. If you do not, will it leave open the drawing of a *Jones v Dunkel* inference?

## D. When?

### When is an affidavit appropriate?

17. The facts of the case might make it better to have the evidence of disputed conversations adduced orally. This is often the case where there are allegations of fraud or oral misrepresentation. Seek a direction from the court if you are in a jurisdiction where this might be the approach.
18. The reasons for this approach were referred to by Pembroke J. in *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [28]:

*"A common thread in the commentary is that the studied reconstruction, and formulation in writing, of contentious conversations and oral communications in language that is usually settled and refined by lawyers, can sometimes be unreliable and unintentionally misleading. In an appropriate case, **a more reliable touchstone of the truth is the witness' frank and honest recollection of the communication, given orally in the witness box, without the formality of an affidavit or the supervising hand of an interested lawyer. Even if the recollection is spare, and perhaps because it is so, it will very often be more credible. And the process of leading the evidence in chief orally may well be fairer to the witness.**" (emphasis added)*

19. An affidavit will in those cases cover all of the relevant evidence other than the disputed conversation. An account of the disputed evidence may be given orally, with an outline of the evidence expected to be given by the witness usually provided in advance to avoid ambush or surprise.

### When do I prepare the affidavit?

20. As early as possible – case managed lists make this necessary but also as a matter of good practice, start developing theory of the case and building upon it.
21. The story comes out of the chronology. That is worth repeating. The story comes out of the chronology.
22. Always, always, always prepare a chronology.
23. Best practice is to prepare your affidavits **before** drafting your pleading!

**E. What?**

What is the subject matter of the affidavit? What do I need to address?

24. Affidavit evidence may be prepared in several different contexts:
  - (a) evidence in chief;
  - (b) evidence in reply;
  - (c) interlocutory evidence.
25. In any case, the starting point is to identify the issues between the parties – usually defined by pleadings, which disclose the facts in issue – and with an eye to the remedies sought.
26. If you are for the plaintiff preparing evidence in chief, ask yourself: What evidence do I need to prove the case – what are the elements of the cause of action and the justification for the remedies sought? Bear in mind, if you are for the plaintiff, your client will have the opportunity to reply to the defendant's evidence, so avoid anticipating what you think the defendant's evidence might be.
27. With reply evidence, ask yourself: What do I need to reply to in the evidence of the defendant? Reply evidence is not an opportunity to bolster your evidence in chief.
28. If you are the defendant, ask yourself: What do I need to address the issues pleaded, to refute the plaintiff's evidence and to establish the positive defences I have pleaded?

**F. How?**

The formal requirements

29. The rules of procedure are your friend. They will assist you to persuade your audience and if complied with will avoid distraction.
30. In NSW, the UCPR prescribes an approved form for affidavits (Form 40).
31. In general, the rules of court require:

- (a) a heading setting out the name of the deponent and date of making the affidavit;<sup>2</sup>
  - (b) consecutively numbered paragraphs;<sup>3</sup>
  - (c) numbered pages including annexures<sup>4</sup> (exhibits are to utilise a separate number sequence and if the same deponent makes more than one affidavit, the exhibits may pick up from the last page number of the previous exhibit)<sup>5</sup>;
  - (d) annexures and exhibits are to be identified by prescribed certificate;<sup>6</sup>
  - (e) one subject per paragraph;<sup>7</sup>
  - (f) annexures should be limited to 50 pages, otherwise use an exhibit;<sup>8</sup>
  - (g) amendments must be initialled, or leave will be required to file the affidavit.<sup>9</sup>
32. How the affidavit is sworn/affirmed is important. Ensure you use the correct jurat: affirm or swear? It is not sufficient to “affirm/swear”. You should also observe the requirements of the jurat (requirement for a witness and who may witness).
33. Particular judges and lists may also have particular practice notes that modify the usual rules of the Court. They must be strictly complied with. (For example, the Construction and Technology List).

#### Customary requirements

34. Some other cardinal rules:
- (a) organise your material chronologically. This is axiomatic and cannot be overstated. The story comes out of the chronology. The chronological order of events is often central to remedies and therefore pleadings.

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<sup>2</sup> UCPR 35.3A “Heading to affidavit”.

<sup>3</sup> UCPR 35.4(a)&(b) “Format of affidavit dealing with more than one matter”.

<sup>4</sup> UCPR 35.6(3) “Annexures and exhibits”.

<sup>5</sup> UCPR35.6(4A) “Annexures and exhibits”.

<sup>6</sup> UCPR35.6(4) “Annexures and exhibits”.

