

Writing to the Trial Judge — For Affidavits

Wayne Schiess

Most lawyers will need to prepare an affidavit at some point; many will write dozens, if not hundreds. So how effectively are you writing them? For most lawyers, writing an affidavit is strictly routine: drag out an old form, duplicate it, and change the details. Done. The result is a formulaic and bland document.

Formulaic and bland is perhaps fine for some affidavits, but many affidavits are important. You might be counting on an affidavit to get a crucial point across to the opposing counsel, the judge, or the hearing examiner. How can you make your affidavit stand out from the routine and the mundane?

If you want people to read and understand your affidavits quickly and easily, you should apply three simple techniques.

Use the Bold Synopsis

As noted in the previous article, one of the most important principles in legal writing is to provide an up-front summary.¹ Put the critical information first. Usually, the main point of an affidavit is buried somewhere in the middle. For example, read this affidavit and pay attention to when you know what the critical point is.

¹ Wayne Schiess, *Writing to the Trial Judge — For Motions*, 12 Scribes J. Legal Writing 131, 132–33 (2008–2009) (citing several authorities).

AFFIDAVIT

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

DENNIS RAGLEY, being duly sworn, deposes and says:

1. My name is Dennis Ragley. I am over 21 years of age, of sound mind, and I have personal knowledge of the facts stated below.
2. I am the district supervisor for ReadyFoods, Inc., and I am responsible for 10 restaurants in the south Texas area, including the Beaumont Freddy's restaurant.
3. On July 10, 2008, I was called by Celia Gonzales, assistant manager at the Beaumont restaurant, and was informed that a shift manager, Kenneth Ivey, had called in and said that he would not work his scheduled shift because his cat had died that morning. In addition, he had not found someone to cover his shift during his absence.
4. I called Kim Henderson, who was originally scheduled to begin working at the restaurant as the general manager on July 17, 2008, and asked if she would cover Ivey's shift, since he had not found anyone to cover his shift.
5. I also asked Kim Henderson to suspend Ivey without pay until I could speak with the company's human-resources department about proper discipline.
6. After speaking with Demetria Suka, the human-resources administrator, and Ted Whitney, general counsel for ReadyFoods, Inc., I decided that Ivey should be demoted for failing to work his scheduled shift and for failing to find a person to cover his shift. The fact that he was a male had absolutely no bearing on my decision to demote him.
7. No other employee has ever been given time off for the death of his or her pet.
8. Mr. Ivey was demoted because he had shown by his actions that he could not handle the responsibility of being a shift manager.

9. The foregoing affidavit consisting of one (1) typewritten page is true and correct.

FURTHER AFFIANT SAYETH NAUGHT

What's the critical information in this affidavit? It's that Mr. Ivey was demoted after he missed work because his cat died. He was not demoted, the affiant asserts, because he is a male. Now, where did you realize that? Probably in paragraph 6; that's where I grasped the main point of the story — the critical information in the affidavit.

But there's no reason an affidavit must be written that way, with the critical point hiding in paragraph 6. Affidavits, like nearly all other legal writing, ought to introduce the main point at the beginning. You can do that with a bold synopsis.

To create a bold synopsis for an affidavit:

- Write a brief synopsis of the affidavit's main point and identify the affiant.
- Keep the synopsis to 40 or 50 words.
- Put the synopsis up front, indented, and in boldface type.

A bold synopsis for the original affidavit might look like this:

This affidavit, by Kenneth Ivey's supervisor, Dennis Ragley, explains that Ivey was demoted because he missed his shift — after his cat had died — and because he did not find someone to cover his shift. Ivey was not demoted because he is a male.

Beginning affidavits this way benefits both the writer and the reader.

The writer benefits because creating the synopsis makes you think hard about what you're asserting in the affidavit. The synopsis helps you focus your writing on the critical point. It makes you articulate your point, succinctly.

Readers benefit because the synopsis allows them to quickly grasp the point of the affidavit even if they do not have time to read the whole thing. But for readers, the synopsis is more than just a time-saver. When readers scan the synopsis before reading the main text, the story becomes easier to follow; it makes sense the first time through. Plus, when the ending is spelled out up front, readers tend to fit the story to the ending — and that's persuasion.

Use Headings to Ease the Reader's Way

To make affidavits more readable, easier to follow, and more inviting to the eye, use headings.

- Put the headings in boldface type so that they stand out.
- Use some topic headings (one or two words each).
- Use some phrasal headings — cogent phrases that preview the factual assertions.

Headings in affidavits can be very effective. They cue the reader about content and organization, break up long blocks of text, and make documents easier to skim.

