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# HOW TO STOP FORECLOSURE

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## INCLUDES LEGAL AUTHORITY

How To Stop Foreclosure, Securitization, Wall Street, The People Behind The Boom And Bust Of The American Economy, About A System Which Serves The Elite, Dysfunctional Courts, What To Do In Court And How To Keep Your Property!

It's The Biggest Book On How To Talk To The Judge. It's Also An Insider Book About What Happens In A Court Room: Was Passiert In Einem Amerikanischen Gerichtshof? Achtung!

***By Christian Meister***  
former sheriff candidate

*“There have been great many men before my time who have caused change in the face of economic terror by financial institutions, and I call upon the judiciary to take a look at what judges outside their locale have said about these frivolous lawsuits and MERS. If they do, most, if not all, of these foreclosures will stop”—Christian Meister, August 22, 2010*

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COAST-TO-COAST PRAISE FOR  
HOW TO STOP FORECLOSURE

“Your quote here!”



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HOW TO STOP  
FORECLOSURE

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FIRST EDITION

Dedicated to my parents,  
Erna und Franz Meister





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*A Colossal Failure of Common Sense.*

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Appendix A.1.2: Form affidavit in support of motion to recuse

Appendix A.2: Form certificate of interested persons ...

Appendix 1.1.1: MERS in South Carolina, Sumter County (Judge Evans)

**Order**, Case No. 2005-CP-43-0278, January 19, 2006

Appendix 1.1.2: MERS in South Carolina, Sumter County (Judge Campbell)

**Affidavit**, Case No. 2005-CP-43-0278, 2006

Appendix 1.2.1: MERS in Florida, Miami Dade County (Judge Gordon)

**Order**, Case No. 05-2425, September 28, 2005

Appendix 1.2.2: MERS in Florida, Miami Dade County (Judge Gordon) (Judge Genden appears in transcript)

**Transcript**, Case No. 05-2425, September 16, 2005

Appendix 1.2.3: MERS in Florida, Sarasota County (Judge Silberman)

**Order**, Case No. 2D08-4647, March 3, 2010

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*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 1.2.4: MERS in Florida, failure to comply with discovery rules, prohibited from introducing note, prohibited from entering assignment of mortgage, Stern (Judge Tepper)  
**Order**, Case No. 51-2007-CA-6684ES, March 25, 2010

Appendix 1.2.5: Florida, Pinellas County, Motion for rehearing re motion for summary judgment (Judge Rondolino)  
**Transcript**, Case No. 07013084CI, April 7, 2010

Appendix 1.2.6: Florida, Palm Beach County, Motion for Sanctions pursuant to §57.105, Fla. Stat. (Attorney Cullen)  
**Motion**, CASE NO: 50 2008 CA 022258 XXXXMB February 2010

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 1.3.1: MERS and bankruptcy in Nevada (Judge Riegle)  
**Order**

Appendix 1.3.2: MERS and bankruptcy in Nevada (Judge Dawson)  
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Appendix 2.1.1: MERS in the Kansas Supreme Court (Judge Rosen)  
**Order**, Case No. 98,489

Appendix 4.1.1: MERS in Texas, Fort Worth

(Judge Dauphinot)

**Order**, Case No. 2-08-088-CV, June 4, 2009

Appendix 5.1.1: MERS in New York

(Judge Kurtz)

**Order**, Case No. 22 43 4107, December 14, 2007

Appendix 5.1.2: MERS in New York

(Judge Farneti)

**Order**, Index No. 30755/2007, March 13, 2008

Appendix 5.1.3: MERS in New York

(Judge Schack)

**Order**, Index No. 32052/07, November 19, 2007

Appendix 5.1.4: MERS in New York

(Judge Schack)

**Order**, Index No. 27296/07, June 5, 2008

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 5.1.5: MERS in New York, Kings County

(Judge Schack)

**Order**, Index No. 15968/07, November 3, 2008

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 5.1.5.2: MERS in New York, Kings County

**Order**, Appellate Court: 2009-00863, April 27, 2010

Lower Court: Index No. 15968/07, November 3, 2008

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 5.1.6: MERS in New York, Kings County  
(Judge Schack)

**Order**, Index No. 39192/2007, February 5, 2008

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*NOTE: APPENDIX 5.1.6 HAS NOT BEEN INCLUDED AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 5.1.7: MERS in New York, Kings County  
(Judge Schack)

**Order**, Index No. 18236/08, February 3, 2009

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 6.1.1: Mortgage assignments in Massachusetts  
(Judge Long)

**Order**, Case No. 384283, October 14, 2009

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE VERY IMPORTANT.*

Appendix 6.1.1.2: Mortgage assignments in  
Massachusetts, Motion in opposition to motion to vacate  
(Attorney Costello)

**Motion**, Case No. 384283, June 29, 2009

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 6.2.1. Mortgage assignments in Massachusetts,  
“publication” “newspaper of general circulation” recording  
the assignment “remove a cloud from the title” action  
(Judge Long)

**Order**, Case No. 384283 (KCL), March 26, 2009

**Order**, Case No. 386018 (KCL), March 26, 2009

**Order**, Case No. 386755 (KCL), March 26, 2009

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 6.2.2. In response to Appendix 6.2.1's Orders: Motion of the Real Estate Bar Association for Massachusetts; statement of interest; "previously foreclosed properties;" "the titles were presumed to have been" "marketable;" "under the logic of the court's decision" on March 26, 2009, "those titles" "have been rendered" "unmarketable if not defective"

**Statement of Interest**, June 16, 2009

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Appendix 10.1.1: Various case law in Florida

**Order**

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Appendix 11.1.1: Procedural Dilemma, Affidavit Summary Judgment Standard, Second District Court of Appeal, Florida (Judge Wallace)

**Order**, Case No. 2D07-5873, November 14, 2008

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 12.1.1: Fraud on the court, Assignment by law firm in Florida, Duval County, Order with prejudice (Judge Johnson)



**Order**, Case No. 16-2008-CA-3989, August 9, 2010  
\*scan4 “m2d”

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE **VERY** IMPORTANT.*

Appendix 15.1.1: Fraud on the court, Class action complaint against attorney David J. Stern, in the U.S. District Court, Southern District of Florida (Attorney Trent)

**Complaint**, Case No. 0:10-cv-61296-CMA, July 6, 2010

\*scan4 “m2d”

*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK. THIS CASE APPEARS TO BE IMPORTANT.*

Appendix 16.1.1: California, County of Alameda “complaint for violation of ordinance” “agent for service of process” “eviction process” “bank will pursue legal action against the tenant” (City Attorney Russo)

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*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE LISTED APPENDIX AT THE TIME OF PUBLICATION OF THIS BOOK.*

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*NO ANALYSIS HAS BEEN PROVIDED CONCERNING THE CASE IN THE ABOVE  
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HOW TO STOP  
FORECLOSURE

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## ABOUT THE AUTHOR

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Christian Meister was born in Austria in 1968 and came to the United States in 1987 at the age of 19. He served in the U.S. military during Operation Desert Storm and became a U.S. citizen in 1999. As a drug interdiction and search and rescue support staff Petty Officer, Meister was responsible for the operational safety of a 210-foot Coast Guard Cutter, the USCGC “Dependable” WMEC-626, stationed in Galveston, Texas, with missions in the Caribbean Sea.

During his run for Sheriff in Lee County, Florida, in 2008, Meister communicated with 100s of people and found that one problem was prevalent. Thousands of home owners were unable to pay for their mortgages. Meister asked, why so many? Meister went to the circuit court in order to observe. After studying, researching, and communicating with experts in the area of trusts and financial transactions, Meister came to the conclusion that something had to be done.

Meister, who has an academic and practical background in print journalism, noticed that media would only talk about the first part of the truth: Bernie Madoff had been sentenced for 150 years in prison for his criminal involvement at “Wall Street.” However, media would not talk about the second part of the truth: Some Judges have already stopped foreclosures because the financial institutions’ paperwork was not in order.

The paperwork is not in order because these institutions have taken shortcuts during the process of mortgage securitization in order to securitize as quickly as possible in an attempt to create Billions of Dollars in additional profits and to shift liability of the high-risk “garbage” but “AAA”-rated mortgages to Wall Street investors.

Meister additionally found that, despite these facts, the financial institutions continue to foreclose and that they attempt to address the paperwork deficiency by inserting into the litigation a third-party “bogus” entity called MERS which they claim has the authority to foreclose when Judges have already stated that MERS does not have it.

This research led Meister to write a book in 2010—*How To Stop Foreclosure*—about the foreclosure crisis in an attempt to educate people about the fleecing of America by financial institutions. Meister feared that by the time case law would work its way through every State it would be too late: Thousands of homes would be needlessly lost, neighborhoods destroyed,



CHRISTIAN MEISTER—2010—2008—2010





CHRISTIAN MEISTER—2003



Mom and  
Christian  
in Austria

Christian  
1995  
Clearwater  
Florida







Dad and Christian in Austria in about 1970

and parents and their children needlessly displaced. Politicians, in an attempt to secure votes, have essentially given away homes to less-affluent socio-economic classes and minorities in the interest of equality, pressing financial institutions to lend with few limitations to “every man who could walk and talk” and do so regardless of whether the income supported the mortgage payments.

These politicians also have succumbed to interest groups and certain politicians who did not get re-elected enjoy, today, cushy executive positions at the (bailed out) financial institutions for which they had performed legislative favors. These financial institutions have lobbied the American economy into the ground.

In his book, Meister attempts to provide the tools by which property owners could legally fight in order to keep their homes threatened by foreclosure. The second edition includes tactics on how to enforce, in a court of law, burden of proof—, admissible evidence—, testimony by counsel—, document authentication—, cross examination—, hearsay standards, and how to cross examine the opposing party’s record custodian, and more.

Meister’s motivation to help rests, in part, on the fact that the financial institutions have lied to the people. They have destroyed the economy and have caused unemployment on a massive scale. They have caused damage by creating artificial demand for real estate by giving mortgages to people who they knew they could not afford to pay for them in the third year and by causing real estate prices to artificially inflate and then to collapse, leaving millions of home owners, including those who could afford to pay for their mortgages, stranded with mortgages that are way above market value, a.k.a., upside down.

Meister believes that the financial institutions responsible for these consequences ought to either have their paper work in proper order in their attempt to prove that they are entitled to foreclose or step away from the foreclosure litigation.

Christian Meister has managed litigation in the U.S. District Court for the Middle District of Florida, Fort Myers, FL, Division, from 2006 to 2010, and in the U.S. Circuit Court of Appeals in the Eleventh Circuit, in Atlanta, Georgia, from 2009 to 2010, in his capacity as a Pro Se litigant. He has handled all phases of discovery, including the deposing of defendants and defending plaintiff in deposition, and the crafting of interrogatories, requests for production of documents, and subpoenas. Meister is familiar with direct- and cross-examination techniques and has crafted numerous legal motions and memoranda of law. His legal writing experience exceeds 2,500 hours, from 2006 to 2010.

Meister’s legal specialties include Section 1983 governmental entity liability law and police liability law as well as Title VII, employment discrimination. Most important, Meister is familiar with the United States’ (Eleventh Circuit) and Florida courts’ (First District) local rules, local “local” rules and federal and State rules of appellate procedure. One of Christian Meister’s works—*Christian Meister’s Appellant Brief*—filed in November 2009 in the U.S. District Court of Appeals for the Eleventh Circuit, was touted by opposing counsel as a “manifesto” on rights.

During litigation, Meister found that appellate courts in Florida as well as federal appellate courts in the Eleventh Circuit are not required to provide a reason for their Orders; worse, if a Judge feels that he or she does not “want” to provide a justification, the litigant is, pursuant to the Florida Rules of Appellate Procedure, not entitled to an appeal in the Florida Supreme Court.

This is, in Meister's opinion, an abuse of judicial power. It also deceives the people because they believe that a three-tier hierarchy of courts exists (trial-, appellate, and Supreme Court) when, in fact, the very appellate rules encourage appellate judges to condone a trial judge's possibly corrupt bias or discriminatory animus. Worse, the three-tier system of courts intended to serve as a check and balance on corrupt judges and intended to provide a remedy for the lower courts' possible judicial errors, does, in essence, not exist.

Meister has advanced the additional legal argument in the U.S. Supreme Court that the Eleventh Circuit Court of Appeals' refusal to review an appellant's brief (a critical legal document) on the grounds that it is verbose (exceeds the court-imposed page limit) deprives the litigant of due process in a case where the very question before the appellate court *is* whether the lower court's (trial court's) refusal to review a litigant's motion (also a critical legal document) on the grounds that it is verbose is Unconstitutional. (One holds to reason that if a litigant cannot craft a document in a legalese-condensed style in the trial court, he won't be capable of crafting the same in an appellate court.)

Here, Meister made the legal argument that the appellate court has essentially refused to carry out its intended Constitutional duties and that it ought to have reviewed the legal document on an appeal despite the fact that the pro se litigant is not capable of complying with the court-imposed page limitation in the appellate court. Additionally, the federal appellate court has refused to provide the reasons for the refusal.

Meister has petitioned the U.S. Supreme Court for a writ of certiorari in 2009, once, and in 2010, twice. He also has petitioned the Florida Supreme Court in 2009.

Meister's motivation to write about equal protection and about due process rights was sparked by the unlawful and retaliatory termination by the Lee County Sheriff's Office in 2005 in response to Meister's complaint about harassment by a co-worker who was a former convicted woman batterer and (re-hired) law enforcement officer.

Meister's background includes experience in real estate. He negotiated commercial lease transactions and sold residential properties in Fullerton, California, from 2002 to 2004. He was a member of a real estate investments association (RIAOC) and also traded company shares for several years.

As a Staff Writer for the Daily Titan—Cal State Fullerton's University Newspaper—Meister published stories for the news beat. He graduated Cum Laude with a B.A. in Communication with a concentration in print journalism from California State University, Fullerton, CA, in 2004. Meister also graduated from the Southwest Florida Public Service Academy (sponsored by the Lee County Sheriff's Office) in 2006. He is familiar with officer safety, the use-of-force matrix, and liability issues relating to law enforcement. In 2006, he passed the Florida Department of Law Enforcement (FDLE) Officer Certification Examination, a prerequisite to carrying out the functions of a sworn law enforcement officer.

As a certified family case manager in 2007 and 2008, Meister served in child protection for a DCF-contracted agency where he provided services for abandoned, abused, and neglected children adjudicated dependent on the State of Florida. In his capacity as a State certified child protection professional, Meister participated in judicial proceedings and gave advisory recommendations concerning children and parent progress.

Meister's passions include playing classical piano, e.g. Chopin's Etude, Opus 10, No. 12, and Schubert's Impromptus Opus 90, No. 2, writing about law and due process, and photography. Meister is attempting to upstart two online companies, one of which will give

people an opportunity to voice their grievances about government or businesses in their communities. Christian Meister is a registered independent candidate for the 2012 Sheriff election in Lee County, Florida. In 2008, he garnered 25 percent or 61,000 votes.



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## INTRODUCTION

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*DISCLAIMER: THE INFORMATION PROVIDED IN THIS BOOK IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY.*

The home owner has defaulted on the mortgage, hasn't he? Hasn't she? So, are these home owners coming into the court room in an attempt to try to keep their properties on, say, a technicality?

If indeed the suing party bank believes that it is entitled to foreclose on a given property, have it—at the very least—provide documentation that *shows* that it is entitled to foreclose.

Right now, in most, if not all, of those mortgages where MERS is involved—and MERS is involved in nearly all mortgages which were closed after the year 2000—the suing parties are *not* showing their entitlement to sue; Judges in several States have said so.

Yet only a handful of judges across the United States have taken the time, acting *sua sponte*, to go beyond their daily routine of siding with the suing parties' smooth talking attorneys.

Only a few hero judges have gone beyond proclaiming that “the documents appear to be in order” when, in reality, these judge haven't even read the contents of the assignments of mortgage by MERS.

Some, if not most, of judges are not interested in doing more than what their paycheck requires them to do—I had an interaction with at least one magistrate (judge) who outright declined to wanting anything to do with this, stating that it was not her fault and that she could not, when other courts have held otherwise, act *sua sponte*—and these judges are in denial about their responsibilities to their communities, or they are outright dumb in understanding what is happening [FN-2011].

Otherwise, they would be aware by now—since at least 2007—that the assignments of mortgage by MERS are, e.g., signed on one date but made *effective* on an earlier date, thereby unlawfully backdating the assignments prior to the commencement of the litigation for a specific and hideous, malicious purpose in an attempt to deceive, manipulate and cheat the

system, the American people, and the hardworking, taxpaying folks who make this country run.

Case law prohibits these lawsuits from going forward where an assignment is made *after* the lawsuit is initiated and the numerous frauds involved in these types of litigation are multi-fold!

Shame on these judges (elected in State- and appointed in federal courts) and shame on our politicians who condone this behavior!

There have been great many men before my time who have caused change in the face of economic terror by financial institutions, and I call upon the judiciary to take a look at what judges outside their locale have said about these frivolous lawsuits and MERS. If they do, most, if not all, of these foreclosures will stop.

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*WHAT FOLLOWS IS A VERY LONG FOOTNOTE:*

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\_\_\_\_\_.  
[FN-2011] In August of 2010, I went to the court house in Lee County, Florida. I walked into the court room and a few mortgage foreclosure cases had already been heard. When I found a good moment to interrupt—just when a new case was called, I stood up and said, as follows, below. Note: the herein stated dialogue is an approximation of what actually transpired.

Meister: Your honor, as a concerned citizen of the State of Florida, I'd like to address this court. I'm Christian Meister, and I'm also a Sheriff candidate in Lee County. It's about the foreclosures which are happening all over the United States and where MERS is involved, these foreclosures should not happen and, I have some information for you.

Magistrate (Hereinafter "Judge"): I don't have time now. We have to do this some other time.

Meister: Okay, what time would that be? What time will you be available?

Judge: At the end of the day.

Meister: Would that be at about five o'clock?

Judge: I don't know.



Meister: Can I address this court at the end of the hearings?

Judge: Yes.

Meister: Ok, thank you.

About two hours later, as follows:

Judge: You want to say something?

Meister: As I stated earlier, I am Christian Meister, and I am a Sheriff candidate in Lee County. Would it be alright if I came closer to the table where the attorneys are usually located?

Judge: No!

Meister: OK. I'd like to share some information about the foreclosures and where MERS is involved—nearly all mortgage foreclosure cases involve MERS—none of these foreclosures should take place.

Meister: I am the author of a book, and I have prepared a course proposal to Edison State College, and they have accepted my proposal. It's about the foreclosures and what people can do to stop them.

Meister: Now, I understand that these people come into the court room, and we had one gentleman here today and these litigants know that something is wrong with the party who is suing them where MERS is involved. And they are going about it in the wrong way and that's because it's a complicated matter.

Meister: If only these people knew how to object, if only they would object to the affidavits that the suing party is putting into the court—and they are all hearsay—most, if not all, of these cases where MERS is involved would stop.

Judge: They have to assert it [the objections] themselves. I can't do it for them.

Meister: I understand that.

At some point the magistrate judge wanted to end the conversation, and I said. Your honor, this is a very important issue and I only need a couple of minutes; it won't cost you anything.

Judge: Okay, go ahead.

Meister: This area of securitization and how mortgages are involved is complex. It's like explaining trigonometry to a five-year-old child. It cannot be done.

Meister: But the thing is, we have judges who have looked at certain documents, and they have stopped the foreclosure lawsuits on that basis. It's confusing to make sense out of the mess, but I have found that there is, for example, one item that's not complicated at all.

