DRAFTING AFFIDAVITS OF EVIDENCE-IN-CHIEF

This article examines the drafting of affidavits of evidence-in-chief ("AEICs") in civil trials, from the perspective of the Bench. It will cover procedural rules set out in the Rules of Court 2021 and examine relevant case law. Important topics such as the role of lawyers, principles of evidence and types of affidavits will be covered. This article will provide practical guidance on drafting AEICs and is a useful reference for parties to civil litigation.

Andre **MANIAM**
Judge of the Supreme Court of Singapore.

I. Introduction

1 For the trial of civil cases, the evidence of a party's own witnesses is generally given by affidavits of evidence-in-chief ("AEICs").

2 This article looks at the drafting of AEICs from the perspective of the court, with reference to the Rules of Court and decided cases. The focus is on AEICs of factual witnesses, rather than those of expert witnesses (which are subject to additional rules and principles).

3 This article will discuss:

(a) telling the truth and the role of the lawyer;

(b) the Rules of Court applicable to AEICs;

(c) the general rule that evidence-in-chief is given by AEICs;

(d) the principle that the witness's evidence should be his own;

(e) organisation and length;

(f) evidence: admissibility, relevance, materiality, hearsay and opinion evidence;

(g) joint or corroborative AEICs; and

(h) affidavits before discovery ("AB4D").

II. Telling the truth and role of the lawyer

4 AEICs are statements made on oath as evidence in judicial proceedings. Lying in an AEIC is a serious criminal offence:[1]

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine …

5 Likewise, a lawyer must not include in an AEIC facts that the lawyer knows to be untrue. This could expose the lawyer to criminal liability, *eg*, for abetting the client's offence of giving false evidence in judicial proceedings. It would also be a breach of the lawyer's duty of candour – the duty not to mislead the court. As V K Rajah JA put it in *Bachoo Mohan Singh v Public Prosecutor*[2] ("*Bachoo Mohan Singh*"):

> A crucial aspect of this multi-faceted responsibility is the duty not to mislead the court, also known as the duty of candour (see, in particular, rr 56, 59(a) and 60(f) of the Professional Conduct Rules, as well as Principle 21.01 of *The Guide to the Professional Conduct of Solicitors* (Nicola Taylor gen ed) (The Law Society, 8th Ed, 1999) ('The Guide')). Indeed, this duty is a touchstone of our adversarial system which is based upon the faithful discharge by an advocate and solicitor of this duty to the court. The duty applies when performing any act in the course of practice. Litigants and/or their solicitors must neither deceive nor knowingly or recklessly mislead the court. Untrue facts cannot be knowingly stated, true facts cannot be misleadingly presented, material facts cannot be concealed and a client or witness must not be allowed to mislead the court …
>
> … The solicitor cannot knowingly place a false story before the court …

6 The lawyer's duty of candour, however, does not mean the lawyer is under a general duty to verify the truthfulness or factual accuracy of his client's instructions. As Rajah JA put it in *Bachoo Mohan Singh*:[3]

> The broad issue raised in this case is whether the duty of candour to the court requires the solicitor concerned to verify the truthfulness or factual accuracy of his client's instructions and if so the extent of this duty. This point was addressed in *Wee Soon Kim Anthony v Law Society of Singapore* [2002] 1 SLR(R) 954 ('*Anthony Wee (No 2)*'), where this court explained (at [23]):
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> > There is no general duty on the part of a solicitor that he must verify the instructions of his client. This was laid down in *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 and *Tang Liang Hong v Lee Kuan Yew* [[1997] 3 SLR(R) 576]. It would be different if there were compelling reasons or circumstances which

1 Penal Code 1871 (2020 Rev Ed) s 193.
2 [2010] 4 SLR 137 at [114]–[115].
3 *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [118].

> required the solicitor to verify what the client had instructed. [emphasis added]

More than a decade earlier, Chan Sek Keong JC, in another decision, *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 ('*Anthony Wee (No 1)*'), involving the same litigant solicitor, unequivocally declared with his customary acuity and clarity (at [21]):

> It is not for an advocate and solicitor, whether in his capacity as counsel or as solicitor, to believe or disbelieve his client's instructions, unless he himself has personal knowledge of the matter or *unless his client's statements are inherently incredible or logically impossible. His duty to his client does not go beyond advising him of the folly of making incredible or illogical statements.* [emphasis added]

Of course, a solicitor cannot simply take whatever the client states at face value. The solicitor has a *duty to the client* to assess the instructions holistically and explain to the client what may support or contradict the claim. He has to ensure that his client understands the duty to be truthful and the consequences of being found to be untruthful. [emphasis in original]

7 Thus, in drafting AEICs:

(a) the lawyer must ensure that the client understands that he must be truthful and what happens if the client is found to be untruthful;

(b) the lawyer must not include matters that he knows to be untrue; and

(c) the lawyer is not under a general duty to verify whether what the client says is true or factually accurate, but the lawyer must do so if there are compelling reasons or circumstances requiring such verification.