Most lawyers know that headings work well in motions, briefs, and agreements. Then why don't lawyers use headings in affidavits? Well, you may be thinking, affidavits are a written form of testimony. No one testifies using subject headings. That's odd.

But no one testifies with paragraph numbers, either, yet nearly all affidavits use them. Let's be clear: an affidavit is not a transcript of testimony — you don't put questions and answers in it. Instead, an affidavit is a "voluntary declaration of facts written down and sworn to by the declarant."² It's a prepared statement — written out, thought over, polished. So why can't you use headings in an affidavit?

You can. Here's the original affidavit with headings added:

The affiant

My name is Dennis Ragley. I am over 21 years of age, of sound mind, and I have personal knowledge of the facts stated below. I am the district supervisor for ReadyFoods, Inc., and I am responsible for 10 restaurants in the south Texas area, including the Beaumont Freddy's restaurant.

Events surrounding Ivey's demotion

On July 10, 2008, I was called by Celia Gonzales, an assistant manager at the Beaumont restaurant, and was informed that a shift manager, Kenneth Ivey, had called in and said that he would not work his scheduled shift because his cat had died that morning. In addition, he had not found someone to cover his shift during his absence.

I called Kim Henderson, who was originally scheduled to begin working at the restaurant as the general manager on July 17, 2008, and asked if she would cover Ivey's shift, since he had not found anyone to cover his shift.

I also asked Kim Henderson to suspend Ivey without pay until I could speak with the company's human-resources department about proper discipline.

² *Black's Law Dictionary* 66 (Bryan A. Garner ed., 9th ed., West 2009).

Reasons for Ivey's demotion

After speaking with Demetria Suka, the human-resources administrator, and Ted Whitney, general counsel for ReadyFoods, Inc., I decided that Ivey should be demoted for failing to work his scheduled shift and for failing to find a person to cover his shift. The fact that he was a male had absolutely no bearing on my decision to demote him.

No other employee has ever been given time off for the death of his or her pet.

Mr. Ivey was demoted because he had shown by his actions that he could not handle the responsibility of being a shift manager.

By the way, if you want to leave the paragraph numbers in for ease of reference, you may. But just adding headings makes the affidavit easier to understand, easier to follow, and more persuasive.

Create a Neat, Clean Look by Eliminating Formulaic Clutter

Too much of what gets passed on from old affidavits to new affidavits is archaic, formulaic clutter. For example, many affidavits begin with a caption like this:

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Does this type of caption have a name? Does anyone know why it is there? And most important, is it required in an affidavit?

My informal survey of several dozen lawyers shows that they do not know what it's called, they are not sure why it's there, and they doubt that it's required. After I surveyed those lawyers, I did

my best to find out — through researching on my own — what that caption is. I found nothing. If you are reading this and know what it is, please contact me. Until I know what it is and why it's there, it does not go in my affidavits. And I challenge you to follow me — if you don't know what it is, don't put it in.

Another example, from the end of an affidavit, is the familiar phrase:

FURTHER AFFIANT SAYETH (or SAITH) NAUGHT (or NOT).

That archaic boilerplate actually does have an explanation. Fortunately, someone has done the research on this one, and he is a most reputable source. Bryan Garner, in his *Dictionary of Modern Legal Usage*, tells us that the phrase is from Elizabethan England — the late 1500s — and that English lawyers abandoned it long ago.³ I suggest that American lawyers in 2009 should abandon this Elizabethan phrase too. So I agree with Garner's counsel on variations of the *further affiant* phrases: "The best choice, stylistically speaking, is to use these phrases not."⁴

Here's how the affidavit looks after applying the three techniques I have suggested:

Affidavit

This affidavit, by Kenneth Ivey's supervisor, Dennis Ragley, explains that Ivey was demoted because he missed his shift — after his cat had died — and because he did not find someone to cover his shift. Ivey was not demoted because he is a male.

³ Bryan A. Garner, *A Dictionary of Modern Legal Usage* 378 (2d ed., Oxford U. Press 1995).

⁴ *Id.*

The affiant

My name is Dennis Ragley. I am over 21 years of age, of sound mind, and I have personal knowledge of the facts stated below. I am the district supervisor for ReadyFoods, Inc., and I am responsible for 10 restaurants in the south Texas area, including the Beaumont Freddy's restaurant.

Events surrounding Ivey's demotion

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No other employee has ever been given time off for the death of his or her pet.

Mr. Ivey was demoted because he had shown by his actions that he could not handle the responsibility of being a shift manager.

Signed:

In this revised affidavit, the reader gets a bold-synopsis summary right up front, highlighted headings to guide him or her through the story, and a clutter-free document that's easy to read and understand. This is an affidavit a judge can use.