Meister: If you look at any of the MERS assignments of mortgage, you will see that they contain the phrase "effective as of" an earlier date. I am talking about backdating. It's like making out a check today but backdating it to an earlier date. You cannot do that. We have judges that have addressed this issue, and they have stopped the foreclosures.

Judge: I cannot do that; I cannot act on behalf of a defendant.

Meister: No, that's incorrect. You have the authority as a judge to act sua sponte. Other judges in other states have acted sua sponte. It's within your authority. I have case law that shows they can act sua sponte.

I also told the magistrate judge on that day that if she takes a look at these MERS assignments—and I held up one of them in front of her—that she will see the phrase "effective as of," and that you can't do that.

The Magistrate went on to say that she is not responsible for all these things—and this was in response to my assertion that the suing party was using MERS to throw home owners out of their homes across the United States—and that there was nothing that she could do about it.

I told her that she has the authority to act sua sponte. I believe that she was not interested to hear about it.

=====

*FOOTNOTE ENDS*

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*How to Stop Foreclosure* proposes strategies which residential property owners in America can use in order to obtain their mortgaged home free and clear of any mortgage encumbrance. It does not matter whether they are upside down or in foreclosure. The earlier home owners intervene, however, the better.

Millions of home owners all across the United States who have purchased residential properties or refinanced after the year 2000 cannot be sued because the suing party or its cohorts—the party claiming to have a legal interest in your property—has created adverse

conditions during the process of securitization. This, on the basis of several court decisions outside the State of Florida and on the basis of the author's observations and research in collaboration with experts in Trusts and mortgage fraud auditing.

Financial institutions have retooled our home owners' mortgages and promissory notes into bonds, bluffed investors and, to some extent, government regulators. They sold these bonds to Wall Street investors as high-yield, low-risk (and falsely) rated investments when they were junk. These institutions have received tax benefits in the process, and they have, in the view of this author and outside experts, agreed to alter these notes in order to receive that benefit, thereby excluding their ability to bring a foreclosure lawsuit against property owners. Yet, these parties keep bringing lawsuits against thousands of property owners who do not pay their mortgage.

Our political leaders, in an attempt to secure votes for re-election, have made the false promise to leave no home owner behind and put virtually every minority in a home regardless of whether he or she could afford it. Government has created a political machinery which has blinded home owners, mortgage brokers, and investors who have flipped properties for sizeable profits. Government's bureaucracy has also blinded the very regulatory agencies intended to protect the American public at large from what a reasonable and prudent "thinking" person would conclude as being an impossibility: A bread-winner earning \$1,500 per month is simply not capable of paying a \$1,200 mortgage payment. But, America's lending institutions and Wall Street investment houses have blind-folded Americans into a "never never land" by offering ridiculously low teaser rates.

People from all walks of life, regardless of whether they were sub-prime- or prime-rated borrowers, were teased by monthly mortgages payments as low as about \$800 per month. The people in America have been led into a short-lived version of home ownerships. The actions of our government and American financial institutions have caused the collapse of the American economy, the collapse of their smaller brother and sister banks and, amazingly and as it turns out, themselves. Interestingly, financial institutions are now asking for a bail out, and many are receiving them.

Our people have been set up for failure from the beginning at the benefit of a handful of geniuses who were capable of understanding that their financially engineered financial bond instruments, a.k.a. securitization, can yield Billions of dollars in profits.

Wall Street's power firms which have enabled the exploitation and ransacking of our nation's wealth for at least the next three to five years to come, have skillfully hidden their assets in trusts in the Cayman Islands or elsewhere in the Caribbean, including, for instance, Lehman Brothers, and, from the observations and research conducted by this author, it does not appear that they would care about the American demise they have caused.

Our mainstream media has only sparingly, if any, informed the public about their legal rights. They have failed to educate the American people, in part, because the issues concerning securitization are, at best, difficult to understand. These issues would require extensive coverage much beyond the attention span and capabilities of the viewer who has been trained to absorb catchy sound bites. A human interest story about a cat which fell into the wine cellar and which is now being rescued by a local fireman simply makes for a better and far easier story. Heroes are created more easily in that fashion.

The actors in this scheme of which one might want to characterize as corruption if not a criminal offense are the financial institution's—

1. Pooling and Servicing Agreements or “PSAs.”
2. Financial institutions which pretend to be structured as trusts when they are not.
3. Complicated and legalese phrases which only attorneys who specialize in trusts understand, the phrases of which are embedded in PSAs extending from 600 to 2000 pages in fine print.
4. Undecipherable or near incomprehensible legal phrases and calamities which only experienced attorneys are capable of understanding and which are crafted in order to create the appearance that the suing parties intentions are legitimate.
5. Public notaries who claim to have notarized a signature in one State when the person signing was verifiably situated in a locale outside that of the public notary.
6. Documents purported by MERS to serve as a legitimate instrument in an attempt to legally convey the deed of a property.
7. Case law which has addressed the issue, holding that MERS is not a party of interest
8. Several Judges’ outrage in several States outside of Florida, including one who has identified that MERS has claimed in one State that it “is not” a bank in order to avoid liability for tax evasion and that MERS has claimed in yet another State that it “is” a bank so that it can legally foreclose on property owners.
9. Case law which is emerging ever so frequently, the most recent of which (at the instant typing of this text) is a case in the Second District Court of Appeal in Florida, and this is giving home owners a lot of hope.
10. So much more ....

This book will examine the rights of our home owners. This author predicts that eventually our property owners, if informed properly, will have an opportunity to legally walk away from their mortgage obligation, do so free and clear, without having to pay another dime for a mortgage payment on their contractual mortgage obligation, the obligation of which might not be a contractual one after all.

This author also predicts that eventually any property owner who has lost a home in foreclosure will be able to receive substantial damages—maybe even triple damages—as authorized by federal law in response to, for instance, racketeering and other conspired schemes against home owners. To put this into perspective, this would mean that if a home owner’s contractual mortgage obligation was, say \$300,000, a triple damages award would yield \$900,000 into your pocket.

If time and resources—the mighty Dollar—permits, this book will also examine the conditions which had been created at the time our property owners have signed their loan

documents at the closing table. There, our home owners were often blatantly lied to, charged excessive and hidden, unlawful fees [FN-2011].

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[FN-2011] See Appendix 50.1.1. Junk charges

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[FN-2011] See Appendix 50.2.1. Kickbacks to brokers

In those few and select cases where home owners might not be able to hold the securitizers and banking institutions accountable for their actions (--for instance, in the rare event that the financial firms did not securitize--), home owners might be able to at least mitigate (or offset) their financial obligations. In most cases, however, property owners will be able to legally stall foreclosure litigation by simply engaging the opposing party in substantial discovery warfare. They will succeed—or should succeed if discovery is handled by a competent person—because the suing parties have been known to hide documents in Trusts for their own benefits. If called upon by the courts to reveal the information that’s contained inside these Trusts, the suing parties will attempt to claim that their information is proprietary or a trade secret. At this point, a competent attorney should be able to convey to the court that their client home owner is entitled to the discovery of the information or, in light of a lack of evidence against the home owner, the suing party will have little choice but to drop the lawsuit against the home owner, a competent attorney should so argue. The suing party will be inclined to not reveal the information that’s contained inside these Trusts or will vehemently deny that the information is of any relevance to the home owner because in revealing the information, the true makings of their deeds are exposed. It is anticipated that they might face liability or even criminal charges against them. Discovery conducted by a competent person will often, in these lawsuits against home owners, reveal documents which also show that the so-called lenders have misappropriated funds and/or have charged our home owners hidden fees, the fees of which our property owners are entirely unaware of. Additionally, the suing party will, in many cases, simply discontinue the lawsuit against the home owner because, as it is the case in Lee County, Florida, the hired-gun attorney is not going to spend ten to twenty hours on any one fight, put up by a home owner, when the attorney can earn that same fee of about \$500 per home by spending, say, about the time it takes to draft a legal complaint—that’s about thirty (30) minutes. It takes only about thirty minutes because these attorneys pre-use the same type of legal complaint over and over again. Additionally, home owners get the rocket-docket treatment in court. The so-called hearings last only about 40 seconds, and the lender’s attorney collects his fee nearly effortlessly. These types of hearings are, of course, a violation of our home owners’ due process rights, in violation of the United States Constitution Fourteenth Amendment Procedural Due Process Clause; however, this bothers neither the attorneys nor the judges, not here in Lee County, at the time of this writing.

This book will also guide the reader so that he or she can determine whether it is morally correct to walk away, given any of the public’s perceived presumption or concern that a promise to repay a contractual mortgage obligation is, well, a promise to repay a mortgage. This book will also guide those financial institutions which have calculated that they can create billion Dollars in profits by, first, enabling people to own a home who cannot afford it by giving it to them temporarily at a near no-cost for about two years and, secondly, by

running off to Wall Street within, say, three months in order to securitize the property as fast as was possible. This book is also written for those banking institutions who knew that they could give those homes away at absolute zero risk, and that any risk was taken up by investors at Wall Street and by international traders around the globe, including those in China. They had no clue what these institutions were cooking up, right under the noses of American regulators.

This author is quite certain that the reader, after reading this book, will, with an unequivocally sounded “yes,” find that he or she has been milked not only out of his home but also out of a job for years to come. As another author has so beautifully explained it, our governmental regulators have failed, at least in part, because America’s private financial institutions, say Lehman Brother or the like, had attracted the smartest and brightest brains, paying security traders a hefty salary and even millions of Dollars in performance-based, yearly bonuses. Salaries received by those who were at the helm of financial oversight and regulatory agencies, including the Securities and Exchange Commission (SEC), was pale and in stark contrast and has attracted the less fortunate (A Colossal Failure of Common Sense) [FN-2006]

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[FN-2006] SEC charged with negligence: See Appendix 100.

Last but not least, this book is about the rights of the people. You, the property owner or the person who knows that his or her people are being affected by the scams of institutions which are later proclaimed as being “too big to fail” and by financial institutions who lobby government to side in their favor, you can do more than you currently believe you can do, given the appropriate information at the appropriate time, and that time is now.



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## CHAPTER 1: ONE ON ONE WITH CHRISTIAN MEISTER: ABOUT GOVERNMENT AND LIES

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*DISCLAIMER: THE INFORMATION PROVIDED IN THIS BOOK IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY.*

My campaign for Lee County, Florida, Sheriff was being contacted in 2008 by those who were seeking help as well as by those who were offering it. I've been most fortunate to have been surrounded by experts: Experts in trusts, experts with financial backgrounds both in the United States and in Europe.

I admit, I enjoy learning, but I also have found that after learning about the scope of corruption and self-serving behavior which has permeated both our government and our corporate financial institutions, I quite don't view things as I once did in the same way as I once did. I just don't.

I had a bit of a different view in my twenties when I believed that the American Dream was real. As a young fellow, a native-born Austrian, I was too curious to remain in my own four corners, - Austria. I admit, my quest to become a Hollywood actor did not work out as I had anticipated. Rather, today, I spend most of my time researching about law and civil rights, as I have been doing extensively, since 2006. My legal work has been filed in both the Federal and Florida courts: The United States District Court for the Middle District of Florida, in Fort Myers, the United States Circuit Court of Appeals, in Atlanta, Georgia, as well as in the District Court of Appeal, First District, in Tallahassee, Florida, and in the Florida Supreme Court.

I made my first contact with law when I took a real estate law class. 'Nothing fancy, just a 200-level introductory class at a community college in Fullerton, California. I then progressed to a 400-level class in criminal law. At that time, it felt as if I were in law school but was told that, absent the Socrates method of teaching, I was not. Then, after my graduation, Cum Laude, from California State University, Fullerton, I decided to follow my father's foot-steps who had been a customs officer in Austria, and I was accepted for training at the Lee County Sheriff's Office in Florida. My experience in public service had actually begun a few years earlier: I was a military Petty Officer in the United States Coast Guard. I

was stationed aboard the USCG “Dependable,” WMEC-626, a 210-foot cutter, with its home port in Galveston, Texas. The ship patrolled the Caribbean Sea, and I was part of a team which was responsible to conduct search and rescue operations and drug interdiction.

A few years later, in Florida, I was hired by the Lee County Sheriff’s Office (“LCSO”). The Sheriff’s Office offered to sponsor me in order to become a deputy Sheriff. I gladly accepted, but I soon learned that my belief in fairness and motivation to improve what I felt needed to improve was not much appreciated the LCSO.

Generally, I like to put the right things where right things belong. All too often, especially in a larger organization, there are cliques and red tape, and speaking out just about anything can be trouble.

And so, another era in my life had started, ending abruptly in May 2005 just as soon as it had started in December 2004 when I was hired by the LCSO. Perhaps I was, at that time, naive to believe that being a part of a prestigious organization devoted to public service meant that the people at the helm would treat people fairly, employ staff of decent character, take an interest in workers’ diversity and respect others’ cultural differences.

But, soon I learned that being a member of the Lee County Sheriff’s Office was not what I had believed it would be. I was a member of an organization with privileges that extend only to those who are a part of their clique system: I was “fired” because I did not play well with the LCSO’s good ole’ boys’ politics. I didn’t then, and I don’t do it now. ‘Make a complaint about something that you believe is wrong or inappropriate and your last employment days are counted. They—the LCSO in this example—will then find something about you to examine and turn a mouse into an elephant. Many people make more than a mouse’s worth the mistake, but they are still at the Sheriff’s Office, gainfully employed.

I was hired by what I presumably had believed was an outstanding law enforcement agency. This is so because I had no reasons to believe it any differently. Perhaps I owe this to my father. He told me to never lie to anyone and to be honest. I believed in this sense of honesty. I especially believed in this, working for a law enforcement agency.

At the Lee County Sheriff’s Office, I was hand-picked in 2004, along with seven other individuals, from a pool of about 200 applicants, during an application process which lasted nearly one year. The application process was tedious and time-consuming.

My dreams and goals came crashing down when I was, one day, told to stand in the academy yard for half an hour while mind games were being played about my performance at the training academy. This, despite the fact that I was a successful Lee County Sheriff deputy trainee who, being short of his graduation in just ten more days after a five month training stint, was passing the written examinations and law enforcement officer tactical training exercises as I was required to pass them pursuant to the standards of the Florida Department of Law Enforcement Training Commission.

The Lee County Sheriff’s Office (LCSO) had made it a point to interfere with my academy training when it had no business to interfere. On May 18, 2005, the LCSO essentially forced me to stop attending the academy.

The LCSO took it a step further, stating to media when I ran for Sheriff in 2008 that I “washed out” from the academy, and lied about my performance.

I filed legal action against the Lee County Sheriff’s Office in 2006 because I didn’t like to be “railroaded.” I might have tolerated similar conduct by a private company but I was not about to endure the abuse by a governmental entity law enforcement agency because it had



the power to label me for the rest of my life to the extent that finding a job as a law enforcement officer was going to be a challenge.

I believe that people have basic, essential rights. One is that people have, given a successful performance and hard work ethic, an entitlement to enjoy their chosen profession. When the LCSO lied to me about the reasons for the termination, I was not going to tolerate it. When the LCSO lied to others about my integrity about my person and a career track and public service, the fight was on.

The LCSO had an issue with my complaint against one of their long-established employees, and I made the complaint when I was a recruit in the academy; the LCSO fired me in response to my complaint. The LCSO made references to my language based abilities, also pointing to my accent and to the fact that my native language is German and not English.

I ran for Sheriff in 2008 because I have an issue with self-serving government. I ran for Sheriff because I knew that people are being railroaded at the Sheriff's Office. I ran for Sheriff because I know that taxpayers are paying the price when people get unjustifiably, unfairly, and unnecessarily terminated for the underlying purpose of a government's self-serving benefit. People who are falsely accused and fired because they are not a part of the good ole' boys' club are expected to get upset about it, and they seek the remedy of the law. Taxpayers are paying for this remedy. Employees are entitled to enjoy the fruits of their efforts. When they do their job well, they are entitled to get compensated accordingly. Taxpayers are entitled to have a Sheriff who believes in what *they* believe in, including fair treatment regardless of rank or time served.

Once, I was told that when a door closes, another one opens. I did find this difficult to believe when I was asked to return my LCSO wind breaker. It wasn't a gun and a badge I was returning, but it was an LCSO wind breaker, nevertheless. The lies were tough to swallow, and I admit if you wanted to see a man with tears, there was one to see.

By the actions of the LCSO I was led into another one of my talents, as it would turn out. Indeed, my friend was correct. While a door hasn't opened in terms of obtaining financial freedom—in fact, it's quite the contrary as I am more broke than ever before in my life—I have developed a knack for the law and fair play. Unfortunately, our courts do not play fair well. Here, I am talking about the rights of people when they enter a court room. I am also talking about my personal experiences as a litigant who has proceeded in a court of law without an attorney, as a pro se litigant for the past four years, from 2006 to 2010. I am also talking about a person who has found that the Lee County Sheriff's Office is not the only governmental entity which needs fixing. Our American judicial system is broken. I can say so with complete confidence, based on my own findings and on the basis of my numerous communications I have had with other individuals who attempted to turn to a court of law for relief.

What I have found is that the legal system—the American adversarial legal system, as it is in form—is not intended for any of whom are not capable or willing to hire an attorney. Blind justice appears to be only reserved for those who are capable of hiring a member of the Bar. Beyond that, one has very little, if any, rights. The best of justice is also reserved for those who can afford to pay the best of attorneys. Many attorneys cause the convictions of even their own clients, those who would otherwise not be convicted had they had an attorney who understands, for instance, that an inference is not to be built on top of another inference, a.k.a., the pyramiding of inferences, according to Frederick D. Graves, J.D., author of

Jurisdictionary®.

One door closes, another one opens. I was, during my campaign for Sheriff in 2008, approached by a gentleman who was gravely displeased how home owners were being treated by local judges right here in Lee County. To put it bluntly, it's awful.

Being in an American local court room feels like being in an English Court of law during the dark era of the Middle ages where an accused is brought into the court room, given a few minutes to talk in order to create the appearance that there is, indeed, a court of law, only to be told that he is going to be executed the next day.

In Lee County, Florida, I have observed one judge become annoyed in a foreclosure lawsuit against a home owner, and the judge adjudicated in favor of the opposing party because he was annoyed.

This book isn't about me or about my experiences, but I believe that the provided discussion about my background and experiences will help readers to put things in proper perspective. Property owners in Lee County have an uphill battle. Worse, our nation's economy is in big trouble.

This book is written for those who are willing to fight in a court of law. Regardless of whether you want to fight for your rights, you should know about others' plights, your neighbors' and your fellow residents' and citizens'. I care about those who are being "railroaded," and I believe that I understand their grievances and concerns to some extent. I have led a good fight, but I might not win my own personal case in pursuit for the proverbial justice. One might find that I have made my share of mistakes—one of them might include not keeping my mouth shut at the time when the LCSO felt that it was required—but no one can claim that I am lacking character. I am not one to sit still or to accept the status quo as the only solution. There are plenty of characters who are lacking soul and it's very dark inside. I am not one of them.

There is a light, and I want to share it with you. I remain, with a personal gratitude regardless of a grieving past for I have it chalked off as being a part of simply being alive. I also want to thank those who are dedicating their lives and public service at the Sheriff's office every day, and I wish that they can instill a part of their good spirit and their good deeds onto others, within the organization and outside. America needs good leaders. Lee County needs good leaders. It starts with the men and women in the trenches. It starts with you. America will eventually recover as it always has, and so I say, God Speed.



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## CHAPTER 2: THE CURSE EXTENDS TO NOT ONLY THOSE WHO ARE UNABLE TO PAY

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The financial institutions' and Wall Street's greed has not only affected those who have lost or who are going to lose their homes in foreclosure because they cannot afford to pay for their mortgage payment but it has also affected those who do not even own a home.

