HCBA BROWN BAG WITH COUNTY JUDGE ELIZABETH G. RICE
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Avoiding Technical Minefields and Overcoming Procedural Hurdles in Drafting Affidavits and Obtaining Default and Summary Final Judgments.

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OUTLINE

1. **Motions.**

a. Motions for Entry of Default Final Judgment.

(1) County Court Cases - Governed by *Fla. R. Civ. P*. 1.500(e).
"Final judgments after default may be entered by the court at any time….If it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references, or conduct hearings as it deems necessary and shall accord a right of trial by jury to the parties when required by the Constitution or any statute." (emphasis added)

(2) Small Claims Cases - Governed by *Small Claims R*. 7.170(b).
"After default is entered, the judge shall receive evidence establishing the damages and enter judgment in accordance with the evidence and the law." (emphasis added)

b. Motions for Summary Final Judgment.
(1) Governed by *Fla. R. Civ. P*. 1.510.

2. **Affidavits in Support of Default and Summary Final Judgments.**

a. Affidavits in General.

(1) **"Affidavit" Defined.** Webster's New World College Dictionary (4th ed. 1999) defines an affidavit as a "written statement made on oath before a notary public or other person authorized to administer oaths."

(2) **Properly Notarized**. As stated in the definition above, the affiant must make an oath or affirmation as to the truth of the facts stated in the affidavit. If the oath is administered by a notary public, the notary's "jurat" or certificate of administration of the oath must be included in the affidavit in the correct form. *In re Sinclair*, 191 B.R. 474 (Bankr. M.D. Fla. 1996). *See Fla. Stat.* § 117.05(13)(a) (2005). The notary's certificate of acknowledgment of execution (i.e., "the foregoing instrument was acknowledged before me") in lieu of an oath renders the affidavit legally insufficient. *See id*. at 475; *Fla. Stat.* § 117.05(13)(b) (2005).

(3) **Affiant's Competency**. An affidavit must clearly show the affiant is competent to testify to the matters stated in the affidavit. *Fla. R. Civ. P*. 1.510 Author's Comment – 1967 [hereinafter "*FRCP* 1.510 Comment"]; *Elser v. Law Offices of James*

M. Russ, P.A., 679 So. 2d 309 (Fla. 5th DCA 1996). An affiant fails to satisfy this competency requirement where affiant merely states, without more, that affiant has "personal knowledge." *Id.; see also Montejo Invests. N.V. v. Green Cos., Inc. of Fla.*, 471 So 2d 158 (Fla. 3d DCA 1985)(where affiant merely stated his title, that he was familiar with the facts stated in the complaint, and that to the best of his knowledge and belief the facts were true and accurate, affidavit was legally insufficient as it failed to show affirmatively that affiant was competent to testify to matters set forth therein, was not based on personal knowledge, and did not set forth facts as would be admissible in evidence); *Iglesia v. City of Miami Beach*, 487 So. 2d 1205 (Fla. 3d DCA 1986), *rev. denied*, 494 So. 2d 1151 (Fla. 1986)("addition of the phrase that the affiant is 'personally knowledgeable' with respect to the allegations of the complaint adds nothing, since it is not a statement of fact, but is itself a mere conclusion or opinion of the affiant"). An affiant should establish the factual basis for affiant's competence (i.e., age, bases of affiant's personal knowledge of the relevant matters at issue in the case, etc.). M. Tanner & E. Gonzalez, *Florida Civil Trial Preparation*, Motion Practice (Fla. Bar 2002).

