

FORECLOSURE LITIGATION IN FLORIDA
PRESENTATION BY JUDGE BURTON C. CONNER
(Fla. Bar Online CLE Program, 1/6/11)

Pitfalls to Avoid: Ethics and foreclosure filing practice (strict compliance)
(Follow up to presentation by Elizabeth Tarbert)

A. Miscellaneous Issues of Ethics and Professionalism

Rule 4-8.4. Misconduct

A lawyer shall not:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...

(Next two items may be instances of “creation/filing false documents)

Filing motions to cancel foreclosure sales and not providing accurate information as to the reason for the motion

In re Amendments to Florida Rules of Civil Procedure, 44 So. 3d 555 (Fla. 2010) adopted Form 1.996(b) as the appropriate form for a motion to cancel and reschedule a foreclosure sale.

Not being accurate when filing certificates of compliance

Demanding the mediator to report an impasse when the parties have worked out an agreement

The Preamble to the Rules of Professional Conduct contains the following statements of ethical principles lawyers should follow:

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities.

Counsel-not-of-record regularly appearing at a hearing to cover for counsel-of-record

Wasting the court’s time by setting hearings and not appearing

Not properly withdrawing as counsel of record or obtaining a proper substitution of counsel

Rule 2.505(e) and (f) state the requirements for termination and substitution of counsel, both require a court order.

B. Compliance With Laws Pertaining to Notary Public and Sworn Statements

Distinction Between Verification, Oaths, Affidavits, and Acknowledgments

Crain v. State, 914 So. 2d 1015 (Fla. 5th DCA 2005):

Verification means that the individual executes the required document with an oath or affirmation that the information contained therein is true-it does not require that the document be sworn to before an individual authorized to administer oaths. § 92.525(4)(c), Fla. Stat. (2003); *Mieles v. South Miami Hosp.*, 659 So.2d 1265 (Fla. 3d DCA 1995); ***1019** *State, Dep't of Highway Safety & Motor Vehicles v. Padilla*, 629 So.2d 180 (Fla. 3d DCA 1993), *review denied*, 639 So.2d 980 (Fla.1994). “An **affidavit** is by definition a statement in writing under an oath administered by a duly authorized person....” *Youngker v. State*, 215 So.2d 318, 321 (Fla. 4th DCA 1968) (citing *Black's Law Dictionary*, (4th ed.)). “An **oath** is an unequivocal act, before an officer authorized to administer oaths, by which the person knowingly attests to the truth of a statement and assumes the obligations of an oath.” *State v. Johnston*, 553 So.2d 730, 733 (Fla. 2d DCA 1989)...

Verification

Section 92.525, Florida Statutes is the statutory framework for verification of documents.

92.525. Verification of documents; perjury by false written declaration, penalty

(1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:

(a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or

(b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: “Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,” followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words “to the best of my knowledge and

belief” may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

(3) A person who knowingly makes a false declaration under subsection (2) is guilty of the crime of perjury by false written declaration, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) As used in this section:

(b) The term “document” means any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.

(c) The requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.

Pursuant to § 92.525(2), Florida Statutes a verification may be made on information or belief, if authorized by law, and will be sufficient to subject the affiant to penalties of perjury. Op.Atty.Gen. 95-40, June 13, 1995.

Oaths: Positive Statement vs. Good Faith Belief

The case law discusses oaths based on “knowledge, information and belief” as compared with oaths without such qualifying language. Although the case law is not explicit, as to what extent a person should investigate facts before stating they are true based on “knowledge, information and belief, the case law is clear that oaths based on “knowledge, information and belief” do not have the same weight as oaths without such qualifiers. For example, in ***Barton v. Circuit Court of Nineteenth Judicial Circuit***, 659 So. 2d 1262 (Fla. 4th DCA 1995), the Fourth District stated: “A verification which states that the information contained therein is true “to the best of [the affiant's] knowledge” is insufficient because it is qualified, not positive” citing ***Hahn v. Frederick***, 66 So. 2d 823 (Fla. 1953) (case involving affidavits to disqualify a judge), where the Supreme Court said:

The farthest either affiant goes in supporting the facts stated in the main affidavit is his statement that the facts in the main affidavit are true ‘to the best of his knowledge, information and belief.’ Such a statement in an affidavit amounts to no more than a statement that so far as affiant's

knowledge goes, the facts are true; but in order to ‘support the facts in substance,’ the affidavits must be that affiant *has knowledge* of the facts and *knows them to be true*. An affidavit the statements of which are alleged on information and belief is, by the weight of authority, insufficient in any instance where one is required to make affidavit as to the substantive truth of facts stated, and not merely as to good faith.

One should not assume that just because an oath is based on good faith belief as to the truth of the facts stated, as opposed to a more positive and direct statement based on personal knowledge, that such an oath requires less diligence in investigation.

There is a published Attorney General Opinion which states: Pursuant to F.S. § 92.525(2), a verification may be made on information or belief, if authorized by law, and will be sufficient to subject the affiant to penalties of perjury. Op.Atty.Gen. 95-40, June 13, 1995.

If an oath is based on knowledge and belief, especially by an attorney, it would seem the “good faith” aspect of such an oath requires diligence in conducting an investigation to the facts being sworn to, since untruthful verifications will subject the verifier to punishment for perjury.

Rule 1.110 (b), Florida Rules of Civil Procedure, which now requires foreclosure complaints to be verified, does allow verification “to the best knowledge and belief.” Since verification based on “best knowledge and belief” requires a good faith investigation to put the verifier in the position of stating facts in form of an oath, it is not good practice for attorneys to verify foreclosure complaints. It puts the attorney in the position of being a witness in the case.

The comment to Rule 4-3.3 states:

*An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer...However, **an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of reasonably diligent inquiry.***

Side Note: The “best knowledge and belief” standard is not applicable to order to show cause proceedings under Section 702.10, Florida Statutes. A land trust trustee's verified answer to foreclosure complaint was insufficient to preclude entry of final judgment of foreclosure because trustee swore that facts were “true to best of his knowledge and belief,” rather than true. Muss v. Lennar Florida Partners I, L.P., App. 4 Dist., 673 So.2d 84 (1996), rehearing denied.

Acknowledgments

The legal requirements for properly acknowledging documents to make them recordable on the public records are in Chapter 695, Florida Statutes. I would suggest you review Section 695.09 to assure that documents you are relying on were properly acknowledge to give notice of the mortgage lien or transfers of the lien rights.

Notary Publics and Notarized Documents

Chapter 117, Florida Statutes is the primary statutory framework for notaries public and notarization of documents.

117.03. Administration of oaths

*A notary public may administer an oath and make a certificate thereof when it is necessary for the execution of any writing or document to be published under the seal of a notary public. **The notary public may not take an acknowledgment of execution in lieu of an oath if an oath is required.***

A notary public may not administer an oath over the telephone to a person who is not in the presence of the notary. Op.Atty.Gen. 92-95, 12-23, 92.

117.05. Use of notary commission; unlawful use; notary fee; seal; duties; employer liability; name change; advertising; photocopies; penalties

(3)(a) A notary public seal shall be affixed to all notarized paper documents and shall be of the rubber stamp type and shall include the words “Notary Public-State of Florida.” The seal shall also include the name of the notary public, the date of expiration of the commission of the notary public, and the commission number. The rubber stamp seal must be affixed to the notarized paper document in photographically reproducible black ink. Every notary public shall print, type, or stamp below his or her signature on a paper document his or her name exactly as commissioned. An impression-type seal

may be used in addition to the rubber stamp seal, but the rubber stamp seal shall be the official seal for use on a paper document, and the impression-type seal may not be substituted therefor.

(4) When notarizing a signature, a notary public shall complete a jurat or notarial certificate in substantially the same form as those found in subsection (13). The jurat or certificate of acknowledgment shall contain the following elements:

(a) The venue stating the location of the notarization in the format, "State of Florida, County of _____."

(b) The type of notarial act performed, an oath or an acknowledgment, evidenced by the words "sworn" or "acknowledged."