During the real estate boom which collapsed in 2007, the financially poor and, if you will, minorities, were given an opportunity to participate in what has ordinarily been reserved for an entirely separate socio-economic class. The lowest at the financial totem pole had been enabled to buy into the American Dream—a house, a home, or a castle—by what can best be described as an invention by Wall Street's savvy banking institution and a machinery, well lubricated by government and their officials who had sought election or re-election.

Financially engineered products have existed well before the expansion of our most recent boom and bust, but never before in history have those who hold the keys to the apparatus of securitization, along with their invention of, for instance, tranches and CDOs, placed an animal of the size of an elephant, into the not-so well reinforced living room floor of every person in America.

A large number of people, all across the United States, have been lulled into the “American Dream” under a pretense of political correctness. Candidates for political office or those seeking re-election have sold “minorities” and minority voters on the idea that they, too, are “equally” entitled to own a home. However, they obtained homes under a guise of political correctness, and they lost those homes because they couldn't afford them. Bankers knew about that. Representatives in government knew about that. The scheme was a scheme that was set up to fail from the beginning.

Perhaps one needs to ask the question if the scheme of securitization falls under the definition of a scheme which was formally introduced as the Ponzi Scheme or Pyramid Scheme. You may review these by definition, located in the Glossary of this book: Definition of a Ponzi Scheme; Definition of a Pyramid Scheme on Page. You decide.

One who is capable of fairly reasoning would want to believe that most people are just not capable of paying a mortgage payment when the surreal teaser rate of 1.99 percent begins to expire in the second or third year and when the rate then jumps to a rate of, say, 10 percent in the fourth year, thereby about doubling the mortgage payment.

Our so-called leaders—both in corporate industry as well as in government—knew or should have known that the scheme to put Americans into a home was a setup for failure. A person who is earning \$2,000 a month simply cannot pay a \$1,800 mortgage payment following the expiration of the 1.99 percent teaser rate in the third year. Surely, our bankers must have known. But they could not have cared because the risk was passed on to Wall Street investors who, in turn, were lied to by the very rating agencies whose obligation it was to fairly assess the credit worthiness of these home owners, most of which would have never received a home.

Certainly, a person who earns \$2,000 a month is capable of paying a mortgage payment of \$1,000 and do so for the first two years. But then, it's "game over."

Worse, minorities and others who were at a financial low before they had bought their homes are now worse off than they had been ever before. They now will likely, definitely never realize the American Dream. With their credit scores being so badly bruised, they will not be able to secure a low-interest mortgage again, not anytime soon.

Identified are four kinds of groups which existed in the United States during the real estate boom: Government, a limited number of powerful and rich people, a rather large group of people which are referred to as the "puppets;" and, as you might have guessed, the financially poor.

A large number of mortgage brokers and loan facilitators across America made a decent living levying legitimate as well as hidden fees by assisting the financially poor to obtain the American Dream they knew would endure only temporarily by giving loans to those who they knew could not afford to pay their mortgage payments in the third or fourth year following the expiration of the teaser rate. These brokers and facilitators began to accumulate wealth by purchasing real estate and reinvested their profits by flipping homes, which in turn drove up housing prices, artificially.

But also, these mortgage brokers were, in effect, the servants for a handful of master minds at the helms of major financial institutions who cooked up arguably legitimate financial tools which created new investment opportunities for Wall Street investors following an era—just prior to this most recent boom and bust—which can briefly be described as a crackdown by regulatory agencies to outlaw and/or better regulate the trading of convertible corporate bonds. These bonds, in their early days, had been sold to investors for huge profits, and trading practices regarding these bonds were sound and legitimate. Later, however, corporations and trading firms became greedy and began to take advantage of the public's perception that these bonds were safe investment vehicles. These bonds were then issued to the public as well as to foreign investors despite the fact that these firms knew that they would file bankruptcy, issuing the bonds in a hurry in anticipation of the filing of bankruptcy.

These brokers and facilitators alike, along with the American people, were being "played" by a small number of these masterminds, and they were being played for a huge stake at Wall Street's cash cow, amidst the government's blind eye or, if you will, amidst government's lowly paid and overworked regulatory staff, pale in comparison to what, say, the investment gurus at Lehman Brothers were earning.

They have been played because they, too, have purchased home after home, investment property after investment property, thereby creating a shortage of supply and artificially driving up home prices. They have contributed to their own demise. In the end, properties were incapable of being sold. The American economy was forced to her knees.

They, too, have gasped for air when it, one day, became known that their \$300,000 home was worth only about \$60,000 on the open market and if and only if there was a prospective buyer. In most cases there wasn't; there isn't.

However, unpunished are those at the helm of our governmental institutions who were sworn to office to uphold and to serve the American public. Unpunished are those at the helm of most corporate institutions who have implemented and misplaced what are best referred to as Einstein-like engineered financial tools which had the effect of artificially causing the rise, the unsustainable growth, and consequential fall of our properties' values.

Unpunished are they because they knew that the economy would collapse. They knew that it was only a matter of time. This, for no mom and pop bank would, in their right mind, lend \$300,000 to a person who cannot repay, period.

These brokers and facilitators are the puppets because they had believed that they could keep their newly found riches. They, too, are now "upside down." Their properties are rendered incapable of being sold, given that their mortgage obligation is more than the price which can be fetched in an arms-length transaction.

The people of the United States as well as the global community have been screwed, much arising out of uncontrolled greed.



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## CHAPTER 3: IS FLORIDA BEHIND THE PACK OR LEADING THE PACK?

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In certain States, judges have already stated that, where certain conditions exist, the parties who are claiming to have a legal interest in home owners' properties do not actually have a legal interest to sue.

This book will examine these conditions and the courts' orders which have held in favor of our home owners. This book will provide those property owners who live outside of those States in which Courts have ruled favorably with an overview of what they can and cannot do. Property owners will be enabled to understand what the documents in their possession, including the all-so important promissory note, really mean and how they can be used as legal weapons against the parties who are claiming to have a legal interest in their properties. Property owners will also be enabled to understand what the documents mean which are not in their possession, including those which the suing parties fail to file with the courts for a given and self-serving interest, including, for example, the (600-plus to 2000 pages) Pooling and Servicing Agreement. Property owners will be able to link these documents with the strategies identified in this book and determine which course of action is best suited for the home owner's factual situation.

Home owners in America should be encouraged because about every month or so new and important case law hits the public arena. On the downside, this may not be the case that will enable you to control the judge with legal precedent because this case law may have held that certain favorable conditions exist in the State of California but not where you reside, say, in Florida. Time will improve all of our lives. I anticipate that people will be able to obtain their property free and clear regardless of whether they live in a currently deemed "favor less" or "favor able" State. Of course, a suggested course of action is to know about all of the available strategies, regardless of whether they are currently available in your State. At some future point, there will be one big blast as banking institutions will face a judge who is going to be well informed about the institutions' schemes. And, these schemes stink in all directions.

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## CHAPTER 4: WHAT SECURITIZATION AND TAX BENEFITS MEAN TO YOU

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In cases where mortgages and their respective promissory notes have been securitized, the suing party has essentially created a waiver to sue at the instant moment the mortgage and the note was securitized. This waiver is just that: The suing party is not entitled to bring a foreclosure action against the home owner. In order to securitize thousands and thousands of mortgages, certain legal structures had to be created along with legal documents in support of these structures. Those who created legal structures in order to securitize mortgages cannot bring a legal claim of foreclosure against home owners in America. In doing so, these financial firms had to agree or they inadvertently agreed to waive their right to sue.

Additionally, and, perhaps, more importantly, the suing party has participated in a process in which certain tax benefits were obtained and that, on the basis of those conditions, the suing party has forfeited any of its arguably otherwise available legal right to sue. In short, the property owner or his attorney is capable of making the legal argument that the suing party has participated in the IRS tax benefit or REMIC and that the property is to be obtained free and clear of any mortgage encumbrance as a result thereof. These financial firms have created legal vehicles and documents which have allowed them to reap certain financial benefits, both by securitizing mortgages and also by voluntarily and glad-fully submitting to IRS tax havens.



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## CHAPTER 5: KNOWING THE RULES CAN HELP YOU TO GET YOUR HOME FREE AND CLEAR

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The Florida Rules of Civil Procedure, the Florida Rules of Appellate Procedure, and the Florida Rules of Evidence can help you to get your home free and clear. Ditto as to the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence, depending on whether property owners pursue their legal interests in a State or Federal court.

This author believes that in most, if not all, cases, the suing party will self-create fatal conditions during the process of litigation. This book will examine these conditions.

Knowing the rules can help you get your home free and clear. Here's what Frederick Graves says about the rules:

“Arguing with judges is like arguing with baseball umpires. You better know the rules and how to use them! Did you know every major league baseball park has its own "Ground Rules", and there are "Universal Ground Rules" that apply to all major league parks? Here are a few rules from the Official MLB Rulebook: A player is not permitted to step or go into a dugout to make a catch. A player is permitted to reach into a dugout to make a catch. If a player makes a catch outside the dugout and his momentum carries him into the dugout, the catch is allowed as long as the player does not fall in the dugout. Seems simple enough, doesn't it? But, what if the players or the coach don't know the rules? What happens then? Will it do any good at all to argue with the umpire? Probably not! And all the %#\$@&\* will only get you thrown out of the park and possibly grounded for the season! To argue successfully with a baseball umpire or a judge in a lawsuit, you must know how to use the rules! Knowing the rules is not enough. You must know how to use the rules! It's the bottom of the ninth. Two down. Batter at the plate. The count is three and two. The batter pops a high foul. You push back your catcher's mask and dash toward the dugout to make the catch. The ball hits your glove and at that precise instant you trip on the rim of the dugout and fall in. You scramble



to your feet, climb out of the dugout, ball in your upraised hand and triumphant grin on your face. Teammates cheer. Fans roar fanatic approval from the stands. But, the scornful look on the umpire's face and his raspy voice quickly erase your victorious joy. "Foul Ball!" Not an out? "But, I caught the ball, ump!" The player strides purposely toward the umpire, waving a fist, yelling obscenities, and spitting (of course). Fast behind is the coach, marching menacingly toward the umpire, cap shoved back, both fists in the air, also shouting nasties and accusing the umpire of needing a new pair of glasses. The umpire stands firmly behind the plate, hands planted on his hips, and waits for the verbal onslaught. "I caught the foul ball. It's an out!" "It's a foul ball. Period!" the umpire insists. "You must be blind, Ump! It's an out! Game's over. We win! Didn't you see me catch the ball? Jeeter couldn't do any better!" "Maybe not," the umpire insists, "but Jeeter knows the ground rules! You fell in the dugout. Catch doesn't count. Get back behind the plate where you belong!" "But. But. But."

"Claiming you're pro se and should therefore be allowed to play by different rules doesn't count! Either know how to use the rules or lose!"

"Learn how to use the official rules ... or lose." It might be the "play of the season" to you. You might show up with all kinds of documents and things you think are "admissible evidence". You might know the law of the case is on your side. But! If you don't know how to use the rules of evidence and the rules of procedure to argue effectively with the judge ... you lose! Many judges and lawyers don't know the rules! This works to your advantage if you've studied my course!"

"There will be times when you'll need to argue with the judge about this or that, but please believe what I learned these past 24 years since I started practicing law as a licensed attorney, unless you know the rules and how to argue the rules effectively, you have no more chance of changing a judge's ruling than the catcher who snagged a foul ball in mid-air while falling into the dugout!"

"The Rules rule! End of story! I should add that the rules do favor the good guy, the side that should win. But, if you don't know the rules and how to argue them effectively with a judge, you have no chance of winning in a contest where the other side knows the rules better than you do. The judge isn't supposed to help you, any more than an umpire should favor either baseball team."

"A host of wannabe legal gurus are infesting the internet and barbershops with half-baked schemes that sound too good to be true . . . You've probably heard people promoting ideas that you can win by challenging a

judge's oath of office, claiming a UCC lien in the lender's collateral, insisting banks don't loan "real money", or trying to be "above the law" because you denied your citizenship or claim you're a "sovereign human being". Sounds like an easy way to win ... and it might work in small claims or traffic court ... but it will not carry the day in any kind of serious lawsuit or criminal case.”

“You are not above the law. Challenging a judge's oath is not going to win your lawsuit. You cannot defeat a collateral lien of a lender by claiming a lien in your own property! And, if you think you can win by arguing banks don't loan "real money", you may end up defending yourself in sanity proceedings seeking to have you committed to an asylum.”

“The key to winning is knowing how to use the rules! Silver-bullet methods offered by wannabe legal gurus will only get you deeper into trouble! Why not learn how to use the rules for yourself? The Rules of Evidence. The Rules of Procedure. That's all there is to it. The rules of court are actually simpler than the official rules of major league baseball ... believe it or not! Major league baseball rules take up about 125 pages, while the most important rules of court are less than 50!”

“Force judges to enforce the rules, instead of allowing the lawyer on the other side twist the law against you! You cannot hope to win until you know how to use the rules to control judges and lawyers (including your own, if you have one)!”

“Know the rules and force everyone to play by them! Know how to draft proper pleadings, know how to get admissible evidence in the court's record, know how to keep the other side from getting their evidence in, know how to move the court to enter orders favorable to your cause.”



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## CHAPTER 6: ABOUT YOUR RIGHTS IN FEDERAL COURT

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Not every State's court has as of yet legally recognized that those who are claiming to have a legal interest in your property have, by their conduct and action, agreed to waive their right to sue home owners.

The suing parties most certainly also know that the legal waiver is not yet available to home owners in every State. They also know that most home owners do not know about their legal rights. Home owners who are not aware of their legal rights will lose their properties. However, homes need not be lost. Even home owners who are located in States which have not yet legally recognized that home owners cannot be sued because the respective financial entities have waived their right to sue, and property owners do not need to lose their homes because they can bring legal claims for Federal violations which had been committed against the home owners at the closing table. These violations are not necessarily connected to the violations in terms of the process of securitization, but they can be used so as to either off-set damages. Even in cases where it turns out that the so-called lender had followed the law—the author doubts that this is the case—the home owner will have remained in his castle for up to a few years. The legal process is slow. The procedure in which the suing party is made to provide documents in a legal proceeding known as discovery can take many, many months, and will delay a legal action regardless of who is right and who is wrong.

Here, the home owner may want to file a legal claim for one or several of Federal violations and do so in Federal court, striking a legal blow to the suing party.

In a worst case scenario, the countersuit for Federal violations will delay the home owner's eviction. In a good case scenario, the home owner will have delayed his or her case until the time at which the home owner's respective State has finally recognized the suing party's waiver to sue, and the home owner can obtain his or her home free and clear at that point. If home owners have not already won their cases by the time the Federal lawsuits are adjudicated, they can obtain their homes free and clear at the time at which the waiver can be enforced in a court of law.

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## CHAPTER 7: YOU DID NOT LIE BUT THE LOAN FACILITATOR DID

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Property owners may want to engage the suing party by pursuing a claim for deceiving you, the home owner. What you might know is that many lenders did not ask, for example, how much money a prospective borrower was earning. They even instructed home owners to just “state” their income, on paper, without further verification. Prospective home owner never had to provide any documentation in order to prove their income.

How was it possible that a person earning \$20,000 a year could afford a \$250,000 house? The answer is that lenders were willing to give them a loan for that \$250,000 home because it was not the lender’s money. It was somebody else’s money. Additionally, any risk was passed on to Wall Street investors by quickly selling off the contractual obligation and the home owner’s promise to repay to an entity, such as Leman Brothers, who, in turn securitized thousands of those mortgages, selling them off to Wall Street investors, a.k.a. certificate holders.

Lenders knew that people could not afford to pay their mortgage payments after the expiration of their exotic or Adjustable Rate Mortgage, a.k.a., ARM’s, initial teaser percentage rate in the second or third year. You also may want to recall that it took 30 days to get approved for a loan about twenty years ago but only about 10 minutes to get approved for a loan after the year 2000. There is a reason for just about anything. Now you know: the risk wasn’t theirs’. The money which you, the home owner, received for the purchase of your home and which you believed was the money which came from a lender or the entity which sat across from you at the closing table never was *that* entity’s money. It was someone else’s money.

Ultimately, it was our American taxpayers who were paying for that risk when the housing market and our American economy collapsed in 2007. Our government disingenuously labeled A.I.G., i.e., the firm which insured the securitized mortgages, as “too big to fail,” sucking the air out of taxpayer’s windpipes.

What follows is an excerpt of *Colossal Failure of Common Sense*: “The lawyers were on the march, with lawsuits flying around like artillery shells all over the country as people swore they were sold mortgages did not understand. They were confused by the interest rates and the closing costs. There were allegations of unfair and discriminatory loans, reckless and

predatory lending, words like deception, high pressure, irresponsible and falsified were sworn before judges. And then there were the accusations of companies deliberately altering the income and employment statements of applicants. In one court room, a plaintiff swore . . . that the mortgage broker had placed \$5,000 in her bank account, photo-copied the statement, and then removed the money in order to qualify her for a loan. There were continued allegations of overstatement of assets. There were legal actions, class actions, rear-guard actions and chain reactions” (Colossal Failure of Common Sense, CD 10, Track 6).



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## CHAPTER 8: WHAT OFF-SETTING CAN DO FOR YOU AND THE ISSUE OF TIME

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Most home owners fail to go to court and claim a defense, any defense at all. In a scenario that is played out day-in and day-out in a court room all across America, the suing party simply asserts that the home owner owes a certain amount of money.

They additionally claim that they are entitled to damages for any interests and fees, caused by the home owners' failure to pay the mortgage payment. However, home owners are entitled to have the suing party's alleged damages mitigated. This is typically accomplished by legally forcing the suing party to produce all of their documentation which clearly demonstrates and itemizes with specificity the amounts the suing party is claiming the property owner owes.

A bright attorney will rigidly adhere to the rules of the court, forcing the opponent to provide, for instance, an accounting ledger. He or she will also move the court to subpoena important witnesses for cross examination.

This process means that the suing party has to produce all of the documents which clearly show, pursuant to evidence rules that home owners owe the damages the suing party is claiming they owe. And, the suing party has to show that the home owner owes the contractual mortgage obligation to the suing party and not some other entity.

Our legal process also empowers those who are willing to take the time to take up the issue in a court of law to produce any such document pursuant to evidence rules, which require that the suing party shows not only that these documents legitimately exist but also that these documents had better been kept by a record custodian, in a safe manner, in a place at which these and related documents are typically kept during the course of business, according to long-standing case law.

In the event that the suing party fails to prove up any of the requirements, the alleged document fails to enter into the court as a piece of usable evidence, leaving the home owner with a partial, if not complete, but tremendously important victory. Forcing legally the suing party to provide these documents pursuant to evidence rules has additional benefits. One is that the homeowner's insistence that the suing party and the local court follow evidence rules to the tooth and nail will delay the litigation and do so legally and justifiably pursuant to law. Litigation may be delayed for many, many months, even years.

Additionally, a home owner may benefit from this delay because the suing parties are suing thousands and thousands of home owners, and that's taking up a chunk of their time as well. Foreclosure courts are completely and utterly swamped. I couldn't have said it any better. These suing parties will not place a lot of time into one single case in which the home owner is clever enough to make an attempt to initiate a legitimate fight.

The suing parties will not spend a lot of time with a home owner who is going to put up a legitimate resistance because the suing parties can so easily "walk all over" thousands and thousands of other home owners who are gullible and clueless. Why should the suing parties spend two, three, or more hours with you, worry about evidence rules, worry about the rules of civil procedure, and spend numerous hours in order to prepare their witnesses for cross-examination when they can get thousands of home owners who have not even heard about the rules of evidence in and out of the court room in less than 20 seconds, at about \$500 a "pop."