<sup>7</sup> UCPR 35.4(c) “Format of affidavit dealing with more than one matter”.

<sup>8</sup> UCPR 35.6 “Annexures and exhibits”.

<sup>9</sup> UCPR 35.5 “Alterations”.

- (b) give evidence of conversations in direct speech (*LMI Australasia Pty Limited v Baulderstone Hornibrook Pty Limited* (2001) 53 NSWLR 31 at [8]-[11]).
- 35. The use of direct speech is the subject of differing views but has the following to recommend it:
  - (a) it enables the presentation of evidence in more admissible, less objectionable, form; and
  - (b) the evidence is likely (partly as a consequence of the first point) to carry more weight.
- 36. When drafting evidence of direct speech, use the actual words if the witness can recall them. It is very uncommon for a witness to recall the precise actual words of a conversation. But when they do have that precision of recollection, it is as well to also state why the witness recalls the precise words (eg someone swore who they have not heard that person swear before).
- 37. In the more common scenario, the witness cannot recall the exact words used. Then, it is sufficient to say, where they can recall that a conversation occurred, the effect of the words used (“... we had a conversation that included an exchange using words to the following effect ...”).
- 38. It may be that the witness cannot actually recall the occurrence of a conversation but is nevertheless convinced that a conversation occurred. This is more common where events have occurred many years ago and the change effected by the conversation is subtle. Although of less weight, there is no point in exaggerating the witness’s recollection.
- 39. Finally, as a matter of commonsense:
  - (a) dates, amounts etc as numbers not words (22 March 2018, **not** twenty second of March two thousand and eighteen);
  - (b) use (appropriately sized) staples – just think of the volume of paper that the court deals with every day.

## Ethical parameters

40. Lawyers must bear in mind their ethical duties when preparing affidavit evidence.
41. The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 provide:

### Rule 24

#### 24 Integrity of evidence—influencing evidence

##### 24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

##### 24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth,

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness, or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

### Rule 25

#### 25 Integrity of evidence—two witnesses together

25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing, and

25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

42. Caution your witnesses not to discuss their evidence with each other.
43. Do not disclose to a witness the evidence being given or likely to be given by your other witnesses in the case.
44. It is acceptable to show the evidence of the other side to your witnesses.
45. The person administering the deponent's oath must be personally satisfied that the witness thoroughly understands the content of the affidavit being sworn to and may not rely on assurances by others that this is the case (*Bourke* (1899) 44 Ch D 110 at 126; *Darrigo v Carter* (2003) 44 ASCR 162 per Selway J at [9]).
46. Give the witness space to tell her or his version of events.
47. When you do sit down with your witness to take written evidence, you should avoid asking leading questions (*Hodgson v Amcor Ltd* (2011) 32 VR 495 at 520). Treat the interview as if it you were leading the witness's evidence in court, in accordance with the *Evidence Act*. Leading questions may suggest that a particular answer is sought and, it has been suggested, "implant false memories in people".<sup>10</sup> Your job is to set out the "honestly held recollection of the individual" (*Byrnes v Jokono Pty Ltd* [2002] FCA 41 at [41]).

#### Evidentiary considerations

48. The first consideration is relevance (s.55 and 56 EA).
49. In *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [9] – [11], [19] – [22], Pembroke J rejected the whole of the plaintiff's affidavit in chief, saying:

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<sup>10</sup> A Sullivan QC, "Witness Statements and Affidavits as an alternative to oral evidence", New South Wales Bar Association Bar Practice Course, August 2015 at n. 75, referring to Mr Spigelman AC QC in Bar News Winter 2011, 99 at 110).

[9] ...I have to say that, **to use the most neutral language, that affidavit is inappropriate, confusing and unhelpful. It is a prolix examination of minutiae carried out without any lawyerly discrimination. The majority of it is irrelevant to the resolution of the particular factual and legal issues that I must decide.**

[10] It can be fairly described as a gallimaufry - **difficult to understand and impossible to disentangle.** It is a jumble that masks rather than illuminates the facts that are necessary to determine the issues in dispute. The sheer length of the affidavit is oppressive. It consists of 6,657 paragraphs spread over nearly 500 pages. There are 63 pages of detailed objections by the defendants. Page after page explains in agonising detail the life and times of Mr Sullivan, Mr Thomas and Mr Willett. Dozens and dozens of persons who have no serious involvement in the issues for determination are introduced in cameo roles in the narrative. Minor celebrities and rugby league identities feature frequently. **Little attempt has been made to meaningfully correlate the narrative recounted in the affidavit with the particular facts that have been pleaded.**

...

