Written Evidence:

Witness Statements and Affidavits as an alternative to oral evidence

"Truth may sometimes leak out of an affidavit, like water from the bottom of a well"
(see footnote 35)

August 2015

Alan Sullivan QC
Eleven Wentworth Chambers
180 Phillip Street
Sydney

Written Evidence: Witness Statements and Affidavits as an alternative to oral evidence

August 2015

Alan Sullivan QC

INDEX

1.0 The Object and Purpose of Giving Evidence in chief by Affidavit or Witness Statement

1.1 Affidavits (and witness statements) are written statements of evidence in chief. Their content is dictated by substantive rules of evidence and their form by rules of court (including Practice Notes and the like issued by the Court): their style involves a choice of language and by drafting they occasionally excite interest in the judge who finally determines the issues.[1] In this paper, except where necessary to distinguish, I shall use the expressions "written evidence", "affidavit" and "witness statement" interchangeably.

1.2 There appear to be four justifications advanced from time to time for evidence in chief being given by way of Affidavit or Witness Statement rather than orally.

1.3 First, it is thought that giving of evidence by way of Affidavit or Witness Statement **saves valuable court time** in the hearing of a matter (with the attendant assumption that thereby there will be a saving in cost and minimisation of inconvenience to parties and witnesses).[2]

1.4 Secondly, it has been said that one purpose of advance disclosure of intended evidence is the **promotion of early settlement.**[3]

1.5 Thirdly, it has been observed that the filing and serving of Affidavits or Witness Statements ensures the early appraisal of the opposite party with information about the matters truly in issue, thereby ensuring the saving of time and money wasted in **trial by ambush.**[4]

1.6 Lastly, it has been said that one particular benefit of exchange of witness statements is that it provides in a practical way for the co-operation of parties to ensure that only the

---

1 P.M. Donohoe QC "*Affidavits*" being a paper delivered to the NSW Bar Association Bar Practice Course in 1990.

2 See, e.g., *Emmett, 'Practical Litigation in the Federal Court of Australia: Affidavits'* (2000) 20 Australian Bar Review 28 at 28; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 635 [175].

3 *Akins v Abigroup Limited* (1998) 43 NSWLR 539 at 551; *Hodgson v Amcor Ltd* (2011) 32 VR 495 at 521 [84].

4 *Akins v Abigroup* at 551; *Concrete* at 635 [175]; *Saad v State of New South Wales* [2013] NSWSC 154 at [52]; *Hodgson v Amcor Ltd* at [82].

real issues in dispute are brought forward for the trial and it encompasses the need for the parties to be clear and precise in illuminating the issues for trial.[5]

1.7 Requiring written evidence is sometimes called the "cards on the table" approach and it has been said the "advantages" of having evidence in chief served in writing on the other side before the trial are so compelling that even in **fraud** cases or cases where **credit** is in issue, evidence in chief should be given in writing except in the most exceptional circumstances.[6]

1.8 Notwithstanding these perceived 'advantages', as, hopefully, this Paper will demonstrate use of Affidavits or Witness Statements as the mode of giving evidence in chief is not always the most desirable option, either from the point of view of the court or from that of the litigant. This is especially so when one is talking about final hearings of hotly contested commercial cases where critical facts are in dispute.

1.9 In this Paper, I propose doing the following:-

(a) To discuss the differences (or lack thereof) between Affidavits and Witness Statements (Section 2);

(b) To set out and discussing the factors should be taken into account in determining whether written evidence should be employed and, if so, how the written evidence should be prepared (Sections 3 – 9);

(c) To mention some of the potential consequences of filing or reading written evidence in court hearings (Section 10);

(d) To summarize the duties and obligations of lawyers when considering to prepare or preparing written evidence (Section 11).

5 *Saad v State of New South Wales* [2013] NSWSC 154 at [51].

6 As to use of the expression "cards on the table approach" see, e.g., *Hodgson v Amcor Ltd* at [82]. As to the remainder of this paragraph, see *Boyes v Colins* (2000) 23 WAR 123 at [64] – [68]; *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367; *Digby v. Essex County Council* [1994] PIQR P53, CA at 57. In Western Australia, the Supreme Court has gone as far to issue a Practice Direction, CPD 4.5 which expressly states that the mere fact that issues raise credibility issues will not prevent Witness Statement Orders being made. Another suggested benefit of written evidence of lay witnesses is that it enables expert evidence more accurately to relate to the primary facts – see Coleman, *The Practice and Procedure of the Commercial Court*, 3rd ed., p.142.

2.0 The difference between an Affidavit and a Witness Statement

2.1 Distinguishing a properly prepared Affidavit from a properly prepared Witness Statement is a bit like trying to pick the differences between a dolphin and a porpoise. In truth they are, or ought to be, the same thing in substance and certainly should be prepared in exactly the same way.

2.2 Affidavits have been around for centuries. They were the traditional means in courts of equity for the evidence in chief of a witness to be given. The Affidavit would be prepared, with due observance to the rules of evidence, then signed and either sworn or affirmed by the witness. When the case came on for hearing (either final or interlocutory) the Affidavit would be read.

2.3 During the course of reading the Affidavit, the opposing party would take objections to the material contained in the Affidavit based on the rules of evidence. Once those objections were determined by the court, what remained of the Affidavit became that witness' evidence in chief. If no objections had been taken to the Affidavit then, except with leave of the court (which was very sparingly granted), no further oral evidence in chief from that witness was permitted. Rather, if the opposing party required that witness for cross-examination, the next involvement of the particular witness would be to attend for cross-examination (and, possibly, re-examination).

2.4 If objections had been successfully taken to portions of the Affidavit then it was not uncommon for the court to give to the party calling the witness leave to adduce oral evidence to 'cure' the objectionable portions of the Affidavit. Leave to adduce oral evidence was not invariably granted. Indeed, generally speaking, many judges were reluctant to grant leave except where the objection was one as to form.[7]

2.5 Nothing much has changed in respect of the process by which material in Affidavits becomes evidence in the court proceeding although there has been some relaxation of the 'rules' by reason of the implementation of the *Evidence Act* in New South Wales, the Federal Court, Tasmania, Victoria and the ACT. By and large, however, the process remains that described above.

[7] In respect of objections as to form, see paragraph [8.3] below.

2.6 Witness Statements came into vogue, at least in New South Wales, with the commercial litigation revolution initiated by the Honourable Andrew Rogers AO QC when he became the judge in charge of the Commercial List in the Common Law Division of the New South Wales Supreme Court. Rogers J was determined to create an expeditious, efficient, streamlined and relatively informal procedure for the resolution of commercial disputes which had hitherto been absent. He introduced many initiatives to achieve this aim. One was the introduction, by way of Practice Note, of the requirement that a witness' evidence in chief, generally, be given by way of Witness Statement.[8]

2.7 In New South Wales, the current Practice Note for proceedings in the Commercial List and in the Technology and Construction List of the Equity Division is Practice Note *SC Eq. 3*. On its face, *SC Eq. 3* appears to water down the presumption that evidence in chief be given by way of witness statement as indicated by the use of the word "may" in paragraph 25.12. However, paragraph 33 of the Practice Note contemplates that evidence will be served on the other parties (thus envisaging written evidence) and that, subject to directions by the Court, evidence will be given in accordance with the "usual order for hearing". The form of the usual order for hearing is annexed as Annexure 3 and that usual order specifically contemplates that, unless the court otherwise orders, evidence will be by way of witness statement or affidavit (paragraphs 5 and 6). Moreover, paragraph 6 severely restrains the adducing of oral evidence where witness statements have been ordered.[9]

2.8 In respect of other proceedings in the Supreme Court of New South Wales, UCPR r.2.3(k) and r.31.4 specifically provide that the court may direct evidence to be given by way of a witness statement and contains similar restraints against the adducing of oral evidence where such an order is made.

---

8 See the 'old' Practice Note 39 substantially reproduced in *Akins v Abigroup*, *supra*, fn3 at pp 543 – 544. In part, presumably, this idea reflected the fact that from early 1986 the Commercial Court in England began requiring witness statements. See Coleman, The *Practice and Procedure of the Commercial Court*, 3rd ed., Preface at p. iii.

9 See especially paragraph 6.4 – if the affidavit or witness statement is not read, no one else may put on the affidavit or statement in evidence without the leave of the court; para 6.5 if the affidavit is read or the maker of the statement is called as a witness, then except for new matters which arise in the course of the trial, oral evidence may not be led which departs from the substance of that contained in the witness statement. See also *Hodgson v Amcor Ltd* at [82].

2.9 Of particular note is Practice Note SC CL 5 which governs most trials in the Common Law Division of the NSW Supreme Court. Paragraphs 27 of that Practice Note provides that at the Directions Hearing prior to trial one of the tasks is "directing that a party or all parties serve or file and serve witness statements – the purpose of such a direction being to facilitate clarification of issues and realistic negotiations for settlement".

2.10 As will be seen later,[10] the rule in NSW and, indeed, in all other Australian jurisdictions is that, unless the Court otherwise orders, evidence at trial is to be adduced orally. What has already been said and what follows will demonstrate how much that rule has been eroded and, as farmers and conservationists know, erosion is not always a good thing!

2.11 All other Australian jurisdictions, including the Federal Court, contain provisions essentially similar to the regime in NSW enabling evidence in chief to be given in writing other than orally. I shall discuss the position in some of those other jurisdictions in a little more detail below.[11]

2.12 The role and function of the Witness Statement was intended to be, and is, precisely the same as that of the Affidavit. It is supposed to be the exclusive source of a witness' evidence in chief (whether that witness is an expert witness or a lay witness). The differences between the Witness Statement on the one hand and the Affidavit on the other were, and are, much more ones of form than of substance. Unlike the Affidavit, the witness does not swear to or affirm the truth of the contents of the Witness Statements. He or she merely signs it. When the case comes on for hearing, the Witness Statement is **tendered** as evidence (as opposed to being **read** as an Affidavit is). The Witness Statement thus, usually, gets given an exhibit number whereas an Affidavit does not.

2.13 The Witness Statement, to be evidence, of course, needs to be in admissible form[12] and needs ultimately to be sworn to or affirmed by the witness. Thus, the same process of objection to various parts of the Witness Statement occurs as in the case of an Affidavit. When that is completed, the relevant witness is called and asked a few formal questions designed to obtain the witness' agreement, on oath or affirmation, to the effect that the

10 See paragraph [4.3] below.

11 See footnotes 20, 21, 40, 77 and 93-94 below.

12 See, e.g. r.31.4(7) of the UCPR and footnote 93 below.

contents of the Witness Statement are true and/or that the opinions expressed therein are honestly held by the witness. Once those formalities are concluded, the 'evidence' contained in the Witness Statement is of precisely the same character, nature and weight as that which would have been contained in an Affidavit had the witness chosen to give his or her evidence (or been directed to) that way.

2.14 Thus, there is no significant difference between an Affidavit on the one hand and a Witness Statement on the other hand and it is essential to bear this in mind when preparing either document. The lawyer charged with the task of assisting a witness to draft a Witness Statement should not think that there are some lesser or lower standards which are acceptable in terms of admissibility or the like. The best approach, in my experience, is to disregard the formal title of the document and draft it as if it was an Affidavit.[13]

2.15 In jurisdictions, or even individual cases, where the litigant is given a choice between whether to use Affidavits on the one hand or Witness Statements on the other, a decision needs to be made as to which form to use.[14]

2.16 If the witness is not 100% sure about matters or the document needs to be prepared hurriedly before all information is available to the witness or the lawyer has some doubts about the reliability or integrity of the witness (to mention just a few possible scenarios) it may be better to opt for the Witness Statement route. That takes out of play, unless and until the Witness Statement is tendered, the possibility of a charge of perjury being laid pursuant to s.29 of the *Oaths Act* (NSW) or similar legislation in other jurisdictions and, more importantly, means the witness' credit is slightly less likely to be undermined or eroded in the event that he or she subsequently gives inconsistent later written or oral evidence because he or she hasn't sworn on his or her oath (or affirmation) to the previous inconsistent material.

---

13 In Western Australia, by reason of CPD 4.5, it appears that a slightly more sympathetic approach is taken to the application of the rules of evidence to witness statements than elsewhere – see *LexisNexis Civil Procedure WA* [16,167.30].

14 As apparently contemplated by the *NSW Supreme Court's Practice Note SC Eq. 3* in respect of cases in the Commercial List or the Technology and Construction List. See paragraph *25(12)* of that *Practice Note*. R2.3(k) of the UCPR expressly confers on a court the power to order evidence in chief to be given either or both by an Affidavit or a Witness Statement.

2.17 On the other hand, there are often good reasons for opting for an Affidavit. If, for instance, the witness is old or in ill-health then it will be much easier to tender his or her Affidavit evidence (although its weight will be diminished) at the hearing in the event that the witness through death or incapacity is unable to attend at the hearing.[15]

2.18 Further, frequently witnesses are not required for cross-examination and having the evidence in the form of an Affidavit avoids the inconvenience to the witness of having to attend court merely to swear to or affirm the contents of his or her evidence.

