

ATTACKING AFFIDAVITS

Maintaining the Integrity of the Process

By Christopher M. Kelly and Laura G. Simons

The use of affidavits by counsel, whether submitted by the defense to substantiate its contention that summary judgment is warranted or by the plaintiff in an effort to show the existence of a material issue for trial, often can be an effective method of presenting information critical to the court's evaluation of the merits of the case. However, in many respects, the formalities of affidavits have fallen by the wayside. Over time, as courts have become less procedurally formal, there has been a corresponding erosion of the standards governing testamentary evidence submitted by practitioners and considered by courts. As standards for affiant-submitted evidence have eroded and fallen by the wayside, so has the integrity of the fact-finding process. The importance of maintaining and enforcing the standards established for sworn statements is as important as the integri-

ty of the justice system itself.

This article revisits and emphasizes the procedural and practical requirements for the admissibility of sworn statements. Supporting or opposing affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify to the matters stated." Fed. R. Civ. P. 56(e)(1). A party who submits evidence in the form of affidavits must do so in the proper, authenticated form. Even at a preliminary stage of trial, courts should not permit admission of documents that do not strictly comply with procedural rules. It is imperative that a party's sworn submission be sufficient in execution and substance, as well as consistent with prior assertions, to ensure the integrity of the process. Accordingly, practitioners should reexamine their affidavit forms and consider

whether they are in compliance with the applicable rules and case law as to form. Practitioners also should examine opposing counsel's submissions and move to strike any that do not meet the clear standards set forth for admissible affidavits and sworn statements.

Technical requirements for a sworn statement are critical but often not met

The mere signing of a statement in the presence of a notary, or a notary's placement of an "acknowledgment" on a statement, does not constitute a *sworn* statement or affidavit. In *Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993), the plaintiff argued that courts should be "lenient" in accepting documents at the summary judgment stage, "as long as they are 'probative,' or at least 'evidence of evidence' that could later be introduced at trial."

The court rejected this argument, holding: "We have no desire to make technical minefields of summary judgment proceedings, but neither can we countenance laxness in the proper ... presentation of proof." *Id.* at 92. Every practitioner and court should hold to this rule to ensure the integrity of the process.

In one precedential case, the U.S. Court of Appeals for the Fifth Circuit was confronted with the issue of whether a party's signed statement, given in the presence of a notary, constituted competent summary judgment evidence. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1305 (5th Cir. 1988). The acknowledgment at the end of the purported affidavit considered by the Court read as follows:

BEFORE ME, the undersigned authority, on this day personally appeared Mrs. Rukmini Sukarno Kline, known to me to be the person whose name is subscribed to the foregoing Affidavit, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

/s/ Rukmini Sukarno Kline
RUKMINI SUKARNO KLINE

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 17th day of April, 1983.

/s/ Robert C. Bennett, Jr.
Notary Public in and for Harris County, Texas

Id. at 1306. In spite of opposing counsel's argument that the evaluation of its submission was "hyper-technical," the court held that this acknowledgment was insufficient to convert the unsworn statement into a valid affidavit and was thus properly disregarded as competent summary judgment evidence. In support of its conclusion of law, for which it has been positively cited 85 times by courts throughout the country, the court held:

[T]he only evidence in the summary judgment record purport-

ing to justify [appellant's position] was her own rendition of facts contained in a notarized, self-described "affidavit." This affidavit is neither sworn nor its contents stated to be true and correct nor stated under penalty of perjury.

Id. at 1305-06. A recent federal court ruling in Texas similarly demonstrates this pitfall. *Schelsteder v. Montgomery County, Tex.*, 2006 WL 1117883, at *3 (S.D. Tex. 2006). In *Schelsteder*, the court held that statements that merely bear the signature of a notary, as were proffered by the plaintiffs, constitute neither affidavits nor sworn statements appropriate for the court's consideration upon the defendant's motion for summary judgment. The court rejected the plaintiffs' submissions as proper evidence, holding:

Plaintiffs have filed a number of witness statements that Plaintiffs' counsel characterize as "affidavits," but they are not sworn to nor are they statements made under penalty of perjury. The mere signing of a statement in the presence of a notary, or a notary's placement of an "acknowledgment" on a statement, does not constitute a sworn statement or affidavit. ... Accordingly, the [statements] do not constitute summary judgment evidence under [Rule 56(c)], and are not considered on the pending motion.

Id. The plaintiffs' failure to present proper statements, made under penalty of perjury, warranted the court's disregard of the proposed "affidavits" and its granting of summary judgment in favor of the defendants. Courts throughout the country unanimously agree with the *Nissho-Iwai* court's holding, that the mere signing of a statement in the presence of a notary or the notary's placement of an acknowledgment on the statement does not then render the document a sworn statement admissible as evidence.