(c) That the signer personally appeared before the notary public at the time of the notarization.

(d) The exact date of the notarial act.

(e) The name of the person whose signature is being notarized. It is presumed, absent such specific notation by the notary public, that notarization is to all signatures.

(f) The specific type of identification the notary public is relying upon in identifying the signer, either based on personal knowledge or satisfactory evidence specified in subsection (5).

(g) The notary's official signature.

(h) The notary's name, typed, printed, or stamped below the signature.

(i) The notary's official seal affixed below or to either side of the notary's signature.

(5) A notary public may not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument. A notary public shall certify in the certificate of acknowledgment or jurat the type of identification, either

based on personal knowledge or other form of identification, upon which the notary public is relying.

(a) For purposes of this subsection, “personally knows” means having an acquaintance, derived from association with the individual, which establishes the individual's identity with at least a reasonable certainty.

(6) The employer of a notary public shall be liable to the persons involved for all damages proximately caused by the notary's official misconduct, if the notary public was acting within the scope of his or her employment at the time the notary engaged in the official misconduct.

(8) Any notary public who knowingly acts as a notary public after his or her commission has expired is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(12)(a) A notary public may supervise the making of a photocopy of an original document and attest to the trueness of the copy, provided the document is neither a vital record in this state, another state, a territory of the United States, or another country, nor a public record, if a copy can be made by the custodian of the public record.

(b) A notary public must use a certificate in substantially the following form in notarizing an attested copy:

***STATE OF FLORIDA
COUNTY OF _____***

On this ___ day of _____, (year), I attest that the preceding or attached document is a true, exact, complete, and unaltered photocopy made by me of (description of document) presented to me by the document's custodian, _____, and, to the best of my knowledge, that the photocopied document is neither a vital record nor a public record, certified copies of which are available from an official source other than a notary public.

***(Official Notary Signature and Notary Seal)
(Name of Notary Typed, Printed or Stamped)***

(13) The following notarial certificates are sufficient for the purposes indicated, if completed with the information required by this chapter. The

specification of forms under this subsection does not preclude the use of other forms.

(a) For an oath or affirmation:

STATE OF FLORIDA
COUNTY OF _____

*Sworn to (or affirmed) and subscribed before me this ____ day of ____, (year)
, by (name of person making statement).*

*(Signature of Notary Public--State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)*

[Note: If the oath is by a person in a corporate capacity, it is important to identify the title or capacity of the person in the corporate structure.]

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

(b) For an acknowledgment in an individual capacity:

STATE OF FLORIDA
COUNTY OF _____

*The foregoing instrument was acknowledged before me this ____ day of ____,
(year), by (name of person acknowledging).*

*(Signature of Notary Public--State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)*

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

(c) For an acknowledgment in a representative capacity:

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this ____ day of _____, (year) , by (name of person) as (type of authority, e.g. officer, trustee, attorney in fact) for (name of party on behalf of whom instrument was executed) .

*(Signature of Notary Public--State of Florida)
(Print, Type, or Stamp Commissioned Name of Notary Public)*

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

117.105. False or fraudulent acknowledgments; penalty

A notary public who falsely or fraudulently takes an acknowledgment of an instrument as a notary public or who falsely or fraudulently makes a certificate as a notary public or who falsely takes or receives an acknowledgment of the signature on a written instrument is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

A notary public was liable for damages which resulted from her unlawful act in notarizing and acknowledging a purported mortgage which had not in fact been executed by plaintiff and his wife, and it was not necessary for liability that court find that notary participated in alleged conspiracy to slander title of plaintiff to the property described in the purported mortgage. DeCamp v. Allen, App. 1 Dist., 156 So.2d 661 (1963).

117.107. Prohibited acts

(2) A notary public may not sign notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to the Department of State with an exemplar of the facsimile signature stamp.

(3) A notary public may not affix his or her signature to a blank form of affidavit or certificate of acknowledgment and deliver that form to another person with the intent that it be used as an affidavit or acknowledgment.