2.19 Finally, perhaps, evidence adduced by way of Affidavit may be viewed, initially at least, as somewhat more authoritative and persuasive than that adduced through a Witness Statement. After all, by swearing to or affirming the truth of the contents of an Affidavit the witness is exposing himself or herself to the risk of a criminal conviction.

3.0 Factors to consider in respect of the use of Written Evidence

3.1 In determining whether the case is one where truly the appropriate mode of evidence is written evidence and, if so, the form that that evidence should take there are a variety of factors which must be considered by the lawyer. Without pretending to be exhaustive, the following factors are nearly always relevant.

(a) Is written evidence the right form of evidence for the particular case? (see Section 4 below);

(b) The forum in which the evidence is to be adduced (see Section 5 below);

(c) The nature of the proceeding (see Section 6 below);

(d) The nature of the evidence (see Section 7 below);

(e) The admissibility of the contents of the written evidence (see Sections 8 & 9 below);

(f) The consequences of giving evidence in writing (see Section 10.0 below).

[15] But a Witness Statement could also probably be tendered in such circumstances pursuant to s.63 of the *Evidence Act*. See paragraph [6.17] below.

3.2 I have already mentioned the principal objects of written evidence, at least so far as the court is concerned.[16] Those objects, at face value, appear admirable and properly aimed at achieving a fair and efficient administration of justice. Generally speaking, written evidence does frequently achieve these aims but only if witnesses and lawyers properly discharge their duties in the preparation of the Affidavit evidence.[17]

3.3 Moreover, sometimes, despite the best efforts of everyone involved, adducing evidence by way of Affidavit does not, or may not, always achieve these laudable objectives.

4.0 Is this a case where written evidence is <u>appropriate</u>?

4.1 If the case in question is an interlocutory hearing or a proceeding of an interlocutory nature, such as a claim for an interlocutory injunction or a fight over discovery or security for costs or where the rules require that evidence be by way of affidavit[18] then, obviously, the only permitted mode of evidence is Affidavit evidence. I shall discuss the use of Affidavit evidence in such applications below.[19]

4.2 However, when one is talking about a **final** hearing, it is not axiomatic that written evidence is the best form of evidence or, even, should be the preferred course, notwithstanding the views summarized in [1.3] – [1.6] above.

4.3 In both the Federal Court and in the Supreme Court of New South Wales (and in all other jurisdictions) **the primary rule** is that the evidence of any witness on any issue at a trial of a cause is to be given **orally** in court.[20] Under Rule 31.1 of the UCPR in NSW where proceedings have been commenced by Statement of Claim then evidence at the hearing is to be in oral form but the Court may order it to be by Affidavit or Witness Statement. Where the proceedings are not commenced by Statement of Claim (e.g. as in most Equity cases) or the evidence is not to be adduced at a "trial" (that is, it

16 See paragraphs [1.3]-[1.6] above.

17 As to which, see paragraphs [11.1] – [11.6] below.

18 See e.g. Practice Note SC Gen 4; *Ritchie's Uniform Civil Procedure, NSW*, Vol. 1 at [35.1.10].

19 See paragraphs [6.3]-[6.19] below.

20 Section 47(6) of the *Federal Court of Australia Act 1976*; UCPR *Rule* 31.1; see also, for example, s.28 of the *Evidence Act*; see also *South Australian Supreme Court Rules* Re. R 78.01; *West Australian Supreme Court Rules*, 0.36R.1; *Victorian Supreme Court (General Civil Procedures) Rules* 2005, R.40.02.

is an interlocutory proceedings in nature) then the evidence is to be by Affidavit unless otherwise ordered – see R.31.2 of the UCPR. However, as noted above, in New South Wales, in commercial cases commenced in the Supreme Court, there still seems to be a presumption that evidence in chief be given by way of Witness Statement albeit, perhaps, not as strong a presumption as existed in the past.[21]

4.4 Furthermore, courts are much more involved with case management now than in the past. This seems to be the case in all courts or divisions of courts. In NSW, for instance, ss.56 – 61 of the C.P.A. entrench the role of case management and the orders courts can make to achieve the objective of just, quick and cheap disposal of proceedings.[22]

4.5 When litigating a commercial matter, however, one should not start with the *a priori* assumption that the evidence in chief should be given by way of Affidavit or Witness Statement. Rather, it is necessary to determine, considering all of the issues in the case, whether it is better for all or some of evidence to be given orally or whether it is preferable for it to be given in written form. If the decision is made that oral evidence is preferable then the practitioner must be vigilant to ensure that an appropriate order has been made by the court if that is required.[23]

4.6 Most judges and experienced commercial litigators would confess, I suspect, that in an ideal litigation world where there was unlimited court time available and the parties and the lawyers had the time and resources necessarily required, oral evidence in chief is still the optimal way of assisting a court in its fact finding duty.[24]

---

21 See paragraph [2.7] above. The approach in other jurisdictions varies. In Western Australia there seems a very strong predisposition in favour of ordering that evidence in chief be in writing – see CPD 4.5 and, generally, *LexisNexis, Rules of the Supreme Court of WA* [34.5.9D], [20.0.02]. In Victoria, a more cautious approach is adopted. More than mere lip service is paid to the primary rule that evidence is to be oral. Even in proceedings in the Commercial Court to which Practice Note 10 of 2011 applies, paragraph 13.11A makes it plain that the onus is upon the party applying for written evidence to justify its use and that where credit issues are involved or where there are significant contested issues of fact then generally written evidence will be inappropriate. Even in the "birthplace" of witness statements, namely the Commercial Court in England, the view is that where there is disputed evidence of oral negotiations it will almost always be desirable for witnesses to give their evidence on such matters orally – see Coleman, *The Practice and Procedure of the Commercial Court*, 3rd ed., p. 143. For reasons to be developed in this paper, the author favours strongly the Victorian approach. As to the approach to the Federal Court, at least in NSW, see footnote 29 below.

22 See also s.37M of the FCA. Rule 2.3(k) of the UCPR which applies generally to proceedings in NSW courts empowers a court to order, in any proceedings, that evidence in chief be given orally, or by affidavit or witness statement, or both.

23 And any application for such an order must be made as quickly as possible – certainly before any timetable for serving of evidence is agreed – in NSW, see paras 5 & 7 of SC Eq 1 and SC Eq 3.

24 See paragraphs [4.18] – [4.22] below.

4.7 There are a number of reasons for this. First, however honorable, professional and ethical the lawyer assisting a witness to prepare his or her Affidavit is,[25] the Affidavit ultimately produced usually reflects the language, grammar and logical thought process of the lawyer concerned rather than the witness himself or herself. Obviously, Affidavits must be drafted honestly but usually they are also crafted to present the case which is being advanced by the party for whom the witness is being called in the best possible light. Lawyers are, or should be, experts with language and this is often reflected in the Affidavits which they prepare.

4.8 Thus, many Affidavits or witness statements as finally drafted resemble somewhat the ghost-written autobiographies of famous sportsmen or movie stars. Rarely, if ever, do they convey the true personality of the deponent. But it is that personality which the court and the lawyers present in court need to come to know and assess in the fact finding process.

4.9 Experienced judges know this and are much more sceptical about the weight to be attached to statements made in affidavits or even to inconsistencies in affidavits than they are when dealing with oral evidence.

4.10 Witness this exchange between the former Chief Justice of Australia and highly experienced Senior Counsel :- [26]

"Mr Douglas: ...	*Justice Palmer did rely upon the inconsistencies in these affidavits as reflecting adversely upon the credit of the principals of Say-Dee ...*
Gleeson CJ:	*I am sure all witnesses write their own affidavits for themselves.*
Mr Douglas:	*Well, they did not, your Honour, we know that.*
Gleeson CJ:	*We know the way it is done."*

4.11 It may be thought that a witness' personality can be revealed by competent cross-examination. Sometimes, but not always, that is true but there is an anterior comment which needs to be made before one gets to the cross-examination difficulties sometimes caused by written evidence.

25 I shall summarize the lawyer's obligations in Section 11.0 below.

26 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2006] HCA Trans 682, 12 December 2006.

4.12 The object of eliciting any evidence in chief, whether orally or in writing, is to paint a picture of the relevant events in the way most favourable to your client's case. You want the witness to come across as a decent, honest, reliable sort of person to whom the judge or jury can relate. You want his or her evidence to be presented as credible, especially where there is a conflict in respect of that evidence. Even, or especially, poorly educated, not very intelligent witnesses who give their evidence in chief orally are often able to create an initial favourable impression with the judge or jury by the way in which they give that evidence orally. Rarely, if ever, will a cross-examiner wish to assist in creating such an impression! Evidence given by a witness orally may create a favourable (or unfavourable) impression which an Affidavit can never do even if the content is exactly the same and even if the witness is exposed to cross-examination..

4.13 Moreover, from the point of view of the witness , giving evidence orally in answer to questions asked by sympathetic counsel who is not trying to trap him or her but rather to present him or her in the best possible light to the court often enables that witness to grow in confidence and to relax (as well as creating an initial favourable impression with the judge) before that witness is confronted with the ordeal of cross-examination.[27]

4.14 From the point of view of the cross-examiner also, listening to the witness give his evidence in chief can be a huge advantage. The cross-examiner gets a feel for the witness. He or she gets an appreciation for how the witness thinks and can store up in his or her mind for cross-examination and final address, differences between the manner in which the witness gave his evidence in chief and the way he or she gave it in cross-examination. How often have all of us seen the witness who, in chief, is smooth, responsive, concise and prompt in answering questions but who becomes hesitant, unresponsive, evasive or verbose in cross-examination?[28]

4.15 Therefore, there is much to be said for the view that oral evidence in chief is better designed to promote the proper administration of justice than written evidence. This,

---

27 Further, as stated by Smith J in *Grossberg v New Theme Pty Ltd* [2003] VSC 185 at [70] there is a danger in cross-examination for witnesses who do not read their witness statement with the same care as the cross-examiner; see, also, to the same effect *Ali v Hartley Poynton Ltd* [2002] VSC 113 at [396].

28 A further difficulty for the cross-examiner is adverted to by Whelan J in *McMahon v McMahon* [2008] VSC 386 at [116]. There the judge cautioned against impugning a witness' credit on the basis of an exaggeration in his witness statement exposed in cross-examination because litigation lawyers had had a substantial involvement in the preparation of the witness statement.

of course, does not overcome the problem of 'trial by ambush' but there are simple expedients which can eliminate or minimise such a tactic. A frequently employed method of achieving this is to require opposing parties to serve on each other an outline of what they expect the witness to say. It is not perfect but, once more if the lawyers are doing their job properly and honestly, it does remove much of the fear of being caught by surprise by evidence given in chief.[29]

4.16 Notwithstanding the perceived advantages of written evidence from a procedural fairness and case management perspective, increasingly judges, in my experience, are recognizing the importance and desirability of at least part of the evidence being given orally. Despite the adoption of a seemingly contrary position in Western Australia, with respect, I regard this as the correct approach.[30]

4.17 This is particularly the case where the witness in question is giving evidence on a controversial issue where there is a substantial conflict between the parties. Frequently, such a situation will emerge where allegations of fraud or other morally reprehensible conduct are made. But even in less vivid cases, such as ones relating to oral contracts, oral representations, estoppel claims or where a contract is sought to be set aside on the grounds of duress, undue influence or unconscionability, such contentious factual issues will often arise.

4.18 Many of the considerations which I have been discussing are summarized more eloquently and succinctly by Justice Emmett writing extra-judicially. His Honour had expressed the following view:- [31]

> *"Where evidence is uncontroversial it is clearly convenient that the evidence be adduced in a written form. Such a procedure is capable of saving time and avoiding misunderstanding and confusion.*
> *However, where evidence is controversial, particularly where credibility of the witness is involved, the adducing of the evidence in written form is often undesirable and can be*

---

29 The dominant practice in the Federal Court in NSW is that critical contentious evidence should be given viva voce but that an outline of evidence or a proof of evidence be served on the other side. Often there is also a direction that there is to be no cross-examination on that outline or proof without leave of the court – see the very useful article by Justice Alan Robertson "*Affidavit Evidence*" [2014] Fed J Schol 3 available on Austlii. The position seems similar in Victoria – see *Hodgson v Amcor Ltd* at [80] where it is also said that the outline or summary should clearly identify the topics in respect of which evidence will be given and the substance of the evidence.

30 As to the position in Western Australia, see footnote 21 above.

31 In his Article *'Practical Litigation in the Federal Court of Australia: 'Affidavits'* (2000) 20 Australian Bar Review 28 at 28.

quite unfair. An honest witness, albeit nervous in unfamiliar and overbearing surroundings, will be better able to defend in cross-examination evidence given by the witness in his or her own words. With the very best of intentions, a lawyer who settles an Affidavit or a Witness Statement will invariably reduce the language of the witness to the lawyer's own language. That may entail changes in meaning and emphasis that, although not intended, may expose a witness to unnecessary difficulties in the course of cross-examination. On the other hand, a dishonest witness will always be assisted by having evidence put into credible form by a lawyer. Where an assessment of credit is required, a judge will have a much better prospect of assessing a witness who gives evidence in chief orally rather than being exposed to cross-examination immediately upon entering the witness box."