It is important to consider the specific elements a statement must

satisfy in order for it to constitute an affidavit upon which courts will rely. The proffered statement must satisfy three essential elements: "(1) a written oath embodying the facts as sworn to by the affiant; (2) the signature of the affiant; and (3) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer." 3 AM. JUR. 2D *Affidavits* § 8 (2008). Perhaps most critical to the evaluation of the sufficiency of a party's submission is the court's consideration of whether the affiant provided the statement with a true understanding of the significance of his submission. *Tishcon Corp. v. Soundview Communications, Inc.*, 2005 WL 6038743, at *4 (N.D. Ga. 2005); *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004). In *Tishcon*, the plaintiff submitted a statement in which he incorporated the phrase, "hereby declares under penalties of perjury the following," but neglected to declare his statement "true and correct." *Id.* The court held that of greatest importance in its evaluation of the statement is whether the person "signal[s] that he understands the legal significance of his statements and the potential for punishment if he lies." *Id.* If a party's submission demonstrates a lack of understanding of the statement's legal significance, or perhaps an indifference to the penalties of perjury, the submission should be properly excluded from the court's evaluation.

The requirements for a sworn statement or affidavit do not exist merely to irritate practitioners with inconsequential formalities. It has become too commonplace for practitioners to ignore the requirements for a proper affidavit and for some courts to avoid enforcing the requirements for fear of being perceived as too hyper-technical. The requirements for sworn statements and affidavits exist to protect the integrity of the truth-seeking process and to guard the rights of the parties from abuse. Failure of practitioners and courts to strictly enforce the requirements undermines the legitimacy of a justice system that is

dependent on truthful testimony.

Substance of a party's submission must constitute admissible evidence

Affidavits submitted by a party must be made on personal knowledge and must set forth facts that would be admissible in evidence. Rule 56(e)(1), FRCP. Just as the requirements for the form of a statement should not be relaxed, evidentiary requirements also should be strictly enforced. Failure to analyze the substance of an affidavit, in light of the requirements of the Rules of Evidence, can undermine the integrity of the process.

Case law helps shed light on courts' potential treatment of hearsay and other evidentiary violations with regard to affidavits. A North Carolina federal district court in 2008 was confronted with an affidavit that constituted hearsay. *Gell v. Town of Aulander*, 252 F.R.D. 297 (E.D.N.C. 2008). In *Gell*, the plaintiff had been acquitted of criminal charges and subsequently filed a civil suit against persons involved in his criminal investigation and prosecution. The defendants moved for summary judgment. *Id.* at 299-300. In response, the plaintiff submitted a document prepared by an investigator working on his behalf who had met with a witness for the purpose of conducting an interview. The investigator asked questions of the witness and "created a draft affidavit" for her based on her responses to his interview questions. *Id.* at 300-301. The defendants argued, and the court agreed, that these unsworn statements in the form of responses to questions, made by a witness and simultaneously recorded by the interviewer, were inadmissible hearsay. In accordance with this holding, a person's unsworn responses to interview questions that have been recorded by a third party are inadmissible hearsay when offered for their truth and thus are to be excluded from the court's consideration upon a party's motion for summary judgment. *Id.*

In another case involving similar circumstances, several discharged police recruits filed suit against the

city for wrongful discharge on the basis of race and gender. *Friedel v. City of Madison*, 832 F.2d 965 (7th Cir. 1987). After nine months of discovery, the defendants filed a motion for summary judgment with accompanying affidavits. The court held that the plaintiffs' counsel provided an "object lesson in how not to respond to a motion for summary judgment." *Id.* at 969. Plaintiffs' counsel provided their own affidavits, to which they attached a number of unsworn interviews of police recruits. The court rejected these unsworn interview questions and responses as inadmissible evidence, holding:

The use of affidavits by counsel is in certain carefully confined situations undoubtedly appropriate, but it is a tactic fraught with peril, and counsel must remember that the requirements of Rule 56(e) are set out in mandatory terms and the failure to comply with those requirements makes the proposed evidence inadmissible during the consideration of the summary judgment motion. Supporting materials designed to establish issues of fact in a summary judgment proceeding must be established through one of the vehicles designed to ensure reliability and veracity—answers to interrogatories, admissions and affidavits.