[19] **It is common for some litigants to want to use their evidence as an opportunity to unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case.** But a fair hearing of their case can be seriously hindered by such unfiltered outpourings. That is why, among other things, counsel have a duty to the court which is additional to their duty to the party whom they represent. ...

...

[23] For those reasons, a strictly adversarial approach to the presentation of a party's case must sometimes be tempered. **Counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary,** whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest. It is more likely to ensure that a just result is reached - sooner and with less expense.

50. Avoid conclusions and submissions:

e.g. "we agreed"; "she misled me"; "he breached his duty of care" etc

51. Most evidentiary problems (particularly hearsay) are avoided if you stick to the "five senses" or faculties: sight, hearing, smell, taste, and touch.

52. There may be exceptions where state of mind is relevant ("I believed" etc), but even in such cases the basis of the belief is grounded in the five senses.

*"I heard him say those words, and this led me to believe ... "*

*"I observed that she was gesticulating violently, her body was tense and she was shouting and I therefore believed that she was angry".*

53. Failure to adhere to the rules has a bearing on costs. In *Kinda Kapers Charlestown Pty Ltd v Newcastle Neptune Underwater Club Inc* [2007] NSWSC 329 at [77]-[78] the court ordered that a successful party was not entitled to its costs of preparing an affidavit “*without any regard to the rules of evidence. After the rulings on evidence, nothing of substance remained.*”

The witness's voice, language and personality

54. Let the witness speak through the affidavit.
55. Bryson QC made the point most succinctly in his 1985 paper<sup>11</sup> (at 251):

*“...it is not possible to draft an affidavit properly without seeing the witness. When you see him, do not do all the talking — get him to talk. If this takes time, you must use time. The document you produce must be something which the witness will regard as his own document. He may be drifting along in the belief that because you are drafting the affidavit, all will be well and he need not think about it. Do not let this happen. Put on him the task of reading through the draft and telling you it is correct, or where it should be corrected.*

***It is important to draw from the witness, and to get down in his affidavit, his relevant evidence, complete, as understood by him, and unembellished by anyone else's interpretation. He will only forget the embellishment and disavow it later.***

*The court will soon compare or contrast the comprehension and powers of expression shown in cross-examination with the language of the affidavit.*

*While **the witness should come through**, and his affidavit should be his expression, not yours, an affidavit should not sound like ordinary speech, because ordinary speech will not serve the purpose.”* (emphasis added)

56. Alan Sullivan QC has expressed a similar view<sup>12</sup> (at 7.18):

*“The language employed should be language of a kind the witness habitually uses rather than a legal ‘translation’. **It is important that the court, to the extent possible, feels that it is the witness speaking through the Affidavit not the witness’ lawyer.** Not only is this important because it enables the court to get a ‘feel’ for the witness but also it eliminates or minimises the risk of the witness being embarrassed or undermined in cross-examination if he or she is cross-examined upon particular language used in the Affidavit with which the witness is unfamiliar or in respect of which he or she is uncertain as to is [sic] meaning. ...”* (emphasis added)

57. Alan Sullivan QC makes the further point that if the witness is unsophisticated, but her affidavit uses complex language that the witness does not understand, the risks

<sup>11</sup> JP Bryson QC, “How to draft an affidavit” (1985) 1 Australian Bar Review 250.

<sup>12</sup> A Sullivan QC, “Witness Statements and Affidavits as an alternative to oral evidence”, New South Wales Bar Association Bar Practice Course, August 2015.

are obvious. That witness may be made by a cross-examiner to “feel foolish or look stupid by establishing that the witness has no or little understanding of what the language he or she has sworn to means”.

58. Above all, use language which is readily understood.
59. The point is illustrated in the two examples at Appendix 1 to this paper. Each deals with the same subject matter. Example B is easier to understand, complies with the rules of evidence and is more persuasive.

### **G. Three stages of drafting**

#### Stage 1: The first draft

60. When you commence:
- (i) sit with witness face to face – phone interviews are to be avoided where possible;
  - (ii) record with permission and use the transcript as the first draft;
  - (iii) be prepared: have the pleadings, the documents set out chronologically and a list of questions ready. Again, we emphasise the importance of a chronology;
  - (iv) Understand that drafting affidavits takes time. There is no getting away from that reality. Take your client through the documents in a methodical way.