4.19 Moreover, sometimes using Affidavits will not even achieve the objective of saving valuable court time. This is especially so where the Affidavits have been prepared well in advance of the trial and the issues have narrowed or changed since the Affidavit was prepared. Sometimes, in such circumstances, through fault on both sides, much inadmissible material is placed before the court which requires time to deal with. In *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* the High Court gave this trenchant criticism of such a practice:- [32]

"*Written statements of witnesses, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance."*

4.20 Further, Callinan J, echoing the thoughts of Emmett J set out in [4.18] above, had this to say about the practice of filing and serving affidavits/witness statements in advance of a trial:- [33]

"*[174] … The procedure for trials in the (Federal Court) jurisdiction also involves the preparation, exchanging and filing of statements … in advance of the hearing which may, and almost always will, be read before the trial begins.*

[175] This system has its disadvantages and dangers. On the one hand, the trial judge will be well educated in many of the details of the case on each side by the time that the hearing starts. But on the other hand, it may sometimes be difficult for the trial judge, apparently fully conversant with the facts and issues, not to have formed some provisional view at least of the outcome of the case. The justifications for the provision of written statements in advance of trial have

[32] (2004) 219 CLR 165 at 177-178 [35]; see also the comments of Pembroke J summarized in paragraph[4.22] below.

[33] *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 at 634-635 [174] – [176].

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 were 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.*

[176] I mention these matters because in sum they may well incline a trial judge towards a degree of outspokenness of a kind to which he or she would not be inclined in a conventional trial on largely oral evidence."[34]

4.21 In a similar vein, former Chief Justice of NSW, the Hon Mr James Spigelman AC QC, had this to say in delivering the 2011 Sir Maurice Byers Lecture on the topic of "Truth and the Law:- [35]

> *"There is, however, no control of leading questions … by lawyers preparing the written statements of evidence that have become ubiquitous in legal proceedings. The stilted legal drafting, in words the witness would never use, too often using the same formulation for all relevant witnesses, is an impediment to truth finding. The process props up a false witness, but a truthful witness will more readily concede a discrepancy in cross-examination and look the worse for the honest concession.*
>
> *An observation, variously attributed to Lord Buckmaster or Lord Justices Bowen and Chitty is that 'truth may sometimes leak out from an affidavit, like water from the bottom of a well'. Even if ethical constraints on witness coaching are complied with, the conduct of a lawyer taking a statement or preparing a witness may give clues on what evidence may be useful."*

4.22 Nor did Pembroke J pull his punches in a comparatively recent case.[36] His Honour's observations included the following:[37]

(a) affidavits/witness statements are not always the best means of leading evidence in chief. This is especially so where disputed issues of fact include oral

34 See, also, per Callinan J in *D'Orta-Ekenaike v. Victoria Legal Aid* (2005) 223 CLR 1 at 118 [375].

35 *Bar News* Winter 2011 99 at 110.

36 *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [23]-[29].

37 See [23], [25], [28]-[29] of his Honour's judgment.

representations or conversations;

(b) an endorsement of Justice Emmett's views quoted in paragraph 4.18 above;

(c) the studious reconstruction and formulation in writing of contentious conversations and oral communications in language that is usually settled and refined by a lawyer can sometimes be unreliable and unintentionally misleading;

(d) sometimes 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;

(e) if evidence in chief of a contentious conversation is addressed orally, the evidence will usually be more economical and more confined that it would otherwise have been;

(f) affidavits/witness statements can consume inordinate amounts of time in their making, in ruling on objections to them and in their patient deconstruction by cross-examination.

4.23 It is apparent, therefore, that not all judges are convinced of the wisdom of written evidence being the exclusive form of evidence in all cases. Nor should practitioners be.

4.24 It is fundamentally important for a litigation lawyer to make an early and informed call whether, in the particular case, all or part of the evidence in chief should be led in writing or orally. He or she should not be deterred from seeking the appropriate form of evidence by the conventional or usual practice in the jurisdiction where the case is likely to be heard.

5.0 Forum

5.1 If it is decided, or ordered, that some of the evidence is to be in written form, the first important step is to ensure that evidence complies with the court rules / practice directions in the relevant jurisdiction.

5.2 In preparing written evidence, an essential preliminary step is to know the procedures and preferences of the particular court in which the written evidence is to be employed. The *Supreme Court* Rules in most States and Territories specifically make provision for written evidence and the form thereof. In New South Wales, the relevant Rules are

contained in *Parts 4 and 35 of the UCPR*[38] and in the Federal Court the relevant Rules are contained in Part 29[39]. The Rules, in general, deal with the formal and procedural requirements relating to the use of written evidence in proceedings of the court. Sometimes, those Rules differ in content and thus it is necessary for the lawyer to have regard to the particular Rules of a particular court when preparing the Affidavit.

5.3 Moreover, it is not only the Court Rules, per se, to which regard must be had. Courts frequently supplement or vary the provisions contained in the Rules dealing with Affidavits or Witness Statements by issuing Practice Notes or Practice Directions applicable generally or in specific situations or in specialist court lists or divisions. The litigation lawyer has to be familiar with all such Practice Notes or Practice Directions. In NSW, of particular importance, are Practice Note SC Gen 4 whose title is "Supreme Court – Affidavits" and Practice Notes SC Eq 1, SC Eq 3 and SC CL 5 to which reference has already been made. In the Federal Court one has to be familiar with the Practice Notes dealing with Case Management and the Fast Track Procedure such as Practice Notes CM 1 and CM 8.[40]

5.4 Time and space do not permit an examination of all relevant court Rules and Practice Directions. I shall confine my comments, therefore, to the situation in New South Wales and to that pertaining in the Federal Court. Except where it is particularly important to do so, I will not refer to the Practice Notes or Practice Directions.

The Position in New South Wales

5.5 The position in NSW is governed in the main by the Uniform Civil Procedure Rules 2005 ("**the UCPR**").

38 See also Form 40.

39 See also Form 59.

40 For a very good discussion of written evidence in the Federal Court, see Justice Alan Robertson's paper referred to in footnote 29 above. In Victoria, for commercial cases, detailed rules for the form of written evidence are set out in Practice Note 10 of 2011. Likewise in Western Australia detailed rules are set out in Consolidated Practice Direction CPD 4.5.

5.6 An important requirement of Affidavits is that they should be divided into consecutively numbered paragraphs and each paragraph should, so far as possible, be confined to a **distinct** and **discrete portion** of the subject evidence.[41]

5.7 The UCPR also deal with the requirements where a deponent is under a legal incapacity[42] and specifically require that each page of the Affidavit (but not annexures or exhibits thereto) be signed by the deponent and by the person before whom it is sworn.[43]

5.8 It should be noted that the making of knowingly false statements in an Affidavit renders the deponent liable to prosecution for perjury. [44] Thus a lawyer, especially when 'doubling up' as the witness to the Affidavit, ought not to permit the swearing of an Affidavit if he or she is aware, or reasonably believes, that it, or a part of it, is false. Nor should they permit an Affidavit to be sworn unless they are satisfied that the deponent understands the nature of an oath or affirmation, and the contents of the Affidavit.[45]

5.9 An important feature of the UCPR, which everyone should remember, is a requirement that the pages of an Affidavit and its annexures should be consecutively **numbered**.[46] Many judges become very irritated when this rule is ignored or overlooked although, sometimes, the haste with which an Affidavit has been prepared means that numbering does not occur. The thing which exasperates judges most is to be told that the relevant annexure is about two-thirds the way through the Affidavit just after the letter from X to Y dated (blank). You will keep on side with the court for longer and better maintain its goodwill if the judge can readily find the document by reference to its page number. It is also much easier to navigate through the evidence. Thus, even in jurisdictions which do not contain a corresponding rule, I would recommend that that all pages of the Affidavit and annexures be numbered. [47]

41 UCPR 35.4.
42 UCPR 35.3, 35.7.
43 UCPR 35.7B.
44 Section 29 of the *Oaths Act* 1900. There are similar provisions in all other Australian jurisdictions.
45 *Bourke v Davis* (1899) 44 Ch.D 110 at 126.
46 UCPR 35.6(3).
47 See, *Bryson, 'Affidavits'*, (1999) 18 Australian Bar Review 166 at 168.

5.10 One thing to bear in mind in NSW is what to do with annexures or exhibits. The ordinary rule is that documents may be annexed or made an exhibit to an affidavit [48] but in matters in the Commercial List and Technology and Construction List the rule is otherwise. Annexing or exhibiting documents to affidavits or witness statements is only permitted, in such matters, in interlocutory applications or by leave of the court or agreement of the parties.[49]

5.11 The *UCPR* also deal with matters such as irregularities in Affidavits,[50] filing and serving of Affidavits, proof of service of Affidavits and cross-examination on Affidavits. They also prohibit Affidavits, or portions of them which contain scandalous, irrelevant or otherwise oppressive matter.[51]

5.12 It is also important to remember that all dates, sums and other **numbers** in any document, including in an Affidavit or Witness Statement, are to be expressed in figures rather than words.[52]

The Federal Court Rules

5.13 In general terms, these follow a similar format to the UCPR but there are significant differences. The principal Federal Court Rules to become acquainted with are contained in Part 2 and Part 29. The standard form in which an Affidavit must be drafted is Form 59 of the Federal Court Forms.

5.14 The Federal Court Rules were significantly overhauled in 2011. The Federal Court Rules 2011 came into force on 1 August 2011. Their overall purpose is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. It is important to observe that the rules of court are meant to be a guide to parties and their lawyers as to how a proceeding will be conducted in the court. They are not slavishly applied and Rule 1.34 of the FCR provides that the court may dispense with compliance with the Rules.

48 r.35.6 UCPR.
49 Practice Note SC Eq.3 paragraph 35.
50 UCPR 35.1.
51 UCPR 4.15.
52 UCPR 4.7.

5.15 R.2.11 – 2.16 deal with general requirements in respect of all the documents (including affidavits and witness statements) and should be complied with in respect of written evidence in chief to be filed or served in Federal Court proceedings. These Rules require compliance with approved forms and deal with matters such as the title of documents, signatures and the formal information to be contained in each document.

5.16 The principal Part of the FCR dealing with affidavits specifically is Part 29. In many respects the FCR are similar to and closely resemble their counterparts in the UCPR. But the following features of the FCR are important to note:-

(a) an affidavit must comply with Form 59 and be made in the first person; [53]

(b) documents which accompany the affidavit must be either annexed to it or exhibited to it; [54]

(c) not only must the affidavit be divided into numbered paragraphs but, to the extent practicable, each paragraph must deal with a separate subject;[55]

(d) each page of the affidavit, including any annexure, must be clearly and consecutively numbered starting with page "1";[56] and

(e) each page of the affidavit (but not any annexure) must be signed by the deponent and by the person before whom it is sworn.[57]

5.17 One difference between the UCPR and the FCR is that when it comes to scandalous material etc. there is no specific provision in the UCPR prohibiting the use of such material in affidavits. Rather one must have regard to the general powers relating to documents set out in r.4.15 of the UCPR. There is a similar general provision in the FCR (r.6.01) but r 29.03 also specifically prohibits an affidavit from containing scandalous, frivolous, evasive or ambiguous material. R.29.03(2) goes so far as to empower the court to order that the affidavit, or a part of the affidavit, which contains such material be removed from the court file.

53 Rule 29.02 – note that the UCPR in New South Wales no longer require the affidavit to be in the first person

54 R.29.02(4) and(5) – note the different position in New South Wales at least in respect of Commercial List matters referred to in [5.10] above).

55 R.29.02(3).

56 R.29.02(6).

57 R.29.02(7).

6.0 The form of the hearing for which the written evidence is to be used

6.1 A matter of fundamental importance to be taken into account in preparing the written evidence is whether the hearing for which it is to be used is an **interlocutory** one on the one hand or a **final** hearing on the other hand. In an interlocutory hearing, the usual form of written evidence will be the Affidavit (that is an affidavit in the traditional sense as opposed to a witness statement).

6.2 The general rules as to the preparation of Affidavits contained in the *UCPR* or the *Federal Court* Rules apply with equal force to Affidavits to be used in interlocutory proceedings although courts, appreciating the urgency with which such Affidavits are usually prepared, are more forgiving and less inclined to reject Affidavits, or portions thereof, for formal, technical or evidentiary reasons.

6.3 However, a very important difference between Affidavits to be used in interlocutory proceedings and those to be used in final hearings is a relaxation of the **hearsay** Rule. Section 75 of the *Evidence Act* provides that, in an **interlocutory** proceeding, the hearsay rule does not apply to the evidence if the party who adduces it also adduces evidence of its source.

6.4 Section 75 of the *Evidence Act*, thus, removes the need for the deponent to swear to his or her **belief** in the contents of the hearsay material. [58] Obviously, in some cases, this is an important relaxation of the evidentiary requirements but again should not be interpreted as a licence to merely put in anything, on a hearsay basis, even if the deponent has no genuine belief in the accuracy thereof.[59]

6.5 Moreover, just because s.75 of the *Evidence Act* permits hearsay evidence for interlocutory proceedings that does not necessarily mean that it is desirable to put on hearsay evidence if a person with direct or primary knowledge of the facts is available to give the evidence himself or herself. Obviously, for tactical or forensic reasons (e.g., to avoid the possibility of cross-examination of someone who maybe an important witness at the trial) there may be a strong temptation to put on hearsay evidence instead

58 Which used to be the case in NSW and in the Federal Court – see, e.g., *Part 36 Rule 4* of the NSW SCR and *O33 R2* of the FCR which was repealed in 2001).