(4) **Affiant's Personal Knowledge**. An affidavit therefore must be based on an affiant's personal knowledge. The purpose of this requirement is to prevent the trial court from relying on hearsay as the basis for its decision and to ensure there is an admissible evidentiary basis for the claim or affiant's position rather than mere belief or conjecture. *Florida Dept. of Fin. Servs. v. Associated Indus. Ins. Co., Inc.*, 868 So. 2d 600 (Fla. 1st DCA 2004); 49 *Fla. Jur 2d*, Summary Judgment § 39 (2006). Accordingly, an affiant should state in detail the facts showing affiant has personal knowledge. *Id. See, e.g., Hoyt v. St. Lucie County, Bd. of County Comm'rs*, 705 So. 2d 119 (Fla. 4th DCA 1998)(affidavit legally insufficient where it fails to reflect facts demonstrating how affiant would possess personal knowledge of the matters at issue in case); *Carter v. Cessna Fin. Corp.*, 498 So. 2d 1319 (Fla. 4th DCA 1986)(affidavit legally insufficient where affiant failed to set out a factual basis to support claim of personal knowledge of matter at issue in case and failed to make assertions based on personal knowledge).

An affiant's failure, however, to expressly state in the affidavit that it is "based on personal knowledge" does not necessarily render the affidavit deficient. A court may find the affidavit is legally sufficient if it is clear from the statements set forth therein that affiant has personal knowledge of the relevant matter at issue in the case. *See, e.g., Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So. 2d 369 (Fla. 1st DCA 1988)(affidavit could be considered where it was clearly evident from face of affidavit that defendant merely recounting actions and conversations in which she was involved); *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984)(affidavit sufficient where it was clear from statements made therein that they were based on affiant's own knowledge); *Alvarez v. Florida Ins. Guar. Ass'n, Inc.*, 661 So. 2d 1230 (Fla. 3d DCA 1995)(affidavit sufficient where affiant stated her title as officer and manager, stated she was familiar with certain relevant procedures, described those procedures, and stated that copies of documents attached to affidavit were true and correct copies); 49 *Fla. Jur 2d*, Summary Judgment § 39 (2006).

(a) Affidavits based on "information and belief" and to the "best of knowledge" are legally insufficient. *See Thompson v. Citizens Nat'l Bank of Leesburg*, 433 So. 2d 32 (Fla. 5th DCA 1983); *P & T Elec. Co. v. Spadea*, 227 So. 2d 234 (Fla. 4th DCA 1969), *writ discharged*, 235 So. 2d 510 (Fla. 1970); *Tarkoff v. Schmunk*, 117 So. 2d 442 (Fla. 2d DCA 1960); *see also Hayn v. Frederick*, 66 So. 2d 823 (Fla. 1953). *But see, First Nat'l Entertainment Corp. v. Brumlik*, 531 So. 2d 403, 405 (Fla. 5th DCA 1988)(summary judgment affidavit based on "information and belief" sufficient where body of affidavit indicated affiant had personal knowledge of facts and circumstances surrounding basis of plaintiff's claim).

(b) An affidavit which shows conclusively on its face that the affiant could not possess personal knowledge of the matters stated therein likewise is legally deficient. *Avatar Props., Inc. v. Boney*, 494 So. 2d 289 (Fla. 2d DCA 1986)(affidavit legally insufficient to defeat summary judgment where affiant clearly incapable of having personal knowledge of facts at issue in case); *Thompson v. Citizens Nat'l Bank of Leesburg*, 433 So. 2d 32 (Fla. 5th DCA 1983)(affidavit filed by liquidator of FDIC in case involving note obtained from FDIC's predecessor in interest was legally insufficient where affiant's allegations as to the history of the loan transaction and the relevant business records could not have been made on the basis of personal knowledge); 49 *Fla. Jur 2d*, Summary Judgment § 39 (2006).

(c) Note: Although affidavits must set forth facts which would be admissible in evidence, this does not mean that the affidavit itself is admissible. *Fla. Jur. 2d* Summary Judgment § 39. *Ex parte* affidavits actually are hearsay.