III. Rules of Court applicable to AEICs

8 AEICs, and affidavits more generally, are addressed in O 15 rr 16–29 of the Rules of Court 2021 ("ROC 2021", which came into operation on 1 April 2022[4]), and O 38 r 2 and O 41 of the previous edition of the Rules of Court[5] ("ROC 2014", which continue to apply to proceedings commenced before 1 April 2022).[6]

4 Rules of Court 2021 O 1 r 1(1).
5 Rules of Court (2014 Rev Ed).
6 Rules of Court 2021 O 1 r 2(2) read with First Schedule, para 1.

IV. The general rule: evidence-in-chief by AEICs

9 The general rule requiring evidence-in-chief to be given by AEICs is stated as follows:[7]

> **Evidence in originating claim, assessment of damages or value and taking of accounts (O. 15, r. 16)**
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> **16.**—(1) As a general rule, the trial in an originating claim, assessment of damages or value, and taking of accounts must be decided on the basis of the witnesses' affidavits of evidence-in-chief, cross-examination, re-examination and on oral or written submissions.
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> **Evidence by affidavit (O. 38, r. 2)**
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> **2.**—(1) Without prejudice to the generality of Rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of affidavit and, unless the Court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination and, in default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court.

10 As an exception, the court may allow some or all of a witness's evidence-in-chief to be given orally:[8]

> **Evidence in originating claim, assessment of damages or value and taking of accounts (O. 15, r. 16)**
>
> **16.** …
>
> (2) In a special case, the Court may allow a witness' evidence-in-chief to be given orally instead of by affidavit of evidence-in-chief.
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> **Evidence by affidavit (O. 38, r. 2)**
>
> **2.** …
>
> (4) Notwithstanding paragraph (1), (2) or (3), the Court may, if it thinks just, order that evidence of a party or any witness or any part of such evidence be given orally at the trial or hearing of any cause or matter.

11 Thus, the court may allow a witness to give evidence-in-chief orally if the witness is unwilling to provide an AEIC (and might even be unwilling to attend court to testify except under an order to attend court).

12 The court may also allow a witness who has given an AEIC to give supplementary evidence-in-chief. This will, however, only be done sparingly. Under the ROC 2014, the court would only do so "if it

7 See Rules of Court 2021 O 15 r 16(1) and Rules of Court (2014 Rev Ed) O 38 r 2(1).
8 See Rules of Court 2021 O 15 r 16(2) and Rules of Court (2014 Rev Ed) O 38 r 2(4).

thinks just"[9]. Under the ROC 2021, the court would do so only "in a special case".[10]

13 In *CZD v CZE*[11] ("*CZD*"), the court considered what "in a special case" means, in relation to whether to allow a further affidavit from the party seeking to set aside an order allowing enforcement of an arbitral award.

14 Order 3 r 5(6) of the ROC 2021 provides that "[e]xcept in a special case, the Court will not allow further affidavits to be filed after the other party files his or her affidavit under paragraph (5)", *ie*, "[e]xcept in a special case", the court will not allow an applicant to file further affidavits after the other party has filed its reply affidavit.[12]

15 The court emphasised that "[i]t is incumbent on the applicant to ensure that his affidavits filed in support of his application deal with all matters that are relevant to his application. An applicant cannot adopt a wait-and-see approach."[13] However, the court recognised that "[t]he fact that new issues are raised in affidavits filed to contest an application may constitute a special case for the purposes of O 3 r 5(6) if these issues could not reasonably have been within the applicant's contemplation when he filed his affidavit in support of his application."

16 In arriving at this conclusion, the court interpreted the term "special case" with the Ideals set out in O 3 r 1 in mind: the case involved the enforcement of an arbitral award, and an important Ideal was that of achieving expeditious proceedings.[14] Further, the court interpreted the term "special case" with reference to O 3 r 5(7), which provides that an affidavit "must contain all necessary evidence in support of or in opposition (as the case may be) to the application".[15]

17 The applicant in *CZD* sought permission to file a further affidavit on five issues of foreign law. The court did not allow this, finding that two of the issues were plainly irrelevant, one was moot, and the remaining two ought to have been raised by the applicant in his supporting affidavit.[16]

9 Rules of Court (2014 Rev Ed) O 38 r 2(4), quoted at para 10 above.
10 Rules of Court (2014 Rev Ed) O 15 r 16(2), quoted at para 10 above.
11 [2023] 5 SLR 806.
12 *CZD v CZE* [2023] 5 SLR 806 at [18].
13 *CZD v CZE* [2023] 5 SLR 806 at [21].
14 *CZD v CZE* [2023] 5 SLR 806 at [19].
15 *CZD v CZE* [2023] 5 SLR 806 at [20].
16 *CZD v CZE* [2023] 5 SLR 806 at [17]–[22].

18 Although *CZD* concerned the filing of further affidavits for an application, rather than supplementary oral evidence-in-chief for trial, one should not expect the court to be more lenient when it comes to allowing supplementary oral evidence-in-chief.