By legally forcing the suing party to provide these documents, home owners might be able to reduce the amount of money they allegedly owe. In some cases that I am aware of, home owners also have sent the loan servicer thousands of dollars worth the payments and the servicing agent has refused to properly credit the property owner's account. Capitalize on this refusal, and you will be in for a positive surprise.



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## CHAPTER 9: A SAD REALITY: MANY ATTORNEYS ARE INCOMPETENT

[The Middle Ages]

[Attorney Graves about attorneys and law school]

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Attorneys are supposedly trained and solidly grounded in the tasks of authenticating documents, allowing only originals to be entered as evidence and know to follow the rules of evidence. The reality is that, according to Frederick Graves, J.D., author of the *Jursidictionary*, law schools do not teach law students about authentication [FN-1405]. Having sat in during several court room presentations, it is my experience that the rules are not being followed in many situations, and I therefore agree with Graves' observations.

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[FN-1405] In an email newsletter on August 9, 2010, Graves wrote:

“You won't believe me, but most lawyers (and nearly all law school professors) don't have a clue what it takes to win in the real world. That's right! Law school teaches all sorts of things ... but not how to control judges nor how to overcome scheming tricks of crooked lawyers! In 1985 I graduated from Stetson College of Law, the undisputed leader in litigation skills. Stetson wins national trial competitions. Google "national litigation competition Stetson" and see for yourself. But, national trial competitions aren't the real world, and professors at Stetson were too politically correct to teach us how to control judges and overcome scheming tricks of crooked lawyers. What we learned in law school was legal theory and not much practical knowledge! But, theory doesn't win lawsuits. Most lawyers never learn what *Jursidictionary* makes so easy-to-learn. People have been telling me since I started *Jursidictionary* in 1997 that, "Your course should be required in first year law school." But, of course, that's not likely to happen, because what *Jursidictionary* shows you isn't politically correct!”



“I teach you how to control corrupt judges and overcome crooked lawyers and their sneaky tricks! There's a reason why lawyer jokes proliferate. There's a reason why so many people complain about high-minded, high-handed judges who ignore the law. Political correctness prevents justice all-too-often! Winning lawsuits is a brutal, no-holds-barred, axe fight! Jurisdictionary is your axe!”

“Never expect a judge to help you. That's not a judge's job! Judges aren't supposed to help either side. Yet, too often they are biased, and you must know how to control them and put a stop to your opponent's sneaky tricks! Otherwise, you lose!”

“Winners know how to fight to win! Losers believe internet fables. Losers get their legal education at the barbershop or on websites or expensive weekend seminars run by people who never practiced law, never went to law school, and don't know mud from sand about rules or how to use them to control judges.”

“Control judges! Save legal fees! Defeat crooked lawyers!”

“Force judges to enforce the rules, instead of allowing the lawyer on the other side twist the law against you! You cannot win if you don't know how to control the judge and all the lawyers (including your own lawyer, if you can afford to pay one to go to court for you)!”

“Know the rules and how to force everyone to obey! Know how to draft proper pleadings, how to get your own evidence in the court's record, how to keep the other side from getting their evidence in, how to move the court to enter orders favorable to your cause, and how to use your Jurisdictionary legal know-how and case-winning strategies to control the judge and win your case!”

Here, Graves is talking about procedural issues, the rules of civil procedures, the rules of evidence. I also believe that, concerning the current housing crisis, many attorneys are not capable of properly addressing the relevant foreclosure issues. Some attorneys, including those who claim to specialize in real estate law, have shown that they are not capable of helping our property owners because, in part, they do not understand the complexities involving the securitization of mortgages.

Further, the suing parties often go as far as making the legal argument that, concerning the securitized mortgages, any relevant documents are trade secrets and/or that any relevant information contained in legal entities called as trusts cannot be revealed and is protected by law. You might be aware that, for instance, Coca Cola is guarding its soda formula and that it has made the claim that it, a trade secret, cannot be revealed. Hardly any reasonable person would hold otherwise. But, the claim that any business concerning your mortgaged home is a trade secret is a disingenuous approach.

Many real estate attorneys do not understand the complex legal entities which had been created together with the complex legal documents which had been filed with the Securities and Exchange Commission (SEC), all in an attempt to manipulate the American public and in order to create an appearance that their lawsuit is legitimate.

Many of these attorneys are simply not trained to know about Trusts. For instance, they do not understand that a trust appearing to be a trust is, many times, not a trust at all but, simply, a firm registered as a corporation, e.g., in Delaware, with the word “trust” attached to it: e.g., “John Smith Bank Trust Company.”

Generally, if you see the word “Trust” or “Trust Company” appear in the caption of a foreclosure complaint, it’s a red flag and a big bonus point for you.

Also, if you have an attorney who understands that documents which the suing party purports exist need to be properly authenticated, you will have the upper hand in the court room. You will also be well served by knowing, regardless of whether your litigation is a foreclosure action or any other action of law, about which documents or evidence to include as well as to exclude and introduce into the record or, respectively, keep out. The suing party will attempt to keep certain documents out, out from your sight. It is, however, in the home owner’s best interest to persuade the court to keep the documents which the suing party wants to have excluded *included*.

I anticipate that the attorneys who are hired by these institutions, willing to sweep your property from under your feet in less than twenty or forty seconds, are quite capable. I have observed these foreclosure actions in Lee County, and I now know that the suing parties’ attorneys do not follow the rules they are supposed to follow. The reality is that they don’t need to follow any of the rules since they know that you, without an attorney, are clueless. They know that you don’t know the rules which are intended to protect you. So, they do not see a need to follow them.

As an analogy, if you were to play the game of monopoly and were clueless about the rules of the game, your playmate could, if she wanted to, teach you the rules. Worse, she could instruct you about her version of the game’s rules. You then blindly follow your playmate’s instructions because you believe that your playmate will treat you fairly. In court, you have an expectation that you will be treated fairly. However, if you believe this will happen, you are indeed a fool!

The opposing attorney will bluntly walk all over the home owner while the judge looks on. To be fair, a judge, generally, is not in a position to “help” the home owner because of the United States’ adversarial system. In other words, the home owner is the one who has to make the proper requests—or, as it’s known, to move the court in order to get the court to do something—at the proper time in order to have his or her rights enforced. The judge cannot do it for him or her. The judge will not and/or cannot protect you. There appears to be a fine line. The judge may be inclined to assist you since you likely will not know about any of the procedural requirements, but the judge is prohibited from taking any sides. Any act of assistance might be construed, on an appeal, to constitute bias or preferential treatment.

On the other hand, in the interest of justice, the judge should guide a pro se litigant. The opposing attorney knows (or should know) all of the procedural moves. You had better, too, if you want to succeed. Opposing counsels will be one step ahead of your procedural steps since that is what they learned in law school. Sometimes, the opposing attorney is an accomplished board certified trial attorney. If so, be aware.

Generally, if you need to hire an attorney, you might want to hire a board certified trial attorney. The reason why you should hire the board certified trial attorney isn't necessarily because you want an attorney so that he or she can excel during trial and sway the jury. You might want to hire this type of attorney because you want to motivate the opposing party to settle the case. Going to trial is, generally, a risky proposition even from a position of sheer strength. It's especially a dud, with incompetent counsel [FN-2238]. If you hire a board certified attorney, the opposing party's lawyer will know or should know that your attorney has successfully handled a required number of trials. You are then communicating from a stronger position in which to negotiate or settle. In other words, if you speak from a position of strength, you might not need to go to trial. If you are situated in a position of weakness, you will be "played" and lose.

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[FN-2238] In Texas, one court stated that the attorney on the case had failed to "introduce into evidence" the litigant's "sale contract," also stating that the attorney had the "contract with her at the hearing" (Order, page 3) [FN-1652]. This attorney should have been fired if not held liable for malpractice. Attorneys make these types of mistakes and more.

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[FN-1652] The Texas Court of Appeals for the Second District of Texas in Fort Worth, Texas, Mortgage Electronic Registration Systems, As Nominee for Lender and Lender's Successors and Assigns v. Kim Young et al., Case No. 2-08-088-CV, Order delivered on June 4, 2009.

Judges, sometimes, do lend a hand, but, in a rocket docket foreclosure court, don't hold your breath for this to happen. For the most part, I have observed only the worst of treatments in a foreclosure court.

You are automatically guilty the minute you step into the foreclosure court room. The judge just wants to know if you live in the house or not. If you do, you get 60 days in order to move out. If you don't, you have 30 days in order to vacate the property. He may even ask you if there are any reasons why you should not lose your home. Your answer might be a compelling reason to you, but having a job or having six children to feed is not a *legal* reason to prevent the foreclosure, and the judge will politely tell you. This dialogue takes twenty seconds but no longer than forty. You are the cattle which is going to get a steel rod imprinted into your forehead, then escorted out the door, then served for dinner, proverbially, of course. That's twenty or forty seconds. In one case which I have observed, a gentleman was escorted out the door by the bailiff only because he spoke when he was not supposed to speak, attempting to assert his Fourteenth Amendment Equal Protection and Due Process rights. The judge cared less; he was annoyed and ruled in favor of the opposing party only because he was annoyed and not because of any of the merits of the case. In other word, just because the litigant who was not represented by an attorney spoke at the wrong time and annoyed the judge, the home owner lost his house.

This kind of treatment, of course, happened in England during the Middle Ages, but it also happens here in Lee County, Florida, in our modern age, in 2010.



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## CHAPTER 10: WHETHER YOU SHOULD PROCEED WITHOUT AN ATTORNEY AND REPRESENT YOURSELF IN COURT

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Learning the rules of the court, the Florida Rules of Civil Procedure, the Florida Rules of Appellate Procedure, the Florida Rules of Evidence, or any other rule, is quite a bit different than learning how to play Monopoly or poker. Yet, the analogy is proper.

You will not enjoy a good game if you do not know how to proceed. Even your best friends won't allow it. Likewise, you cannot become a participant in a system which generally disfavors litigants who are proceeding without an attorney if you do not know and understand these rules. To win, you must fight. To fight, you must learn. You need to equip yourself with the tools of the trade, i.e., the rules of civil procedure and the rules of evidence, and so forth. To best use the tools and to have them ready and loaded, you must practice.

Winning a lawsuit is not about just the merits of the case, i.e., say, whether or not there was unlawful touching in a sexual harassment scenario in a work place. It's about the merits of the case plus knowing all of the procedural steps and knowing them well. You also must know how to object for only a proper objection can protect you on an appeal. This is what also controls the judge, and he or she knows that if you know how to object you might appeal in the event of judicial error or bias.



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## CHAPTER 11: WHAT TO EXPECT IN A CIRCUIT COURT FORECLOSURE PROCEEDING ON A TYPICAL WEEK-DAY

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In Lee County, Florida, alone, about 200 home owners in foreclosure are processed in the morning and another 200 in the afternoon. The numbers are staggering. Moreover, there can be had very little, if any justice.

Few, if any, of those home owners who do bother to show up in court are getting a fair hearing. They are deprived of our United States Constitution Fourteenth Amendment's Procedural Due Process Clause as well as the Fourteenth Amendment's Equal Protection Clause. Every week-day. All day. Every week. Every month. All year. How much longer?

I will, in this book, include a dialogue which actually took place here in Lee County in the month of December of 2009. The court reporter was present and transcribed the spoken words. I will include these words, as they were spoken by the judge and by the home owner defendant, verbatim. See for yourself. Learn what your court room will and will not do for you.

You might want to protest this conduct or complain. Call for reform. In this case the home owner acted for himself, without an attorney, in his capacity as a Pro Se Counsel. I happened to be present on that day, and I was disgusted by the treatment of our people in an American court room.

Based on this one incident, and on other such similar incidents observed prior to that day on at least four separate occasions in Lee County, I believe that our rights are eroding and, on the basis of what I have missed so far, they have been eroding without my knowledge.

We must resolve these issues and contact our legislatures and demand change. Our nation which supposedly believes in the value of civil order is riddled with judges who idly stand by while our property owners are being stripped of their most basic rights, - a fair hearing and what is known as due process.

American home owners have become a laughing stock, right here, in our local community, and in your local court room. This is happening all over the United States.

I am afraid that you might only be able to fully appreciate the seriousness of these violations if you, somehow, are in a position to have or obtain knowledge about what a fair

hearing ought to be and what it is not. You will then find that our people are treated as second-class, subordinate people, much like cattle, but addressed as Sir or Ma'am.

I believe that many of us have come far astray in our own understanding of what exactly it is that our founding fathers have given us, as a tremendously valuable gift.

I have personally observed that judges do not enforce the rules of the law. For example, they tolerate attorneys who act in a court of law as if they were witnesses, despite the fact that the rules do not allow it. These judges allow the opposing attorneys to speak in an attempt to assert the truth and validity of the documents presented in court, despite the fact that, by the rules, attorneys are not allowed to testify. See [FN-2310].

These judges allow the attorneys to make legal arguments on the basis of documents which had not even been formally and properly admitted into evidence. These judges allow these attorneys to speak as if they had first-hand knowledge of the events, and they do not require the attorneys to give statements of their knowledge, if any, under oath.

During a foreclosure action, I have also observed one judge who has stated that on the basis of the evidence before him everything appeared to be in order and that the home owner, therefore, had to vacate the home. Only minutes later, the same judge stated that he was not familiar with the case. This, in the presence of the court reporter who had recorded every word.

I have also observed that the same judge, having proclaimed that he was unfamiliar with the home owner's case, was talking so quietly and/or was nearly whispering to the opposing counsel about the case without giving the home owner (and Pro Se counsel) the opportunity to be a part of the conversation. This home owner was blatantly deprived of due process and equal protection under the law. When the home owner courageously objected several times in order to let the judge know that this whispering was causing the home owner undue prejudice—the home owner even properly objected and did so according to the rules on at least one occasion—the home owner was told that the judge needed to be updated with the case. After that, following another objection to the Unconstitutional treatment, the home owner was escorted out of the court room, treated like a second-class citizen. In the Dark Ages, he would have been slaughtered the next day or hung. Here, in 2009, he was just being deprived of his property. Just.



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## CHAPTER 12: A CLAIM FOR FRAUD IS DISFAVORED BY THE COURTS

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Property owners and, generally, those who are seeking to file a legal claim in a court of law also need to know that attorneys, in some cases, are not willing to do certain things which a party who is proceeding without an attorney might otherwise be capable or willing of doing.

A claim for fraud is disfavored by the courts, but a pro se litigant has a better chance of asserting it. In some instances, a home owner might want to assert a claim of fraud. It just depends on the case. Be aware, however, that some attorneys are not going to allege a cause of action for fraud because this kind of claim requires them to state with specificity all of the legal elements required and do so before they have an opportunity to discover all of the truth during discovery.

Attorneys may not be willing to assert a claim of fraud both because it is difficult—but not impossible—to prove the elements of fraud and because they fear that they may jeopardize their license to practice law. This fear might be warranted, given the Bar’s oversight and desire to protect and serve its brotherhood of which attorneys and judges are members.

Most attorneys may also not be willing to pursue a legal claim of fraud because they do not want to expose their fellow attorneys with whom they share the court room, day-in and day-out.

On the other hand, if you are capable of proceeding without the assistance of an attorney, Pro Se, or, for yourself, you can pursue a legal claim of fraud, and this book will provide the case law which has discussed the issues pertaining thereto.

A claim of fraud would be most appropriate in cases in which the suing parties have fabricated documents in order to deceive you and, well, also the judge. They have the guts to actually file these documents in a court of law. I have, for instance, pointed out earlier that public notaries have notarized signatures in one State where the parties signing a given document were located, at the time of the signing, in another State.

In any event, most attorneys are not willing to expose the opposing attorney in a court of law, and that’s that.

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## CHAPTER 13: HOME OWNERS CAN DELAY THEIR LITIGATION BY FILING BANKRUPTCY

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Contrary to what you are being told by bankruptcy attorneys, filing bankruptcy does not save your home. It only delays the eventual loss of your home. In an internet post in February 2007, attorney Frederick Graves states that “bankruptcy is almost never a good idea.”

While filing bankruptcy may not be what you want and need, you may want to resort to filing bankruptcy as a strategic legal tool in certain cases and in certain cases only. You may use it in order to stall certain legal dilemmas. For example, if your real estate law attorney has jeopardized your case, and the judge tells you that you have 30 or 60 days to vacate your home, you may want to file bankruptcy in order to halt, temporarily and as a measure of last resort, the immediate and impending sale of your property.

The actual act of filing bankruptcy is a quick formality. Best of all, once filed, a property owner may choose to simply not follow through with the suit. At that point, the court will dismiss the bankruptcy case. Be aware that, at that point, the foreclosure lawsuit continues, and that means that you better have a plan B, or else.

You might view the filing of bankruptcy as a temporary solution, in order to protect your due process rights. Be aware that you will eventually lose your home if you do not take additional action.





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## CHAPTER 14: MODIFYING A MORTGAGE MIGHT BE A BAD IDEA

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Modifying a loan also does not guarantee that your mortgage payment will be lowered by an amount sufficient in order to put you in a position to keep up with any future mortgage payments. Those who you believe are inclined to modify your existing mortgage are actually in the least interested in modifying your mortgage because the act of modifying will expose those involved in the securitization of your mortgage to legal liability. Those who have reaped huge profits by securitizing mortgages are concerned that they will be sued by the certificate holders—the investors at Wall Street—who have, in reliance on false promises, purchased bonds consisting of thousands of mortgages, including yours. Those who pretend to want to modify your existing mortgage are not likely to modify your mortgage because an action of foreclosure and subsequent sale of your home is what they need in order to wash their hands clean and not a loan modification.

It's simply an accounting issue: They need your mortgage obligation off their accounting books. They don't care if they sell your home for \$50, \$3,000, or \$600. You need to know that "kicking" you out of your home is the only legal strategy available to them; else, they fear they might get sued by thousands and thousands of Wall Street investors. And they already have.

Also know that modifying your mortgage can worsen your financial position. Many home owners I have talked to have told me that they have paid thousands of Dollars to those who have promised them a loan modification. In the end, the mortgage was only lowered by an insignificant amount, say, \$50. Again, these folks are not interested in modifying your mortgage. They are not your buddies, and they don't care about you.

They also know that you will walk away from your home because a \$50 reduction in your mortgage payment will not help you, not in any way, shape or form. It cannot help you and they know it cannot because the scheme which was set up to encourage the American people to buy a home with a monthly mortgage payment of, say, \$800, in the first two years and a mortgage payment of, say, \$1,200 thereafter with a bread-winner earning \$1,500 per month is not going to make you a proud home owner now by lowering your payment to \$1,150 from \$1,200 while you are earning the same or even less as Americans are losing their jobs left and right. You might also say that this scheme—the one in which your payment is lowered to

\$1,150—is just another form to take your money, and you might be able to bring a legal action against them on such basis.

These firms “play” with you because they can. They know that you are hoping to knock off at least \$300 or more and that you are desperate. They know more than you do. They also play the “call-us-and-we-will-see-if-you-qualify-for-a-loan-modification” public relations ploy because it makes them look good. It creates an appearance that “banks” work with people, and they know that the media and even some judges buy into this marketing ploy. They also get to collect just a little bit more of that green stuff from you, while they can.



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## CHAPTER 15.10: GOVERNMENT WILL NOT PROTECT YOU

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This book is not about government, but, given the proper time, I may be inclined to talk about how interest rates affect the economic market. Indeed, government indeed has failed to protect you. It always has. It always will. In essence, government—if you really must know—is created and influenced by corporations which pump millions of Dollar into governmental oversight. People get elected into governmental positions by airing political campaign ads on your television set in order to get you to vote for them. These advertisements are, generally, not paid by you, the individual, but by corporations’ campaign contributions. These corporations have armies of lobbyists who load up those willing to scrub backs with money. Of course, individuals also contribute to a candidate’s campaign coffer, but the results are pale in comparison.