(5) **Must Be Based on Admissible Evidence**. Affidavits should set forth facts which would be admissible at trial. *Humphrys v. Jarrell*, 104 So. 2d 404 (Fla. 2d DCA 1958); *see Warden v. Chase Manhattan Bank, USA, N.A.*, 872 So. 2d 432 (Fla. 4th DCA 2004). Allegations in an affidavit that set forth incompetent and inadmissible matter, such as hearsay or opinion testimony, that would be inadmissible at trial, should be disregarded by the trial court. *Id.* at 409; *see also Palmer v. Liberty Nat'l Life Ins. Co.*, 499 So. 2d 903 (Fla. 1st DCA 1986), *rev. denied*, 499 So. 2d 903 (Fla. 1987) ("If evidence presented to the trial judge as a part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence should not be considered in ruling on the motion."); *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264 (Fla. 4th DCA 1972)("affidavit predicated on inadmissible hearsay does not comply with the summary judgment rule and cannot be utilized either in support of or in opposition to summary judgment").

(6) **Affidavits Based on Ultimate Facts Legally Insufficient**. Affidavits may not be based on allegations of ultimate facts. *Dean v. Gold Coast Theatres, Inc.*, 156 So. 2d 546 (Fla. 2d DCA 1963)("Statements of ultimate facts in an affidavit in support of a motion for summary decree are of no weight."). For example, the statement "at no time did affiant have any knowledge of the alleged fraudulent circumstances set

forth in plaintiff's complaint" would be a statement of ultimate fact as it provides no detail as to how affiant lacked knowledge of the alleged matter. *See id.* at 549; *Jones Constr. Co. of Central Florida, Inc. v. Florida Workers' Comp. JUA, Inc.*, 793 So. 2d 978, 979-80 (Fla. 2d DCA 2001)(affidavit that states only that affiant has personal knowledge of the facts, that the allegations in the complaint are true and correct, and that defendant owes plaintiff $3,671,312 is legally insufficient as affidavit failed to set forth any evidentiary facts that would be admissible in evidence). Moreover, an affidavit that amounts to nothing more than a statement by affiant that the allegations in the complaint are true similarly is insufficient. *See Iglesia v. City of Miami Beach*, 487 So. 2d 1205 (Fla. 3d DCA 1986).

(7) **Affidavits Based on Conclusions of Law Legally Insufficient**. Affidavits likewise may not be based on conclusions of law. *Hurricane Boats, Inc. v.* Certified *Indus. Fabricators, Inc.*, 246 So. 2d 174 (Fla. 3d DCA 1974); *Deerfield Beach Bank v. Nager*, 140 So. 2d 120 (Fla. 2d DCA 1962).

(8) **Document Supplying Basis for Knowledge – Must be Attached and Authenticated**. When a document supplies the basis for an affiant's personal knowledge, the affiant must attach the document to the affidavit. *Fla. R. Civ. P.* 1.510(e); *see, e.g., CSX Transp., Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995)(court reversed summary judgment where witness based statements on reports, but failed to attach reports to affidavit*); Zoda v. Hedden*, 596 So. 2d 1225 (Fla. 2d DCA 1992)(attorney not competent to testify in affidavit as to property transactions reflected in settlements, deeds, and judgments contained in public records, since attorney was not custodian of public records, and consequently, was unable to authenticate documents referred to in his affidavit); *Topping v. Hotel George V*, 268 So. 2d 388 (Fla. 2d DCA 1972)(attorneys' affidavit stating he was familiar with client's records and the records reflected certain information constituted inadmissible hearsay); *Rowland v. Wolf*, 192 So. 2d 47, 49 (Fla. 3d DCA 1966)(court rejected Plaintiff's affidavit that defendant acknowledged debt in writing where Plaintiff failed to attach letters from defendant); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988), *appeal after remand*, 576 So. 2d 906 (Fla. 1st DCA 1991). If the affiant lacks possession of a copy of the document, affiant must state so in the affidavit and describe the document, state when and where affiant saw it and under what circumstances, who has possession, and what efforts have been made to obtain it or a copy of it. *FRCP* 1.510 Comment.

(9) **Sound Discretion of Trial Court**. The admission and consideration of an affidavit is a matter within the sound discretion of the trial court. *Scott v. NCNB Nat'l Bank of Fla.*, 489 So. 2d 221, 223 (Fla. 2d DCA 1986).

b. Affidavit in "Proof of Claim"/Support of Motion – Selected Issues.