19 Just as an affidavit for an application "must contain all necessary evidence in support of or in opposition (as the case may be) to the application",[17] an AEIC "must contain all material facts".[18] If supplementary oral evidence-in-chief is sought because the AEIC did not include what should have been in it in the first place, the court is likely to be unsympathetic.

20 The court would be more sympathetic if the supplementary oral evidence-in-chief is to deal with matters not reasonably within the contemplation of that party at the time of AEICs. In particular, the court may allow supplementary oral evidence-in-chief to address new facts which have occurred after the AEICs – O 15 r 16(4) of the ROC 2021 provides as follows:

> An affidavit of evidence-in-chief must contain all material facts which may not be departed from or supplemented by new facts in oral evidence unless the new facts occurred after the date of making the affidavit of evidence-in-chief.

21 In view of the general rule requiring AEICs and the limited exception of supplementary oral evidence-in-chief, a lawyer should not omit material evidence from a witness's AEIC intending to adduce it in supplementary oral evidence-in-chief and so surprise his opponent. If the court does not allow supplementary evidence-in-chief, and the point is then not raised in cross-examination, that evidence might never see the light of day.

V. Witness's evidence should be his own

A. Witness's evidence should be his own, not someone else's

22 The importance of the principle that the witness' evidence should be his own, was emphasised in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[19] ("*Ernest (CA)*"). The case concerned witness preparation but the principles apply equally to the drafting of AEICs.

17 Rules of Court 2021 O 3 r 5(7).
18 Rules of Court 2021 O 15 r 16(4).
19 [2018] 1 SLR 894 at [134]–[144].

23 At first instance in *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala*[20] ("*Ernest (HC)*"), one of the witnesses (the defendant's brother, Tony) had used a document to refresh his memory, in the course of his testimony. That document ("D-3") comprised 14 pages of questions and answers and was headed "Possible Questions". The judge observed that many of the questions and answers were in the "nature of a script",[21] and that "it went to the very veracity of [Ernest's legal team's] witnesses and the evidential value of their evidence".[22] The judge also found that Tony and other witnesses attended group "training sessions".[23] The judge held that a large part of Tony's evidence should be accorded negligible weight due to his witness "training sessions",[24] and that Tony's reliance on "D-3") was also a serious, probably irremediable, breach of his credibility[25] – the judge thus held that the credibility and accuracy of the important and relevant parts of Tony's evidence on the issues before the court had been severely compromised and the judge was constrained to give negligible weight to most of his evidence.[26] On appeal, the Court of Appeal held that the judge's assessment that Tony's evidence could not be relied on and should be given little or no weight was unimpeachable.

24 The following propositions from the Court of Appeal's judgment inform the process of drafting AEICs:

(a) "the witness's evidence must be his own independent testimony";[27] "the witness's evidence *must remain* ***his own***" [emphasis in original][28] – that is a line that must not be crossed;

(b) a solicitor "must not allow other persons – including the solicitor – to *actually supplant or supplement* the witness's own evidence"[29] [emphasis in original];

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20 [2017] SGHC 14.

21 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [267].

22 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [268].

23 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [269]–[271].

24 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [284].

25 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [287].

26 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [290].

27 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2018] 1 SLR 894 at [137].

28 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2018] 1 SLR 894 at [136].

29 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2018] 1 SLR 894 at [138].

(c) questioning of a witness should not be too lengthy or repetitive: there must not be "repetitive 'drilling' of a witness to a degree where his true recollection of events is supplanted by another version suggested to him by an interviewer or other party";[30] and

(d) witnesses should not be interviewed in groups.[31]

25 The principle that a lawyer must not supplant or supplement the witness's own evidence means that the lawyer cannot get the witness to tell the court what is not the witness's evidence, but instead something that comes from the lawyer, the lawyer's client, another witness, or another person who is not a witness.

26 This does not, however, mean that lawyers should themselves affirm AEICs so that their version of the facts is placed as evidence before the court.

27 *The Evpo Agsa*[32] is instructive on this. The matter before the court was an application for security. The defendants' case was based on four affidavits, all made by their lawyer (who then appeared as counsel). The court noted that the defendants had an agent, foreign lawyers, and surveyors, but none of them made an affidavit, and counsel could not explain why.[33] Moreover, counsel's affidavit mingled admissible matters with inadmissible matters; indeed, his affidavits contained conclusions of facts, arguments, comments, inferences, statements of law, expert opinion, reliance on hearsay evidence, reliance on self-serving documents and counsel generally argued his clients' case.[34] The court held: "No court could accept the contents of those affidavits as conclusive and decide in favour of the owners."[35] The court also affirmed the rule "that counsel and counsel's clerks should not become witnesses in cases in which they are retained", a rule that equally applies to counsel making affidavits where the facts are in dispute.[36] The court emphasised that advocates are officers of court, great trust is placed on them, and they should not unconsciously or consciously shape the evidence to favour their case or client. That should likewise be borne in mind when lawyers are drafting AEICs for witnesses.

