

Trial Law TIPS

Roy D. Wasson's
TIP #93

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Affidavits are not Admissible in Evidence!

That's right. It comes as a surprise to many experienced trial lawyers to learn that the venerable affidavit—sworn testimony in written form under oath and notarized—may not be presented in evidence at an evidentiary hearing over objection of opposing counsel. Affidavits are so necessary in many aspects of civil litigation, and the prohibition against introducing them in evidence is so rarely invoked, that it seems to be a common misimpression that affidavits may be introduced at an evidentiary hearing. That is incorrect. Affidavits are rank hearsay that cannot be cross examined and are absolutely inadmissible over objection.

“It is well settled that affidavits are not admissible to prove facts in issue at an evidentiary hearing because they are not subject to cross-examination and because they impermissibly shift the burden of proof to the other party.” *Fortune v.*

Fortune, 61 So. 3d 441, 445 (Fla. 2d DCA 2011). An affidavit is a classic example of a hearsay document: an out-of-court statement offered to establish the truth of the matter set forth therein. As such, affidavits may not be admitted over objection. *E.g.*, *Doug Sears Consulting, Inc. v. ATS Servs., Inc.*, 752 So. 668 (Fla. 1st DCA 2000)(affidavit inadmissible in hearing to dissolve writ of garnishment); *B.C.S. v. Wise*, 910 So. 2d 871 (Fla. 5th DCA 2005)(affidavit inadmissible in evidentiary hearing to determine minimum contacts for personal jurisdiction).

Perhaps some of the reason for the misunderstanding about the admissibility of affidavits is that affidavits are actually ***required*** in certain situations to earn the right to have an evidentiary hearing. For example, in litigating the issue of personal jurisdiction over a foreign corporation, affidavits must be filed in order to counter a plaintiff's allegations of minimum contacts with Florida. Where a complaint has properly pled a jurisdictional basis against a non-resident defendant, and the defendant has contested personal jurisdiction by way of a motion to dismiss, "[a]ffidavits are generally necessary to support these challenges because the motion, by itself, only raises the legal sufficiency of the pleadings which is not an issue in these proceedings." *Law Offices of Sybil Shainwald v. Barrow*, 817 So.2d 873, 876 (Fla. 5th DCA 2002).

Further, once a defendant successfully contests the allegations of personal jurisdiction by way of affidavit, "[t]he burden then shifts to the plaintiff to prove ***by affidavit or other sworn statements*** that jurisdiction is proper." *Northwestern Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 193-94 (Fla. 5th DCA 2003). Thus, although affidavits are necessary as a proffer of the evidence that will be presented at the hearing, they are not sufficient to constitute evidence on the jurisdictional issue when the facts are controverted.

Another area of law where affidavits are necessary is in the summary judgment context. Under Fla. R. Civ. P. 1.510,

affidavits are properly considered in a motion for summary judgment or the response thereto. However, if the affidavits are in conflict, they may not be weighed and the matter must proceed to the ultimate evidentiary hearing: the trial.

Where an evidentiary hearing is permitted under the law, it is reversible error to limit the parties to submission by affidavits. *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168 (Fla. 1991).

Trial attorneys sometimes mistakenly believe that affidavits are admissible at evidentiary hearings to assess the amount of attorneys' fees to be awarded. Although it is common practice to obtain an expert affidavit concerning the reasonable number of hours and the reasonable hourly rates, unless there is an agreement from opposing counsel that the affidavit will be admissible, it will be excluded as hearsay. *E.g.*, *Dondhy v. Schinpeler*, 528 So. 2d 484 (Fla. 3d DCA 1988); *Souncrafter's v. Laird*, 467 So. 2d 480 (Fla. 5th DCA 1985).

Thus, if you have been operating under the misimpression that affidavits are admissible as an exception to the hearsay rule, I hope that this Tip has saved you some disappointment (or worse) at a future hearing. Be prepared with a live witness unless you have a signed stipulation from opposing counsel that affidavits will be admissible.

Keep Tryin!

Roy