(1) **Documentary Evidence**. When appropriate, a client's affidavit should be used to provide an evidentiary foundation for the primary supporting documentary evidence of a party's claim. M. Tanner & E. Gonzalez, *Florida Civil Trial Preparation*, Motion Practice (Fla. Bar 2002). In proving a claim, there are two layers of documentary evidence. *Id*. The first layer consists of documents that support the facts stated in the motion for relief or, in come instances, the complaint. *See id.* The second layer consists of the affidavits or other documents that support the admissibility of the "first-layer" or primary supporting documents. *Id*. If an evidentiary foundation for the primary documentary evidence is necessary, but not properly laid, the primary supporting documentary evidence is inadmissible and it would be error for the court to consider it in support of the party's motion or request for relief. *Id*.; *Nichols v. Preiser*, 849 So. 2d 478 (Fla. 2d DCA 2003)(trial court unable to properly consider attorneys' documents in legal malpractice action where documents had not been properly authenticated).

(2) **Business Records**. To be admissible, a business record pursuant to section 90.803(6), Florida Statutes, must:

> (a) be made at or near the time of an act, event, condition, opinion, or diagnosis (i.e., entry made contemporaneous with act, event, condition, opinion, or diagnosis),
>
> (b) contain information supplied by or transmitted by a person with knowledge acting within the course of a regularly conducted business activity,
>
> (c) be kept in the course of a regularly conducted business activity,
>
> (d) be the type of document the business regularly makes when engaging in its particular business activity; and
>
> (e) be shown by the testimony of the custodian of the record or other qualified witness who has the necessary knowledge to testify as to how a particular document was made or by a certification or declaration with appropriate notice of affiant's intent to rely on such certification or declaration.

If a party has failed to lay the proper foundation for a business record's admissibility, a witness may not testify as to the contents of the record. *See Fla. Stat.* § 90.803(6); *Thompson v. State*, 705 So. 2d 1046, 1048 (Fla. 4th DCA 1998); *Brown v. State*, 537 So. 2d 180 (Fla. 3d DCA 1989); *Cullimore v. Barnett Bank of Jacksonville*, 386 So. 2d 894, 895 (Fla. 1st DCA 1980). *See also* 1 *Fla. Prac., Evidence* § 803.6 (2005 ed.)

(3) **Computer Records**. Like business records, computer printouts are admissible if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness of the information in the printout. *LEA Indus., Inc. v. Raelyn Int'l, Inc.*, 363 So. 2d 49, 52 (Fla. 3d DCA 1978); s*ee Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988).

(4) **Affidavits by Party's Attorneys**. An attorney should avoid giving an affidavit in support of the claim of the attorney's client (except of course as to attorneys' fees). In *Hardemon v. Fish*, 325 So. 2d 411 (Fla. 3d DCA 1976), the court ruled it was inappropriate for counsel to give an affidavit in support of his client's motion for summary judgment because doing so was in contravention to Canon 5, EC 5-9, DR 5--102, Code of Professional Responsibility, and other legal precedent. 325 So. 2d 411, *citing Millican v. Hunter*, 73 So. 2d 58 (Fla. 1954); *Hubbard v. Hubbard*, 233 So. 2d 150 (Fla. 4th DCA 1970). In reaching its decision, the *Hardemon* court reasoned that the trial court should not have considered counsel's affidavit because counsel would not have been permitted to testify at trial due to ethical prohibitions (and hence, the affidavit failed to contain evidence that would be admissible at trial). *Id.* at 150.