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30 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2018] 1 SLR 894 at [139].
31 *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2018] 1 SLR 894 at [140].
32 [1992] 1 SLR(R) 662.
33 *The Evpo Agsa* [1992] 1 SLR(R) 662 at [19].
34 *The Evpo Agsa* [1992] 1 SLR(R) 662 at [19].
35 *The Evpo Agsa* [1992] 1 SLR(R) 662 at [19].
36 *The Evpo Agsa* [1992] 1 SLR(R) 662 at [15]–[16].

28 A lawyer should not be an advocate in a case, and also give evidence which is material to the determination of any contested issue before the court: that is now stated in r 11(3) of the Legal Profession (Professional Conduct) Rules 2015.

B. Comparison of AEICs with oral evidence-in-chief

29 It is useful to reflect on the characteristics of oral evidence-in-chief and what lessons may be drawn from that, for the drafting of AEICs.

30 It has been more than 40 years since AEICs were introduced in 1991. Prior to that, witnesses would give their evidence-in-chief orally:

(a) the lawyer for the party calling the witness would pose non-leading questions to the witness, *ie*, questions that did not suggest what the answer should be;

(b) the witness would answer in his own words; and

(c) if the witness wished to testify in a language other than English, the questions and answers would be interpreted.

31 These characteristics of the process of giving oral evidence-in-chief are all aspects of the principle that the witness's evidence should be his own, as is elaborated below.

C. Non-leading questions

32 With the advent of AEICs, a lawyer would no longer lead his witnesses' evidence-in-chief by asking questions in open court; instead, he would question the witnesses out of court, and draft AEICs based on what the witnesses say. This does not, however, mean that a lawyer can now suggest to a witness what his evidence should be, when if he were leading oral evidence-in-chief from the witness he would be constrained to ask non-leading questions. In interviewing a witness, a lawyer should still ask open-ended questions to find out what the witness's evidence is. Asking leading questions creates the danger that the witness's answer, which then goes into his AEIC, is not the witness's own evidence but something suggested to him by the lawyer.

33 Consider the story of the blind men and the elephant. Six blind men, none of whom has ever encountered an elephant before, are individually allowed to touch the elephant. The first only touches the elephant's trunk, and says, "it is a snake". The second only touches the elephant's tail, and says, "it is a rope". The third only touches the elephant's ear, and says "it is a fan". The fourth only touches the elephant's leg and

says, "it is a tree trunk". The fifth only touches the elephant's tusk and says, "it is a spear". The last only touches the elephant's body and says, "it is a wall".

34 If the blind men were then asked to give evidence as to what they encountered, their evidence should be no different from their *individual* impressions, *ie*, a snake, a rope, a fan, a tree trunk, a spear or a wall. If, however, in the process of drafting their AEICs it is suggested to each of them that they had encountered an "elephant", and their AEICs then uniformly say "elephant", that would distort the process. The witnesses would not be giving evidence that was *true to them*, but instead repeating a "party line". The folly of doing this may, moreover, be exposed in cross-examination, with the witnesses acknowledging that they had different experiences, or with them even admitting that they actually do not know what an "elephant" is. One of the worst answers to hear when a witness is asked, "why did you say this in your AEIC?", is: "the lawyer told me to".

35 In the quest to prove that the creature was an elephant, the lawyer should not massage the witnesses' accounts so they all say "elephant". He should take their evidence as it is, and persuade the court in *submissions* that the evidence paints a composite picture of an elephant.

D. The witness's own words

36 In giving oral evidence-in-chief, a witness would answer in his own words. The language in an AEIC should likewise be that of the witness, as far as possible; the AEIC should not read as if it is a statement by the lawyer.

37 A lawyer should not load AEICs with vocabulary that the lawyer has, but the witness does not. A lawyer should avoid using legal jargon (unless that has been explained to the witness, and the explanation stated in the AEIC), *eg*, if the lawyer feels a term like "special damages" needs to be included in the AEIC, and prior to that the witness did not know what "special damages" were, the witness should say in the AEIC that his understanding of that term is derived from an explanation by the lawyer. All the more so, if the term is not only legal jargon, but in a foreign or ancient language like Latin. A lawyer should consider whether in an AEIC it is really necessary to use terms like *mutatis mutandis*, *pro tanto*, or even more commonplace ones like *inter alia* and *prima facie*; might there be an English equivalent, within the witness's vocabulary, which might serve equally well (or better)?

38 Loading an AEIC with words that are not the witness's own invites trouble: it gives opposing counsel ammunition for easy cross-examination – the witness can be asked to explain the words he has used in his AEIC, and if he cannot (or has difficulty doing so), submissions may be made as to his credibility. It is painful to hear a witness saying of his own AEIC, "I don't know what this means, the lawyer wrote it."

E. Choice of language for AEIC and for testimony

39 A related issue is: does the witness need the affidavit (drafted in English) to be interpreted to him, and will he require the assistance of an interpreter at trial?