Meanwhile, the good guys—these are often politicians who run as independent candidates, without party affiliation—struggle as the campaign contributions they get amount to a small and less significant amount of money. Often, if not always, they are out-powered in terms of financial clout, keeping them from influencing an election. Their commercials are far and few in between, unsupported by a major party.

Many people have also been brainwashed to believe that less government is good. While, arguably, smaller government is better, good government is not about big government or small government, but, as the word “good” implies, it’s about good government. Good government does what benefits a large number of people and what benefits, generally, all people regardless of whether they are poor or rich or whether they are a corporate firm or a small business enterprise. Privately held companies are big or they are small. They do “good” or they do “bad.” I prefer good. I prefer that big companies do “good,” and I prefer that small businesses do “good.” It’s about the word “good.” It’s not about size. Businesses, regardless of whether they are big or small, are capable of earning big profits. When they do, they are producing what other people need to have and need to consume. I prefer that they produce what other people need and that they do not produce any other artificially created amount or demand, stimulated by governmental policy or interests motivated by interest groups. Now, that’s big. That’s too big. That’s too big for me, and that’s not “good.” It’s also unethical. So, to be sure, big or small is not about “good.” Only “good” is good. I want

good government.

I classify “good” government as being that which embodies a person of character and one who will speak out regardless of whether his action will upset the status quo, and, thirdly, a person who takes the position that it will matter less whether he or she gets re-elected but more whether what he is doing is really about the people he or she has promised to serve. Many people may be qualified to perform the tasks which a certain job requires. Only a few, however, have the integrity and character to perform their job duties in mind that the job is not about them but for the people. Those who get elected and run for re-election often fill the airwaves with outright lies and clever phrases in order to get the “little people” to vote for them, the very ads of which are bought by the big corporations in the form of campaign contributions. Those who get elected know that they cannot get re-elected by implementing policies which are just and fair to all of the people. It has been since the beginning of all time that there has existed and will exist two classes, the one which dominates and the one which is dominated. In modern times, the one class which wants to lead is usually the one which grows large corporations and employs others. The one class which is less inclined to lead or possess material goods is the one which is employed by those who want to employ and/or govern. As an unattended and unflattering consequence, the result is, has been, and always will be, that the employing class is stronger than the other, and it is they who finance our politicians and not the large mass of the people. Rightly, it is the mass of the people who should elect their governmental officials, but they, in reality, do not. The people who should elect their governmental officials only elect them—and they actually do elect them—after they are being told whom to elect and the television commercials, paid for by the employing class, is the vehicle which suggests to the employed class whom to elect. The employed class believes it is them who elect the government officials, but it is to the contrary. It’s a deception at best. In some cases, the little and unknown but “good” guy’s campaign for political office might even be suppressed, say, by the media for it too, is a part of the regime, and it must play well in order to receive certain perks, be they governmental or private.

Politicians—at least most—are certainly willing to please the large corporations. They do so because they receive perks from them. The actions of politicians or other leaders, including any appointed czars—are what dictate the course of our economy to the extent that these actions interfere with the open and free market. For instance, through Federal Chairman Allan Greenspan’s aggressive campaign, interest rates dropped 13 times between May 2000 and June 2003, from 6.5 percent to 1 percent, with eleven of the rate decreases taking place in 2001 alone. This aggressive campaign had the effect of encouraging mortgage brokers to encourage every person possible to purchase a home. Suddenly, homes were being made affordable to nearly every American. Mortgage brokers earned huge fees in the process. Greenspan’s aggressive campaign could not be sustained—where else and how low could a rate of 1 percent go?—and interest rates had to rise again. The rising interest rate had the effect of forcing home owners out of their homes. At a time when home owners needed to refinance the most as their teaser rate were expiring, they could not. The new interest rates had shot up, causing our home owners to leave their homes. Homes again were in ample supply. Only, at this time, they were nearly worthless. Government’s attempt to put every person on American soil into a home had failed, leaving behind an economy in shambles. The artificially induced housing stimulus, caused, in part, by Greenspan’s aggressive campaign, had failed. Explained Glen Hubbard in 2008, when he was White House Counsel

of Economic Advisers: The Feds easy money policy put a lot of the wind of the back of some of the transactions in the housing market and elsewhere we are now suffering from.”

It isn’t a question of whether any one party is responsible for having either a government too large or too little because all such parties who cater to corporations are going to be involved in siding with them, and not the masses, our people.

When government favors business interests by choosing to *not* regulate businesses—or, as it is in this case, Wall Street investment firms—government is, in fact, regulating *against* the American people and *for* the large corporations.

I call it as I see it: When government chooses to not regulate businesses, it chooses to actually *regulate* the individual. Why? Because the uncurtailed exploitation of, for example, our property owners in the United States is what benefits the large corporations, and they are permitted to reign over the people as they please, with the assistance of our political leaders.

You can thank, in part, your political leaders for the fact that you are currently unemployed, that you have lost your home and/or your vehicle, for the fact that you are in the midst of a divorce, and thank them for the few but sporadic suicides in America, and so forth.

About government, See Appendix 200.



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## CHAPTER 15.50: KNOWLEDGE AT A GLANCE: CONSPIRACY THEORY? MEDIA?

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See Appendix 400.



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## CHAPTER 16: WHAT HAPPENS TO YOUR PROPERTY TAXES DURING FORECLOSURE

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The good news is that it is not in the best interest of the suing party to see your home lost in a tax sale as a result of the failure to pay the taxes on your property. In most cases—and, of course, this cannot be guaranteed—the party foreclosing against you will continue to pay the property taxes on foreclosed properties in order to avoid losing the home to Uncle Sam if you don't. You certainly may pay property taxes during the time your property is in foreclosure litigation, but why would you do it? It is anticipated that the suing party will, in most cases, pay the property taxes. It might serve you well, however, to check and to be sure that they are indeed paying the taxes for you.

In one case, I confirmed this: I went to the county tax appraiser's office in Lee County, Florida. There, I was told that the "mortgage company" has paid for the home owner's property taxes in November of 2009, which are due once a year. My only concern would be this: In the event that the home owner wins the foreclosure lawsuit, would the suing party file a lien against the property, having paid the property taxes for three years? Interesting question ... Be sure to have the financial means to pay for the property taxes if necessary, compensating the suing party if it loses the litigation. In the event that you are unsure about what to do, pay the property taxes and any other expenses.



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## CHAPTER 17: ENDORSEMENT IN BLANK

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True or False: A promissory note cannot be transferred by a showing of an endorsement in blank.

To obtain the answer to this question, seek out case law which addresses whether a promissory note with a blank endorsement can be transferred from one party to another. Specifically, attempt to locate case law which states that a suing party cannot foreclose on a mortgage in a case where the endorsement of the promissory note is a blank endorsement.





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## CHAPTER 18.10: INTRODUCTION: GETTING WARMED UP: TEACHING CRITICAL LEGAL CONCEPTS BY EXAMPLE: BURDEN OF PROOF

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The attorney for the bank will step into the court room with his proverbial hands around your neck and will, essentially, tell the court that you—the home owner—have to prove to the court that the paperwork is not in order.

Correct?

Wrong!

It is the suing party bank who has to prove that the paper work *is* in order.

In a court of law, the burden of proof is on the party who is suing you. It is immensely important that you understand this concept, and if you fail to understand it, you will lose your case. If you *do* understand it, you have a great chance at keeping your home, despite the fact that you are behind in your mortgage payments. The suing party bank has to prove to the court that it is entitled to foreclose on your home regardless of whether you are behind with your mortgage payments.

You are probably familiar with the concept that a person who is accused of having committed a crime is not obligated to explain that he or she did not commit the crime. Here, the burden of proof is on the State in order to prove that you have committed the crime. If the State fails to prove it, you win.

Our courts have established this system because it is much more difficult for a person to prove a negative—that he or she didn't do something or that something is not in order—than it is to prove a positive—that the person did something or that the paper work is in order. Our courts have established this system because it is fair. The person who sues or the person who accuses needs to establish the basis for the accusation.

Our courts have established through case precedent what exactly it is that a litigant—plaintiff or defendant—has to prove in a court of law and at which step in the process of the litigation it has to be proven. It is laid out very clearly, established through existing case law.

Yet, many attorneys, day-in and day-out, abuse those who are proceeding without an attorney. They simply ignore exactly that kind of case laws and rules of procedure which

were intended to protect all of our rights in a court of law.

What you also should know is that, in many types of litigation, the burden of proof shifts at certain stages during the litigation. But, don't let this confuse you: Case law, again, has clearly set forth at which time a party has the burden of proof and at which time he or she does not. Case law also clarifies at which time stage of the litigation the plaintiff or the defendant has to do what and how. This shift of proof is also referred to by courts as the burden of proof shift or the burden of proof shift analysis.

Simply stated, if you know the rules—in this case you understand that case law controls the burden of proof requirements and which—you will be in a better position to control the situation, fight and win. The opposing attorneys will attempt to confuse you by his or her sophisticated sounding oratory; he will stop at little to lie to you about what needs to be done. But, now you know who has the burden of proof.

You might want to obtain the case law which pertains to your State and jurisdiction. With that being said, I need to disclose to you that you ought to use the provided case law below as a starting point only. I will also provide you, in a short while, with resources so that you can obtain the relevant case law which applies to your State or jurisdiction, i.e., you'd be wise to obtain a subscription to a legal database so that you can enjoy an equal playing field when you step into a court of law.

Here's some case law regarding burden of proof which might confuse you:

Case Law—A payee's ("bank's or plaintiff's) possession of an original uncanceled promissory note raises a presumption of non-payment that shifts the burden of proof to the payor to establish payment or another defense. Cole Taylor Bank v. Shannon, 772 So.2d 546, 550 (Fla. 1st DCA 2000).

However, consider the following argument: The home owner (defendant) is not required, at this time, to proof that payments are current because the plaintiff has failed to make a showing of the original promissory note. This means, when the court questions whether the home owner is current on his payment, the questioning should immediately be followed up with an objection, i.e., the suing parry bank has, as an example, failed to show that it is the holder of the promissory note (or the holder of the mortgage, etc.); therefore, an inquiry into whether the home owner is current with his or her mortgage payments is irrelevant. Be sure to read court citations—such as the one provided above—in *context*, i.e. you will need to read court opinions in their entirety and go beyond the citations. This book is loaded with powerful citations which will stir you in the right direction. Be sure, however, to do your own legal research if you really want to win!



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## CHAPTER 18.20: INTRODUCTION: GETTING WARMED UP: TEACHING CRITICAL LEGAL CONCEPTS BY EXAMPLE: THE TEENAGE DAUGHTER AND THE LAW

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I want you to assume that you have a teenage daughter. Also imagine that you, the parent, told her to come home at 11 p.m. on a Saturday night. Much to your dismay, your daughter comes home at 3 a.m. in the morning.

Also imagine that your daughter is told by you, her father, that she is grounded for two weeks and you state, as a reason, that she is grounded because she did not come home within the permissible time.

Of course, you are entirely familiar with this scenario and it's straight forward: Here, we are talking about punishment for a supposed act.

Now, we are going to use the above example in order to illustrate one very important point.

Before I elaborate, I will pose one simple question: Is there anything, I mean, anything at all, wrong with the above stated scenario. If you get this question right, I will, no doubt, put you into my hall of fame. Unfortunately, I know that you will fail.

What I want you to take away from this example is that law is actually quite simple. It's not magical and it's not complicated. Unfortunately, about six months ago, I couldn't have stated what I am stating here, and thanks to my insight following continued studies—and to awesome individuals, including Frederick Graves and his [www.jurisdictionary.com](http://www.jurisdictionary.com), I can now write about what the folks at the Bar (who want to keep the legal profession alive and well) want you to believe is hugely complicated.

For a moment, I'd like you to reflect upon what I stated: Your teenage daughter had failed to come home when she was supposed to come home and is being punished for her failure to come home on time. She is being punished because she did not do what she was supposed to do.

You will say, this is very simple. What's the big fuss about?

I now want you to imagine that you are in a court room. Also imagine that you are an attorney who was hired by the teenage daughter who claims that she had done nothing wrong.

Also imagine that you, her father, has also hired an attorney. You already know that the father wants to see the teenage daughter punished.

Imagine now that the opposing attorney opens with a couple of words and states as follows: Your honor, the teenage daughter came home at 3 a. m. on Sunday, and she was supposed to come home at 11 p.m. on Saturday. She needs to be punished because she did not follow her father's wishes.

What do you say now? Do you see anything differently, at this time? Anything at all?

You will understand, soon, where I am going with this, and I want you to never forget the teenage problem story.

First, I want you to identify the components of what is taking place. The attorney for the father who wants to punish his daughter is engaged in two different things. First, he is stating facts. Secondly, he is making an argument—in this case, it would be a legal argument. Additionally, the argument is based on the facts represented by the father's attorney.

Now that the teenage daughter problem is taking into a court of law, do you see any problem with the scenario? You really should, but I know you won't. But, I am not too eager to give you the solution to the puzzle. Here is what a person who has no experience in a court of law (or even many attorney) would do in a court of law.

The father's attorney (who gets to speak first): Your honor, the daughter came home at 3 a.m. when she should have been home by 11 p.m., and because she did not follow her fathers' directions, she should be punished by being grounded for two weeks.

The teenage daughter's attorney: Your honor, I do not believe that the teenager daughter should be punished for coming home at 3 a.m. because the teenage daughter was out of breath when she came home and she really did try to be on time, and there is no case law that would allow the teenage daughter to be punished under these circumstances to the extent the father's attorney would want her to be punished.

The father's attorney in response: Your honor, no, the teenage daughter deserves to be grounded for two weeks because she did not come home when she was supposed to come home.

Judge: Okay, now that I have heard both sides, I will rule on this, and I will enter an Order for ...

Still, do you see anything wrong with this?

Let's clarify by example. I will repeat some parts and show you how the scenario should have been handled, as follows:

#### *THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

The father's attorney (who gets to speak first): Your honor, the daughter came home at 3 a.m. when she should have been home by 11 p.m., and because she did not follow her fathers' directions, she should be punished by being grounded for two weeks.

#### *END OF RESTATEMENT*

The teenage daughter's attorney: Your honor, none of the facts upon which the father's attorney is relying in his argument are facts in evidence!

Bingo – Wow – What?

Yes, - end of conversation. End of story!

What?

That's right. The father's attorney can talk all day and all night and make legal arguments all day and all night and none of the things the father's attorney is talking about have any weight whatsoever because the supposed facts the attorney is talking about in support of his argument as to why the teenage daughter should be punished are not facts at all because no facts which are not in evidence can, by a court of law, be considered.

Here is what the teenage daughter's attorney should have told the judge:

The father's attorney (who gets to speak first): Your honor, the daughter came home at 3 a.m. ...

The teenage daughter's attorney: Objection, your honor.

A decent judge should at that point do this: What's the basis for the objection?

Teenage daughter's attorney: Facts not in evidence

(You could also say the opposing attorney is talking out of his rear ... but don't do that!)

(You could also say that the opposing attorney is testifying, and he is not allowed to testify)

(You could also say that the opposing attorney needs to be put under oath if he wants to testify and that, upon that time, he can no longer represent his client)

(You could also say that the opposing attorney cannot be both a witness and an attorney, and that he needs to pick one. If he wants to be the attorney on that case, he needs to stop talking as if he were a witness on the case.)

(You could also say that the opposing attorney does not have personal knowledge about the facts and that therefore he is not allowed to testify under the hearsay rule.)

A decent judge, in response to the above "Facts not in evidence," would say:

Judge: Objection sustained (and that means that whoever objected is correct).

Assume that the father's attorney continues to talk and says, "The teenage daughter should have been home by 11 p.m., and the teenage daughter's attorney should say:

Teenage daughter's attorney: Objection, facts not in evidence!

Assume that the father's attorney continues to talk and says, "The teenage daughter should be punished by being grounded for two weeks because she did not follow her father's directions ," and the teenage daughter's attorney should say, "Objection, facts not in evidence!"

The teenage daughter's attorney could also say: "Objection, Hearsay!"

The case ends (or should end if the judge is decent and does what he is supposed to do, but that won't happen in a foreclosure court, I nearly guarantee it!)

Oh, we are talking foreclosure court now – yes, we are.

Please understand this and do so carefully and thoroughly: No attorney can make a legal argument where the facts of the case have not been entered into evidence.

And, you ask the next question: How are facts entered into evidence.

In brief, the suing party—the party who is making the accusation that you, the defendant, owe something or has caused some kind of damages through some kind of conduct—has the burden to establish the facts against you.

Here, in short, you are entitled to have any kind of document which is used against you authenticated.

Secondly, the party who is suing you has the responsibility—a.k.a.—the burden of proof, to show to the court that the facts truly are as they are stated. In order to get these facts admitted into evidence, these facts need to first be established through testimony by a witness. And, this person cannot be—it can never be—the attorney who is representing the party.

You might, at this point, ask, why am I talking about all this in such great length and detail?

I assure you that in a wonderful world, we would not be having this conversation. However, we live in a very corrupted world where it's corporate interest (and judges who are bought by corporate money) against the little guy and that's you, the home owner, for instance.

In a foreclosure court, when you are required to appear at a hearing, the suing party (or bank's) attorney will talk to the judge about the case as if the two were brothers and co-conspirators (and they are), and the attorney will make legal arguments to the judge and talk about the fact that there was an assignment, a note, and how the note was transferred from A to B to C and that bla bla bla and that bla bla bla. You, the homeowner, will stand there like an idiot (and that's only the case because you don't know what you are doing) and the attorney and judge well know that you don't have a fighting chance, and try to argue against what they are saying when all you have to do is say stop! And, how do you say stop. Here's how, as discussed above.

Objection: Opposing counsel is talking about facts that are not in evidence.

And, whatever arguments the opposing counsel is making, have no relevance because they are based on facts which are not in evidence.

It's as simple as that, and it's the end of that conversation.

Now, if you were to read about this in a text book about law, you would be reading about authentication of documents and about objections regarding facts that are not in evidence, including some of the other objections I have included in apprentices, above.

You really need to know only about one thing: No argument can be used where the argument is based on facts that are not in evidence.

In order to get these facts into evidence, the suing party has to, somehow (and this is explained elsewhere), bring the person into the court so that that person can testify under oath as to the facts the other attorney believes are necessary in order to move forward with the case. You, the teenage daughter's attorney are then entitled to cross-examine (also explained elsewhere) that witness in order to establish that the statements made by the witness are bogus and a lie.

Here is what's good to know: The banks which have securitized (99% of them) will not—in most cases—bring in the witness to talk about the facts because that witness will be, somehow, unavailable. Remember that during the process of the securitization the entity doing the securitizing has done a lot of tricks in order to securitize as quickly as possible and they, in the process, lost or deliberately, lost their paperwork. They then fabricated documents in order to create the appearance that their attempt to foreclose on you is legitimate. However, you, the home owner does not necessarily have to prove that all of this fraud exists. Simply have the party who is suing you show up in court to testify as to the truthfulness about these supposed facts, and you will, soon, stop wondering why there's a no-show.

And this no-show is what will stop the case.

What also will stop the case is the fact that documents which have not been authenticated are not admissible as evidence in a court of law: they are considered what is called hearsay.

And that's the end of the story.

Remember: Objection, facts not in evidence!

Remember: Objection, documents are not in evidence!

And, the only way to get these document admitted into evidence is by going through the process of authentication.

The process of authentication can be cumbersome, but you should have controlling case law in order to control the judge.

