

The In-House Legal Professional's Guide to

DRAFTING AFFIDAVITS THAT STAND UP TO SCRUTINY

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The “Robo Signing” Scandal

In the fall of 2010, numerous news stories broke regarding a “scandal” in mortgage foreclosure actions across the United States. To the layperson, the media made it sound as though millions of foreclosures were occurring without the paperwork being in proper order, and that ordinary citizens were at risk of losing their homes without any justification. Of course, the truth was far from the impression created in the minds of the public.

The truth was that witnesses at depositions in garden variety foreclosure cases had offered imprecise testimony about signing “thousands” of affidavits every week, under circumstances that led to the conclusion that those affidavits were not based on personal knowledge and that the witnesses had not actually reviewed the records they were basing their testimony on. Many of the media stories – including the very first story that kicked off the “scandal” – were simply not correct. Nevertheless, for a period of time the “hype” seemed to overshadow the truth.

No material errors were discovered. The affidavits that had been offered were not materially incorrect. At worst, those affidavits said or implied that the affiant had reviewed documents or information that he or she had not actually reviewed. Instead, the affiant had apparently relied upon someone else’s review of the documents or information on which the affidavits were based.

Despite the fact that the affidavits – in nearly all cases – were materially correct, the “scandal” has had significant and expensive consequences. State Attorneys General have opened investigations and the U.S. Congress has made an inquiry. Some courts have changed their local rules with respect to the submission of evidence in mortgage foreclosure cases. The New Jersey Supreme Court issued a rule to show cause to a number of mortgage servicers, demanding that they appear and explain why the court should not enjoin them from continuing to conduct foreclosures in that state. Many class action cases have been filed, numerous individual actions have been filed, and countless defendants in mortgage foreclosures are now attempting to assert defenses, all of which has raised litigation costs for servicers. Servicers have implemented internal policy and procedure reviews and in some cases have established voluntary “remediation” programs, some of which have resulted in starting a number of foreclosures over from scratch. Even foreclosures in which there are no issues are being delayed as defense attorneys seek to challenge evidence being offered in these otherwise routine cases.

How Did We Get Here, and How Can We Prevent It From Happening Again?

One of the core functions of a mortgage servicer is to enforce the interests of the loan owners when borrowers default. Unfortunately, that requires foreclosures. Mortgage servicers are the primary prosecutors of mortgage foreclosures in the United States. They retain the firms that file the cases and generally control the information that is used to obtain judgments. They keep the records. Their employees provide the evidence – including the affidavit testimony – that results in the judgments.

The volume of foreclosures in 2009 and 2010 increased significantly from earlier years. Employees of servicers saw large increases in the number of cases they were being asked to handle, and it became a challenge to keep up with the case flow. This led to procedures that were not ideal, and culminated in deposition testimony that suggested a much larger problem than actually existed.

About half of the states in the U.S. require foreclosures to be conducted in a judicial proceeding. In these states, a plaintiff in a mortgage foreclosure case must obtain a judgment of foreclosure. A very large percentage of those judgments are entered by default when the borrowers fail to appear in the cases and raise any defense. As a result, there is literally no one “minding the store” with regard to the quality of the evidence provided to the court in support of those requests for judgments. Servicers and their counsel are largely on the “honor system” with regard to the quality of evidence, because no one is defending the case and challenging what they offer. Even when a borrower does retain a lawyer to defend a mortgage foreclosure case, chances are good that lawyer is more interested in negotiating a loan modification or short sale than in actually litigating the claim for foreclosure.

One of the problems servicers face is the fact that different jurisdictions have different requirements for the evidence that must be submitted in support of a request for a judgment. But all judgments require the submission of evidence. Servicers and their counsel must provide the court with admissible evidence to establish: A.) that they are entitled to a judgment of foreclosure; and B.) the amount of the judgment. The specific requirements may vary from jurisdiction

to jurisdiction, but all jurisdictions require evidence to be admissible, which means it must be offered by competent witnesses.