40 There are broadly three language options for a witness giving oral testimony:

(a) the witness can testify in English;

(b) the witness can testify in another language, with questions interpreted to him using that language, and his answers interpreted in English; or

(c) the witness can generally testify in English, but with an interpreter on hand to assist him in understanding questions, and in expressing himself in his answers.

41 The use of interpreters should not, however, be abused. If a witness is fluent in English but chooses to testify in another language so as to buy time to think and answer, that may be exposed and backfire. For instance, if the witness has dealt with the other party's representatives or witnesses in English, in discussions, meetings, or correspondence, he might be questioned on his language ability; if it then emerges that he is perfectly capable of testifying in English but chose not to, he may lose credibility.

42 The same considerations apply to whether the witness affirms his AEIC in English (as drafted), or if it is first interpreted to him in another language (and if that is done, it should be reflected in the AEIC). If a witness affirms his AEIC in English, then asks to testify through an interpreter at trial, his language ability may again come under scrutiny.

43 In drafting AEICs and getting them affirmed, the lawyer should ask himself what language (or languages) were used in interviewing the witness; and whether or not the witness is going to affirm the AEIC with interpretation, the lawyer should ensure that the witness understands the contents of his AEIC – it is, after all, being put forward as the witness's evidence.

VI. Joint or corroborative AEICs

44 The rules of court allow the making of joint affidavits:[37]

> **Joint affidavit (O. 15, r. 21)**
>
> **21.** Two or more persons may make a joint affidavit if all the facts that they are affirming are the same.
>
> **Affidavit by 2 or more deponents (O. 41, r. 2)**
>
> **2.**—(1) Where an affidavit is made by two or more deponents, the names of the persons making the affidavit must be inserted in the attestation …

45 The court in *Teo Ai Hua v Teo Mui Mui*[38] ("*Teo Ai Hua*") however stated that it is generally not good practice for two or more parties to affirm a joint AEIC. The court explained that, first, during a trial witnesses are examined in turn and are never jointly examined; second, it is unlikely that a witness will possess the same degree of knowledge of the material facts as another witness, especially when it concerns multiple events spanning over a few years, and this is especially so when there are events which only one of the witnesses can testify to. In *Teo Ai Hua*, the court considered the filing of a joint AEIC by the plaintiffs to be "wholly inappropriate", describing it as an "undesirable drafting shortcut".

46 It may be tempting to have one lead AEIC where one witness is chosen as the main storyteller, recounting not only what he has personal knowledge of, but also what he does not have personal knowledge of, but repeats based on something someone else has said. That is then paired with corroborative affidavits by other witnesses who simply associate themselves with the lead affidavit or identified portions of it. In some cases, it is ironic that the corroborative witnesses are not corroborating the lead witness's evidence, but their own evidence which the lead witness has put forward as part of *his* story. All this should not be done.

47 In *Jasviderbir Sing Sethi v Sandeep Singh Bhatia*[39] ("*Sethi v Bhatia*"), an analysis of the AEICs of the plaintiffs and their witnesses showed 32 instances where entire paragraphs of the first plaintiff's AEIC was replicated in the AEICs of three other witnesses.[40] The court found that those 32 paragraphs were not mere similarities, but were replicated word for word or almost word for word right down to the punctuation

37 See Rules of Court 2021 O 15 r 21 and Rules of Court (2014 Rev Ed) O 41 r 2(1).
38 [2011] 3 SLR 935 at [39]–[41].
39 [2021] SGHC 14.
40 *Jasviderbir Sing Sethi v Sandeep Singh Bhatia* [2021] SGHC 14 at [56].

and the turns of phrase, similarities which went well beyond what would ordinarily be expected from witnesses testifying about the same events.[41]

48 It appeared to the court that the first plaintiff's AEIC was drafted first, and then used as a template for the AEICs of the other three witnesses; the other three witnesses' AEICs were then put in front of them, and, at best, they skim read their AEICs without concentrating on the detail before affirming them: one of the witnesses confirmed as much.[42]

49 The court held that the circumstances in which the AEICs were drafted and affirmed did not allow the court to treat the other three witnesses' AEICs as independent of the first plaintiff's evidence, and thus corroborative of it; thus, the court gave no corroborative weight to the evidence of those three witnesses. However, the court considered the source of the evidence in the first plaintiff's AEIC to nevertheless be his own independent memory of the relevant evidence, assisted in the usual way by reviewing the relevant documents. As such, the court evaluated the veracity of the first plaintiff's evidence like all other oral evidence: by weighing it in the light of the opposing oral evidence, the independent and objective evidence and the associated inherent probabilities.