59 See paragraphs[7.10] –[7.11] below.

of an Affidavit from that person in interlocutory proceedings. But if the person with direct knowledge is available then that fact can be unmasked with little effort by your opponent at an interlocutory hearing.

6.6 If so unmasked, then the tactic may backfire. The court may think that the party calling the hearsay evidence is trying to hide or conceal a witness and attach much less weight to the evidence than would be the case if the person with actual knowledge of the relevant events swore the Affidavit himself or herself.

6.7 Generally speaking, therefore, even if the hearing is one to which s.75 of the *Evidence Act* truly applies the safer, better and more persuasive course, if time and circumstances permit, is to put on Affidavit evidence from someone who has actual knowledge of the events rather than mere hearsay knowledge. Cross examination of such a person will be limited at best. Usually the court will not permit a witness in an interlocutory proceeding to be cross-examined on issues which will arise at trial. Thus, the need to protect a witness is more apparent than real.[60]

6.8 Moreover, sometimes what would appear, at first blush, to be an 'interlocutory' proceeding (because it is not the final hearing of the overall matter) is in truth not so. An illustration of this is *Allstate Life Insurance Co v Australia & New Zealand Banking Group Limited (No 3)*, a decision of Lindgren J in the Federal Court.[61]

6.9 There, the court was concerned with a motion for a permanent injunction restraining the taking of a deposition overseas from a foreign witness. Hearsay evidence was sought to be utilised for the purposes of the determination of that issue. Lindgren J refused to receive the hearsay evidence notwithstanding that the Federal Court then had a court rule roughly equivalent to old *Part 36 Rule 4* of the *NSWSCR* (which provided

60 See, e.g., Young, Croft and Smith, *On Equity*, (2009) p.1057 [16.500].

61 (1996) 64 FCR 55. Another tricky situation is an application to bring a derivative action on behalf of a company pursuant to ss 236-237 of the *Corporations Act 2001*. Some judges have treated that as a final application and rejected hearsay evidence (e.g. *Swanson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at [24]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 60 NSWLR 425 at [15]; *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 784 at [12]). At least one other has expressed the view that such an application is interlocutory because it did not finally determine the issues between the parties, since their rights are unaffected if the application is refused (*Hackett v Nambucca Valley Quarries Pty Ltd* [2012] NSWSC 1189). It is submitted that since the outcome of such an application finally determines whether a person has a right under the Act to bring an action in the name of the company it is final in nature and that, consequently, hearsay evidence should not be used.

that hearsay evidence was allowed at interlocutory proceedings where undue delay or hardship would otherwise be caused). There was, however, an important difference between the *FCR Rule* in its then form and its New South Wales equivalent. In *Part 36 Rule 1* of the *NSW* Rules the word 'trial' was defined to mean a trial in proceedings commenced by statement of claim. Under the *Federal Court Rules* with which Lindgren J was dealing, the word 'trial' was defined in *O1 R4* as 'any hearing other than an interlocutory hearing'.

6.10 Thus, for practical purposes, the Federal Court regime that Lindgren J was considering was substantially the same as s.75 of the *Evidence Act*. Lindgren J held that as the determination of the motion would finally dispose the question whether or not such a deposition could be given it was not of an interlocutory nature but rather was of a final nature. Accordingly, the hearsay evidence was inadmissible.

6.11 Always, where time, circumstances and forensic considerations permit, whatever the nature of the proceedings the safest course is to rely on direct evidence rather than hearsay evidence.

6.12 A further trap to be avoided is again one which is frequently seen. Often an Affidavit will be prepared for, say, an ex parte injunction based heavily on hearsay material. When the matter comes back before the court for a contested interlocutory hearing for the continuation or otherwise of the injunction frequently the same Affidavit material is relied upon in unamended form.

6.13 However, by the time the contested interlocutory hearing takes place, the justification for relying upon hearsay material may have disappeared. Technically, the hearsay material is still admissible under s.75 of the *Evidence Act.* However, a skilled and experienced opponent may draw to the attention of the court, on the contested hearing, the fact that, despite better, more reliable and testable evidence being available, the moving party is still relying upon the hearsay material. Suggestions may be made that the moving party is not discharging its duty to the court to present the court with the best evidence on the issues and that much less weight should be attached, on the

contested hearing, to the hearsay material than has hitherto been the case. Sometimes, such submissions sometimes find a very receptive audience.[62]

6.14 Always put yourself in the position of how the opponent would seek to undermine or eliminate the hearsay evidence. Play the devil's advocate. The extra time, cost and inconvenience of updating the evidentiary material will be far outweighed usually by its increased probative value and the reduction of the risk of losing the application because it is held that the evidence is no longer admissible or is of less weight because, for instance, the court is no longer satisfied that there would be undue delay or inconvenience in calling more direct evidence.

6.15 Finally, in jurisdictions where the *Evidence Act* does apply (or even in other jurisdictions), it must be remembered that even at a trial or final hearing sometimes hearsay material can be admitted. But, this is not the occasion to discuss generally the statutory and common law rules as to when hearsay evidence can be admitted on a final basis.

6.16 However, one matter which it is appropriate to discuss now is that s.63, s.64 and s.65 of the *Evidence Act* provide, even at a final hearing or trial, provide for significant relaxations of the rule against hearsay evidence where, for instance, the maker of the statement is unavailable at the trial, or it would cause undue expense or undue delay to call the witness, or where the evidence in question is evidence previously given in another court proceeding or even in wider circumstances.[63]

6.17 A recent rather revealing case involving s.63 of the *Evidence Act* is *Cox v State of New South Wales*.[64] That was a case involving a civil claim for damages for personal injury which a plaintiff alleged that he had suffered as a child by reason of a sexual assault committed upon him at a school. When called to give evidence, the plaintiff had no recollection of the events constituting the assault. However, in the past, he had told his mother about those events. Simpson J (as her Honour then was) found that, in the

62 Even, where the proceedings are interlocutory, a court may place very little weight on hearsay evidence – see, e.g. *Re Parberry* [2010] NSWSC 775 at [10].

63 See, especially, s.65(2) and (8) of the *Evidence Act*.

64 (2007) 71 NSWLR 255 which was referred to without apparent criticism by the Court of Criminal Appeal in *Tan v The Queen* [2008] NSWCCA 332; (2008) 192 A. Crim R 310.

circumstances, the plaintiff was a person "not available to give evidence about an asserted fact" for the purposes of s.63 of the *Act* by reason of the definition of "not available to give evidence" in Part 2, clause 4 of the dictionary to the *Act* and the language employed in s.13 of the *Evidence Act*. She held that once a witness states that he or she has no recollection of events, it has to be concluded that the witness was not capable of giving a rational reply to questions about those facts and so was not "competent" to give evidence about the fact within the meaning of s.13 of the *Act*. Since the plaintiff was not "competent" to give evidence about the fact, by reason of Part 2 clause 4 of the dictionary he was taken to be not available to give evidence about that fact with the result that s.63 of the *Evidence Act* applied so that his mother could give hearsay evidence of the events in question. In *Tan v R*,[65] the Court of Criminal Appeal appears to have accepted the correctness of this approach although holding that it only applied where a witness truly had no recollection of events and that it did not apply where the court believed that the witness was merely feigning a lack of recollection.

6.18 Thus, where the hearing is a long way off or there is a genuine concern about whether or not a witness may remember matters at the hearing (because, for instance, the witness may already be showing signs of a failing memory) it may be sometimes be advisable to prepare an affidavit by someone who has spoken to the witness prior to the hearing and has been told by the witness about the relevant events.

6.19 However, if such an affidavit is to be relied on then it is essential to give the notice stipulated by s.67 of the *Act*. My experience is that s.67 of the *Evidence Act* is, in practice, a very under-utilised provision.

7.0 The Nature of the Evidence

7.1 Broadly speaking, in commercial litigation, the evidence to be adduced by Affidavit will be either **lay** evidence on the one hand or **expert** evidence on the other hand. Expert evidence in chief is almost always given by way of an expert report annexed to an Affidavit of the expert verifying the report.

65 See fn. 64 above.

7.2 In virtually all jurisdictions, the rules of court provide for **Codes of Conduct** to which experts must depose as having complied with before their evidence will be accepted or given full weight. Lawyers should be thoroughly familiar with the appropriate code of conduct applicable for a given case and ensure that their expert does take that into account and that his or her evidence complies with that code of conduct. It is usually necessary for the expert to state in his or her report that the Code of Conduct has been complied with. In some jurisdictions, the lawyer has to swear a certificate to that effect. If it emerges that the expert has not complied with the code of conduct his or her evidence may be rejected or, at best, its weight will be significantly affected.

7.3 Whilst, in general terms, the principles relating to drafting expert reports are much the same as those in respect of drafting lay Affidavits there are substantial and significant differences which the lawyer must bear in mind. Particularly, in jurisdictions to which it applies, the provisions as to expert evidence in the *Evidence Act* must be thoroughly known and considered by the lawyer. There are provisions in the *Evidence Act* which change the common law rules. Thus, for instance, the common law prohibition on an expert giving evidence on the **ultimate issue** has been largely relaxed by the *Evidence Act.* [66]

7.4 However, courts generally do not like having experts tell them how they should decide the case. Thus, notwithstanding the relaxation of the 'ultimate issue' rule by s.80 of the *Evidence Act* an expert's affidavit or report should avoid, if possible, seeking to tell the court the answer to the ultimate issue. Further, in some cases, the relaxation of the 'ultimate issue' rule by s.80 is inapplicable. An illustration of this is expert evidence as to foreign law. Even where s.80 of the *Evidence Act* otherwise applies, the expert is precluded from opining how that foreign law applies to the facts of a particular case.[67]

7.5 Moreover, there are many more restraints on the admission of expert evidence than there are in respect of lay evidence. Of course, the touchstone remains that of relevance but that is not an end of the matter.[68]

---

66 See, e.g., s.80 of the *Evidence Act.*

67 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Limited (No 6)* (1996) 64 FCR 79

68 See paragraph [8.3(k)] below and the paper there referred to. It is important to assist in the drafting of the expert evidence by minimizing the chance of successful objections being taken.

7.6 It is critical when assisting in the preparation of written expert evidence to satisfy yourself that the deponent truly is an "expert" in respect of the opinions being ventured. This is not as easy as it seems.[69]

7.7 Moreover, in preparing a case, expert assistance may well be required for determining whether there is a case at all, to assist in formulation of the statement of claim, in discovery and inspection of documents or preparation of cross-examination. An expert who assists in such tasks is called, colloquially, a "dirty expert", meaning one whose independence and objectivity may be questioned by a court. Such a person should not usually be selected to give expert evidence to the court because less weight is likely to be attached to the opinions expressed. Rather, a "clean" expert should be chosen to give such evidence, that is, one who has not assisted the party's case in the ways outlined.[70]

7.8 Further, when it comes to expert evidence, a lawyer must be very careful in the way in which he or she assists in the preparation of the expert's report. It is fine to suggest changes to make the report more readable or to ensure that it deals fully with all the issues and is in admissible form. But the line must not be crossed. Lawyers should not make any comment to the expert or any suggestion with a view to getting the expert to change his or her opinion.[71] In many jurisdictions drafts of expert's reports may be obtained by the opposing party and if the opinion expressed in the draft is different from that in the final report, vigorous cross-examination of the expert can be expected. If that cross-examination reveals the change is due to a lawyer's intervention extremely

69 See, e.g. *Honeysett v The Queen* [2014] HCA 29; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

70 See, e.g. *ASIC v Rich* [2005] NSWSC 149 at [348]-[365]; *Cobram Laundry Services Pty Ltd v Murray Goulburn Co-Operative Co Ltd* [2000] VSC 353 and *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [676]-[680]; and generally, Kelly and Butler, "*Ethical Considerations in Dealing with Experts*" being a paper presented to the Bar Association of Queensland Ethics Seminar on 1 December 2010. For an excellent collection of papers on the role of experts and lawyers' obligations relating to the preparation of expert evidence, see *Bar News*, being the Journal of the NSW Bar Association, Summer 2006/2007 pp 32-81.

71 See, eg, *Harrington-Smith v State of Western Australia* (No 7) (2003) 130 FCR 424 at [19]; *Universal Music Australia Pty Ltd v Sherman Licence Holdings Ltd* (2005) 220 ALR 1 at [227]-[231]. Justice Robertson's view (which I respectfully share) is that it is essential that an expert be left to draft his or her own affidavit or report annexed to an affidavit from scratch once subject matters have been identified in broad terms. He sees the role of the lawyer to be strictly limited to questions of clarity or admissibility. No suggestion should be made to an expert whether by way of leading question or otherwise as to the substantive content of the affidavit or report – see Robertson, "*Affidavit Evidence*" [2014] Fed J Schol 3 published on Austlii. See, generally, *Cross on Evidence* 10th ed (2015) at 1040-1045 [29080], 1077-1078 [29220].

adverse consequences will almost certainly flow not only for the evidence but also for the lawyer concerned.