To avoid the kind of scrutiny that the mortgage servicing industry is currently experiencing with regard to the affidavits it offers in support of mortgage foreclosures, servicers need to re-familiarize themselves with the applicable rules of evidence, and establish practices and procedures to ensure that the evidence they offer in support of judgments of foreclosure is in fact competent and admissible.

Offering inadmissible evidence is pointless. It will not support the judgment the servicer is seeking. In fact, offering inadmissible evidence is more than just worthless; it is counterproductive because it damages the servicer's credibility with the court. Once you have lost credibility with the court, efficiency suffers, because the court will begin to more closely scrutinize the evidence being offered. In most cases this will not change the outcome of the case, but it will result in delay in getting the case resolved and a concomitant increase in litigation cost.

Servicers need to rebuild courts' trust in the evidence they offer in mortgage foreclosures and routine litigation. They will do this by ensuring they have in place good systems to ensure that the evidence they offer is competent and admissible.

Sources of Law Governing Content of Affidavits

The requirements for the admission of evidence, including particular rules related to affidavits, are found in several places. In federal court, the content of an affidavit is governed by the Federal Rules of Evidence. In state court, state rules of evidence apply. Many states have adopted the Federal Rules of Evidence or rules that are more or less based upon the Federal Rules of Evidence. Other states may have a common law of evidence.

In addition to rules of evidence themselves, courts may have local rules that specify the content of affidavits, and a specific judge may have a standing order or other particular requirement that applies to his or her courtroom.

While the particulars of the rules will vary from court to court, they do share certain common requirements, however. To begin with, an affidavit is a substitute for direct testimony. Direct testimony must be admissible, and to be admissible, it must be offered by a witness with personal knowledge of the facts. The same is true of affidavits. And an affidavit must be comprised of facts, not conclusions or opinions.

Affidavits Are Evidence

An affidavit is a substitute for direct testimony offered on the witness stand. It is subject to all of the same rules that govern the admission of live testimony. Accordingly, the preparation of an affidavit should present the testimony in the same way it would be presented if the attorney were conducting a direct examination. The affidavit must lay all the necessary evidentiary foundations to support the conclusion the attorney seeks to have the court draw, without presenting the testimony in a way that is forbidden (for example, by offering conclusions of law, or opinions).

All evidence must be admissible and persuasive, or it is worthless. To be admissible, testimony in an affidavit must be offered by a competent witness. To be persuasive, the affidavit must be trustworthy. The court must have confidence that the information being offered is correct.

A competent witness has first hand knowledge of the facts related. That means the witness personally observed the facts being offered. If the witness does not have personal knowledge of the facts, that witness is not competent and the facts are not admissible.

Federal Rule of Evidence 602

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Most employees of mortgage loan servicers will not have personal knowledge of the key facts. For example, in most cases they know nothing about the origination of the loan. They almost certainly have no personal knowledge of when loan documents were signed or if the signatures are genuine. Similarly, they have no personal knowledge about what documents were delivered at closing. Thus, they will generally not be competent to offer testimony on these subjects.

Most employees at a mortgage loan servicer do have personal knowledge of how the servicer's books and records are made and kept, however. They likely have knowledge of the procedures employed by the servicer for accounting for payments received and charges made to borrower accounts. They know what the codes in those books and records mean, and they can decipher the servicing notes that are maintained.

In the typical foreclosure case, it is the records that will do the talking, not affiant himself or herself. It is the affiant's job to get those records admitted into evidence, and to interpret those records for the court.

Before the affiant can offer the records into evidence, however, he or she must establish that he or she is competent to offer the necessary foundational testimony. The affiant must testify as to his or her position with the company, job duties and responsibilities, and personal knowledge of the company's record keeping practices. All of this information should be set forth at the very beginning of the affidavit.