50 A similar attack on similarities in AEICs was mounted in *Poh Chiak Ow v United Overseas Bank Ltd*[43] ("*Poh Chiak Ow*"). The plaintiff in that case pointed out that the AEICs of three bank witnesses about a meeting they had attended with him, were couched in the same terms. Nevertheless, the court accepted the bank's witnesses' evidence, noting that they were all at the same meeting, they had had a meeting among themselves after the plaintiff left, and they also elaborated on the meeting in their oral testimony.[44] It remains the case, though, that lawyers should avoid drafting joint AEICs, corroborative AEICs that simply confirm another witness's AEIC, or multiple AEICs in the same or very similar terms.

51 The court in *Teo Ai Hua* gave examples of the limited instances where joint affidavits may be useful and appropriate: "a joint expert report made by two experts who possess similar expertise to arrive at a joint opinion, or a joint correction made by two deponents where the facts deposed to are very limited and uncontroversial".[45]

41 *Jasviderbir Sing Sethi v Sandeep Singh Bhatia* [2021] SGHC 14 at [57].
42 *Jasviderbir Sing Sethi v Sandeep Singh Bhatia* [2021] SGHC 14 at [59].
43 [2020] SGHC 275.
44 *Poh Chiak Ow v United Overseas Bank Ltd* [2020] SGHC 275 at [83]–[84].
45 *Teo Ai Hua v Teo Mui Mui* [2011] 3 SLR 935 at [39].

VII. Organisation and length

52 Well-organised AEICs help in communicating the witness's evidence to the court. Depending on the case, the facts might be presented chronologically, or based on topics. Harking back to the previous practice of oral evidence-in-chief, a lawyer would decide on the sequence of questions to pose, to elicit the witness' evidence-in-chief. Thought should similarly be put into the organisation of an AEIC.

53 As for length, the drafter should strive to produce a concise AEIC. What evidence should go into an AEIC is discussed in the section below.

VIII. Evidence: admissibility, relevance, materiality, hearsay and opinion evidence

A. Admissibility

54 An AEIC is a witness's evidence-in-chief: its contents are *evidence*, as indeed are the contents of affidavits generally:[46]

> An affidavit is a statement of evidence in the English language, signed and affirmed before a commission of oaths.

55 In turn, evidence (including evidence from witnesses) is used to prove *facts*. The Rules of Court reinforce this:[47]

> **Contents of affidavit (O. 15, r. 25)**
>
> **25.**—(1) An affidavit must contain only relevant facts.
>
> (2) An affidavit must not contain —
>
> (*a*) vulgar or insulting words unless those words are in issue in the action; or
>
> (*b*) anything that is intended to offend or to belittle any person or entity.
>
> **Contents of affidavit (O. 41, r. 5)**
>
> **5.**—(1) Subject to the other provisions of these Rules, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

46 Rules of Court 2021 O 15 r 18.

47 See Rules of Court 2021 O 15 rr 25(1)–25(2) and Rules of Court (2014 Rev Ed) O 41 rr 5(1)–5(2).

56 Under the Rules of Court 2014, affidavits for the purpose of interlocutory proceedings could contain statements of information or belief with the sources and ground thereof; however, AEICs could contain only such facts as the deponent was able of his own knowledge to prove (because AEICs were for trial, and not for the purpose of interlocutory proceedings).

57 That distinction is not expressly drawn in the Rules of Court 2021, but this does not mean that AEICs can now contain facts that are not within the deponent's personal knowledge, but instead based on sources of information and belief. It remains the case that AEICs must contain admissible evidence, and if the contents in a witness's AEIC are not within his personal knowledge but based on a statement of a third party, it would generally be hearsay and inadmissible (the issue of hearsay is discussed below). Order 15 r 16(5) of the ROC 2021 thus provides: "An affidavit of evidence-in-chief must contain only evidence that is admissible in law."

58 Whether under the ROC 2014 or ROC 2021, it is inappropriate to include in an AEIC a stock phrase to the effect that the contents of the AEIC are either within the deponent's personal knowledge, or are based on sources of information and belief. Saying this adds nothing to the admissibility of the contents of the AEIC; if at all, it only alerts the other side that the AEIC may contain matters outside the scope of the witness's personal knowledge.

59 AEICs are to contain evidence of *facts*. That can be contrasted with *submissions*. The drafter of an AEIC should not use it as a vehicle to make legal arguments: see *The Evpo Agsa*, discussed at para 27 above.

B. Relevance

60 Not only must an affidavit contain facts, those facts must be *relevant* to the case:[48]

> **Contents of affidavit (O. 15, r. 25)**
>
> **25.**—(1) An affidavit must contain only relevant facts.
>
> **Scandalous, etc., matter in affidavits (O. 41, r. 6)**
>
> **6.** The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

48 See Rules of Court 2021 O 15 r 25(1) and Rules of Court (2014 Rev Ed) O 41 r 6.

C. Materiality

61 ROC 2021 further provides that an AEIC "must contain all material facts".[49] The drafter of an AEIC should be guided by the pleadings as to what those material facts are, *ie*, what facts are material for the parties to prove or disprove in relation to the claim, defence, or counterclaim (as the case may be).