7.9 When it comes to preparing, or assisting in preparing a **lay** affidavit, the lawyer should be acutely conscious of all the judicial criticisms of interventions by lawyers referred to above.[72]

7.10 In particular, they should be alert to the fact that the written evidence procedure requires of all participating in the process of preparing and making the statements the obligation to take the greatest care to ensure the witness statements contain the truth, the whole truth and nothing but the truth. The primary responsibility to avoid abuse must be with the party's solicitor and barrister.[73]

7.11 Moreover, the duty does not end with the filing of the written evidence. If, after filing a witness statement, a lawyer is put on inquiry as to the truth of the facts stated in it he or she should, where practicable, check whether those facts are true. If the lawyer discovers that the witness statement is incorrect the other parties must be informed immediately.[74]

7.12 The obligation to ensure, as best one can, that the written evidence is truthful has a flow-on effect to the manner of asking a witness questions for the purpose of preparing a witness statement.

7.13 Mr Spigelman AC QC in delivering the 2011 Sir Maurice Byers Address spoke powerfully of the ability of questioning to implant false memories in people.[75] He

---

72 See paragraph [4.18[-[4.22] above.

73 *ZYX Music GmbH v King* (1995) 31 I.P.R. 207 at 216, 220. See also Justice Alan Robertson's paper referred to in footnote 29 above. The duty extends to the lawyer satisfying himself or herself that the witness understands the contents of the witness statement or affidavit and of the nature of an oath or affirmation – see Bourke v Davis (1889) 44 Ch. D 110 at 126.

74 *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at 60, 62. However, whilst there is a duty to take proper steps to ensure the evidence is truthful and to seek to draw inaccuracies to the attention of the court and other side if put on enquiry about the truthfulness of any evidence there may be limitations on such duties. There is no rule that requires the person before whom an affidavit is sworn to be impartial and independent of the deponent. Nor is there any duty upon a person taking an oath independently to verify the truth or otherwise of what is deposed to – see, *D'Arrigo v Carter* [2003] FCA 5; (2003) 44 ACSR 162 at [9] per Selway J. Whilst the position and obligations of the person witnessing an affidavit are different to those of a lawyer helping to prepare written evidence it is very strongly arguable that the lawyer's duty does not extend to verifying or guaranteeing the truth of what is deposed to, at least where the lawyer has not been put on inquiry as to the truth of what is deposed to.

75 See *Bar News Winter 2011*, being the Journal of the NSW Bar Association, 99 at 110.

observed that asking of **leading questions** had this tendency and that such questions would be rejected by a court if asked by counsel during a witness' evidence in chief. But he continued:

> *"There is, however, no control of leading questions…by lawyers preparing written statements of evidence that have become ubiquitous in legal proceedings.*"[76]

7.14 Whilst it may be impossible to police or even to detect whether a witness statement has been obtained by asking leading questions, in my strong view an ethical lawyer asking a witness questions for the purpose of preparing written evidence should avoid leading questions.

7.15 Some jurisdictions expressly recognize this obligation. In Western Australia, the Bar Association has published Best Practice Guide 01/2009-2011 entitled "Preparing Witness Statements for Use in Civil Cases".[77] It is a comprehensive 34 page document. It explicitly condemns the use of leading questions in preparation of witness statements and proscribes such conduct by lawyers. It gives examples of the types of questions which are permitted.[78]

7.16 There is one aspect in respect of which, with respect, our Western Australian colleagues may go too far and prohibit a practice which is commonplace and permitted in NSW and other jurisdictions. Doubtless relying on the same logic as eschews the asking of leading questions, the WA Bar Association Best Practice Guide says this in the context of preparing written evidence in reply to that of another party[79]:

> "*24.1 A witness statement is not a pleading. It should never adopt the form of responding to particular paragraphs in other statements.* ***The witness should not be told what is in other witness statements****… As explained elsewhere in this Guide, the testimony should be elicited by open questions that do not direct the witness to give a*

---

76 Ibid. In England, the Commercial Court Guide states that it is the duty of all legal advisers concerned with the preparation of witness statements to ensure that the witness is not led beyond what he or she can truthfully say and in particular what he or she can truthfully and independently recollect of past events – Coleman, *The Practice and Procedure of the Commercial Court*, 3rd ed., pp 142-143. A similar duty must exist for Australian lawyers. As observed by Allsop J in *Byrnes v Jokono Pty Ltd* [2002] FCA 41 at [14], a lawyer who assists in the preparation of written evidence must remember that its purpose is to reflect the honestly held recollection of the individual, assisted by sensibly ordered and presented documentary and other background material.

77 This is available on the WA Bar Association website. It is said (at p(i)) to have been subjected to scrutiny by judges and experienced lawyers and, as I understand it, it has the force of a Practice Direction.

78 See [10.1]-[10.3] of the Guide at pp 12-13. As to what is a "leading question" see *Cross on Evidence*, 10th Aus. ed, pp 541-543 [17150].

79 See pp 30-32 of the Guide.

particular version of events…"

"*24.3 At trial, counsel will have an obligation to put an inconsistent version of the facts to a witness when cross-examining the witness. However, the evidence in chief of a witness recorded in a statement is the testimony of the witness, preserved as much as possible from any process that will taint the independence of that testimony…"*.(emphasis added)

7.17 Such a rigorous approach is not adopted in NSW. It is the norm to ask a witness to comment on versions of events, conversations etc deposed to by an opposing party's witnesses in their statements. Indeed, contrary to the obligation referred to in paragraph 24.3 of the WA Guide quoted above, there is powerful legal authority for the proposition that where evidence in chief is by affidavit or witness statement then such an obligation does not exist, the rationale being that where there is written evidence the other party is put on notice of versions of events inconsistent with his or hers and has the opportunity to deal with it in evidence in reply.[80]

7.18 Subject to what has just been said, when it comes to preparing a lay affidavit, the aim is to tell that witness' story in the most relevant, accurate, concise and persuasive way possible. 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 meaning.[81] The cross-examiner, having 'shut the gates' by getting the witness to acknowledge that he has thoroughly read and understood his Affidavit, and that he does not wish to make any alterations or modifications thereto or add or delete anything to or from it, can often take the witness to a particular part of the Affidavit which uses relatively refined or sophisticated language and make the witness feel

80 See, e.g., *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [105]; 261 ALR 382 at 404-405; *Cross on Evidence*, 10th Aus.ed (2013) pp 610-611 [17445].

81 See, eg, comments quoted in paragraphs [4.20] and [4.21] and in fn. 28 above. In a recent case in which I appeared for a deponent of an affidavit who had a limited grasp of English (it being his second language) prepared and swore an affidavit without an interpreter. It was written in faultless and sophisticated English. He said in one paragraph that he had been "reckless". When cross-examined, he had no idea what it meant. The court's faith in the reliability of his written evidence was clearly shaken.

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. The court will not expect the witness to be an Oxford don and an Affidavit should not make the witness look like one if he or she is truly not so. It is counter-productive to create such a false impression. It only makes the court wonder as to what extent the language in the Affidavit truly reflects the witness' version of events or as to whether the witness truly means or understands anything stated in the Affidavit.

7.19 In the same vein, witnesses or potential witnesses will often exaggerate their experience, ability or qualifications or their case generally. This is bad enough when the evidence is given orally but worse still when it is given by way of Affidavit or Witness Statement, thus giving the opposing party time to check the witness' credentials. I have seen cases lost because, irrelevantly, a witness has stated that he has particular educational qualifications when in fact he or she does not possess any such qualifications, thus irreparably undermining his or her credit.

7.20 Accordingly, when drafting an Affidavit about such matters a minimalist approach is recommended except where the dictates of the case demand that a more fulsome explanation of the witness' ability, qualifications and experience is called for. Even then, in preparing the Affidavit great care should be taken, even at the risk of causing offence, to establish that the witness is not over-selling himself or herself. Where the evidence is to be given by way of an Affidavit, the risk of perjury should be fully explained to a witness.[82]

7.21 In preparing the lay Affidavit (or any Affidavit) the matters I have already referred to need to be taken into account. For instance, the rules of court sometimes provide that the Affidavit must be made in **the first person.**[83] The Affidavit should be prepared accordingly. Furthermore, the Affidavit should be drafted in admissible form and

82 See s.29 of the *Oaths Act.* As to the forensic dangers of "exaggeration" in a witness statement – see *McMahon v McMahon* [2008] VSC 386 at [116].

83 E.g. *FCR r.29.02(1)* – but not in NSW.

conscious of the types of objection which may be taken to the evidence. I shall deal with this below in a separate section.[84]

7.22 Moreover, whilst the Affidavit evidence is intended to be the exclusive substitute for a witness' oral evidence in chief it should be remembered that not necessarily all the rules relating to oral evidence in chief apply to Affidavit evidence. An example of this is s.29 of the *Evidence Act*. Section 29(2) provides that, where the court directs, a witness may give evidence in **narrative** form. A familiar example of evidence being given in a 'narrative' form is where a policeman gets in the witness box and, without a question being asked, proceeds to recite, without pause, the whole of his or her evidence in chief.[85] The better view appears to be, however, that this provision does not apply to evidence given by way of Affidavit or Witness Statement.[86]

7.23 Typically in a lay Affidavit there will be evidence of conversations. Ideally, for it will have much greater weight, it is best for a witness to give evidence of the exact words used. However, we all know that witnesses cannot be expected to remember, word for word, conversations which took place in the past, even as recently as a few days before the Affidavit is sworn. Hence, the familiar drafting technique in respect of conversations of commencing with an expression such as:-

"*We then had a conversation, where words* ***to the following effect*** *were said ….*"[87]

7.24 What then happens is that the drafter of the Affidavit seeks to put in direct speech the text of the conversation. I have been in courts where judges, explaining this process to witnesses, have asked them to imagine a cartoon strip and the 'bubble' coming out of the cartoon character's mouth and ask them to 'pretend' they are in a similar situation and to give evidence accordingly. We all know how artificial this is and how difficult it is for a lay person to adjust and accommodate to this mode of giving evidence.

---

84 See Section 8.0 and, to a lesser extent, Section 9.0 below. It has been observed that the written evidence should contain nothing that the witness could not state in evidence given orally and should not contain hearsay or irrelevant material – see, Coleman, *The Practice and Procedure of the Commercial Court*, 3rd ed., pp 143.

85 See, e.g. *Odgers, The Uniform Evidence Law*, 11th Ed. p 103.

86 See *Odgers* at p 106 [1.2.222.0]. As to the problems with giving evidence in narrative form; see *Cross on Evidence*, 10th Aus. Ed, pp 540-541 [17145].

87 This is legitimate – see, e.g., *Hamilton-Smith v George* [2006] FCA 1551 at [83]; see *Cross on Evidence*, 10th Aus. Ed, pp 540-541 [17145].

7.25 Nevertheless, unrepentantly I have on many occasions drafted or settled Affidavits whereby the relevant conversations are put into direct speech. I still think it is the safer and correct course to pursue. However, in more recent times, some courts have become increasingly disposed to permit evidence of conversations to be given in **indirect** speech. Barrett J concluded in *LMI Australasia Pty Limited v Baulderstone Hornibrook Pty Limited* [88] that there is no rule of law, whether under the *Evidence Act* or otherwise, which makes inadmissible evidence of a conversation given in indirect speech.[89] It seems, from personal and anecdotal experience, that judges in NSW are more keen on observing the "direct speech" rule than judges in other Australian jurisdictions.[90]

7.26 Barrett J's judgment is, however, illuminating as to both the proprieties of so doing and the pitfalls thereof. It is convenient to quote the relevant extract:-

> "There is no rule of law, whether under the Evidence Act or otherwise, which makes inadmissible evidence of a conversation given in indirect speech, but there are obviously very good reasons why courts have, over the years, been astute to regard the direct speech form as the best form. The statements in the two Queensland cases to which Mr Campbell took me share a common thread of the witness' inability to remember the precise words used. In each of the passages I have quoted there is a statement that the witness was unable to remember the precise words. Obviously if a witness can remember them, evidence should be given of the ipsissima verba.
>
> The possibility that Section 135 [which affords a judicial discretion to exclude evidence] may be invoked where evidence of a conversation is given in indirect speech is, of course, real. However, the question under that section will not merely be whether there is prejudice, but whether that prejudice is unfair prejudice operating against the opposing party because of a curtailment of the ability to cross-examine. I accept that not all of the cross-examination opportunities available in a case of direct speech report will arise in a case of an indirect speech report, but the ability to engage in meaningful cross-examination will exist nevertheless. There is also the point that the probative value of the evidence may be diminished by its form." (emphasis added)

7.27 In that particular case, His Honour declined to permit the Affidavit evidence in the form of indirect speech to be read but granted leave for oral evidence in direct form to be adduced from the witness. He justified this course by stating the following:-

> "*I do not say that that should be invariably done where an Affidavit or Witness Statement reports a conversation in indirect speech; but it is the desirable course here where the*

88 (2001) 53 NSWLR 31 at pp33 – 34 ([8] – [11]).