For example, a typical affidavit might begin:

JANE DOE, being first sworn upon her oath, deposes and states as follows:

1. I am over the age of 18 and if called upon to do so could testify competently about the facts set forth in this affidavit.
2. I have been a Foreclosure Specialist at XYZ Mortgage Loan Servicing since February of 2009.
3. As a Foreclosure Specialist my duties and responsibilities include working with outside counsel handling foreclosure cases for the owners of loans serviced by XYZ. I am familiar with the record keeping practices of XYZ, including XYZ's procedures and practices related to accounting for the receipt of payments received as well as charges to the accounts of persons whose loans are serviced by XYZ, the generation and sending of notices to borrowers, and the creation and retention of records related to communications with borrowers. I have received training on the computer systems used by XYZ to service borrowers' loans, and understand the codes used in those systems.

These simple paragraphs establish that this witness has personal knowledge of how records are made and kept by this servicer. The affidavit can now move forward to lay the necessary foundations for the admission of those records into evidence. Those records, in turn, will establish the plaintiff's entitlement to a judgment.

Documents & Computer Records Are Hearsay

The Hearsay Rule & The Business Records Exception

Hearsay – what someone else said – is generally inadmissible because it is considered untrustworthy. Documents are considered to be “another person” as far as the rules of evidence are concerned. That is, a witness generally cannot testify about what a document “says” unless the document itself has been admitted into evidence.

Federal Rule of Evidence 801 (c)

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fortunately, an exception is made for “business records.” Business records are considered sufficiently trustworthy to be admitted despite the general ban on the admission of hearsay. Courts consider that businesses in general could not properly function unless they maintained reliable records. Thus, a document that was made and kept in the routine and ordinary course of a business is generally considered trustworthy enough to be admitted as evidence.

Federal Rule of Evidence 803(6)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the

memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Note that the Federal Rule of Evidence governing the admission of business records emphasizes that the witness offering the document must be a “custodian or other qualified witness” and the admission is subject to a condition that there are no circumstances that indicate a lack of trustworthiness. The witness offering the documents is thus not required to have personal knowledge of the facts set forth in the records, but is required to know about how that record was made and kept, and about the company’s recordkeeping practices generally.

Most – if not all – state courts have exceptions to the hearsay rule that are essentially the same as the business records exception found in the Federal Rules of Evidence.

The Two Necessary Foundations

In order to properly offer a business record into evidence, two foundations must be established. A “foundation” is a sequence of facts that lead the court to the logical conclusion that the offered evidence meets the criteria for admission.

The first “foundation” the witness must lay is authentication or identification of the document being offered. That is, the witness must say what the document is. This means the document should be attached to the affidavit as an exhibit and the witness should refer to it.

Second, the witness must offer all of the elements of the exception to the hearsay rule. That is, the witness must testify:

1. that the record was made by a person with first hand knowledge,
2. at or about the time of the event described,
3. that it was the regular practice of the business to make this type of record, and
4. that this particular record was made and kept in the course of that regularly conducted business activity.

Note that the affiant does not necessarily need to identify each person who made each entry in the record to be admitted. A payment history, for example, may be created by a number of people depending on who entered the various payments and charges. A set of servicing notes may include entries by a number of people, and the affiant may not know all of them. But the affiant knows that when payments are received, the general practice is that information about the particular payment is recorded by a person who has first hand knowledge about the amount of that payment. It is enough that the affiant knows that the record is typically made by persons with firsthand knowledge of the facts.

Don't forget about persuasion. Laying these foundations is not just important to cover the technical bases for admission of the documents that establish the facts you need to obtain a judgment. They are also intended to persuade the court that the evidence you are offering is reliable and "worthy," and that you are entitled to the relief you are seeking.

Some Specific Documents

This section will examine a few common documents in mortgage-servicer litigation and the foundations necessary to have them admitted into evidence.

Promissory Notes

The promissory note is probably the most commonly seen document in mortgage loan servicing-related litigation. It is a central document because – in most cases – it is virtually incontrovertible evidence of the borrower’s obligations to the owner of the note. A promissory note is not necessary to prove that a debt is owed, but it is the easiest way to establish that a debt is owed.

