

How Does One Draft an Affidavit?

- Drafting a proper affidavit is simply thinking about the best way to convince a judge that one's position in a factual dispute is the correct one.

I always let clients and their witnesses produce the first draft of affidavits. It saves the client money and often provides me with knowledge and an understanding that a rushed interview of a witness might not generate.

It also prevents a situation in which all the affidavits sound like the attorney (or paralegal) who drafted them, and instead, allows the witness' own voice to come through.

- The court (correctly) perceives the client as vouching for the affidavits he or she provides the court on his or her behalf.
- **In order for an affidavit to be useful, it must be four things:**
 - 1) credible;
 - 2) knowledgeable;
 - 3) factual; and
 - 4) relevant.
- A good affidavit should start with a section explaining who the witness is and what about the witness' background and experience makes that witness credible. The introduction can also explain the witness' relationship to the parties or the dispute so that the court can understand how that witness was in a position to know what he or she is testifying to.

The next section of the affidavit should deal with the witness' knowledge of the factual issues in dispute. It is important that this section of the affidavit remain focused on facts, not opinion.

If the purpose of a witness affidavit is to establish that the Mom is the more actively involved parent, the affidavit should focus on what things mom does that makes her the more actively involved parent. A description of these activities, and a comparison of the activities that dad takes primary responsibility for, is much more powerful than a simple conclusory statement.

Further when factual claims can be substantiated or corroborated by documentary evidence, such documents should be attached to the affidavit as an exhibit with the affidavit describing and explaining the exhibit.

For example, a statement that Mom is the person taking the children to the pediatrician is much more credible if the affidavit contains the pediatric records showing this.

- It is helpful for a witness to be balanced. An affidavit that simply praises one party and slams the other party is generally less credible than an affidavit that acknowledges the strengths and weaknesses of each party.

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- Affidavits that speak glowingly of a party, but fail to address or acknowledge that party's serious weaknesses are not credible.

Take an example of a parent who lost custody of a child after succumbing to drug addiction and who is now trying to get custody of that child back. Affidavits describing that parent as "a wonderful parent" do not assist the fact finder unless there are also affidavits explaining how this parent has overcome the addiction.

- An affidavit should be relevant by focusing on the issues in factual dispute. If custody is not in dispute, an affidavit focusing on custody issues wastes the court's time. It is also important to craft affidavits that focus on the factual disputes within the larger dispute.

For example, when custody is contested because one parent is allegedly abusive, affidavits should focus and read differently than when custody is contested because one parent is allegedly a substance abuser.

In a custody case in which there are allegations that a parent is a substance abuser, affidavits that provide a factual basis to substantiate or dispute this allegation are vital. Affidavits that discuss custody, but ignore this issue aren't extremely helpful.

- After the introductory section explaining biography and the witness' involvement with the parties or the dispute, an affidavit can be organized by topic or flow chronologically. When organizing an affidavit by topic, bold explanatory headers at the beginning of each topic are helpful.
- Part of the craft of drafting a credible affidavit is minimizing typographical and grammatical errors, using appropriate language, and having the affidavit flow in an organized fashion.
- An affidavit filled with errors in language, spelling, punctuation or diction, or one that moves chaotically through topics or time reflects poorly on the person providing the affidavit and diminishes his or her credibility.
- The first and only task of every affidavit is to convince the judge that the witness has credible, knowledgeable, factual, and relevant information.
- In editing draft affidavits, you as the paralegal should be focused on confirming factual accuracy, ensuring balance (when possible) in describing the facts, removing or corroborating incredible statements, limiting conclusory statements (or justifying conclusory statements by providing significant factual detail) and removing melodramatic and irrelevant language.

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