89 See, to similar effect, *Cross on Evidence*, 10th Aus. Ed, pp 540-541 [17145] and *Hamilton-Smith v George* [2006] FCA 1551 at [81] – [82]; see also *Odgers*, 11th Ed, at 98 [1.2.1950], 232, [1.3.210]; see, however, *r.29.02(1)* of the *FCR* from whose language, Bryson JA,(as he was then) writing extra-judicially, observes that "it follows that it is in **direct** speech" – *Bryson, 'Affidavits'* (1999) 18 Australian Bar Review 166 at 171

90 As noted by Justice Alan Robertson in his paper *"Affidavit Evidence"* cited in footnote 29 above. I respectfully share Justice Robertson's view that it is always safer to use direct speech.

conversation concerned plays an important role in the case and the objection has been taken conscientiously."[91]

7.28 Accordingly, whilst deposing to a conversation in the form of indirect speech may not be fatal to the admissibility of the relevant evidence nevertheless it will create problems and may affect its weight. It is far better to avoid these problems by putting the conversations in direct speech in the first place. Using the familiar preamble, referred to in [7.23] above, eliminates the risk of an opponent successfully asserting that the witness has sworn to a recollection of the exact words used when that is inherently improbable.[92]

7.29 Most importantly, in drafting written evidence the cardinal sin is to draft it contrary to the rules of evidence.**[93]** It therefore behoves the lawyer preparing the Affidavit to bear in mind, at all times in the process, the relevant rules of evidence and what objections, if any, may be taken to the Affidavit material. It is much preferable to draft an Affidavit which complies with the rules of evidence rather than to seek to cure the problem later on by, if you are lucky enough, filing a supplementary Affidavit or by successfully seeking leave to adduce oral evidence to overcome the evidentiary deficiency. Further, although, sometimes, provisions such as Section 70(1)(a) of the *Civil Procedure Act* 2005 (NSW) may be successfully invoked to obtain an order from a court dispensing with the rules of evidence in circumstances where the matter is not bona fide in dispute or where compliance with the rules of evidence would give rise to expense or delay nevertheless experience suggests that courts only make such orders in extreme

---

91 53 NSWLR 31 at 34 [11].

92 It seems that both at common law and pursuant to s.78 of the *Evidence Act* a witness can also give evidence of the impression made on the witness by whatever words were used or of the witness' understanding of a conversation – *Connex Group Australia Pty Ltd v Butt* [2004] NSWSC 379; *R v Wright* (1985) 19 A Crim R 17 and, generally see *Cross on Evidence*, 10th Aus. Ed, pp 540-543 [17145].

93 However, in Western Australian a flexible attitude to the rules of evidence will be applied to avoid the necessity for "pedantic accuracy" – see *LexisNexis, Civil Procedure WA*, [16.164.20]. The general importance, however of this requirement was emphasised by White J of the NSW Supreme Court in *Kinda Kapers Charlestown Pty Ltd v Newcastle Neptune Underwater Club Inc* [2007] NSWSC 329 at [78] where his Honour directed that the defendant's solicitor not seek to recover from the defendant the costs of the preparation of an affidavit, saying:

> *"I made [this direction] because …[the] affidavit was prepared without any regard to the rules of evidence. After the rulings on evidence, nothing of substance remained. It is not enough to say that a client or a witness wishes to express himself or herself in his own terms. The party's legal representatives have a responsibility to ensure that affidavits are prepared with regard to the rules of evidence because upon being read, the affidavit will form the evidence in chief."*

As to the need to comply with rules of evidence just as for oral evidence, see *Hodgson v Amcor Ltd* (2011) 32 VR 495 at 520 [79].

circumstances and upon proper proof. Accordingly, unless one has a very strong case utilising such a provision then then there is no alternative but to draft the Affidavit in compliance with the rules of evidence.[94]

8.0 Admissibility

8.1 In drafting Affidavits, not only the 'technical' rules of evidence contained in the general law and under the *Evidence Act* must be borne in mind but particular rules of evidence relating to particular areas of the law must also be considered. For instance, if the case involves a written contract, especially one containing an entire agreement clause, then in drafting the Affidavit regard must be had to such rules as the parol evidence rule or the common law rules prohibiting evidence of subsequent conduct in order to construe an agreement.[95]

8.2 Generally, in drafting an Affidavit, the lawyer should have in mind a **checklist** of possible objections and, at the conclusion of the process (certainly before the Affidavit is served or filed) ascertain as best he or she can that the contents of the Affidavit do not infringe one or other of the matters on the checklist.

8.3 A checklist which I frequently use for objections is as follows:-

(a) **Relevance** (Sections 55 -56 of the Evidence Act);

(b) **Competence** – even in the case of non-experts, has the witness the competence, ability, experience etc to give the relevant evidence especially when expressing an opinion or giving evidence of a practice or custom: If so, is that competence etc properly set out in the Affidavit;

(c) **Privilege** – is the witness giving evidence which subject to a privilege such as legal professional privilege or 'without prejudice' privilege which the opponent may assert;

94 There are similar provisions in other States– see r.394.1 UCPR (Qld) and r.40.05 Supreme Court (General Civil Procedure) Rules 2005 (Vic). The equivalent rule in the FCR (0.33 R2) was repealed in 2002 and not replaced. Undoubtedly this is because the work that rule had to do in Federal Court proceedings is now done by ss 190(3) and (4) of the *Evidence Act*. Perhaps the NSW Rule and the Victorian one are superfluous for the same reason. However, where material is non-contentious then objection should not be taken to it. It only makes judges impatient if objection is taken to such material – see, eg. Justice Robertson's paper referred to in footnote 29 above.

95 There are, of course, ways around such rules if, e.g., the case genuinely presents the opportunity to allege that the written contract was not the entire agreement between the parties, or that it was varied or that there is an estoppel or that there is a case for rectification.

(d) **The best evidence rule** – this is frequently infringed when a witness purports to summarise the contents of a document which is, or ought to be, annexed to the Affidavit. The document will speak for itself and is the 'best evidence' of its contents.[96]

(e) **Conclusion** – this is one of the many objections as to 'form'. A witness is entitled to say what was said or what occurred but is not entitled to conclude what that means or what the effect of those words or conduct was. Thus, e.g., in the case of an alleged oral contract, a witness can say; "I said X to A and A said Y to me". That witness is not entitled to say "A and I **agreed** Z";

(f) **Opinion evidence** – this is similar to the **competence** objection. It occurs when a non-expert gives an opinion as to a matter or a state of affairs or a practice when the witness has not demonstrated from prior portions of his Affidavit the requisite knowledge, experience or qualifications to express that opinion;

(g) **Hearsay**[97] –It is important to remember that 'hearsay' is only objectionable if it is tendered to prove the truth of what was said. It may be admissible if it is intended to prove not the truth of what was said but rather merely the fact it was said (so as to explain, if it be relevant to do so, why the deponent then acted in a particular way). Thus, e.g., if the witness' evidence is that "A said to me that he had killed my cat" then, assuming A is not a party, that evidence is not admissible to prove that, in fact, A killed the deponent's cat. However, if an issue in the case is whether or not the deponent and A were on friendly terms then the fact of that statement having been made may be relevant and admissible on that issue[98] ;

(h) **Evidence assumes a fact not in evidence –** a witness may give evidence upon a stated assumption. If that assumption is proved, the evidence will be admissible. However, if the witness does not state the assumption upon which he or she is giving the evidence or if the assumption is one which, for some reason or other, simply cannot be proved then the evidence is irrelevant and inadmissible. By way of illustration, if an Affidavit read "A and I thereafter conducted our affairs on the basis of the agreement we had reached", then that evidence would be inadmissible if there was no evidence of any such agreement. It would also be objectionable as a conclusion, even if the agreement was conceded or in evidence,

---

96 Compare Section 48(4) of the *Evidence Act* and cl 5.9 Pt 2 of the Dictionary to the Act which defines when a document is "unavailable"; as to the continued vitality and importance of the best evidence rule *see Golden Eagle International Trading Pty Ltd v Zhang* (2007) 229 CLR 498 at 500 [4] where the majority judgment quoted from Lord Hardwicke's judgment in *Omychund v Barker* (1744) 26 ER 15 at 33 to the effect:- "*The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit"*.

97 As already noted, hearsay evidence is not inadmissible in interlocutory hearings – see paragraphs [6.3]-[6.11] above.

98 For an excellent review and summary of the rule against hearsay see the penetrating judgment of the Hon Michael McHugh AC QC sitting as a judge of the Hong Kong Final Court of Appeal in *Oei Hengky Wiryo v HKSAR* [2007] HKCFA 7 at [34] – [76].

because it does not say what the parties actually did, from which **the court** may conclude whether or not that conduct flowed from the agreement;

(i) **The evidence is confusing, misleading, ambiguous, vague or unintelligible** – such evidence is oppressive and hence unhelpful or irrelevant. The rules of court specifically provide for oppressive material to be struck out of an Affidavit; [99]

(j) **Argumentative** – a witnesses' job, especially a lay witness, is to present the facts to the court. It is not the witnesses' role to argue what conclusions should be drawn from those facts or how the case should be decided. This is another 'form' objection;

(k) **Expert Evidence Objections[100] -** the most important basic objections to expert evidence are as follows:

(i) **The Specialised Knowledge Rule** – Honeysett v R [2014] HCA 29 at [4], [24], [46]. Opinion evidence must be substantially based on the witness' specialised knowledge. "Specialised knowledge" is to be distinguished from matters of common knowledge. It is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical nature and a person without any formal qualifications may acquire specialised knowledge by experience. But the word "knowledge" connotes more than subjective belief or unsupported speculation.[101]

(ii) **The Assumption Identification Rule** – expert evidence is inadmissible unless the facts on which the opinion is based are stated by the expert.[102]

(iii) **The Proof of Assumption Rule** – expert evidence is inadmissible unless there is evidence admitted before the end of the tendering party's case capable of proving matters sufficiently similar to the assumption to render the opinion of value.[103]

(iv) **The Statement of Reasoning Rule** – expert evidence is inadmissible unless it states the criteria necessary to enable the trial of fact to evaluate that the expert's conclusions are valid. That evidence must reveal the

99 See, e.g., UCPR *4.15*.

100 It would lengthen the scope of this paragraph unduly to set out further specific types of objection which may be taken into expert evidence but those types of objection are set out in a now fairly old paper "*Objecting to Evidence*" prepared by the author hereof and Mr P.H. Greenwood SC dated October 2005 and available on the NSW Bar Association website; see also the important recent decisions of the High Court of Australia in *Dasreef Pty Ltd v. Hawchar* [2011] HCA 21, (2011) 243 CLR 588 and *Honeysett v The Queen* [2014] HCA 29; 88 ALJR 786; 311 ALR 320.

101 *Honeysett v R* at [23].

102 *Dasreef* at [[64], [95]-[101]; *Cross on Evidence*, 10th Aus Ed [29065], pp 1027-1029; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [64], [70]-[72] and [85].

103 *Dasreef* at [102], [110] and [127]; *Cross on Evidence* at [29070]; *Chaina v Presbyterian Church (NSW) Property Trust (No. 13)* [2013] NSWSC 1057 at [9], [208].

expert's reasoning – how the expert used his expertise to reach the opinion stated.[104]

(v) **The Limit of Factual Evidence Rule** – an expert's evidence on matters of fact is in the same position as the factual evidence of any other witness.[105] Therefore, for example, there is no special rule giving expert witnesses the right to give hearsay evidence of fact.[106] Moreover, an expert witness cannot be permitted to express his or her findings of fact or his or her interpretation of facts.[107] It is not for the expert to prove facts except the facts of which he or she is entitled to give direct and admissible evidence.[108]

8.4 There are possibly many other common forms of objection which I may have overlooked to which regard should be had in preparing Affidavits but I think that I have listed the main ones. [109]

8.5 The other side of the coin is, of course, the decision to take objections to the other side's affidavits or witness' statements. This should, ideally, be done well in advance of the trial and after having obtained directions for the filing of lists of objections by the parties and a timetable for the provision of supplementary affidavits to "cure" any objections made. The reason for this is, of course, to minimise delay at the hearing dealing with objections and by oral evidence being adduced to then "cure" the objections.[110] Care should also be taken to avoid making technically correct but captious objections. Nothing irritates a judge more than for such objections to be taken.[111]

8.6 However, it is important to take all proper objections. Your client as witness should not have to respond and /or expose himself or herself to cross-examination in respect of inadmissible material. Thus, for instance, a party is entitled to take the view that

104 *Dasreef* at [42], [129]-130]; *Honeysett v R* [24]; *Cross on Evidence* at [29075].

105 *English Exporters (London) Limited v Eldonwall Limited* [1973] 1 Ch 415 at 421; *Pownall v Conlan Management Pty Ltd* (1995) 16 ACSR 227 at 231; *R v Katzmann* [1999] 2 VR 123 at 156; *Makita* at [82]).