(8) A notary public may not amend a notarial certificate after the notarization is complete.

(9) A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the presence of the notary public at the time the signature is notarized. Any notary public who violates this subsection is guilty of a civil infraction, punishable by penalty not exceeding \$5,000, and such violation constitutes malfeasance and misfeasance in the conduct of official duties. It is no defense to the civil infraction specified in this subsection that the notary public acted without intent to defraud. A notary public who violates this subsection with the intent to defraud is guilty of violating s. 117.105.

(10) A notary public may not notarize a signature on a document if the document is incomplete or blank. However, an endorsement or assignment in blank of a negotiable or nonnegotiable note and the assignment in blank of any instrument given as security for such note is not deemed incomplete.

C. Possible Sanctions or Outcomes for Sloppy, Inaccurate or Fraudulent Documents Filed With the Court

Judge may deny a motion with or without prejudice.

Judge may award attorney's fees based on the doctrine of inequitable conduct. The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith. *Bitterman v. Bitterman*, 714 so. 2d 356 (Fla. 1998).

Judge may dismiss the action with or without prejudice if the court determines a fraud on the court has occurred. The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892

F.2d 1115, 1118 (1st Cir.1989). When reviewing a case for fraud, the court should consider the proper mix of factors and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Id. at 1117-18. Because dismissal sounds “the death knell of the lawsuit,” courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious. Id. at 1118. The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. Kornblum v. Schneider, 609 So.2d 138, 139 (Fla. 4th DCA 1992). Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances. Id.; Bird v. Hardrives of Delray, Inc., 644 So.2d 89, 90 (Fla. 4th DCA 1994). See Granados v. Zehr, 979 So. 2d 1155 (Fla. 5th DCA 2008) as a recent case discussing principles of fraud on the court.

Rules of Civil Procedure: State and local rules related to foreclosure filings

A. Knowing the Procedures of the Presiding Judge

Most civil judges have a published memorandum regarding procedures in their courtroom as far as obtaining hearings and docket management. Many judges have the procedural memos posted to their webpage, which can generally be accessed under the judge's name on the circuit website. A number of judges post their calendars on their web page.

In this day and time of shrinking budgets, the court system and judges are asked to do more with less resources. Thus, it is extremely important for attorneys and their staffs to follow the procedural memos of judges in moving the case through the court process. Judges and judicial assistants find it extremely annoying when attorneys and legal staff call the judge's office to ask a question that is completely answered by reviewing the judge's procedural memo. It is equally annoying when motions, letters or orders are submitted to the judge's office which do not comply with the procedural memo. Many times it is apparent the lawyer or legal staff is just too lazy to bother reading the memo. It is not uncommon for the judge or judicial assistant to simply ignore such inquiries or submissions until they do comply with the procedural memo.

It is quite common that the civil work load in a county is divided between several judges. It is extremely time consuming and wasteful when materials are submitted to the wrong judge's office. It connotes sloppiness and laziness on the part of the lawyer when that happens.

B. Recent Civil Rule Changes (In re Amendments to Florida Rules of Civil Procedure, 44 So. 3d 555 (Fla. 2010))

- Rule 1.110(b) – Requires mortgage foreclosure complaints to be verified
- Form 1.924 – Affidavit of Diligent Search and Inquiry (to standardize the submission of affidavits in support of constructive service)
- Form 1.996(a) – Final Judgment of Foreclosure (many circuits now require adherence to this form and specify in what way there may be additions to the form)
- Form 1.996(b) – Motion to Cancel and Reschedule Foreclosure Sale (Supreme Court no longer approves the prior practice in many circuits that the sale can be canceled by the Clerk of Court if a plaintiff

representative is not present; cancelation of a sale now requires a court order)

C. Other Topics

Statute of Limitations

Parties to a Foreclosure Action

Plaintiffs

Necessary and Proper Defendants

Superior Interests

Association Liens and Assessments

Lis Pendens

Foreclosure Complaint

Original Document Filing and Reestablishment of the Note

Summary Judgment

Affirmative Defenses

Judicial Sale