(5) **Pre-judgment Interest**. Affidavits in proof of claim should (and must in County Court Division J) contain at a minimum and in most circumstances a pre-judgment interest calculation setting forth the following information: (1) the date from which and through which the party is seeking interest; and (2) the rate of interest being sought. In addition, it is advisable that the party seeking pre-judgment interest provide the court an interest per diem to assist the court in determining the amount of pre-judgment interest due to the date of the judgment. [Note: This Court has observed the prevalent practice of parties filing separate "affidavits of interest." As pre-judgment interest is an aspect of a party's claim, it would seem that sworn statements regarding the calculation of pre-judgment interest should be included in the party's affidavit in proof of claim.]

c. Affidavit of Non-Military Service. Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (a/k/a the Servicemembers Civil Relief Act), 50 *U.S.C.A. App.* § 501, et seq., a plaintiff must file in both federal and state cases (a) an affidavit setting forth facts showing that the defendant is not in the military service, or (b) an affidavit setting forth that the defendant is in military service or that the plaintiff is unable to determine whether or not the defendant is in such service, before a judgment based on the defendant's default may be entered.

d. Affidavit of Attorneys' Fees and Costs. If a party is seeking attorneys' fees and costs pursuant to a contract, statute, or rule of procedure, then the attorney representing such party must file an affidavit setting forth, at a bare minimum, the number of hours expended and the rate (or flat fee) charged to the client in accordance with *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

e. Affidavit as to Reasonable Attorneys' Fees. The party seeking attorneys' fees also must file an affidavit as to the reasonableness of such attorneys' fees in accordance with *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), unless the reasonableness of such fee previously has been admitted by the opposing party.

3. Additional Pleading/Proof Requirements for Entry of Default Final Judgments.

a. Documentary Evidence of Claim - EGR Requirements.

(1) **Credit Card Cases**. In most circumstances, the court will require the following documents be attached to the affidavit in proof of claim, unless such documents were previously attached to plaintiff's complaint/statement of claim: (a) copy of the last credit card statement actually sent to defendant; (b) copy of card member agreement, to prove entitlement to pre-judgment interest in excess of statutory rate and attorneys' fees; (c) if some doubt or uncertainty exists regarding plaintiff's standing to bring an action on the debt as an assignee, then the assignment of the debt or bill of sale of the account.

(2) **Promissory Note Cases**. In most circumstances, the court will require the original note be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/**s**tatement of claim.

(3) **Automobile Loan Deficiency Cases.** The court may require the following documents be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/statement of claim: (a) a copy of the section 679.611, Florida Statutes, notification of disposition to defendant; (b) a copy of the section 679.616, Florida Statutes, explanation of calculation of deficiency to defendant.

(4) **Subrogation Cases.** The court may require the following documents be attached to the affidavit in proof of claim, unless previously attached to plaintiff's complaint/statement of claim: (a) evidence of damages (i.e., estimate for repair, photos, etc.); (b) evidence of payment (i.e., canceled check, etc.). [Note: In subrogation cases in which the insured/subrogor has not been joined as a plaintiff, the insurer/subrogee may not seek the recovery of the insured's deductible as an element of damage against defendant.]

b. Attorneys' Fees Constitute Unliquidated Damages – Hearing Legally Required. As attorneys' fees constitute unliquidated damages, a defaulted party has a due process right to notice and an opportunity to be heard on the issue as to the reasonableness of the amount of fees sought to be awarded against the defaulted party. *Asian Imports, Inc.*, 633 So. 2d 551 (Fla. 1st DCA 1994); *Scott v. Revels, Inc.*, 491 So. 2d 1230 (Fla. 2d DCA 1986); *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660 (Fla. 5th DCA 1983); *Fla. R. Civ. P.* 1.440(c). Indeed, it is reversible error for a court to award attorneys' fees against a defaulted party absent reasonable notice and a hearing on the matter. *See id.* In *Sloan v. Freedom Savings & Loan Association*, 525 So.2d 1000 (Fla. 5th DCA 1988), however, the court concluded a claim for damages, liquidated or unliquidated, including a claim for attorneys' fees and costs, could be decided by summary judgment. *Id.* at 1001.

4. Additional Pleading/Proof Requirements for Entry of Summary Final Judgments.

a. Summary Judgment Affidavits in Particular

(1) **Governed by *Fla. R. Civ. P.* 1.510(e)**.