106 *English Exporters* at [422], *Pownall* at [231]; *Ramsay v Watson* (1961) 108 CLR 642 at 648; *R v Reiner* (1974) 8 SASR [102] at [109]-[110]; *Sych v Hunter* (1974) 8 SSR 118.

107 *R v Fowler* (1985) 39 SASR 440 at 443.

108 *Hillier v Lucas* [2000] SASC 331 at [316]-[320].

109 But see also paragraph [9.1] below.

110 See *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [29]. If objections are taken well in advance of the trial, advance rulings on evidence may be able to be obtained under s.192A of the *Evidence Act*, thus saving hearing time.

111 See footnote 94 above.

evidence in an affidavit will be excluded if it is irrelevant and, thus, not deal with such material in any affidavit in response.[112]

9.0 Other poor or objectionable drafting techniques

9.1 In a very useful Paper entitled *'Practical Litigation in the Federal Court of Australia: Affidavits'*[113] , Justice Emmett has catalogued a number of other poor, objectionable or unnecessary drafting practices. They include the following:-

(a) **Hypothetical evidence** – it is certainly permissible for an appropriately qualified person to give evidence as to what is done habitually in a particular field of endeavour. It is also permissible to give evidence as to what can or could be done in a particular field at a particular time. However, where particular circumstances have not actually arisen, any evidence as to what would have been done in such circumstances had they arisen in fact, would be entirely hypothetical and would be inadmissible. It is not permissible to give evidence as to what a particular class of person would have done in hypothetical circumstances;

(b) **Direct evidence of the state of mind of another person** – a witness cannot give direct evidence of the state of mind of another person (unless perhaps the witness is a psychiatrist). However, such a witness can give evidence of observations etc. of another person from which an inference might be drawn by the court;[114]

(c) **Affidavits are not pleadings** – with the possible exception of the Family Court of Australia, courts do not permit Affidavits to be used as pleadings. It is thus usually irrelevant for a deponent to say that he or she does not know and cannot admit the assertions made in another Affidavit by someone else. It may be necessary for a particular assertion in an Affidavit by one deponent to be denied in a subsequent Affidavit by another deponent. Normally, however, it will be more helpful for an opponent to give his or her version, in narrative form, of the relevant facts, rather than to deal, sentence by sentence with each of the assertions made in an earlier Affidavit;

(d) **Dealing with assertions line by line** – the practice of filing Affidavits in which a subsequent deponent deals with each assertion made in an earlier Affidavit line by line can lead to intolerable complexity in endeavouring to work out what is in

---

112 per Kunc J in *Saravinovska v Saravinovski (No 3)* [2014] NSWSC 155 at [6]. See, also, *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 599 [19], 620 [83].

113 (2000) 20 Australian Bar Review 28.

114 But a witness can give evidence that someone appeared to be ill angry, drunk or in some other condition which the witness' experiences as a member of the community enables him or her to form an opinion upon – see, eg, *R v Whitby* (1957) 74 W N (NSW) 441 at 443-444.

dispute and what is not. Further, after rulings on objections, it is often very difficult to determine what is in evidence and what is not;

(e) **Corroborating Affidavits** - one sometimes sees an Affidavit whereby the deponent merely asserts that he has read another Affidavit and swears that the contents of that other Affidavit are true. This is often a shorthand method adopted to corroborate evidence of another deponent. However, it is next to worthless as corroboration. If two witnesses are going to give evidence as to the same matter for the purposes of corroboration, the evidence of each witness should be the evidence of that witness and no one else. If the witness has no independent recollection, the so-called corroboration would have no weight at all. If the witness has an independent recollection, that recollection should be stated in the Affidavit. It is logically possible, but highly improbable in the real world, that two witnesses will have independent recollections which coincide to the letter.[115]

(f) To his Honour's very useful list, of course, must be added including in affidavits matter which is scandalous, frivolous, vexatious, irrelevant or oppressive. The court rules in most jurisdictions specifically provide the power for the court to order the removal of such material from any documents including affidavits.[116] . By way of further explanation:-

Scandalous

A matter is scandalous if it is indecent or offensive, or is intended for the purpose of abusing or prejudicing the opposite party (see, e.g., *Christie v Christie* (1873) 8 Ch App 499; *Wu v Avin Operations Pty Ltd* (No.2) [2006] FCA 792). Relevant matters will not be struck out simply because they are scandalous (*Rossage v Rossage* [1960] 1 All ER 600 at 602). However, an affidavit which contains a substantial amount of scandalous material may be ordered to be taken off the file notwithstanding that it also contains relevant material (*Rossage v Rossage*; *Fisher v Owen* (1878) 8 Ch D 645 at 652).

Frivolous

A matter is frivolous if it is plainly without foundation (*Young v Holloway* (1895) P.87.

---

115 Where witnesses use identical language to describe a conversation or event it seriously prejudices the value of the evidence as noted by Palmer J in *Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 at [90]-[91] in these terms: -

> *"[90] Save in the case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.*
>
> *[91] Where the identity of the evidence is due to collusion, the devaluation of the evidence is justified but where.. the identity of the evidence is due entirely to a mistake on the part of a legal adviser, a witness' credit and a party's case may be unjustly damaged."*

See also Robertson, "Affidavit Evidence" [2014] Fed J Schol 3 published on Austlii. Further, in Singh v Singh [2007] NSWSC 1357 at [12]-[13] Barrett J (as his Honour then was) adopted the same view as Justice Emmett, rejecting affidavit evidence which merely adopted the evidence of another person.

See also Mr Spigelman's comments quoted in paragraph [4.21] above.

116 See, e.g., r4.15 of UCPR (NSW) and O14 r8 and O41r3 of the FCR.

Vexatious

A matter is vexatious when it lacks bona fides and is hopeless and tends to cause the opponent unnecessary anxiety, trouble and expense (see, e.g., Bullen and Leake, *Precedents of Pleadings* [1975] (12th ed at p.145).

Oppressive

This heading covers other matters which would tend to prejudice, embarrass or delay the fair trial of an action, or is an abuse of the court's process. A matter will not be struck out merely because it is unnecessary, if it is otherwise harmless nor because the opposing party swears that it is untrue. However, if the evidence is affected by unnecessary matter, or the opponent is not informed of the precise nature of the case he or she has to meet, the matter may be struck out (see Ritchie's, *Uniform Civil Procedure New South Wales* [4.15.25] and, also 8.3.9 above).

9.2 As humorously observed by the late Paul Donohoe QC:- [117]

"Without endorsing every sentiment but emboldened by the forthright approach the following advice might be offered to one's opponent.

1. Make the story long.
2. Adopt obscure prose.
3. Ignore chronological order.
4. Deal with several subjects in each paragraph.
5. Annex illegible copies of documents that are inadmissible anyway.
6. Leave wide margins on every page after the first.
7. Set dates and sums out in words.
8. File numerous affidavits by the same deponent when one would do.
9. Answer every paragraph by one continuous paragraph with numerous sub-paragraphs concealing, where possible, the fact being addressed.
10. Show your style:-
    (1) 'I am the hereinbefore mentioned plaintiff in these subject proceedings.'
    (2) 'On the first day of January in the year of our Lord one thousand nine hundred and ninety.'
    (3) 'Bill Joan Pty Limited (hereafter called Billjoan).
    (4) 'It was always understood between us.'

---

[117] See, Donohoe "*Affidavits*" [513]; for another colourful description of poor drafting techniques see *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [9]-[10]. Point 3 made by Mr Donohoe above concerning chronological order is, somewhat curiously, not the subject usually of Court Rules or Practice Directions in Australia although it is in England – see Coleman, The Practice and Procedure of the Commercial Court, 3rd ed, p 143. In his paper on Affidavit Evidence referred to in footnote 29, Justice Alan Robertson also advocates generally adopting a chronological approach. Justice Robertson, echoing some of Mr Donohoe's other thoughts goes on in his paper to urge lawyers **not** to fit within any of "Sedley J's Laws of Documents" which, he says, include: -

(a) documents shall in no circumstance be paginated continuously;

(b) at least 10% of annexures should appear more than once;

(c) that only one side of double sided documents should be reproduced; and

(d) that the written evidence and annexures or exhibits should be held together, in the absolute discretion of the lawyer assembling them, by a ring or arch-binder so damaged that the two arcs do not meet."

(5) 'I wrote a letter which said (etc).'
(6) 'He never wrote to the Deceased.'
(7) 'She seemed happy.'
(8) 'We agreed.'

'I humbly request this Honourable Court to grant the orders in the summons filed herein.'"

9.3 Also avoid overkill or exaggeration in affidavits. This manifests itself in a variety of ways too numerous to set out. One frequent example is where a relevant conversation was engaged in at a meeting where many people were present or where a relevant event was observed by many people. There is a tendency, to avoid an adverse inference arising pursuant to the principles expressed in *Jones v Dunkel*, to put as many people as possible on Affidavit as to that conversation or event. Apart from wracking up costs and creating time pressures, usually, all this does is to multiply the opportunities for the cross-examiner to pick up minor discrepancies between the various witnesses and magnify and enlarge upon them to the extent that the strength of the case is diminished. Critical judgment needs to be exercised to determine just how many Affidavits should be put on from different people in such circumstances. Certainly, however, generally it is not necessary to depose everyone who participated in the relevant conversation or witnessed the relevant event. That is to misunderstand the rule in *Jones v Dunkel*. The rule in *Jones v Dunkel* does not require a party to give cumulative evidence. It does not compel time to be wasted in calling unnecessary witnesses.[118]

10.0 Consequences of filing or reading Affidavits

10.1 It must always be remembered that once an Affidavit is filed and served, especially if the Affidavit is that of a party as opposed to a mere witness, then that Affidavit can be used against your client if it contains **admissions**. If it contains admissions, then the relevant portions of the Affidavit may be **tendered against your client** even if you choose not to read the Affidavit.[119]

[118] *Cubillo v The Commonwealth* (2000) 103 FCR 1 at 120; *Yolarno Pty Limited v Transglobal Capital Pty Limited (No 2)* [2003] NSWSC 1004 at paragraph 25. As to exaggeration, see McMahon v McMahon cited in fn. 28 above.

[119] See, generally, *Ritchie, [35.2.35] p.8136; see Leaders Shoes (Aust) Pty Ltd v. National Insurance Co. of NZ Ltd [1968] 1 NSWLR 344 at 346*; see also *Emmett, 'Practical Litigation in the Federal Court of Australia: 'Affidavits'* (2000) 20 Australian Bar Review 28 at 38 – 39; see also *Austress Freyssinet Pty Ltd. v Marlin International Pty Ltd.* [2002] NSWSC 958; *Trade Practices Commission v TNT Management Pty Ltd* (1984)

10.2 Moreover, it sometimes happens that, although having read an affidavit, the deponent does not wish to be cross-examined or the legal adviser takes the view that it is highly undesirable for him or her to be cross-examined. Instances of this are where it becomes apparent (from other evidence) that something stated in the affidavit may be untrue or where other facts have emerged which show the deponent in a poor light. In such cases it may be better to have no evidence from him or her rather than have the witness cross-examined.

10.3 However, generally speaking, once an affidavit is read (or a witness statement is tendered) you cannot withdraw it and the deponent must be made available for cross-examination on pain of possible prosecution for contempt.[120] As Lord Denning said in *Comet Products*:-

> "A [deponent], when he is threatened with cross-examination, cannot get out of it by saying he will withdraw his affidavit."

10.4 Similarly to the situation with documents produced on discovery, a witness statement which has been served cannot be used by the party receiving it for any collateral purpose without leave of the Court.[121] However, the possibility of such leave being granted should not be ignored. A client needs to be asked if, and why, anything said in the witness statement may have adverse consequences for him or her outside the court case if such leave was granted.

10.5 These potential consequences emphasises the care which needs to be taken in preparing Affidavits and in selecting the material to be inserted in them, especially where there is doubt whether, ultimately, the Affidavit will be read, on behalf of your client, in court.

10.6 Also, frequently, an Affidavit or Witness Statement contains a reference to advice received by a party which would otherwise be **privileged**. Similarly, an expert's report may be served by one party upon the other with the apparent intention of relying upon

56 ALR 647 at 664 – as to the circumstances in which the affidavit of a witness who is not a party may be tendered as an admission against a party, see *British Thomson-Houston Co. v British Insulated & Helsby Cables* [1924] 2 Ch. 160.

120 See, e.g., *Re Quartz Hill; Ex parte Young* 21 Ch 642 at 645; *Comet Products (UK) Ltd v. Hawkes Plastics Ltd* [1971] 2 QB 67 – at 74 E – H.