Id. at 970 (internal quotations omitted). The answers to interview questions were based mostly on what the persons "heard" or "felt" to be the case and thus exhibited "serious hearsay and other evidentiary problems and [ran] against the literal requirements of [Rule 56(e)]." *Id.*

Essentially, the *Friedel* court held that unsworn interview responses simply do not qualify as "vehicles designed to ensure reliability," which is required for admissibility of a party's evidence in opposition to summary judgment. Other courts' holdings also support this conclusion. The Fourth Circuit Court of Appeals has recognized that interviews conducted by an attorney who has an interest in the litigation,

whereupon interviewees' affidavits are created, are "not conducive to frank disclosures," such that the interview responses and affidavits that reflect interviewees' answers may be properly discredited. *Natl Labor Relations Bd. v. Lifetime Door Co.*, 390 F.2d 272, 275-76 (4th Cir. 1968). In addition to the danger of unreliable responses in these unsworn interview settings, one court has also discussed the dangers associated with an affiant's "filling in the blanks" of a preprinted form. *State v. Bowman*, 1989 WL 83313, *4 (Tenn. Crim. App. 1989). In spite of the fact that this case arose in the criminal context, the court's reasoning provides helpful insight into courts' potential evaluation of the deficiencies that inevitably result when an affiant merely circles or fills in responses to a questionnaire and submits it to the court to support his position. The court here held:

The danger with [questionnaires] is that they inevitably tend to lull users into what might be termed a "check-off and fill-in-the-blank mentality" which ... produces a dearth of information. If the [affiant] here had been called upon to draw the affidavit largely from scratch, he might have fallen back on the trusty technique of setting out who-what-when-where-why, and thus would have avoided the deficiencies in the affidavit.

Id. An affidavit or sworn statement must set forth facts that conform to the Rules of Evidence. It must be provided under circumstances that are conducive to eliciting frank disclosures. Information regarded by the court as inherently unreliable or lacking in specificity is insufficient. Accordingly, courts and practitioners should spend as much time discussing the admissibility of the information contained within an affidavit as they do discussing the substance of it.

Sworn statements and affidavits must be consistent with prior submissions and statements

Too often practitioners believe

that they can correct or contradict prior testimony by way of affidavit and therein create an issue of fact. This practice often takes the role of advocate a step too far and can undermine the integrity of the process. Where a party submits an affidavit to the court that contains information inconsistent with the party's prior deposition testimony or other sworn submission, courts hold that these contradictory affidavits should be disregarded as "shams" or "competing affidavits." See *Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir. 2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *Martin v. Merrell Dow Pharms., Inc.*, 851 F.2d 703, 705 (3rd Cir. 1988). Courts will disregard a subsequent affidavit as a sham—that is, as not creating an issue of fact for purposes of summary judgment—in the event that it contra-

dicts the party's own prior sworn statement. All federal circuits and most state jurisdictions have adopted the sham affidavit doctrine in some form. *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003) (citing *Shelcusky v. Garjulio*, 172 N.J. 185, 797 A.2d 138 (N.J. 2002) (collecting cases)).

Essentially, this doctrine provides that a plaintiff cannot submit an affidavit in which he alleges new or different facts from those previously asserted in an attempt to create a material issue for trial. In distinguishing between a sham affidavit versus one that merely corrects or clarifies an issue previously addressed by the party, some courts have developed the following considerations for guidance:

- (1) whether an explanation is offered for the statements that

contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (S.C. 2004) (citing *Pittman v. Atl. Realty Co.*, 754 A.2d 1030, 1042 (Md. 2000)). Where a party submits a competing affi-

The Family Court Affidavit: Uses and Misuses

By David C. Shea

At the *pendente lite* stage of domestic proceedings, the affidavit can be a crucial instrument in the determination of the outcome. If it is sufficient and properly prepared, the client might spend the next year or two living with a good result in terms of visitation and support while working toward a final hearing. If it is defective in substance or admissibility, the client might spend the same time complaining to your office and scrambling to find a change in circumstance that might provide sufficient reason to seek a modification of a temporary order, or might seek new counsel altogether.

Because Rule 21(c), SCRFC, specifically makes Rule 6(d), SCRCP, inapplicable to temporary hearings in family court, affidavits are not filed in advance of the hearing, and oftentimes the lawyers receive the opposing party's affidavits at the onset of the hearing and at the same time as the presiding judge. Thus, the practitioner has little time to review the submissions and must try to quickly absorb the substance and provide the client the chance to do the same,

while at the same time incorporating anything gleaned into any allowed oral argument. Therefore, it is possible to miss defects, especially before courts that place no limit on the number or length of submissions, with numerous affidavits to review.