Unfortunately, most servicers’ employees will not have firsthand knowledge of the creation of the promissory notes evidencing the loans they service, unless they happen to also originate loans and then retain servicing. In that situation (where the current servicer also happens to have been the originator) the servicer may have employees with firsthand knowledge related to the creation of the promissory note. But in most cases, the servicer receives electronic copies of origination documents that include a copy of a promissory note. The best the servicer’s employees will usually be able to do is offer testimony that the note is a genuine and authentic copy of the note in their files. If required to do so, the servicer can obtain the original note from the owner, and the original can be produced to the court or the borrower for inspection. However, the servicer’s employee will normally not have personal knowledge that the note was in fact signed by the borrower, or that it was signed on a particular date. That information – if necessary – will need to be obtained from another source (such as the deposition testimony of the borrower himself or herself, or someone else present at the closing who witnessed the execution of the document). This is a good example of how Requests to Admit may be effectively employed in litigation.

Fortunately, promissory notes are usually not hearsay, because they have what is called “independent legal significance.” That is, an instrument that creates legal rights – such as contracts – have a legal effect separate and apart from the truth of any statement contained within them. Thus, no business records exception is necessary to have them admitted.

Mortgage or Deed of Trust

Just like a promissory note, a mortgage or deed of trust will be at the center of most servicer litigation. However, once again the servicer personnel will likely not have personal knowledge of the facts related to how that document was “made,” though they will know how it was “kept” during the time they serviced the loan. Accordingly, unless the servicer was also the originator, servicer employees probably cannot testify about the creation of the Mortgage or Deed of Trust, though they can testify about that document if it is admitted into evidence.

However, mortgages and deeds of trust are also admissible on the basis that they have “independent legal significance” and thus are not considered hearsay. They do need to be authenticated (i.e., the witness must testify that the document is what it purports to be) but should be easily admitted.

In addition, it is a good idea to use a copy of the mortgage obtained from the recorder of deeds bearing the stamp of the recorder. Even without testimony from a witness, a recorded mortgage is a public document that the court can judicially notice pursuant to Federal Rule of Evidence 201 (or a state court equivalent).

Payment History

A printout from a mortgage loan servicer’s computer system showing all payments received from the borrower is likely the best evidence of the current balance due on a loan. However, this document is classic hearsay, and before the court can consider it, the party offering it must lay a foundation to have it admitted. The affiant will first need to testify that he or she is familiar with the computer system and how records on that system are made and kept. He or she will need to have personal knowledge about how that system works. The affiant should testify about how payments are handled when they are received. That is, entries on the computer system are made by people who have actual knowledge of the amounts of the payments received. The witness will need to testify that the payments are recorded promptly on the system as they are received. The witness will need to testify that the company regularly makes records of payments received on account of (and amounts charged to) the accounts the company services. And the witness will need to testify that these particular entries on this particular printout were all made and kept in the routine and ordinary course of the servicer’s business.

Foundation for Admission of Payment History

1. Affiant has personal knowledge of the servicer's computer system, including how information is made and kept on that system.
2. Records are made by persons with actual knowledge of the information recorded (i.e., people who enter data into the system actually know the dates and amounts of payments and/or charges).
3. Records are made at or about the time of each payment or charge reflected on the history.
4. The servicer regularly makes records of charges and payments related to the accounts it services.
5. This particular record was made and kept in the routine and ordinary course of the servicer's business.
6. The document attached to the affidavit is a genuine and authentic printout of the entries on the system related to the borrower's account.

It used to be that a witness needed to offer testimony about the computer system itself. Affidavits used to state that the computer system was a standard system used in the industry, that it was regularly audited and checked for errors and reliability, and that it was in fact relied upon by the business. In most courts this standard has been relaxed as computers have become more and more a part of our daily lives, but you need to check the requirements of the local jurisdiction. Some may still retain the requirement that some foundational testimony about the computer system itself be offered.