In brief, here is what you need to know about document authentication:

In order to get a document authenticated, the person who signed and/or created the document has to talk about the document on the witness stand, under oath.

Secondly, the document has to have been kept in a certain location at a certain time in a certain manner during the course of business, there's case law available which exactly states what had to have happened to that document and what not.

Here is what you need to know also: There are two types of individuals who will need to testify under oath: First, the person who created and/or signed the document. Secondly, the person who was responsible for keeping the document in a secure location at a certain time in a certain manner, and that person is the record custodian.

This is basic and entirely misunderstood by pro se litigants.

Worse, judges keep their mouth shut on most if not all of these violations (more specifically these are due process violations because they rob you of the process you are entitled to receive).

In short, American courts are dysfunctional and you have, sorry to say, a chance in hell to stand up against the opposing attorney who is a member of the State's respective bar and the judge who, surprise!, is also a member of the State's respective bar. I will cover what to do about the judge and the attorney—since they both belong to the same association which promotes its members' interests and not yours—in another section.

We are done for this chapter; so, stand up and object!

See also Frederick Graves' chapter on objections. He really nails them!

Last but not least, use the tool discussed herein whenever you have a court hearing: When the opposing attorney starts to make legal arguments that will confuse you because you have no clue about how securitization or endorsements in blank or allonges or assignments or MERS work, simply stop the attorney by stating: Objection, facts not in evidence. Make sure that you have a court reporter present from the very beginning to the very end so that every word that is coming out of the attorney's and the judges mouth is put on paper. If the judge rules against you, you now have what is called reversible error, and all of it is recorded on paper (and be sure that you inform the judge that there is reversible error). A court reporter will cost about \$50 per hour and it's worth every penny. It's for your protection. The court will not record the events at the hearing (even though, I was told, this is required) but they don't do it because they don't want their conduct exposed.

Now you know.

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## CHAPTER 19.10: READY FOR ATTACK: THE COURT ROOM IS A BATTLE GROUND: WORDS ARE HEARSAY!

[The words that are coming out of the opposing attorney's mouth are facts not in evidence, are hearsay and cannot be considered for argument, your honor!]

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What is admissible evidence is yet another misunderstood concept. If you do not know what admissible evidence is, you will lose your case.

If you don't know what admissible evidence is, you might lose your case regardless of whether you have a good case.

I should also add that you might win a foreclosure case despite the fact that you should lose it (or have a loser case). What do I mean?

When financial institutions securitized your mortgage, they, in order to earn Billions of Dollars and in order to participate in the conversion of mortgages into securitized (bond-like) investment vehicles, had to do a certain thing with the paper work associated with getting these mortgages securitized. Therefore, in most cases, the promissory note was lost or deliberately lost. Additionally, these promissory notes were unlawfully assigned, and that's good news for you, the home owner in foreclosure.

The very fact of this situation enables you—the homeowner—to obtain your home free and clear and do so despite the fact that you have actually borrowed money to obtain your home.

But, obtaining your home free and clear can only be done if you know what you are doing in your foreclosure suit. So, let's talk about evidence and admissible evidence.

Red flags:

Attorneys, especially in foreclosure cases, will legally argue before the judge as if the facts or the documents relevant to the foreclosure litigation have been admitted into evidence.

Wrong!

Home owners can obtain their homes free and clear if they stop the opposing attorney from providing testimony which speaks to the truthfulness about the facts documents.

What do I do?

When this happens, you must object immediately.



If the facts or documents relevant to your foreclosure case have not (yet) been entered into the record, i.e., if they have not been admitted as evidence, these facts or documents are not admissible evidence in a court of law, period.

This means that these facts or documents cannot be used. Note the subtle but important distinction: Facts or documents might well be evidence, but evidence which is not admitted into evidence (or entered into the record) is not evidence. In a court of law, only admissible or admitted evidence can be talked about or argued about. So, if the opposing party talks about these facts or documents, it is your duty to stop him. I have dedicated a separate chapter on attorneys who testify.

In a foreclosure case, that's exactly what the opposing attorney will do. At the first hearing, he or she will talk about the facts and the documents as if they had been admitted into evidence already despite the fact that they had not. You need to object immediately!

Objection, Your honor!

Judge: What's the basis for the objection?

You: The facts (that are coming out of the opposing attorney's mouth) are not in evidence!

Judge: Objection Sustained!

A good judge should immediately sustain your objection, which will stop the opposing counsel.

How would you, the home owner, or the opposing attorney get the facts and documents into evidence? Here, you will insist that facts and documents are entered into evidence only then when a witness has testified as to the authenticity of the documents and only then when a witness has testified as to the facts.

At the point at which you object to the opposing attorney's attempt to argue his or her client's case on the basis of facts and documents which are not in evidence, your case might stop right then and there. I will talk about "why" in a short while.

What you also need to know is this: Not only does the opposing attorney make legal arguments on the basis of certain facts and documents which have not been admitted into evidence but also he is testifying about these facts and documents as if he had been a first-hand witness. This issue is the topic of our next chapter.

Let's talk about the kind of case law which will put you into the driver's seat. This case law will allow you to force the opposing attorney to make only those kinds of legal arguments which are rested on facts or documents which are rested on admissible evidence (which have been admitted into evidence). Hence, the opposing attorney can talk about admissible evidence only and nothing else! It is this kind of case law which will allow you to control the players in a court of law. These players are, as you know by now, the opposing attorney, and the judge.



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## CHAPTER 19.20: INTRODUCTION: READY FOR ATTACK: THE COURT ROOM IS A BATTLE GROUND: DOCUMENTS ARE HEARSAY!

[Is the person who appears to have signed the documents in fact that person?

Document authentication, the record custodian, cross examination, Federal

Rules of Evidence, and chain of custody]

[Procedure for authentication]

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Know a about authentication of documents and cross examination or lose! Know about custodian of records and cross examination or lose! When you walk into a court room, the opposing party's attorney will show certain documents which are supposedly relevant to your foreclosure to the judge. On the basis of these documents, the suing party bank will win or lose. You need to make sure that the suing party loses and that you win.

Authentication of documents:

The very question is this: Did the person who claims, as it appears on the face of the document, to have signed the document really sign it or did someone else sign it? The answer is this: You are entitled to find out, and the tool for this is called cross examination. You, the homeowner, need to make sure that the document is authentic. If it is not and it is used in the litigation as if it had been authenticated, you might lose your case despite the fact that you should win your case. The opposing counsel will attempt to treat the document as if it had been authenticated in the hopes that you buy into his wishes. Of course, you now know better!

Remember, you are entitled to cross examine the responsible party, and only if it is established that the document is authentic can the document be used as admissible evidence.

These documents might be authentic if a person, other than the opposing party's attorney, says they are authentic and if that person does so under oath and only then.

Only documents which have been authenticated through a certain process—in this case cross examination—can be admitted into evidence.

Authentication, first! Admissibility, second!

How can I get a document authenticated? The following mock dialogue will explain how

you can get a certain document authenticated, making sure that the document is what opposing counsel purports it is.

Bank's attorney: Your honor, I'd like to call my witness.

(This is the person who has supposedly signed the document.)

Judge: OK

Bank's attorney: I have here a document marked as Exhibit A.

The bank's attorney will then show the document marked as Exhibit A to you, the home owner. After your review of the document [FN-2054], the following dialogue will take place:

\_\_\_\_\_.  
[FN-2054] (and you probably had an opportunity to examine the document beforehand, and if you did not have that opportunity you might be entitled to post-pone the case on the grounds that you didn't have an opportunity to examine the document; you are entitled to review the document and do so without the pressure of time.

Bank's attorney: May I approach the witness?

Judge: You may proceed.

Bank's attorney: Please take a minute to look over this document.

(Let the witness briefly review the document.)

Bank's attorney: Have you seen this document before?

Person who supposedly signed the document: Yes

Bank's attorney: What can you tell me about this document?

The answer the bank's attorney wants the person to give is that he or she has seen the document before and that he can, somehow, identify it.

The above dialogue is what is referred to as direct examination. The techniques about direct as well as cross examination are discussed in a separate chapter.

After the bank's attorney has established that the witness has indeed signed the document or that Mr. Signer is, somehow, familiar with it, you, the home owner, would be entitled to cross examine Mr. Signer in an attempt to show that he did not sign the document.

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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According to Kolczynski, "[t]o use real evidence at trial, you must show that it is authentic. FRE 901, 902. Real evidence usually is authenticated by the testimony of a witness with personal knowledge. FRE 901(b)(1). Authentication usually involves the following procedure:

1. A witness introduces the real evidence as the item in question.
2. The witness testifies that he or she is **familiar** with the item.

3. The witness explains the **basis** for his or her familiarity with the item.
4. The witness testifies that in his or her **opinion**, the exhibit is the item in question. The witness must state that the exhibit [i] is the **same item** that was involved in the occurrence now being litigated, and [ii] [h]as not been substantially changed in any way. When the exhibit has passed through several hands, the proof of authentication is referred to as the '**chain of custody**.' A chain of custody is established by the testimony of **successive custodians** of the exhibit, each of whom states that he or she received the item from the previous custodian and passed it on, either unchanged or with designated changes, to the next custodian in the chain. United States v. Mendel, 746 F.2d 155, 166-67 (2nd Cir. 1984)" (Kolczynski, Task 88).

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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Secondly, you must show that the "evidence is relevant." FRE 104(b). According to Kolczynski, "[r]elevant evidence is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' FRE 401. It is a combination of probative value (a tendency to make the truth of a proposition more or less probable) and materiality (of consequence to the determination of the action). United States v. Yunis, 867 F.2d 617, 625 n.11 (D.C. Cir. 1989). If the evidence's probative value outweighs its prejudicial effect, the court probably will admit the evidence. See FRE 403; Dixon v. Int'l Harvester, 754 F.2d 573, 584 (5th Cir. 1985)" (Kolczynski, Task 88).

Evidence or, more specifically, " 'real evidence' is the physical evidence that actually was involved in the occurrence being litigated," including, for example, the "knife that killed the decedent, the engine from the aircraft that crashed, the drill that severed a finger, the contract that was breached, the contested will or patent" (Kolczynski, Task 88).

There are two critical points which you should know about. First, if you, the home owner, insist at the very beginning of your case on your right to cross-examine the person who has supposedly signed the document, your case might stop right then.

This is so because the opposing party—the one which wants to foreclose on your property—has lost or deliberately lost the promissory note and has also, in many cases, fabricated documents and signatures and has done so in an attempt to prove that the promissory notes were properly assigned when they were not.

Who can testify as to the authenticity of a certain document?

One person who could properly testify as to the authenticity of the document is the person who has signed the document.

As you will see in a short while, case law dictates these specifics. Who can do what and where and when and way is controlled by case law and also by the rules of procedure; so, stay tuned!

The reality is that if you request to cross examine this person, most suing party banks will likely refuse to provide that person. Or, the suing party bank will attempt to bring the person

who supposedly signed the document into the court, and at that time the person who supposedly signed the document would have to, in most cases, commit perjury.

If the bank refuses to provide the person for the purpose of cross examination, the case will stop because the burden of proof to prove that the document is authentic is on the bank and not on the home owner. Again, the home owner is not the one who has to prove that the bank's documents are authentic but the burden of proof is on the suing party.

Case law and rules will give you the power by which the opposing party is forced (or quit) to deliver the witness for the purpose of cross examination.

It is also very important that home owners "insist" on getting the suing party's record custodian onto the witness stand. The purpose of the record custodian's testimony is to show—from the home owner's perspective—that the bank has failed to keep the document relevant to the mortgage foreclosure in a proper place at the proper time in the proper manner, as required by law. Case dictates what these specifics might be.

If the bank fails to make a proper showing, you, the home-owner, win.

Again, the burden of proof to show that the bank's documents are in order is on the bank and not on you, the home owner. You are entitled to cross examine a party for the purpose of establishing the authenticity of a document: You are entitled to cross examine the custodian of records for the purpose of ensuring that the document in question has been kept or stored in a proper place in a secured and typical manner, as governed by case law. You are entitled to cross examine a party for the purpose of establishing the truth about facts and documents.



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## CHAPTER 19.30: INTRODUCTION: READY FOR ATTACK: THE COURT ROOM IS A BATTLE GROUND: COUNSEL IS TESTIFYING!

[Counsel is not allowed to testify! Counsel's testimony is hearsay!]

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Understand it! We will talk about it in a separate section.



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**CHAPTER 20.10: INTRODUCTION: KEY LEGAL TACTICS:  
KEY INITIAL QUESTION: ARE YOU GOING TO EMPLOY  
ALL TACTICS OR JUST SOME?**

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Are you going to employ all tactics or just some? Which ones? Procedural legal tactics, substantial legal tactics, or a combination of the two. This is a rhetoric question. You will be able to find the answer in due time.



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**CHAPTER 21.10: INTRODUCTION: KEY LEGAL  
QUESTIONS: PROCEDURAL: YOU MUST MASTER THESE  
WORDS IN YOUR SLEEP: OBJECTION—HEARSAY**

[Objection—objection on the court’s refusal to make a ruling on the objection]

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Objection!





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**CHAPTER 21.20: INTRODUCTION: KEY LEGAL TACTICS:  
PROCEDURAL: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: OBJECTION—COUNSEL IS TESTIFYING**

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Objection—Counsel is testifying! Counsel is not allowed to testify. If counsel keeps talking about the facts that are not in evidence, I will move this court to put opposing counsel under oath, your honor! And, at that time, I am going to move this court to remove the attorney from the case because he cannot be both a witness and counsel! So, what will it be for the opposing counsel!



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**CHAPTER 21.30: INTRODUCTION: KEY LEGAL TACTICS:  
PROCEDURAL: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: OBJECTION—THE AFFIDAVIT IS HEARSAY**

[Objection—counsel is not allowed to talk about the affidavit because he has  
no personal knowledge of the statements in the affidavit]

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Objection—the affidavit is hearsay! Objection—counsel is not allowed to talk about the  
affidavit because he has no personal knowledge of the statements in the affidavit! See also  
Appendix 11.1.1.



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**CHAPTER 21.40: INTRODUCTION: KEY LEGAL TACTICS:  
PROCEDURAL: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: OBJECTION—FACTS ARE NOT IN  
EVIDENCE. OBJECTION—DOCUMENTS ARE NOT IN  
EVIDENCE**

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Objection—facts are not in evidence! Objection—documents are not in evidence!



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**CHAPTER 21.50: INTRODUCTION: KEY LEGAL TACTICS:  
PROCEDURAL: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: YOUR HONOR, I MOVE THIS COURT TO  
GIVE ME PERMISSION TO STEP UP TO THE AREA WHERE  
OPPOSING COUNSEL IS STANDING**

[You are an officer of the court whether you knew this or not]

[Recuse yourself]

[This court causes undue prejudice, and I'm not going to put up with it]

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Your honor, I would like to state for the record, and I have my court reporter present today, to put my words into the record ... I would like to state for the record that the attorney for the opposing party is standing about three feet away from you, and that's you, Judge ( [REDACTED] INSERT NAME OF THE PRECEDING JUDGE). I also state for the record that I, ( [REDACTED] INSERT NAME YOUR NAME), am standing at a distance of about twenty to twenty-five feet from the Judge, and again, that's Judge ( [REDACTED] INSERT NAME OF THE PRECEDING JUDGE). I also state for the record that the opposing attorney is holding in his hands certain documents at a distance of about three feet from the judge's eyes and face. I also state for the record that the attorney for the opposing party and Judge ( [REDACTED] INSERT NAME OF THE PRECEDING JUDGE). are speaking with each other in a familiar tone.

Your Honor, I move this court to give me permission to step up to the area where opposing counsel is standing (which is about 3 feet from the judge's bench).

(I am standing about 20 feet at a distance from the bench while you and the attorney are communicating at a distance at 3 feet apart from one another.)

The opposing counsel and you, the judge, are talking with each other in a familiar tone; opposing counsel is showing off documents to this court out of my review.

The opposing attorney will have to come up here where I'm standing; I'm unduly prejudiced, and I demand equal treatment and due process in this court room.

Judge: Bla la bla, and no!

Defendant's pro se counsel (and that's you): Your honor, my rights are fully protected in this court room, but it seems like we are having a miscommunication.

I am a pro se litigant and I am here in my capacity as the defendant and, in my separate capacity as the pro se counsel for the defendant. I am wearing two different hats if you will.

In addition to that, any attorney in a court of law is an officer of the court, and I, in my capacity as the defendant's pro se counsel, *am* an officer of the court. Whether you like it or not. I am entitled to the same privileges that the opposing counsel is entitled to, no more no less. So, what will it be?

Judge: Bla Bla bla, and no!

You: It is apparent that by the conduct of this court and the opposing counsel I am being prejudiced.

Opposing counsel and this court are talking with each other in a familiar tone; this court is extending special privileges to the opposing counsel, and I am being treated as a second-class litigant.

It is also the case that both the opposing counsel and this court's judge are members of a good ole' boys' association, a.k.a., the Bar. It is obvious that the opposing counsel and this court's judge are conspiring against me, and I am in fear that the defendant will not get a fair trial. I therefore am filing a motion for recusal on my way out, and I demand that you, judge [REDACTED], recuse yourself.

I demand that I be appointed a judge who is not a member of the bar nor has ever been a member of any bar. I have nothing further to say in this case. Have a nice day.

Question: Do you really do this? The answer lies in the question whether you want to make this a part of your procedural battle. Do you have a loser case and nothing to lose? Do you have a winner case but you know that the judge and the opposing attorney will screw you left and right. Do what you believe is the right thing to do. This book is giving you most, if not all, of the tools that are available to you. Including those which most attorney will never use ... Including those which attorneys are not authorized to use, but you are ....



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## CHAPTER 21.60: INTRODUCTION: KEY LEGAL TACTICS: PROCEDURAL: YOU MUST MASTER THESE WORDS IN YOUR SLEEP: DO I UNDERSTAND THAT I CAN WIN EVEN A LOSER CASE ON PROCEDURAL GROUNDS ALONE?

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Did you know: You can win even a loser case on procedural grounds alone? For example, if you have filed a motion to dismiss and the court has not issued an order and has not addressed *your* motion but instead addresses the opposing party's motion (—the opposing party is represented by an attorney and you are not—) or the court orders a hearing regarding another issue but ignores your motion, you might have some ground on which to win your case procedurally, i.e., you might be able to appeal your case and, at the same time, stay in your home several months longer.

In one real life example, a movant (“bank”) filed a motion on February 4, 2010. The court, however issued an order on February 5, 2010, adjudicating on the movant's motion without giving the non-movant (“home owner”) an opportunity to respond.

Outrageous conduct! Unfortunately, this happens every day. This court deprived the home owner of due process by ignoring the very rules it is supposed to follow and which it expects others before it to follow.

The court's order was premature because you were entitled to craft a response to the opposing party's motion within the days set forth in the rules.

Assert in your motion to reconsider the (unjust) order that you have been unduly prejudiced. Assert that this court has erred and that the error is appealable error.

And err they do. So, watch out for these errors because you can use them against them and prolong the case by appealing the error.



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CHAPTER 22.10: INTRODUCTION: KEY LEGAL TACTICS:  
SUBSTANTIVE: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: ASSUMING ARGUENDO THAT MERS IS  
CAPABLE OF ASSIGNING THE MORTGAGE

[MERS is not capable of assigning the note]

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Assuming arguendo that MERS is capable of assigning the mortgage, MERS is not capable of assigning the note because it doesn't have it. One cannot give something which one does not have.

