

Writing to the Trial Judge[®]

Part Two—For affidavits

During a career, a trial lawyer will write hundreds—if not thousands—of papers directed at trial judges. Yet so much of what is written for trial judges is not well suited to that audience. Too often, we lawyers treat judges as if they were reading machines—obligated to read what we submit, no matter how difficult it is.

But trial judges, as an audience, are operating under demanding circumstances:

- Trial judges are busy, yet many court papers require them to plow through lengthy preliminaries.
- Trial judges deal with many different matters, yet many court papers bury the critical point—what separates this case from others—in undifferentiated blocks of text.
- Trial judges must make informed decisions, yet some court papers fudge on the facts or the law, or both.

This article can't fix all the problems with writing for trial judges, but Part Two offers three suggestions for affidavits that will help you get the trial judge's attention, keep it, and deserve it.

Affidavits

Most lawyers will need to prepare an affidavit at some time; 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. So 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

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

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 herein.
2. I am the District Supervisor for Ready-Foods, Inc., and I am responsible for 10 restaurants in the south Texas area, including the Beaumont Freddy's restaurant.
3. On July 10, 1999, 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, Ivey had not found someone to cover his shift during his absence.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. We seek to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For more information about plain English, see our website—www.michbar.org/committees/pengcom.html.

4. I called Kim Henderson, who was originally scheduled to begin working at the restaurant as the General Manager on July 17, 1999, and asked if she would cover Kenneth Ivey's shift since he had not found anyone to cover his shift.
5. I also asked Kim Henderson to suspend Kenneth Ivey without pay until I could speak with the company's human resources department concerning proper discipline.
6. After speaking with Demetria Suka, the human resource administrator, and Ted Whitney, General Counsel for Ready-Foods, Inc., I decided that Kenneth 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 Kenneth Ivey was a male had absolutely no bearing on my decision to demote Mr. Ivey.
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 is the critical information in this affidavit? It is 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 six; that is where I grasped the main point of the story—the critical information in the affidavit.

But there is no reason an affidavit must be written that way, with the critical point hiding in paragraph six. Affidavits, like nearly all legal writing, ought to introduce the main point right up front. You can put the main point up front with a bold synopsis.

I suggest that all affidavits contain a bold synopsis.¹ To create a bold synopsis for an affidavit:

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- Write a brief synopsis of the main point of the affidavit 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.

This bold synopsis tells the reader, in a brief and forceful way, the critical point of the affidavit, right up front. Beginning affidavits this way benefits both the writer and the reader.

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

Readers benefit because the bold 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 bold synopsis is more than just a time-saver. When readers scan the bold synopsis before reading the main text, it becomes easier to follow the story in the affidavit; the story 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 headings in boldface type so 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. They break up long blocks of text. They 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 is a prepared statement: written out, thought over, polished. So why can't you use headings in an affidavit?

You can. Here is 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, 1999, I was contacted by Celia Gonzales, an assistant manager at the

Beaumont restaurant, and was informed that a shift manager, Kenneth Ivey, had called the restaurant and said that he would not work his scheduled shift because his cat had died that morning. In addition, Kenneth Ivey 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, 1999, and asked if she would cover Kenneth Ivey's shift since he had not found anyone to cover his shift.

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

Reasons for Ivey's demotion.

After speaking with Demetria Suka, the human resource administrator, and Ted Whitney, General Counsel for ReadyFoods, Inc., I decided that Kenneth 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 Kenneth Ivey 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 the addition of 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 is called, they are not sure why it is there, and they doubt that it is required. After I sur-

veyed 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 is 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 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. I suggest that American lawyers in 2004 could well 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.³

If we apply the techniques I have suggested here to the original affidavit, we greatly improve it:

- We get an up-front summary.
- We get easy-to-follow headings.
- We get a clutter-free, contemporary document.

Here is how the affidavit looks after applying the three techniques:

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.

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.

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mont restaurant, and was informed that a shift manager, Kenneth Ivey, had called the restaurant and said that he would not work his scheduled shift because his cat had died that morning. In addition, Kenneth Ivey 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, 1999, and asked if she would cover Kenneth Ivey's shift since he had not found anyone to cover his shift.

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

Reasons for Ivey's demotion.

After speaking with Demetria Suka, the human resource administrator, and Ted Whitney, General Counsel for ReadyFoods, Inc., I decided that Kenneth 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 Kenneth Ivey 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.

Signed:

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

This article is excerpted from *Writing for the Legal Audience*, published by Carolina Academic Press.

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FOOTNOTES

1. Schiess, The Bold Synopsis, 63 Tex. B.J. at 1030.
2. Black's Law Dictionary 21 (Pocket ed., Bryan A. Garner, ed., 1996).
3. Bryan A. Garner, A Dictionary of Modern Legal Usage 378 (2d ed., Oxford. U. Press 1995).