#### Stage 2: Subsequent drafts

61. Having taken a first pass at the witness’s evidence, fact-check that evidence:
- (a) against contemporaneous, objective documents (used by almost all judges as the starting point of their analysis of a case). As was observed by McLelland J in *Watson v Foxman* (1995) 49 NSWLR 315 (at 319):

*“Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court “must feel an actual persuasion of its occurrence or existence”. Such satisfaction is “not ... attained or established independently of the nature and consequence of the fact or facts to be proved” including the “seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description,*

*or the gravity of the consequences flowing from a particular finding”:  
Helton v Allen (1940) 63 CLR 691 at 712.*

*Considerations of the above kinds can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a causes of action based on s 52 of the Trade Practices Act 1974 (Cth) (or s 42 of the Fair Trading Act), in the absence of **some reliable contemporaneous record or other satisfactory corroboration.**”*

- (b) against the evidence of your other witnesses (in draft);
  - (c) against the inherent probabilities – does it make sense?
62. Test the witness in conference by challenging the witness’s understanding, putting alternative interpretations and any additional or apparently contradictory evidence to them.
63. If possible, allow time between drafts to “let the dust settle”.

### Stage 3: The final draft

64. Check that the sequence of events is chronological.
65. This includes your response the other side’s evidence. The affidavit will be easier to read if you deal with the other side’s evidence as part of the chronological sequence, rather than having a section at the end of the affidavit which responds to the other side’s evidence. For example, if your opponent’s witness says that the defendant arrived at a meeting in a yellow Lamborghini and your witness, who was also present at the meeting, says she in fact arrived in a green Jaguar, then you should ensure that your witness deals with that divergent evidence in that part of her affidavit that deals with the meeting.
66. Use defined terms in affidavits sparingly. If the witness has sworn two affidavits – an earlier one and a later one – then is it really necessary to define ‘**My Earlier Affidavit**’? Ask yourself: “*Do I really need them? Does it assist the reader/audience? Or is it just a bad habit I have developed?*” Defined terms undoubtedly have their place. For example, if there were several key letters or conversations, it will assist with legibility if they can be given a short-hand reference, ideally by reference to their chronological occurrence (‘the June Letter’, ‘the July Conversation’).

67. Use (sensible) subheadings that follow a logical and chronological sequence. Do they assist the reader?
68. Proof read the document. Better still, have someone else proof read it for you. Once you have read a document more than a few times, you may become blind to spelling mistakes and the like.
69. Ask the witness to proof read the draft affidavit. Leave the witness alone for a time so he or she has time to read it. Check that they understand it. It is their affidavit, not yours.
70. Check compliance with the formal requirements.

#### Multiple affidavits

71. Your evidence will (especially if you are observing the best evidence rule) often require evidence from multiple witnesses. When that is the case:
  - (a) check for internal consistency.
  - (b) don't serve any affidavits until all the evidence has been completed, as adjustments may be required, consistent with your ethical obligations outlined above.

#### **H. Some useful checklists**

72. Appendix 2 contains some checklists prepared by eminent practitioners who have written on this subject. Whilst some are expressed in an ironic, even sarcastic, tone, the message is clear and enduring: take the simple steps to make your affidavits effective, and avoid the traps which engender judicial irritation and may prejudice your client's case.

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**Greenway Chambers**  
**22 March 2018**

## APPENDIX 1

### Example A

1. I am the hereinbefore **mentioned** plaintiff (**Plaintiff**) in these proceedings (**Proceedings**). I crave leave to refer to my affidavit sworn on the thirtieth day of December, in the year of our Lord, two thousand and seventeen (**My Earlier Affidavit**).
2. On the twenty-second day of March in the year of our Lord, two thousand and eighteen, I composed, settled and engrossed an electronic mail message (**Electronic Mail Message**), which I addressed and sent to the defendant (**Defendant**). Now annexed hereto and marked with the letter "A" is a true copy of the aforementioned electronic mail message. By that electronic mail message I confirmed that the Defendant and I had entered into an enforceable contract for valuable consideration on twenty-first day of March in the year of our Lord, two thousand and eighteen. Alex understood, and so did I, that we had reached an enforceable legal contract. On the aforementioned day, namely the twenty-first day of March in the year of our Lord, two thousand and eighteen, the Defendant and I conferred at the coffee house titled "Silks Coffee Lounge", located at the property known as 170 Phillip Street, Sydney, in the State of New South Wales. We agreed that I would sell and the Defendant would purchase the five hundred shares in XYZ Industries Pty Ltd (**XYZ**) of which I had the legal and beneficial ownership, for a total consideration of two-thousand Australian dollars.
3. I humbly request that this Honourable Court makes Orders 1 and 2 of the Summons filed on the fifteenth day of January in the year of our Lord, two thousand and eighteen.