A copy of the printout should be attached to the affidavit as an exhibit. Once a foundation for its admission has been laid, it is acceptable for the witness to offer testimony about the content of the payment history, but the witness must first review the document before offering testimony about its content. This is especially true if the printout is not being attached to the affidavit for some reason. Another alternative is to not have the witness testify about the content of the document. Once testimony establishing a foundation for its admission has been laid, the attorneys can use the document to state things like the principal balance due in their motion papers without specific testimony from the witness.

Good Faith Estimate, Truth in Lending Disclosure Statement, Notice of Right to Cancel, etc.

Good faith estimates, truth in lending statements, notices of right to cancel and the like are often in issue in mortgage servicing litigation. Unfortunately, servicer employees rarely have personal knowledge about the creation of these documents. Once again the servicer employees probably know nothing about the creation of these documents. They simply were not involved with the origination of the loan in most instances.

The good news is that in many cases these documents are not being offered for the truth of the matters asserted within them. Although they are not contracts like promissory notes and mortgages, they still have independent legal significance as they are notices that are required to be provided to the borrower, and the issue is typically whether they were provided or whether their content is legally sufficient. As such, they are not offered for the truth of the matter asserted and are thus not hearsay.

The bad news is that the issue in many cases is whether these documents were delivered to a borrower, which is not something servicer employees would typically know unless the servicer was also the originator. The servicer will need to establish delivery by some means other than testimony of its own employees in most cases. If the documents are not being offered for the truth of the matter asserted, then simple authentication may be sufficient. Otherwise, testimony from the borrower or someone familiar with the origination of the loan will be required.

Selecting An Affiant

Choosing the person to sign an affidavit is an important decision that should not be taken lightly. It used to be rare for witnesses to be deposed in foreclosure and routine mortgage servicing litigation. That is changing. More and more borrowers are challenging testimony offered in affidavits and are seeking to take the deposition of affiants. Servicers need to assume that any person who signs an affidavit will be compelled to testify at a deposition.

The most important criteria for an affiant is that he or she have personal knowledge of the information that must be offered in the affidavit. If that knowledge is limited to how records are made and kept, the witness should keep his or her testimony limited to those subjects and let the records do the talking. The witness will merely testify as to the authenticity of the documents and the necessary foundation to have them admitted into evidence.

Servicers should expect more depositions than they have seen in the past. So when selecting a person to sign an affidavit, the in-house legal professional should consider how that affiant will perform at a deposition. Ask the following questions about any potential affiant:

- Is he or she well-spoken?
- Is he or she confident?
- Does the potential affiant have experience testifying at depositions or in court?
- Is he or she familiar with the applicable law in the case?
- Does the affiant understand the consequences of his or her testimony?

No one is ever happy to be called upon to be a witness in a case. However, it is important that any affiant understand that he or she may be called upon to testify at a deposition, and if that happens, he or she will need to prepare for that deposition. Reluctant witnesses are bad witnesses. Anyone who is not committed to preparing for a deposition that may follow the execution of an affidavit is not an ideal affiant.

Use Multiple Affidavits if Necessary

Often one witness cannot offer all the testimony that you may need to support your request for relief. In this case, use more than one affidavit. Generally it is a good idea to not expose more people than necessary to depositions. However, this must be balanced with the need to offer all the testimony necessary to support the relief being requested. Trying to get all the testimony in with a single affiant will lead to trouble unless the affiant truly has personal knowledge of all of the matters to be covered.

A typical example is the combination of testimony by a document custodian to lay foundations for the admission of documents that require explanation or interpretation. The custodian offers testimony in an affidavit to have the documents admitted, while a second witness offers testimony explaining what the documents mean.

In other cases certain information may not be in the control of the servicer and may need to be obtained by subpoena or an affidavit from a third-party witness, such as a closing agent or a settlement service provider.