Practitioners should note that Rule 6(d), SCRCP, still applies to other types of motions in family court, and affidavits must be provided with the motion. For those who practice exclusively domestic law, this rule is often overlooked by the movant as well as by the opposition, and a timely objection to last-minute affidavits from the moving party can be a useful strategy under the right circumstances.

Still, the affidavit is the workhorse of the temporary hearing. A practitioner's ability to adhere to the rules, know what to present, and know when the opposing affidavits are defective can make the difference in obtaining a favorable result or in establishing a record for supersedeas. Reviewing the jurat (the certification at the foot of the affidavit where the notary signs) for technical defects is

certainly advisable, but one should also look closely for things that might reveal intentional deceit. As notaries abound in South Carolina, it is not unusual for clients to deliver affidavits from witnesses already notarized. And, with high stakes and emotion involved, opposing parties and even clients can't necessarily be trusted in this respect. Real-life examples of "questionable" jurats include affidavits purportedly signed by the same notary but with noticeably different signatures; the back-dated affidavit in which a notary signed with a married name instead of the maiden name she had on the back-date of the affidavit; the notary who purportedly witnessed multiple affidavits, but all of which had varying commission expiration dates; or simply the made-up notary.

Simply the proper selection of affidavits can be an important strategy. As family court judges often advise, affidavits from mothers and fathers of litigants who declare their child is a good parent carry little weight, and it is not necessary to include affidavits that offer no substance. However, pointing out to the court that an in-law provided a supporting affidavit or pointing out that a party who claims to have tremendous family support

davit that attempts to create an issue of fact, the court may properly disregard the party's subsequent conflicting affidavit or sworn statement. Practitioners should avoid losing sight of their role as officers of the court, allowing it to be subsumed by their role as advocates for their clients, by submitting contradictory and competing sworn statements.

Practitioners should attack insufficient submissions with motions to strike or objections

Affidavits that fail to comply with the Rules of Procedure "should be stricken and disregarded." 35B C.J.S. *Federal Civil Procedure* § 1214 (2008). The proper avenue by which counsel should seek such exclusion on pending motion for summary judgment is by motion to strike pursuant to Rule 56(e) of the Rules of Civil Procedure or, alternatively, by

raising a more general objection to the admissibility of the contents of the submission. *Saucier v. Coldwell Banker JME Realty*, 2007 WL 2475943 *3 (S.D. Miss. 2007) (citing *Auto Drive-Away Co. of Hialeah, Inc. v. Interstate Commerce Comm'n*, 360 F.2d 446, 448-49 (5th Cir. 1966)); *Larouche v. Webster*, 175 F.R.D. 452, 454 (S.D.N.Y. 1996).

Case law is clear, however, that such motions must be *timely* made. In the case of summary judgment motions, the motions to strike should be made while the motion for summary judgment is pending before the court. It is settled law among federal and state courts that testimony to which no objection is made may be considered by the trier of fact; an analogous rule applies to testimony provided within an affidavit, whereby improper affidavits may be consid-

ered by the court on motion for summary judgment where counsel raises no objections. *Klingman v. Nat'l Indem. Co.*, 317 F.2d 850, 854 (7th Cir. 1963) (citing *Monks v. Hurley*, 45 F. Supp. 724 (D.C.D. Mass. 1942)). Accordingly, in the absence of a motion by counsel opposing admissibility of an improper affidavit, formal defects within the affidavit ordinarily are waived. *Auto Drive-Away Co. of Hialeah*, 360 F.2d 446 at 449 (citing *U.S. for Use and Benefit of Austin v. W. Elec. Co.*, 337 F.2d 568 (9th Cir. 1964)). However, when motions to strike or objections are timely made by counsel, nonconforming affidavits or any nonconforming portions thereof should be stricken from the record by courts and disregarded as evidence. *Larouche*, 175 F.R.D. 452 at 455. As such, in

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has only affidavits from distant, out-of-state relatives can be helpful in presenting your client's case.

Hearsay can get you in trouble

Hearsay in affidavits is an ongoing problem in the family court. In an Ethics Advisory Opinion that went largely unnoticed within the family court bar, *S.C. Bar Ethics Adv. Op. #08-14*, the question posed by a family court practitioner was:

May a lawyer representing a client in a divorce action file affidavits in support of *ex parte* requests or temporary hearings that include hearsay or information that is not based on the witness's personal knowledge?

The opinion states that a lawyer "may file affidavits that include hearsay or information not based on a witness's personal knowledge in support of *ex parte* requests or temporary hearings," but only so long as it is "clearly identified as such." Further, the opinion states that if the lawyer knows an affidavit to contain hearsay that is not identified as such, the lawyer has a duty to advise the court of the hearsay. In practice, this does not often happen.