62 While an AEIC must contain all *material* facts which the party calling the witness wishes to lead from that witness, this does not mean that the party must (or should) have the witness give all *relevant* evidence that the witness might possibly give, such as to deal with all relevant documents. In particular, a judgment call needs to be made as to how much of the other side's case to deal with in an AEIC (and even to anticipate), and how much to leave to the witness to respond to in cross-examination. It is possible to put too much icing on the cake by having a witness deal with too many issues, or too many documents, in his AEIC. That could result in an AEIC running into hundreds, or indeed, thousands of pages, inundating the court and even the witness himself. In such a case, material evidence may be lost in a sea of other evidence that is relevant but of low materiality.

D. Hearsay

63 A lawyer drafting an AEIC must consider whether intended statements in the AEIC may be hearsay. If the witness gives evidence as to what a third party said to him, that would be hearsay if it is put forward to prove the truth of what the third party said. As the Privy Council explained in *Subramaniam v Public Prosecutor*[50] ("*Subramaniam*"):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

64 In *Subramaniam*, in response to a charge of unlawfully being in possession of ammunition, the accused advanced a defence of duress: that he had been captured by terrorists and carried the ammunition for fear of being killed otherwise. He was allowed to give evidence of conversations

49 See Rules of Court 2021 O 15 r 16(4).
50 [1956] 1 WLR 965 at 970.

between the terrorists and him, for that evidence would not be given to prove that what the terrorists said to him was true, but just that it was said, he believed it, and that is why he acted as he did.

65 If the AEIC is intended to contain hearsay, which is generally inadmissible, the lawyer drafting the AEIC must consider whether that hearsay might nevertheless be admissible by some exception to the hearsay rule, such as the exceptions under s 32 of the Evidence Act 1893.[51] If s 32 is going to be relied upon as the basis to admit hearsay (other than by agreement of the parties under s 32(1)(*k*)) pursuant to s 32(4) there must be compliance with the notice requirements prescribed in the Rules of Court. Those notice requirements are found in O 38 r 4 of the ROC 2014 and O 15 rr 16(7)–16(10) of the ROC 2021.

66 The above discussion relates to a witness who gives an AEIC containing hearsay, *ie*, evidence of a statement that another person has made to the witness.

67 The issue of hearsay in relation to AEICs may also arise in a different context: where the deponent of the AEIC does not attend court as a witness, and it is then sought to admit his AEIC nevertheless as hearsay. Under the Rules of Court, if the deponent does not attend trial for cross-examination, his AEIC would generally not be received in evidence:[52]

> **Evidence in originating claims, assessment of damages or value and taking of accounts (O. 15, r. 16)**
>
> **16.** …
>
> (3) An affidavit of evidence-in-chief may not be used if the maker does not attend Court for cross-examination, unless the parties otherwise agree.
>
> **Evidence by affidavit (O. 38, r. 2)**
>
> **2.**—(1) … unless the Court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination and, in default of his attendance, his affidavit shall not be received in evidence except with the leave of the Court.

68 What the ROC 2014 and ROC 2021 have in common, is that if the parties agree, an AEIC may be used even though the deponent does not attend for cross-examination. However, the reference to the court giving leave to use the AEIC of the absent deponent was in the ROC 2014, but is not in the ROC 2021.

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51 2020 Rev Ed.

52 See Rules of Court 2021 O 15 r 16(3) and Rules of Court (2014 Rev Ed) O 38 r 2(1).

69 The Court of Appeal in *Cheo Yeoh & Associates LLC v AEL*[53] ("*AEL*") accepted that if s 32(1)(*j*)(iii) of the Evidence Act[54] (which was in force then) applied, an absent deponent's AEIC might be admitted by way of that exception to the hearsay rule. That subsection applied to a statement made by a person in respect of whom it is shown "that he is outside Singapore and it is not practicable to secure his attendance". However, that was still subject to s 32(3): "A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant." In *AEL*, the High Court accepted AEL's explanations as to why it was not practicable to secure the attendance of the absent deponents, who were outside Singapore; and the court did not find (under s 32(3)) that it would not be in the interests of justice to treat their evidence as relevant.

70 With testimony by video conferencing having since become commonplace, lawyers who seek to admit AEICs of deponents who are outside Singapore must be prepared to justify why it is not practicable even to have them testify remotely.

E. Opinion evidence

71 The lawyer drafting an AEIC should also consider whether the AEIC might contain statements of opinion, and if so whether those would be admissible.

72 The fact that a witness holds a certain opinion may be a relevant fact in particular cases. Sections 47–53 of the Evidence Act 1893 also set out various categories of opinions, evidence of which would be admissible. That includes the opinions of experts under s 47. Section 47(2) provides that "An expert is a person with such scientific, technical or other specialised knowledge based on training, study or experience." The same definition is found in O 12 r 1(1) of the ROC 2021. Order 12 of the ROC 2021 deals with expert evidence, as did O 40A of the ROC 2014.