Qualities of a Good Affidavit

A good affidavit has the following features:

- It establishes the competence of the witness, including personal knowledge, and clearly delineates between what is based upon the affiant's personal knowledge and what is based upon business records.
- It properly authenticates any documents to be offered as evidence, and lays a proper foundation for the admission of those documents.
- Copies of the documents relied upon by the affiant or necessary to support the relief requested are attached as exhibits to the affidavit.
- The testimony is completely factual and not conclusory. For example, testimony that "the loan went into default on February 3, 2011" is a conclusion of law and not proper testimony. All the witness needs to do is testify that no payment was received from the borrower on that date. Outside counsel can then argue that this fact, combined with the provisions of the loan agreement, means that the loan went into default that day.
- The testimony is short and "punchy." Rather than long narrative, argumentative statements, good affidavits are a series of short declarative and completely factual statements.
- A good affidavit does not assume facts.
- Finally, good affidavits are dated. If more than one affidavit is offered by the same witness in the same case, confusion will ensue if they are not dated.

Notarization

Not all affidavits need to be notarized. Some states require notarization, others do not. Generally speaking, notarization serves two purposes: verification of identity and confirmation that an oath was administered.

The first purpose is rarely an issue in mortgage servicing litigation. It is unlikely that a borrower will challenge whether the signature of the affiant is authentic (i.e., that the person who purports to have signed was in fact who they claimed to be). However, notarization of origination documents can help establish their authenticity. If a signature on an origination document is challenged but the document was notarized, the notary may be able to offer helpful testimony to authenticate the document. Notarized documents are self-authenticating in many instances.

Notaries are supposed to ask for identification to ensure that the person who signs the document they are notarizing is actually who they claim to be. Notaries post bonds so that if the signature turns out not to be genuine, a person who later relies upon that signature has recourse to that bond for any damages suffered.

The second, and more important function, of notarization is to provide evidence that an oath was administered. Even in states where affidavits are not required to be notarized, they are required to be made under oath. One of the functions of the notary is to administer the oath to the affiant. By having the affidavit notarized, you have evidence that the oath was in fact given. The process a servicer employs to notarize affidavits should ensure that the notary administers the oath to the affiant and the affiant signs the affidavit in the presence of the notary.

The requirements for valid notarization are set forth by state and local law, so they can vary. Establishing best practices in the process of notarizing documents will ensure that affidavits are properly notarized in all jurisdictions where notarization is required.

Alternatives to Affidavits

It may not always be necessary to offer an affidavit to obtain the relief you are seeking. Two alternatives to affidavits are declarations and deposition testimony.

In federal court, a “declaration” can be used instead of an affidavit. Federal law provides that a written declaration made under penalty of perjury is sufficient. The declaration must be dated and state the following:

“I declare (certify, verify, or state) under penalty of perjury that the foregoing is true and correct.”

28 U.S.C. § 1746

Some states have equivalent provisions in their statutes or codes of civil procedure.

Another option is deposition testimony. If the borrower is already taking the deposition of a witness who can offer evidence necessary to support the relief that may be sought in a motion for summary judgment, consider having that testimony offered at the deposition. By asking the witness foundational questions at the deposition, the borrower will have the opportunity to cross-examine the witness. That will minimize the issues the borrower can raise with respect to the evidence being offered (which typically revolve around the inability of a borrower to cross-examine an affidavit).

Establish Good Affidavit Habits & Procedures

Affidavits are much more likely to withstand scrutiny if they are the product of good policies and procedures. Many of the problems servicers have experienced recently are the result of overloaded affiants. The first thing servicers can do to avoid future problems is to avoid overloading affiants and providing them with the time they need to verify the information they are being asked to testify about. Affiants need to actually review records that they base their testimony on and should review all documents that are being offered into evidence based on their testimony. Proper foundations for all documents need to be established in every affidavit.

Affidavits should be signed in the presence of a notary, who should administer the oath prior to signature.

Most important, don't take shortcuts. Treat affidavits with the same respect as you would testimony being offered in court -- because they are substitutes for in-court testimony and deserve the same kind of preparation.