While some hearsay is unavoidable in witness affidavits obtained by clients and drafted without the assistance of counsel, it is still prudent for the practitioner to review all affidavits submitted to the court not only to comply with the advisory opinion, but to ensure that the affidavits actually advance the client's position and to comply with the general directives of diligence. It can be quite embarrassing to a practitioner when a client's own witness affidavits conflict with one another and the lawyer did not review them ahead of time and realize the problem.

Ex parte means full disclosure

The advisory opinion also reminds the practitioner of the duties of SCRPC 3.3(d). While it is well settled that *ex parte* orders are condemned by our courts, the exception is when they are justified by exigent circumstances. *Dunnivant v. Dunnivant*, 278 S. C. 445, 298 S. E. (2d) 442 (1982); *McSwain v. Holmes*, 269 S. C. 293, 237 S. E. (2d) 363 (1977). In the family court, exigent circumstances most often arise when the physical safety of a child or spouse is threatened. In *ex parte* applications for emergency or expedited relief, the court's decision must, by necessity,

be made primarily from the contents of the affidavits attached to the petition. Rule 6(d), SCRCP.

Rule 3.3(d) requires that in an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse. Again, in practice this does not often happen. While volunteering adverse facts may seem unnatural to an advocate, the rules exist for a reason.

Disclosure of adverse facts means, for instance, that if your own client has told you that he or she has the same drug problem as the spouse, it is a material fact and should be disclosed if that is the basis for the emergency. Or, if there is a police report (which is hearsay in itself) that relates that the movant was the instigator in a dispute, it should be disclosed. However, a skilled attorney can include adverse facts and still provide support for the *ex parte* request by focusing on the threat, and then providing a supplemental affidavit at the hearing itself that might better express points of advocacy within the facts.

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Bar News

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Court imposed a six-month suspension on **Michael E. Atwater** for failing to respond to the Office of Disciplinary Counsel in the investigation of five matters.

By order of October 26 the Court imposed a definite suspension of nine months on **William H. Jordan** of Charleston for misconduct involving a criminal act.

By order of November 4 the Court imposed a 90-day suspension on **George A. Harper**, retroactive to March 31, based upon his guilty plea to willful failure to file a state income tax return and failure to pay taxes.

By order of November 9 the Court disbarred **Oliver W. Johnson III** for misconduct which involved a pattern of financial misconduct, neglect, guilty pleas to tax evasion and assault and battery, and failing to pay a court reporter and expert witness.

By order of November 9 the Court indefinitely suspended **Kenneth L. Mitchum** for misconduct which included failure to keep a client reasonably informed, failure to diligently pursue a case and attempting to provide financial assistance to a client in connection with pending or contemplated litigation.

By order of November 9 the Court imposed a public reprimand on former Probate Court Judge **Rebecca A. Allen** (not a Bar member) for misconduct involving embezzlement of public funds.

Reinstatements

By order of October 6 the Court reinstated **Eric P. Kelley** of Hermitage, TN, to Active status.

By order of October 8 the Court reinstated **Samantha D. Farlow** to practice.

By order of October 8 the Court reinstated **Patrick Hollingsworth Moore** of Columbia to Active status.

By order of October 20 the Court has reinstated **Pete A. Lang** of Fort Mill to Inactive member status.

By order of November 4 the Court reinstated **Vannie Williams**

Jr. to the practice of law subject to conditions.

Resignations

By order of October 9 the Court accepted the resignation from the Bar of **Susan Barnes**. ■

Attacking Affidavits

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accordance with case law, it is imperative that practitioners take an aggressive approach in considering the admissibility of opponents' submissions and that they raise their objections while the motion is pending. Otherwise, such right may be forfeited.

Conclusion

Given the frequency of parties' submissions of affidavits and the seemingly increasing informality in many courts, it is perhaps not surprising that practitioners' adherence to procedural requirements in the crafting and submission of affidavits has waned. Certain affidavits and sworn statements, which lack procedural formalities or assurances that the affiant understood the significance of his submission or the penalties for perjury, should be attacked by opposing counsel in their role as client advocates and as officers of the court. Insufficient statements should be excluded by courts. In addition, even if technically sound, there always should be an evaluation of the admissibility of the affidavit. Finally, an analysis of whether its contents contradict the party's prior statements or submissions is necessary and any such statements should be disregarded. Practitioners should refine their affidavit forms and practices to ensure compliance with procedural requirements and should be willing to take an aggressive approach in assessing and attacking opposing affidavits to ensure the continued integrity of the court.

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