You might also say, Your Honor, there is no note! Or, more specifically, the Plaintiff does not hold the note. Somebody else might, but that's not the Defendant's problem! This is a lawsuit and not a Mickey Mouse operation! We *are* in a court of law. We are in a court of law where *all* the elements of law have to be proven. Having the note is one of them. If any one of those elements fail. So does the lawsuit against the home owner, period. No discussion!



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**CHAPTER 22.20: INTRODUCTION: KEY LEGAL TACTICS:  
PROCEDURAL: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: I OBJECT TO THE DOCUMENT WHICH  
PURPORTS TO ASSIGN THE MORTGAGE TO MERS.**

[The document is hearsay, and I'm entitled pursuant to FRE to \_\_\_\_]

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Your honor, I object to the document which purports to assign the mortgage from institution xyz to MERS. The document is hearsay, and I'm entitled pursuant to FRE to \_\_\_\_\_. Objection, hearsay.

Judge: Bla blab bla, no let's not waste time with this!

You: Your honor, it is very clear here that opposing counsel and this court are marginalizing this issue I am raising. This issue is an important one. Your honor, I object! Objection! I object to this court's refusal to issue an order on my objection.





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**CHAPTER 22.30: INTRODUCTION: KEY LEGAL TACTICS:  
SUBSTANTIVE: YOU MUST MASTER THESE WORDS IN  
YOUR SLEEP: REGARDING THE MORTGAGE, THE  
DOCUMENTS PURPORT TO SHOW—ALTHOUGH ... —  
THAT THE MORTGAGE WAS ASSIGNED TO MERS**

[However, case law has demonstrated that MERS cannot assign anything]

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Your honor, regarding the mortgage, the documents purport to show—although they have not been authenticated and I reserve all my objection rights in that regard—that the mortgage was assigned to MERS; however, case law has demonstrated that MERS cannot assign anything; therefore, there is no cause of foreclosure action.

You might also say, your Honor, MERS is involved in the assignments, but there is no mortgage!

Or, more specifically, you should say the Plaintiff does not hold the mortgage; somebody else might, but that's not the Defendant's problem!

In fact, your honor, this will be a problem because if the rightful party comes after me in a separate litigation attempting to have me essentially pay twice what I do not owe, I am in trouble, and I will pass the bill on to you, your Honor! Do you have a problem with that?



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## CHAPTER 23.10: INTRODUCTION: KEY LEGAL TACTICS: PROCEDURAL: WHAT THEY WILL SAY TO YOU: TOGETHER WITH THE NOTE AND THIS IS WHAT IT MEANS. IT'S SHOW AND TELL

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It's show and tell! Let's jump back into a procedural legal tactic. And, this point is huge!

At some point, the issue embedded in the phrase "together with the note" will come up. What does it mean to you?

That's an interesting question because ... how will you tackle the problem. Do you know what "together with the note means?"

Well, if you don't know, will the opposing attorney? Will the judge?

Unless you have the exact case law that goes right to the heart of the matter, and I mean to the heart and bone, stay away from trying to explain it.

I take it all back. You shouldn't go there at all. Why? Because there are ways in which to resolve these types of things which are a lot easier on you and are a heck of a lot less risky.

The phrase "together with the note" is located on the infamous MERS Assignment of Mortgage. So, that's a document, right?

Is it authenticated? No!

Simply do this: Object!

Objection, your Honor—Hearsay!

The opposing attorney will say, bla bla bla well, it means this and that and the other and bla bla bla.

Stop!

Stop him from talking!

It's hearsay!

Why is he talking about what's in the document, your Honor?

If opposing counsel wants to bring in the people who created the document, who drafted it, crafted, it created it and tweaked it, who know what's in it, and who signed it, well, then we have something to talk about. Let *them* say what the document is or what it is not.

That document needs to be authenticated, and the opposing counsel is not authorized to do this, your Honor!

Hearsay!

Objection—Hearsay!

Opposing counsel is testifying, and he is not allowed to testify!

End of conversation!

It's show-and-tell time. Let the people who created the document, who stored and kept it come in if, of course, if that's what opposing counsel wants to do. I don't want to do this, your Honor. I am not the party who is trying to prove up the elements of law which say that the suing party has a right to take the home, the suing party is. So, it's the suing party's responsibility to ensure that all the elements of law are met, and not on *me*!

Is there any confusion about this, your Honor?

Now, if case law, your Honor, addresses the issue, if opposing counsel has case law that talks about the phrase "together with the note" okay, we can talk about it, if he wants. But, we are not going to hear him talk as if he had personal knowledge which he does not.

Objection!

Objection to the court's refusal to rule on my objection (if that's the case)



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## CHAPTER 23.20: INTRODUCTION: KEY LEGAL TACTICS: PROCEDURAL: WHAT THEY WILL SAY TO YOU: ARE YOU BEHIND ON YOUR MORTGAGE?

[The Judge, on day one]

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Judge, at the very first hearing: Are you behind in your mortgage payment?

You, the home owner: Objection, your Honor!

Judge: What is it?

You: Your honor, I object to your question because it is prejudice to me. It could also be mistaken as apparent bias against me, the Defendant. I object to it causes me undue prejudice.

You: The question causes me undue prejudice because the elements of law that a plaintiff in a mortgage foreclosure has to prove up are elements 1, 2, 3, 4, and 5.

You: If any of these elements cannot be proven, this litigation is to stop, the lawsuit is to be dismissed. And this process is the same in any litigation.

You: It is therefore irrelevant whether I am behind with my mortgage payment because the Plaintiff is incapable of proving up *all* of the elements of law. All of these elements are required; they are not optional.

You: In a mortgage foreclosure litigation the elements of law are—

1. (1) The “home owner” presently holds title to the proper
2. (2) Plaintiff has promissory note or other document giving plaintiff the right to sue on the note [FN-0211]
3. (3) Home owner (defendant) signed the note.
4. (4) Plaintiff has the mortgage or other document giving plaintiff the right to sue on the mortgage [FN-0211].
5. (5) Home owner (defendant) signed the mortgage.

6. (6) Home owner is in default.

Plaintiff's failure to (1) allege and (2) prove every one of these essential elements (1), (2), (3), (4), (5), and (6) is fatal to the plaintiff's case" (Graves). See also Fla.R.Civ.P. Form 1.944.

You: For these reasons, your Honor, the question that should be asked is – do we have present all of these five points that I have mentioned.

You: In particular, the question is this: Does the suing party have the promissory note? Does the suing party have the mortgage?

You: I am going to tell you right from the outset that I am going to object to any of the suing party's documents and the reason is that these documents are rested on fraud and, of course, they are hearsay. We can get started on any of those objections right away. So, please, do not ask me if I am behind with my payment because this creates an appearance of prejudice against me, and I suspect that would be because I am not represented by an attorney.

As a second objection, but wait until the judge adjudicates on your first objection, object to the fact that the opposing counsel (who is an attorney) is permitted to stand about three to five feet at a distance from the judge's face while you have to stand about twenty-five feet from the action. (At a distance, having to speak into a stupid microphone while the opposing attorney does not, as if you are some kind of an alien or outsider.)

I will take on this issue in a separate chapter. For now, know that you have the right to be treated fairly by a court. However, the judge, in most cases, will treat you as a second-class citizen (and that's guaranteed in 95% of the mortgage foreclosure cases). If you don't object to how the judge treats you (and you might not know that he is doing it you, but that's the reason you are reading this book), you will lose your case despite the fact that you do not need to lose it.

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[FN-0211] Case Law—Florida: In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note: Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note that Plaintiff does not own. *Your Construction Center, Inc. v. Gross*, 316 So.2d 596 (Fla. 4<sup>th</sup> DCA 1975).



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## CHAPTER 24.10: INTRODUCTION: KEY LEGAL TACTICS: KEY INITIAL QUESTION ADDRESSED: YOU WILL BE INCLINED TO ARGUE THE SUBSTANTIAL MATTERS OF THE CASE

[But, why go there and attempt to teach trigonometry to a five year old child]

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You will be inclined to argue the substantive matters of the case. But, why go there? It will feel like having to teach trigonometry to a five year old child.

Object to the opposing attorney's statements in the court room whenever he speaks about facts or documents which purportedly show "something." Object on the grounds of hearsay! Objection, hearsay!

Do it!

Object!

Your case will stop!

A hearsay objection forces the suing party bank to bring a witness into the court.

Likewise, object to any of the affidavits the opposing party will file.

Objection, hearsay!

Object!

This, again, forces the suing party to bring a witness into the court.

Here are the good news: They won't! You heard right!

There will be no witness because during the process of securitization, the suing party has fabricated lies and has deceived.

Even if they come into the court room to testify, they will have to lie and, together with case law, which has already made its way through several States, will show that their statements under oath are even greater lies or deceptions.

The longer you wait, the longer you can delay your case, the better for you.

The corrupt tactics used by the suing party banks will have to be tried as cases of first impression. This means that there are relatively few cases (with published opinions) available which can give you the most serious tool to stop the suing party.

The suing party bank has, over the last few years, inserted MERS as a party claiming to be capable of "coming after you." There simply hasn't been enough time to get brave home

owners into the court room and point it out in a fashion that the judges understand, tolerate, or accept. Every day, however, new cases are coming out.

So, delay your case as much as possible because one day, the media will be all over this, and the courts will no longer allow MERS—by their documents which are intended to deceive you and the judges—to come into their court room and present them.

These lawsuits will eventually stop. Eventually, there will be class action lawsuits—and they have already begun—against the suing party banks en masse.

At this time, this type of scandal is in its infancy. Attempt to delay and wait if you want to win. Eventually you will win.

Let's now dig into some case law which will prepare you to fight, and let's talk about the rules which will protect you, both the rules of evidence and the rules of civil procedure.



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## CHAPTER 25.10: INTRODUCTION: USING PROCEDURAL STANDARDS TO STRIKE BACK: STANDING

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Case Law—Florida: In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note: Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note that Plaintiff does not own. *Your Construction Center, Inc. v. Gross*, 316 So.2d 596 (Fla. 4<sup>th</sup> DCA 1975).

Case Law—Florida: Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being the real party in interest entitled to bring the claim. This entitlement to prosecute a claim in Florida Courts rests exclusively in those persons granted by substantive law, the power to enforce the claim. *Kumar Corp. v. Nopal Lines Ltd. et. Al.*, 462 So.2d 1178 (Fla. 3d. DCA 1985).

Florida Rule of Civil Procedure 1.210 (a): “Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought.”

Continued from above Case Law—Florida: No Florida case holds that a separate entity may maintain suit on a note payable to another entity unless the requirements of Florida Rule of Civil Procedure 1.210 (a) are met. *Concoran v. Brody*, 347 So.2d 689 (Fla. 4<sup>th</sup> DCA 1977).

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No Florida case holds that a separate entity may maintain suit on a note payable to another entity unless the requirements of Florida Rule of Civil Procedure 1.210 (a) are met. Concoran v. Brody, 347 So.2d 689 (Fla. 4<sup>th</sup> DCA 1977).

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In re “no Florida case holds that a separate entity may maintain suit on a note payable to another entity . . . ,” ask yourself the following question: Is the purported holder of the note one entity and the purported holder of the mortgage another, separate entity?



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CHAPTER 25.20: USING STANDARDS TO STRIKE BACK:  
KEY LEGAL TACTICS: PROCEDURAL STANDARDS:  
EXHIBITS INCONSISTENT WITH ALLEGATIONS

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Case Law—Florida: When exhibits are inconsistent with Plaintiff’s allegations of material facts as to who the real party in interest is, such allegations cancel each other out. Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240 (Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So.2d 185, 187 (Fla. 4<sup>th</sup> DCA 1983) Costa Bella Development Corp. v. Costa Development Corp., 411 So.2d 114 (Fla. 3d. DCA 1983).

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Case Law—Florida: When exhibits are inconsistent with Plaintiff’s allegations of material facts as to who the real party in interest is, such allegations cancel each other out. Fladell v. Palm Beach County Canvassing Board, 772 So.2d 1240 (Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So.2d 185, 187 (Fla. 4<sup>th</sup> DCA 1983) Costa Bella Development Corp. v. Costa Development Corp., 411 So.2d 114 (Fla. 3d. DCA 1983).

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The above citation is significant. If the contents [FN-2108] of the MERS assignment of mortgage proffered by the suing party conflict in any way, shape or form with the contents of what is contained in the suing party’s complaint (allegations), the suing party has to strike off

that point. Read the complaint!

\_\_\_\_\_.  
[FN-2108] We will talk / have talked about the contents of the MERS assignment of mortgage and analyzed them at length in a separate chapter. (Just look for the supersized-font text; you can't miss it!)

Your honor, it's not an option. This is the Florida Supreme Court who has said it! The suing party is, pursuant to the decision, incapable of showing at least one of the *required* elements of law, and the dismissal of this cause of action is required.



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CHAPTER 25.30: USING STANDARDS TO STRIKE BACK:  
KEY LEGAL TACTICS: PROCEDURAL STANDARDS:  
ATTACHMENTS REQUIRED

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Fla.R.Civ.P. 1.130 (a) requires a Plaintiff to **attach** copies of all bonds, **notes**, bills of exchange, contracts, accounts, or documents upon which action may be brought to its complaint.



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## CHAPTER 25.40: USING STANDARDS TO STRIKE BACK: KEY LEGAL TACTICS: PROCEDURAL STANDARDS: VERIFICATION REQUIRED IN FLORIDA

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The Florida Supreme Court Task Force established in 2010 that the suing party must verify its complaint. This forces, essentially, the suing party bank's attorney to *not* lie. (I can't say it any better than that!) Why? Because, they have lied as you might have guessed it. And they do across the country by the thousands. See Appendix 600.



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## CHAPTER 26.10: INTRODUCTION: KEEPING IT SIMPLE: YOUR HONOR, WHO OWNS THE MORTGAGE AND WHO OWNS THE NOTE?

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Once, a home owner put it simply, and it was refreshing:

Your honor, I'd be glad to pay the mortgage; I don't have any problem with that. If you show me who it is that I owe the money to, I'd be glad to pay.

Your honor, *who* owns he mortgage and the note? If you tell me that it is this person or that it is that person who I owe the money, I will pay. But, if it is wrong, I am sending you the bill.

I am not certain that I would use this approach. However, these few sentences illustrate the simplicity of it and yet highlight the complexity of what's behind the simply question: Who owns the mortgage and who owns the note.

I would not necessarily try this approach because the opposing attorney might well come up with a mouthful of answers. You, however, are now well informed that anything that comes out of the opposing attorney's mouth is, in most, if not all, cases, hearsay and inadmissible evidence.

The best approach is to thoroughly understand what evidence is and what it really means. If there are no facts or evidence admitted into the court's record, the opposing attorney cannot talk about it. It's really not much more complicated than that.

Then, sit back and enjoy the opposing attorney struggle, but be aware, you must be in control and remain in control. Know your objections and repeat the objections in the appropriate manner and format. Have a court reporter present at all times, and I'm talking about the one who you hire and not the "courts."

You are entitled to due process. It is process that is due to you. Remember that and be armed with case law and rules which require and demand that the judge follow them. That's your Constitutional right, and there is no discussion about it.



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## CHAPTER 27.10: ELEMENTS OF LAW: ALL ELEMENTS: PROVE ALL ELEMENTS OF A MORTGAGE FORECLOSURE ACTION OR CASE DISMISSED

[Case law on documentary taxes on promissory note]

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In an email distribution in 2010, attorney Frederick Graves wrote:

“In a foreclosure case, there are two documents that give a plaintiff a right to sue.

The promissory note. The mortgage

In some cases the note and mortgage are combined in one document, but there are always two parts.

The promissory note:

The note is the home owner’s promise to pay the lender. Promissory notes are worth only the good faith ability of the signer to pay. If a person gives a promissory note in exchange for another (“bank”) to put up money so the person, the another (“bank”) has a right to sue the person when they don’t make good.

The mortgage:

The mortgage is the “home owner’s” promise to surrender title to the property if the home owner does not pay the balance of the note.

To foreclose on a mortgage, the plaintiff must allege and prove six (6) essential fact elements:

1. (1) The “home owner” presently holds title to the property
2. (2) Plaintiff has promissory note or other document giving plaintiff the right to sue on the note [FN-0211]
3. (3) Home owner (defendant) signed the note.
4. (4) Plaintiff has the mortgage or other document giving plaintiff the right to sue on the mortgage [FN-0211].

5. (5) Home owner (defendant) signed the mortgage.

6. (6) Home owner is in default.

Plaintiff's failure to (1) allege and (2) prove every one of these essential elements (1), (2), (3), (4), (5), and (6) is fatal to the plaintiff's case" (Graves). See also Fla.R.Civ.P. Form 1.944.

\_\_\_\_\_.  
[FN-0211] Case Law—Florida: In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note: Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note that Plaintiff does not own. Your Construction Center, Inc. v. Gross, 316 So.2d 596 (Fla. 4<sup>th</sup> DCA 1975).

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In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note: Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note that Plaintiff does not own. Your Construction Center, Inc. v. Gross, 316 So.2d 596 (Fla. 4<sup>th</sup> DCA 1975).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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"The home owner (defendant) is entitled to prove that at least one of the plaintiff's essential elements is missing – either not alleged or impossible to prove. This is the same process for any lawsuit. The only thing that makes foreclosure different from any other courthouse battle is a different set of elements" (Graves).

The text stated below may be inserted into a defendant (home owner's) motion to dismiss or into a defendant (home owner's) motion in opposition to plaintiff's motion for summary judgment.

Suggested Argument—Concerning the plaintiff's complaint, the plaintiff **has failed to provide the promissory note** giving the plaintiff the right to sue on the note.

Case Law—Florida: The original promissory note must be produced and surrendered: A promissory note is clearly a **negotiable instrument** within the definition of §673.1041(1), and either the **original must be produced**, or the lost document must be **reestablished** under



§673.3091, Florida Statutes (2002). See Mason v. Rubin, 727 So.2d 283 (Fla. 4th DCA 1999). See also Downing v. First Nat'l Bank of Lake City, 81 So.2d 486 (Fla. 1955); Thompson v. First Union Nat'l Bank, 643 So.2d 1179, 1180 (Fla. 5th DCA 1994); Figueredo v. Bank Espirito Santo, 537 So.2d 1113 (Fla. 3d DCA 1989).

Case Law—Florida—Continued from above: Because it is negotiable, the promissory note must be surrendered in a foreclosure proceeding so that it does not remain in the stream of commerce. Perry v. Fairbanks Capital Corp., 888 So.2d 725, 727 (Fla. 5th DCA 2004).

Suggested Argument—In the case at bar, the plaintiff has failed to attach the promissory note to the amended complaint filed on or about (date).

Suggested Argument—Continued: Therefore, this cause of action must be dismissed (on this ground alone). Additionally but notwithstanding the above, it is presumed that the plaintiff did not remove the promissory note from the stream of commerce.

Suggested Argument—Continued: Concerning the plaintiff's complaint, the plaintiff has failed to provide the mortgage giving plaintiff the right to sue on the mortgage.

Case Law—Florida—Continued from above: While a mortgage, on the other hand, does not fit into the definition of the documents required by §90.952 to be produced in their original form, and may thus be proved by using a properly authenticated duplicate. Cf. Home Bldg. & Loan Co. v. Rivers, 145 So. 873 (Fla. 1933); Routh v. Richards, 138 So. 69 (Fla. 1931).

Here, I urge you to carefully consider what you are reading. You are entitled to have any kind of document authenticated. Note that the court, here, is not saying that you are not entitled to cross examine a witness who can testify as to the authenticity of a certain document. The court, here, is merely saying that the original document is not required. So, be careful when you read the legalese. In law, every word matter. I stand corrected: Every comma also matters. Note, the issue of authentication is addressed in a separate chapter.