### Example B

1. I am the plaintiff.
2. On 21 March 2018, at about 11am, I met with Alex Jones at Silks cafe, on Phillip Street.
3. During our meeting we had a conversation. That conversation included an exchange in words to the following effect:  

I said:            *"I will sell you my 500 shares in XYZ for \$50 each."*

He said:          *"You're dreaming, mate. \$40 tops."*

I said:            *"You're one tough bastard! Okay, done."*
4. On 22 March 2018, I sent an email to Alex. A copy of that email is annexed and marked "A".

## APPENDIX 2

### Sedley's Law of Documents

(Sir Stephen Sedley "Ashes and Sparks: Essays on Law and Justice" (2011, CUP).)

Sir Stephen Sedley was a judge of the Court of Appeal of England and Wales from 1999 to 2011. He devised "Sedley's Law of Documents", which applies as much to affidavits as it does to other documentary evidence:

- 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 3 numbers in different places.
- Fifth Law: Any important documents shall be omitted.
- Sixth Law: At least 10 per cent 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: Significant passages shall be marked with a highlighter which goes black when photocopied.
- Ninth Law: (a) At least 80 per cent of the documents shall be irrelevant;  
(b) Counsel shall refer in Court to no more than 5 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.
- Tenth Law: Only one side of any double-sided document shall be reproduced.

Eleventh Law: Transcriptions of manuscript documents and translations of foreign documents shall bear as little relation as reasonably practicable to the original.

Twelfth Law: Documents shall be held together, in the absolute discretion of the solicitor assembling them, by: a steel pin sharp enough to injure the reader; a staple too short to penetrate the full thickness of the bundle; tape binding so stitched that the bundle cannot be fully opened; or a ring or arch-binder, so damaged that the arcs do not meet.

### Affidavit Do's and Don'ts

(From PM Donohoe QC, "Drafting Affidavits" New South Wales Bar Practice Course 2011.)

<b>Do</b>	<b>Don't</b>
Do be brief	Don't express critical conversations in indirect speech
Do commence paragraphs with a time reference	Don't refer to an important conversation without identifying when, where and between whom it occurred and the subject of what was said by each speaker
Do follow chronological sequence	Don't deal with several subjects in one paragraph
Do address every relevant subject	Don't say, "It was understood", "we agreed", or "she seemed happy".
Do refer to annexures by page number; for example, "Annexed hereto (page ...)."	Don't describe the contents of documents which are annexed.
Do make sure that alterations are initialled	Don't use annexure notes
Do state the source of information and the evidence of delay or hardship if information and belief is to be relied upon	Don't annex illegible copies
Do put in the margin what should be there	Don't put in the margin what should not be there

<b>Do</b>	<b>Don't</b>
Do check that notice to attend for cross examination has been given.	Don't say, "The facts in paragraph .... are not admitted".
	Don't anticipate issues
	Don't crave leave to refer to anything
	Don't "humbly request this Honourable Court".
	Don't express dates, sums or other numbers in words
	Don't file numerous affidavits by the one deponent

## APPENDIX 3

### Legislation, Rules and Notes

*Civil Procedure Act 2004* (NSW)

*Evidence Act 1995* (NSW) and (Cth)

Uniform Civil Procedure Rules 2005 (especially Part 17 Admissions; Part 31 Evidence; part 35 Affidavits).

*Federal Court of Australia Act 1976* (Cth).

Federal Court Rules 2011; Federal Court (Corporations) Rules 2000; Federal Court (Bankruptcy) Rules 2016.

Practice notes (eg SC Gen 4 Affidavits; but note the requirements of specialist lists such as Commercial List and Technology and Construction List SC EQ 3 and Corporations List SC EQ 4 and in the Federal Court CPN-1, Commercial and Corporations C&C-1).

*Oaths Act 1900* (NSW).

### Books and Articles

JP Bryson QC, "How to draft an affidavit" (1985) 1 Australian Bar Review 250.

PM Donohoe QC, "Drafting Affidavits" New South Wales Bar Practice Course 2011.

John Levingston, "The Law of Affidavits", The Federation Press 2013.

Justice Alan Robertson, "Affidavit evidence" (FCA) [2014] FedJSchol 3.

Sir Stephen Sedley "Ashes and Sparks: Essays on law and justice" (2011, CUP).

A Sullivan QC, "Witness Statements and Affidavits as an alternative to oral evidence", New South Wales Bar Association Bar Practice Course, August 2015.