(2) ***FRCP* 1.510 Comment Instructive**. The Author's Comment – 1967 to Rule 1.510 provides, among other things, that the function of the affidavit is to show there is available competent testimony which can be introduced at trial. *FRCP* 1.510 Comment. The affidavit therefore should be in the form of testimony admissible at trial. *Id*. In addition, the court may disregard a statement in an affidavit which physically is impossible in light of common knowledge or scientific principles. *Id*. *citing Watley v. Florida Power & Light Co.*, 192 So. 2d 27 (Fla. 1st DCA 1966).

(3) **Deadline for Serving Affidavits**. A party moving for summary judgment must file and serve supporting affidavits with the motion at least 20 days prior to the hearing. *Mack v. Commercial Indus. Park, Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989); *Marlar v. Quincy State Bank*, 463 So. 2d 1233; *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719 (Fla. 4th DCA 1978). A movant may file supplemental affidavits less than 20 days before the hearing, but only with the opposing party's written stipulation and consent or upon leave of court granted by written order after written application, with notice to the opposing party, and an opportunity for hearing. *Marlar*, 463 So. 2d at 1234; *see also Ellis v. Barnett Bank of Lakeland*, 341 So. 2d 545, 546 (Fla. 2d DCA 1977). If service of the summary judgment motion and affidavits is achieved by mail, then five days must be added to the notice period pursuant to Rule 1.090(e). *C.E. Huffman Trucking, Inc. v. Red Cedar Corp.*, 723 So.2d 296 (Fla. 2d DCA 1998); *Nelson v. Balkany*, 620 So. 2d 1138, 1139 (Fla. 3d DCA 1993). The motion and affidavits accordingly would need to be served no less than 25 days before the hearing.

(4) **Affidavits Contradicting Prior Testimony**. Generally, an affiant may not contradict or repudiate affiant's prior deposition testimony so as to create an issue of fact. *See Briguera v. Behr Paint Corp*., 712 So. 2d 824 (Fla. 2d DCA 1998); *Ellison v. Anderson*, 74 So. 2d 680 (Fla. 1954). A court, however, may consider such an affidavit if affiant has attempted in the affidavit to excuse or explain the discrepancy. *Stanford v. CSX Transp., Inc.*, 637 So. 2d 37 (Fla. 2d DCA 1994), *rev. denied*, 645 So. 2d 451 (Fla. 1994).

b. Documentary Evidence – EGR Requirements.
See 3.a. (Documentary Evidence) above.

5. **Requirements for Entry of Default Final Judgment After Breach in Settlement Stipulation – EGR Requirements.**

a. Affidavit of Default/Non-Compliance. In settlement stipulations providing for the entry of a final judgment or for an order allowing execution on a final judgment (i.e., in the case of a final judgment, execution withheld) on an *ex parte* basis, without further notice or hearing to the other party, the party seeking the entry of the final judgment must file with the Court an "affidavit of default" or "affidavit of non-compliance" setting forth the following assertions of fact: (1) the date of the default, non-payment, or non-compliance; (2) the total dollar amount of payments made by the defaulting party as of the date of the affidavit; (3) the manner in which the party seeking the final judgment applied the payments to the outstanding indebtedness; and (4) the outstanding balances due and owing for principal, pre-judgment interest, costs, and reasonable attorneys' fees, and the total the amount for which judgment is sought.

Example: (Stipulation provides that upon default, plaintiff may seek amount originally sought in the statement of claim/complaint).

> "Defendant failed to make the payment due on May 5, 2005. Defendant has paid Plaintiff a total of $300 under the settlement stipulation as of the date of this affidavit. The $1,000 was applied first to costs and fees, then to interest, and last to principle. Plaintiff accordingly seeks the entry of a final judgment in the amount of $4,000 in principal, $400 in interest, $280 in costs, and $200 in reasonable attorneys' fees, for a total sum due of $4,880."