73 Order 40A r 1(2) of the ROC 2014 states that: "A reference to an 'expert' in this Order is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings." There is however no equivalent in O 12 of the ROC 2021, although it may be implicit in O 12 r 1 of the ROC 2021, which refers to the person from whom the expert receives instructions or by whom the expert is paid, that the rule is about witnesses who have been engaged and instructed

53 [2015] 4 SLR 325.
54 1997 Rev Ed.

to give expert evidence, rather than about factual witnesses who have relevant opinion evidence to give.

74 Whichever set of rules applies, can a factual witness's AEIC contain expert opinion (if the witness is an "expert" as defined in the Evidence Act)? He would not be a person instructed to give or prepare evidence for the purpose of court proceedings; rather, he would be a witness who has relevant factual evidence to give, who is also qualified to provide an opinion as an expert.

75 If, for instance, the designer of the Titanic were on board its ill-fated voyage, and survived, he would be able to give factual evidence as to what happened on the night in question; but because he was also the designer of the ship, he would be qualified to provide an opinion, as an expert, on why the ship sank, and in particular on whether the design of the ship contributed to what happened.

76 In principle, a person like him who has relevant factual evidence to give, and is also in a position to give an opinion as an expert, should not be precluded from providing both types of evidence. This must however be handled with care, for a person who is giving both factual and expert evidence may be attacked for lacking the independence one might expect from an expert witness who is engaged for the proceedings, and is reminded and confirmed that his paramount duty is to the court. Order 12 r 2(1) of the ROC 2021 also provides that: "No expert evidence may be used in Court unless the court approves." If a party proposes to call a factual witness who will also be giving expert opinion, that must thus be raised with the court.

77 The hazards of not being clear whether the witness is a factual and/or expert witness, are illustrated by the case of *Glassberg, Jonathan William v UBS AG, Singapore Branch*.[55] There, the court placed no reliance on one of the witnesses' affidavits: to the extent that it was intended to be relied upon as expert evidence, it did not comply with the requirements in the rules relating to expert evidence; if it were purely meant to serve as a factual affidavit, the witness did not attest to any facts which were within his own personal knowledge, and instead contained a summary of third-party reports which were not referenced or identified.

55 [2022] SGHC 314 at [62].

IX. AB4D

78 Under the ROC 2014, parties would file their witnesses' AEICs *after* disclosure of documents but before trial. This created a risk of witnesses tailoring their AEICs to fit evidence produced during the discovery process. Moreover, filing affidavits *after* discovery may be too late in narrowing the issues in dispute and the scope of discovery.[56]

79 Under the ROC 2021, after the pleadings have been filed and served, O 9 r 8 gives the court the discretion to order the parties to file their witnesses' AEICs *before* the production of documents (*ie*, AB4D). Order 9 r 8(1) of the ROC 2021 is set out below:

> If the application to challenge the jurisdiction of the Court has been dealt with or where there is no challenge to the jurisdiction of the Court, after pleadings have been filed and served but before any exchange of documents, the Court may, in any particular case, order the parties to file and serve their lists of witnesses and the affidavits of evidence-in-chief of all or some of the witnesses simultaneously or in any sequence.

80 Where the court exercises its discretion to order AB4D, the parties will have to engage in a more thorough preparation of witness evidence at an earlier stage of the litigation.[57] Requiring the parties to file their affidavits before production of documents has the following advantages:[58]

> (a) it enhances the authenticity of evidence in the AEICs (since the witnesses will now be unable to tailor their evidence to the documents produced during document production);
>
> (b) it assists in narrowing the issues in the dispute at an earlier stage in the proceedings, which in turn narrows the scope of discovery (and accordingly reduces the volume of documents produced as well as the amount of time spent on document production); and
>
> (c) it encourages parties to settle where they are forced to have regard to their own evidence without considering their opponent's documents.

81 AB4D removes the temptation for a witness to comment on the other party's documents, especially documents he has never seen

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56 See "Report of the Civil Justice Review Committee" at para 67 <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf> (accessed 1 December 2024).

57 See "Report of the Civil Justice Review Committee" at para 70 <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf> (accessed 1 December 2024).

58 See "Report of the Civil Justice Review Committee" at para 68 <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf> (accessed 1 December 2024).

previously. This promotes discipline in drafting an AEIC based on what is within the witness's own knowledge.

82 Relatedly, in drafting AEICs a lawyer should bear in mind that O 9 r 8 seeks to enhance authenticity by having witnesses state their evidence to the best of their recollection. Thus, lawyers should not abuse the court's process by filing a bare AEIC first, before filing a more substantive supplemental one after production has taken place.[59]

X. Conclusion

83 In drafting AEICs one should bear in mind what an AEIC is – a witness's affidavit of evidence-in-chief:

(a) it is an affidavit – a sworn statement in which the witness must tell the truth;

(b) it must contain the *witness's* evidence, not someone else's evidence; and

(c) it must contain *evidence*, not something else.

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59 See "Report of the Civil Justice Review Committee" at para 69(d) <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf> (accessed 1 December 2024).