

Among the most important documents a junior attorney will be asked to draft is an affidavit. An affidavit, a sworn statement of a witness, is frequently used as a vehicle for submitting relevant facts to a court.

Indeed, it is the rare set of motion papers that is not accompanied by one or more affidavits (or substantively similar documents, such as an affirmation, declaration or certification). For example, in the context of a summary judgment motion, plaintiff's affidavits set forth a detailed account of the facts supporting its claims, while defendant's affidavits may assert facts that attempt to demonstrate the existence of a material issue of fact precluding the issuance of summary judgment, or facts that justify its substantive and procedural defenses to suit.

Similarly, in a discovery motion, such as a motion to compel, the moving affidavit explains why the information sought should be disclosed, and the moving party's good-faith efforts to resolve the dispute without judicial intervention. This column provides some useful tips for junior attorneys tasked with drafting one or more affidavits.

Before putting pen to paper (or fingers to keys), carefully consider the purpose for which the affidavit is being drafted. For instance, if the affidavit is intended to support plaintiff's motion for summary judgment, ensure that the draft will include factual allegations necessary to support each of the required elements of the cause of action being prosecuted.

To ensure this is achieved, it is often helpful to draft a short, one to two page outline of the points to be made in the affidavit. The outline will also provide an excellent opportunity to organize your thoughts before serious drafting begins.

Remember, an affidavit provides your witness with an opportunity to provide a court with an uninterrupted account of the relevant facts. Because court resources are stretched thin, judges are left with precious little time to review motion papers, making it all the more important to both capture and hold the court's attention at the beginning of the affidavit. Crisp story telling will increase the likelihood of a compelling read and a captive audience. Organizing your thoughts prior to commencing drafting will provide a helpful framework for achieving well-thought out, convincing work-product.

When crafting an outline, remember that the affidavit also serves as a vehicle for placing relevant documents before the

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court as exhibits. Exhibits to an affidavit serve many purposes, including bolstering the credibility of the affiant (witness) by substantiating his or her written testimony. Exhibits may also be used to refute factual and legal arguments your opponent has made, or that you anticipate could otherwise be made in opposition to your motion.

Importantly, exhibits to affidavits become part of the court record in connection with the decision on the motion. If the document might be needed in connection with an eventual appeal (or in opposing an eventual appeal), it is imperative that the document be annexed to an affidavit submitted to the trial court.

If the document is not submitted with the motion, generally you will not be permitted to refer to it on any subsequent appeal of the motion. Again, consider necessary exhibits as part of the outlining process to ensure you do not lose sight of them while drafting the affidavit.

It is important to have discussions with the affiant early in the drafting process, preferably before the outline is completed. These discussions are designed to provide the junior attorney with an opportunity to investigate fully the factual allegations which will be set forth in the affidavit.

Remember, the affidavit must be 100 percent truthful. It is incumbent upon counsel to take reasonable steps—including pre-interviewing the affiant—to ensure that false testimony is not presented to the court.

Also keep in mind that not only the affiant but the attorneys may be subjected to sanctions if they do not take reasonable steps to ensure there is a good-faith basis for a submission made to the court. But beyond immediate sanctions,

submitting false testimony can have other negative effects on your lawsuit.

The affiant may ultimately be cross-examined, at deposition or at trial, regarding admissions or other statements made in the affidavit. If your adversary is able to demonstrate that the affiant was less than fully truthful with respect to one or more items in the affidavit, they will then be able to argue, probably effectively, that other aspects of the affiant's testimony are not to be trusted.

Privileged Disclosures

In connection with both your interview and any drafts of the affidavit, if you and your law firm are not representing the affiant, your oral and written communications will likely not be protected from disclosure as privileged. In such situations, be mindful that drafts of affidavits may be fully discoverable.

On a more mundane note, during the interview check with the affiant regarding his availability to review and sign the affidavit at, or around, the date it will be ready for signature. There are few things more stressful than completing an affidavit just before a deadline only to find out the affiant cannot be located when called to review and execute the affidavit. Simple planning can easily eliminate that potential problem.

Finally, it is important to review in advance all of the applicable court rules prior to drafting an affidavit.

Depending on the jurisdiction and the judge assigned to the case, the applicable rules may provide limits on the number of affidavits supporting or opposing a motion, the length of any such affidavits, and how exhibits are to be annexed to an affidavit. (Many courts, for example, specify that only the relevant pages of a deposition transcript should be included as an exhibit.)

In sum, there are any number of factors to consider when drafting an affidavit. Given the important role an affidavit plays in connection with most motions, it is imperative to plan ahead by drafting a meaningful outline prior to commencing work on the affidavit itself.

By considering the relevant issues in advance of drafting an affidavit, you greatly enhance the prospect of drafting a winning affidavit.

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