121 *Springfield Nominees Pty Ltd v Bridgeland Securities Ltd* (1992) 109 ALR 685; *Hearne v Street* (2008) 235 CLR 125 at 154-155 [96]. But the "implied undertaking" ceases once the witness statement is read or tendered and thus becomes evidence – see *Hearne v Street* at [96]; see, also, generally, *Cross on Evidence*, 10th Aus. ed, pp 844-849.

that expert's evidence at the trial. A decision may then be reached by the party preparing the relevant Affidavit evidence not to call the particular witness or not to read the relevant Affidavit. A question arises, in those circumstances, as to whether or not by filing and serving the Affidavit containing the privileged material the privilege has been waived. On the current state of the law, in New South Wales at least, it seems that this question would be answered in the negative because, since the Affidavits or Witness Statements in question are ones which have been prepared pursuant to directions of the court, they would be regarded as having been produced 'under compulsion of law' for the purposes of *Section 122* of the *Evidence Act.*[122]

10.7 However, personally I strongly doubt the correctness of this view. I am not alone. In *Dubbo City Council v Barrett* (2003) NSWCA 267, Young CJ in Eq. delivering the leading judgment of the Court of Appeal felt compelled to follow *Akins v Abigroup* and find that privilege had not been waived in circumstances where an expert's report had been filed and served but not read in court. He felt constrained to hold that privilege had not been waived but did so very reluctantly, saying:- [123]

> "*I very much regret this decision which I am obliged to reach in view of the terms of Section 122(2)(c) of the Evidence Act because it runs contrary to what I have understood to be good practice …*"

10.8 Moreover, in two recent cases, courts have had no trouble in distinguishing cases such as *Akins* on what may be argued to be fairly tenuous grounds. In *Austress Freyssinet Pty Ltd v Marlin International Pty Ltd* [2002] NSWSC 958 Barrett J distinguished *Akins* on the basis that that case concerned a Witness Statement used in another proceeding. According to Barrett J, where the Affidavit or Witness Statement is used in the same proceeding, privilege is waived if it is filed and served.[124] Furthermore, in *Liberty Funding Pty Ltd. v Phoenix Capital Ltd*[125] the Federal Court has sought to distinguish cases such as *Akins* on the ground that the Affidavit in question in *Liberty* was not brought into existence as part of anticipated evidence for a hearing but was

---

122 *Akins v Abigroup Limited* (1998) 43 NSWLR 539; a similar view appears to have been adopted in the past in the Federal Court – see the *Bell Group Limited v Westpac Banking Corporation* (1998) 86 FCR 215. See also *Ritchie's Uniform Civil Procedure NSW* [31.4.20].

123 At [20]. It also appears to be the law in England – see, eg, *Fairfield Mabey Ltd v Shell UK Ltd* [1989] 1 All ER 576. See also *Complete Technology Pty Limited v Toshiba (Australia) Pty Limited* (1994) 53 FCR 125.

124 See [6] – [11] of His Honour's judgment.

125 (2005) 218 ALR 283 at [21] – [23].

intended to be used as a convenient procedural device in lieu of the "usual" Affidavit of discovery.

10.9 More recently, Gordon J of the Federal Court in *Cadbury Schweppes Pty Ltd v Amcor Ltd* has bitten the bullet.[126] Her Honour, having discussed the competing views and authorities, came to the view that service and filing of a witness statement or affidavit, at least at common law (but not deciding whether the same result follows under the Evidence Act (1995) waived legal professional privilege even before the affidavit was read.[127]

10.10 Even more recently, however, there have been very interesting and directly relevant decisions on this topic delivered by the Full Federal Court and by White J of the NSW Supreme Court. In *Australian Competition & Consumer Commission v Cadbury Schweppes Pty Ltd* the Full Federal Court reached the conclusion that *"it is impossible for litigation privilege to attach to the finalised proofs of evidence, when the finalised proofs of evidence were created for the purposes of serving them on the ACC's opponent and when they were in fact served on that opponent."* [128]

10.11 Accordingly, the Full Federal Court held that since the documents were not confidential in the relevant sense they could not be privileged even though they had not yet been read in court. This neatly side-stepped the question of whether there has been a "waiver" of privilege.

10.12 In *Buzzle Operations v Apple Computer Australia* [129], White J of the NSW Supreme Court followed *ACC v Cadbury Schweppes* and held that affidavits and witness' statements which had been prepared, filed and served in proceedings in the Federal Court of Australia (but not read) were not privileged for the purposes of proceedings in the Supreme Court of New South Wales to which the affidavits were also relevant.[130]

126 [2008] FCA 88.

127 See *Cadbury Schweppes* at [6] – [18].

128 [2009] FCAFC 32 at [37]; 174 FCR 457.

129 [2009] NSWSC 225; 74 NSWLR 469.

130 See also *Waugh Asset Management v. Merrill Lynch* [2010] NSWSC 197 at [22]; After a comprehensive and detailed review, Black J of the NSW Supreme Court reached the same conclusion as White J in *Morony v Reschke* [2014] NSWSC 359 at [37]-[55].

10.13 White J, unlike the Full Federal Court in *Cadbury Schweppes*, had the problem of overcoming the "apparent" decision of the NSW Court of Appeal in *Akins v Abigroup* and he did this in the following way.[131]

> "*No authority has been cited to me which requires a different conclusion [to that reached by the Full Federal Court in* ***Cadbury Schweppes****]. In particular, in* ***Akins v Abigroup Pty Ltd****, the New South Wales Court of Appeal did not decide the question as to whether or not the witness' statements there in issue were privileged. The Court refused leave to the appellant to argue that question as it had been accepted before the trial judge that the statements in question were privileged prior to being served in accordance with the requirements of the practice note …*"

10.14 It is to be noted that in *Cadbury Schweppes*, the Full Court was dealing with legal professional privilege at common law [132]whilst White J was dealing with the situation under the *Evidence Act*, however, each court reached the same conclusion. Moreover, in jurisdictions or cases where the common law rules apply, and until the High Court decides to the contrary, the decision of the Full Court in *Cadbury Schweppes* is required to be followed by courts in all Australian jurisdictions unless they can convincingly demonstrate that that decision is wrong and there are compelling reasons to depart from it.[133]

10.15 Moreover, where an Affidavit is intended to be read and, in fact, is read the Affidavit, if not carefully drafted, may result in an unintended waiver of legal professional privilege. If it is regarded as necessary or desirable in an Affidavit to refer to legal advice which has been given then great care should be taken as to the form in which the reference to that legal advice is given. There is no compulsion involved in reading an Affidavit and relying upon it as evidence. Therefore if privileged material is contained in an Affidavit which is read in court the privilege may be lost and this will open the way for your opponent to call for, and have produced, all legal advices on the subject matter of the advice in respect of which privilege has been waived.[134] However, there is a limit on the advices in respect of which privilege will be said to have been

131 [2009] NSWSC 225 at [12]

132 See, e.g., *Buzzle* at [13]

133 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] 230 CLR 89 at 151 – 152 [135]. See also *Gett v. Tabet* [2009] NSWCA 76 at [273] – [286]; *C.A.L. No. 14 Pty Ltd v. Motor Accidents Insurance Board* [2009] HCA 47 at [50]. It is to be noted that the latest Australian edition of *Cross on Evidence* (see 10th edition – 2015) contents itself with saying it is "controversial" whether privilege is lost when a witness statement is served and notes the decisions either way – see p 833 [25010].

134 See, e.g. *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220.

waived. Usually privilege will still apply to advices given after the date of the alleged waiver.[135]

10.16 When drafting an Affidavit, therefore, the lawyer should carefully weigh up the consequences of including any references to legal advice etc and of how those references are going to be made. If the relevant paragraph of the Affidavit read along the lines of, say:-

> *"I received legal advice from White and Wong Legal, having considered that advice and discussed the issue with my colleagues, I decided that I was entitled to do X."*

then probably privilege has not been waived as the evidence does not necessarily disclose the substance of the advice given by the lawyer. It may be that the lawyer's advice was to the direct contrary but the deponent was persuaded of his entitlements by the views of his colleagues.[136]

10.17 If, on the other hand, the relevant paragraph of an Affidavit was to read "I received legal advice from White and Wong Legal supporting my view that I was entitled to do X" then probably privilege will be regarded as having been waived because not only has the existence of the legal advice been disclosed but also its contents or conclusions have been, namely that the lawyer's advice was supportive of the relevant entitlement.[137]

10.18 Privilege may also be inadvertently waived in a case where a deponent's state of mind is relevant and legal advice is likely to have contributed to that state of mind. For example, if the issue is whether a party has elected to terminate a contract following a repudiation of it, the terminating party's "knowledge" of its' right to elect is a fundamental issue.[138]

---

135 See *Rich v Harrington* [2007] FCA 1987 at [28] – [34]; see also *Secretary to the Department of Justice v Osland* [2007] VSCA 96 at [49] – [81].

136 See, e.g., *Ampolex Limited v Perpetual Trustee Company (Canberra) Limited* (1996) 40 NSWLR 12; (1996) 137 ALR 28 at 34.

137 See, e.g., *Australian Unity Health Limited v Private Health Insurance Administration Council* [1999] FCA 1770 at [18]; *Bennett v Chief Executive Officer, Australian Customs Service, supra,* at [62] – [65].

138 See, e.g., Carter's *Breach of Contract*, LexisNexis (2011) [11-04] pp 520-521. See, also, *Cross on Evidence* 10th ed (2015) pp 831=832 [25010] and the cases there cited at fn. 39.

10.19 Thus, to the extent that such a party in his or her written evidence gives evidence of his or her knowledge or lack thereof, then privilege in respect of any legal advice relating to the right to elect would be waived.[139]

10.20 These are other consequences which should be borne in mind when one prepares Affidavits, especially where those Affidavits contain information which would otherwise be privileged and there is no desire to forfeit that privilege.

11.0 The Lawyer's Obligations in Preparing Written Evidence

11.1 In addition to requiring proper discharge of his or her duty of reasonable care, the preparation of written evidence also calls into operation a lawyer's ethical obligations and duties as an officer of the court. What follows is my summary of a lawyer's obligations be they based on duty of care, ethical obligations or those incumbent upon the lawyer by reason of being an officer of the court. The obligations are in no particular order of significance but follow the sequence set out in this paper.

11.2 First, the lawyer needs to determine whether, in the particular circumstances of the particular case, his or her client's interests are best served by all or part of the evidence being given orally rather than in writing and, if so, to make appropriate applications to the court in a timely manner.[140]

11.3 If it is decided that some of the evidence will be in writing, then a choice needs to be made between a witness statement and an affidavit.[141]

11.4 If a decision is made that at least some parts of the evidence will be written evidence, the lawyer must ensure that the formal requirements laid down by the court are complied with in preparing that evidence.[142]

139 cf. *Thomason v Council of Municipality of Campbelltown* (1939) 39 SR (NSW) 347 at 358-359; *Ampolex Limited v Perpetual Trustee Company (Canberra) Ltd* (1995) 37 NSWLR 405 at 411; *Australian Unity Health* at [20]-[21].

140 See paragraphs[3.1] and [4.1]-[4.24] above.

141 That is, if a choice is permitted. As to the choice, see paragraphs [2.14]-[2.19] above.

142 See paragraphs [5.1]-[5.17] above .

11.5 In interlocutory applications where written evidence is required or is the norm and where there are relaxations on the rules of evidence, the lawyer should not be lulled into a false sense of security or complacency.[143]

11.6 In preparing written evidence, the lawyer must always be conscious of the following:

(a) the special and different approach needed when assisting in the preparation of written evidence by experts.[144]

(b) the need to ensure, insofar as is practical, that the written evidence is truthful and candid.[145]

(c) the need to avoid leading questions or similar devices when preparing such evidence.[146]

(d) the need to or, at least, the desirability of, ensuring that written evidence is written in the first person and, where conversations or oral statements are referred to, those conversations or oral statements are set out in direct speech.[147]

(e) The need or, at least, the desirability of trying to make the written evidence read as if it is the witness' language and style as opposed to that of the lawyer.[148]

(f) the importance of drafting written evidence to comply with the rules of evidence.[149]

(g) the avoidance of poor drafting techniques.[150]

(h) the consequences of filing and serving written evidence.[151]

(i) the possible loss of legal professional privilege involved in the serving of such evidence.[152]

12.0 Conclusions

12.1 By necessity, this Paper has only been able to touch upon rather than discuss fully many of the important questions which arise in respect of the preparation of Affidavits and

143 See paragraphs [6.4]-[6.15] above.
144 See paragraphs [7.2]-[7.8] above.
145 See paragraphs [7.10]-[7.11] above.
146 See paragraphs [7.13]-[7.15] above.
147 See paragraphs [7.21]-[7.28] above.
148 See paragraphs [4.7]-[4.10], [4.18]-[4.22] and [7.18] above.
149 See paragraphs [2.13] and footnote 13 and paragraphs [7.29]-[8.5] above.
150 See paragraphs [9.1]-[9.3] above.
151 See paragraphs [10.1]-[10.5] above.
152 See paragraphs [10.6]-[10.20] above.

Witness Statements. Hopefully, however, what I have discussed will highlight the need for care, integrity and skill to be applied to the preparation of such documents and the need for a discerning appraisal of whether, in fact, the case is one where it is in fact suitable that evidence be given by way of Affidavit or Witness Statement.

12.2 For the foreseeable future, evidence in chief by way of Affidavit or Witness Statement will remain a constant task and challenge for the commercial litigator. Preparing such documents is, by no means, a simple or easy task. However, when done properly it is both satisfying and rewarding and not only calculated to achieve the objects promoted by the courts but, more pertinently for litigators, to properly and legitimately advance their clients' interests.

ALAN SULLIVAN QC
August 2015