Suggested Argument—Continued: In the case at bar, no properly authenticated mortgage duplicate relevant to this case has been entered into the record as admissible evidence. Additionally, the plaintiff did not even bother to attach the mortgage or a copy of the mortgage to the amended complaint. Therefore, this cause of action must be dismissed (on this ground alone).

In the event that there is still any confusion about what is a mortgage and what is a promissory note, the Scott court has held, as follows:

Case Law—Florida—Continued from above: A mortgage is the security for the payment of the negotiable promissory note, and is a mere incident of and ancillary to such note. See Scott v. Taylor, 58 So. 30 (Fla. 1912). See also Johns Supply Co. v. McNeeley, 169 So. 732, 734 (Fla. 1936).

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Case Law—Florida—Continued from above: A mortgage is the **security** for the payment **of the** negotiable **promissory note**, and is a **mere incident of and ancillary** to such note. See Scott v. Taylor, 58 So. 30 (Fla. 1912). See also Johns Supply Co. v. McNeeley, 169 So. 732, 734 (Fla. 1936).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Suggested Argument—Continued: Concerning the plaintiff’s complaint, the plaintiff has failed to provide the mortgage which indicates the home owner’s (defendant’s) signature (showing that he signed the mortgage). Therefore this cause of action must be dismissed (on this ground alone).

Suggested Argument—Continued: Additionally, and on separate ground, the amended complaint must be dismissed for the plaintiff’s failure to pay documentary taxes on the promissory note.

Case Law—Florida—Continued from above: Promissory **notes** for which **documentary taxes** have **not been paid** are, **as a matter of law, unenforceable** by **any** Florida court. See Somma v. Metra Elecs. Corp., 727 So.2d 302, 304 (Fla. 5th DCA 1999); Rappaport v. Hollywood Beach Resort Condominium Ass’n, Inc., 905 So.2d 1024 (Fla. 4th DCA 2005); Florida Statutes §210.08(1) (2005) (“The mortgage, trust deed, or other instrument shall **not be enforceable in any court** of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.”).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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Case Law—Florida—Continued from above: Promissory **notes** for which **documentary taxes** have **not been paid** are, **as a matter of law, unenforceable** by **any** Florida court. See Somma v. Metra Elecs. Corp., 727 So.2d 302, 304 (Fla. 5th DCA 1999); Rappaport v. Hollywood Beach Resort Condominium Ass’n, Inc., 905 So.2d 1024 (Fla. 4th DCA 2005);

Florida Statutes §210.08(1) (2005) (“The mortgage, trust deed, or other instrument shall **not be enforceable in any court** of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.”).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Fla.R.Civ.P. Form 1.944 provides the format for a complaint, as follows:

Complaint: Plaintiff sues defendant and alleges:

1. This is an action to foreclose a mortgage on real property in \_\_\_\_\_ County, Florida.
2. On \_\_\_\_ (date) \_\_\_\_, defendant executed and delivered a promissory note and a mortgage securing payment of the note to plaintiff. The mortgage was recorded on \_\_\_\_ (date) \_\_\_\_, in Official Records Book \_\_\_\_\_ at page \_\_\_\_\_ of the public records of \_\_\_\_\_ County, Florida, and mortgaged the property described in the mortgage then owned by and in possession of the mortgagor, a copy of the mortgage containing a copy of the note being attached.
3. Plaintiff owns and holds the note and mortgage.
4. The property is now owned by defendant who holds possession.
5. Defendant has defaulted under the note and mortgage by failing to pay the payment due \_\_\_\_ (date) \_\_\_\_, and all subsequent payments.
6. Plaintiff declares the full amount payable under the note and mortgage to be due.
7. Defendant owes plaintiff \$\_\_\_\_\_ that is due on principal on the note and mortgage, interest from \_\_\_\_ (date) \_\_\_\_, and title search expense for ascertaining necessary parties to this action.
8. Plaintiff is obligated to pay plaintiff’s attorneys a reasonable fee for their services.

WHEREFORE plaintiff demands judgment foreclosing the mortgage and, if the proceeds of the sale are insufficient to pay plaintiff’s claim, a deficiency judgment.

NOTE: This form is for installment payments **with acceleration**. It omits allegations about junior encumbrances, unpaid taxes, and unpaid insurance premiums, and for a receiver. They must be added when proper. **Copies of the note and mortgage must be attached.**

“See Amendments to the Florida Rules of Civil Procedure, 773 So.2d 1098 (Fla. 2000)” (James Publishing).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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NOTE: This form is for installment payments **with acceleration**. It omits allegations about junior encumbrances, unpaid taxes, and unpaid insurance premiums, and for a receiver. They must be added when proper. Copies of the note and mortgage must be attached.

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS*

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You should know that if your mortgage does not contain an **acceleration clause**—and most mortgages, unfortunately for the home owner, do—the suing party can demand payment of mortgage payments missed and only those and cannot demand payment of the mortgage in its entirety.



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## CHAPTER 28.10: PRELIMINARY TASKS: LOCATING THE ASSIGNMENTS RELEVANT TO YOUR CASE ONLINE

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In this chapter, I'll provide you with a work flow so that you can see how you might be able to retrieve the MERS document relevant to your foreclosure case by using a computer with internet access. After your initial search online, I do recommend that you visit the county court or the pertinent court in your area. Depending on the county in which your foreclosure litigation is situated, certain information might not be available to you online unless you visit the respective court. You need to know which documents in your case have been filed by the suing party. Ideally, you would want to print out the court's docket as well as any documents which have been filed in your case for your records and review.

If you live, for example, in Lee County, Florida you would visit [www.leeclerk.org](http://www.leeclerk.org) and click on the following links:

1. [www.leeclerk.org](http://www.leeclerk.org)
2. Online services
3. Search official records
4. Public search
5. Check "both"
6. Enter the last name and then the first name
7. Fill in the date range, say, from 1/1/2010 to 8/12/2010
8. Enter the information and then, for example, the MERS assignment will show

Alternatively, in Lee County, you might want to search for a case by doing the following:

1. [www.leeclerk.org](http://www.leeclerk.org)
2. Online services
3. Search court cases
4. Civil
5. Inquire by name and enter the last name and then the first name
6. Enter the information and then, you will see a case number and a link for further information about your case

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## CHAPTER 28.50: PRELIMINARY TASKS: YOU'RE YOUR MORTGAGE HAVE AN ACCELERATION CLAUSE?

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Does your mortgage have an acceleration clause? If it does not, you know what to do! This can instantly save you! See Appendix 800.1.1!



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## CHAPTER 28.60: PRELIMINARY TASKS: IS THE OUT-OF STATE SUING PARTY REGISTERED WITH THE SECRETARY OF STATE?

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Is the out-of-state suing party registered with the Secretary of State (or other State office)? If the suing party is not, they might not be capable of suing you in a foreclosure action! See Appendix 800.1.1!



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## CHAPTER 29.10: INDUSTRY PRACTICES: THE NOTE ENDORSEMENT IN BLANK AND MERS' CORPORATE RESOLUTION

[Certifying Officers of MERS]

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If I give you a check that's not signed, can you cash it? If I make a copy of a five-Dollar bill, can I go to Wal-Mart and present it at the check-out?

According to Lavelle, "industry intentionally conceals the true ownership of a borrower's promissory note. "MERS Foreclosure procedure [FN-1143] states:

'The agencies (Fannie Mae, Freddie Mac and Ginnie Mae) **require a blank endorsement of the promissory note** when the seller/servicer sells a mortgage loan to them. Therefore, the note should remain endorsed in blank when the foreclosure is commenced unless it is legally required to be endorsed to the foreclosing entity and not just the preferred method. **If it is required to endorse the promissory note to the foreclosing entity,** then the note may need to be endorsed to MERS. However, we have not found it a requirement in Florida that the Note needs to be endorsed to the foreclosing entity' [Lavelle].

'Even though the servicer has physical custody of the note, custom in the mortgage industry is that the investor (Fannie Mae, Freddie Mac, Ginnie Mae or a private investor) **owns the beneficial rights to the promissory note**' [Lavelle].

'If the promissory note is endorsed in blank and the servicer has physical custody of the note, the servicer will technically be the note holder as well as the record mortgage holder. By virtue of having the servicer's employees be certifying officers of MERS, there can be an in-house transfer of possession of the note so that MERS is considered the note holder for purposes of foreclosing the loan' [Lavelle].



\_\_\_\_\_.  
[FN-1143] For industry-wide standards and MERS foreclosure policies, See <http://www.mersinc.org/Foreclosures/index.aspx>

Further, according to Lavalley, the following paragraph is the most important paragraph to the extent that it shows the industry's standard operating procedures and policies:

“Employees of the servicer will be certifying officers of MERS. This means they are authorized to sign any necessary documents as an officer of MERS. The certifying officer is granted this power by a corporate resolution from MERS. In other words, the same individual that signs the documents for the servicer will continue to sign the documents, but now as an officer of MERS” (Lavalley).

Lavalley further states that, “[t]hese ‘industry-wide’ policies, practices, and procedures have drawn the recent attention and ire of judges across the nation and reports in major publications such [as] the Wall St. Journal and New York Times.

*NOTE: PERMISSION TO QUOTE WAS GRANTED BY THE AUTHOR, NYE LAVALLEY.*



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## CHAPTER 29.20: INDUSTRY PRACTICES: MERS MEMBERS AGREE TO APPOINT MERS TO ACT AS THEIR AGENT

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See also Chapter 34.40. MERS is an acronym for Mortgage Electronic Registration Systems, a private company that registers mortgages electronically and tracks changes in ownership. (Ellen Brown, 2009). The Texas Court of Appeals for the Second District of Texas in Fort Worth, Texas, held, as follows:

“[Page 10:] MERS was created for the purpose of tracking ownership interests in residential mortgages [fn-17].”

“Entities such as mortgage lenders “subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages [fn-18].”

“These MERS members ‘contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system’ [fn-19].

\_\_\_\_\_.  
[fn-17] MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 861 N.E.2d 81, 83 (2006).

[fn-18] Id.

[fn-19] Id.”

“When a mortgage is executed through a MERS member and [page 11:] registered in the MERS system, it is recorded in the real property records with MERS named on the instrument as nominee or mortgagee of record [fn-20].”

“While the mortgage is in effect, the original lender may transfer the beneficial ownership or servicing rights on the mortgage to another MERS

member, with MERS tracking these electronic transfers; these assignments are **not recorded** in the real property records [fn-21].”

“If a MERS member assigns its interest in a mortgage to a non-MERS member, this assignment **is recorded** in the real property records and MERS deactivates the loan within its system [fn-22].”

“MERS has ‘no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans’ [fn-23].”

“MERS acts as the agent only for its members; once a note is transferred out of the MERS system to a non-member, MERS cannot act as the agent [fn-24].

[fn-20] Id.

[fn-21] Id.

[fn-22] Id. at n.4.

[fn-23] In re Hawkins, No. BK-S-07-13593-LBR, 2009 WL 901766, at \*3 (Bankr. D. Nev. Mar. 31, 2009) (mem. op.).

[fn-24] Id. at \*4” [FN-1652]

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[FN-1652] The Texas Court of Appeals for the Second District of Texas in Fort Worth, Texas, Mortgage Electronic Registration Systems, As Nominee for Lender and Lender’s Successors and Assigns v. Kim Young et al., Case No. 2-08-088-CV, Order delivered on June 4, 2009.



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## CHAPTER 30.10: PRACTICAL STUDY: YOU'RE THE DETECTIVE: ASSIGNMENTS AND MASTER PIECES OF DECEPTION

[Is it really that simply?]

[Re (26) Making “assignment effective as of” lacks power pursuant to law]

[See also A cause of action for fraud: Backdating and the size of Madison ...]

[Re (17) (26) Holder of mortgage & “together with the Note”]

[Re (40) Corporate seal is missing but required]

[Location of notary differs from location of affiant, but not in this example]

[Re (25) (26) Trustee lacks power pursuant to case law]

[(Re (36) “assistant secretary” is not “duly authorized]

[See also Appendices 300.1.2, 300.1.3, and 300.1.5]

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The purported [FN-2250] assignments filed by the suing party are fraudulent documents in most, if not all, instances. In order to best understand what’s “behind” these documents, we will now rip these assignments apart, piece by piece. In subsequent chapters, we will let case law dissect the statements.

<sup>\_\_\_\_\_</sup>  
[FN-2250] *Purport* is a big word, but it simply means this: The suing party is claiming that there is a proper assignment, or, you might say, the suing party purports that there is a proper assignment. In your legal writing you might also want to use this legal construction: “Assuming *arguendo* that there is a mortgage assignment, then the suing party is still not entitled to bring suit because ....” This simply means: “Assuming, for the purposes of this discussion only and without admitting that it is in fact the case (or true), that indeed there is a mortgage assignment, the suing party is still not entitled to bring suit because ....”

Be sure to make two separate distinctions: First, there are assignments which pertain to the mortgage. Second, there are assignments (and they are more correctly called endorsements) which pertain to the promissory note. In order to successfully litigate mortgage foreclosure,

the suing party must show, amongst other things, that both the assignment of the mortgage and the assignment (endorsement) of the promissory note are legally sufficient.

In 99% of the cases in which MERS purports to assign mortgages, the MERS document is a deception.

Regarding the promissory note, the suing party will, for instance, claim to have lost the promissory note. In some cases the suing party will also have failed to securely affix the allonge onto the promissory note. We will discuss the promissory note and the allonge in a separate chapter.

This chapter is dedicated to showing the movement of the mortgage.

Here, we will show you how the mortgage moved from party A to party B to party C, etc.

If, for instance, the suing party purports to have an ownership interest in the mortgage assigned to party C but the caption of the complaint (against you) shows party K, you will know that the suing party cannot foreclose because it does not own the mortgage.

Typically, the following documents are filed by the suing party in a mortgage foreclosure action:

1. “Mortgage” signed by purchaser of property
2. “Assignment of Security Instrument,” assigning mortgage from original lender to another entity
3. “Assignment of Mortgage” from entity to MERS
4. “Assignment of Mortgage Know All Men By These Presents” from MERS to another
5. “Assignment of Mortgage Know All Men By These Presents” from MERS to another (again). See, for example, Appendices 300.1.2, 300.1.3, and 300.1.5.

When you analyze a mortgage assignment (or promissory note endorsement), be sure to read every word. In law, *every* word has a meaning. If you attempt to read the text as it is presented in “fine-printed” you will easily skip over critical text. The folks who have created these documents are masters of deception! Beat them by retyping the text if you need to (as I have for this book) and by paying attention to every word!

Let’s take a look at how, in the example below, the mortgage has switched hands. It’s best if you draw a diagram while you are reading in order to track ownership from party A to party B to party C.

Also, be aware that the party, say, “Bank Deceptivetown” is not the same party as, say, “Bank Deceptivetown Trust” or “Bank Deceptivetown USA” or “Bank Deceptivetown Mortgage,” and so forth. In fact, these folks (during the process of securitization) have deliberately created similar names in order to confuse you (as well as the judges). Again, each word, no matter how small, has meaning. If, for example, the mortgage assignment purports to identify Bank Deceptivetown Trust as the owner of the mortgage, it is not Bank Deceptivetown (without the word “Trust”) which owns the mortgage no matter what they are trying to tell you. Be very careful (and suspicious).

Also—and this is very important—do not allow the opposing attorney to make an attempt to proffer an explanation in court regarding, say, Bank Deceptivetown versus Bank Deceptivetown Trust. If the mortgage assignment purports to identify Bank Deceptivetown Trust as being the holder of the mortgage, it is *assuming arguendo* Bank Deceptivetown Trust which is the holder of the mortgage and not Bank Deceptivetown (without the word “Trust”).

If the opposing attorney attempts to make an identification, object to the attorney’s statement in court in that he is testifying. The argument is a very simple one: A scoop of strawberry ice cream is a scoop of strawberry ice cream and no matter how much you are inclined to argue, a scoop of strawberry ice cream is *not* a scoop of strawberry ice cream *with* whipping cream on top unless you make it so!

Simply compare the statements in the example assignments below with the statements in the assignments you want to examine. You will find that the language is quite similar, if not **identical**. We begin with step 1.

In step 1, the home owner has signed a mortgage.

In step 2, the mortgage was assigned from the original lender to another entity.

In step 3, the mortgage was assigned from (another) entity to MERS.

In step 4, the mortgage was assigned from MERS to another entity.

In step 5, the mortgage was assigned from MERS to another (same) entity (again).

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Step 1: The mortgage agreement, in our example, was—  
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1. (1) [“signed”] **signed on October 17, 2005**, by the home owner, and
2. [“recorded on”] **recorded** with the clerk of court on **11/18/ 2005**; and
3. [“recording number”] the recording number is \_\_\_\_\_; and
4. [“notary location”] the document was not notarized
5. The name of the document is: “Mortgage Agreement”
6. (6)

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Step 2: The mortgage agreement was—  
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7. (7) [“assigned”] **assigned on October 17, 2005**;
8. (8) [“from / to”] from PRIMEQUITY, LLC to WMC Mortgage Corporation [FN-

1950]; and

\_\_\_\_\_.  
[FN-1950] Note: According to Wikipedia, “GE ceased WMC’s operations in late 2007 due to the subprime market collapse.”

9. [“recorded on”] **recorded** with the clerk of court on **7/26/2006**; and
10. [“recording number”] the recording Number is \_\_\_\_\_; and
11. [“notary location”] the Notary Public is located in **Florida**;
12. [“notary commission”] the Notary Public’s commission expires on \_\_\_\_\_;
13. [“affiant location”] the Affiant (person who is signing the document) is located in the County of Hillsborough, State of **Florida**;
14. The name of the document is “Assignment of Security Instrument”

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Step 3: The mortgage agreement, in our example, was—

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15. (15) [“assigned”] **assigned on December 7, 2007**;
16. (16) [“from / to”] from **WMC** Mortgage Corporation [FN-1950] to MERS:
17. (17) “For value received, the undersigned **HOLDER OF A MORTGAGE** (herein “Assignor”) whose address is . . . **DOES** hereby grant, sell, **ASSIGN**, transfer and convey, **UNTO . . . MERS**, its successors and assigns, a corporation organized and existing under the laws of Delaware (herein “Assignee”), whose address is P.O. Box 2026, Flint, Michigan, 48501-2026, **A CERTAIN MORTGAGE** dated October 17, 2005, made and executed **by [home owner] to an in favor of** WMC Mortgage Corp. . . . “ (Emphasis added by the

author of *How to Stop Foreclosure*).

18. (18) ["recorded on"] recorded with the clerk of court on 2/4/2008; and
19. ["recording number"] the recording number is \_\_\_\_; and
20. ["notary location"] the Notary Public is located in Los Angeles County, **California**;
21. ["notary commission"] the Notary Public's **commission expires** on \_\_\_\_; and
22. ["affiant location"] the Affiant is located in County of Los Angeles, State of **California**;
23. The name of the document is "Assignment of Mortgage" (from entity to MERS).

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Step 4: The mortgage agreement, in our example, was—  
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24. (24) ["assigned"] assigned on **December 9, 2008**;
25. (25) ["from / to"] From MERS to: as follows: "**Assignment of Mortgage Know all men by these presents**: That Mortgage Electronic Registration Systems, Inc. **[MERS]** Residing or located at **c/o GMAC MORTGAGE, LLC., C/O GMAC MORTGAGE, LLC, 1100 Virginia Drive**, Ft. Washington, PA 19034, herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, **DOES** hereby grant, bargain, sell, **ASSIGN**, transfer and set over **UNTO** THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE BANK N.A. AS TRUSTEE residing or located at: C/O GMAC MORTGAGE LLC, 1100 Virginia Drive, Ft. Washington, PA 19034 herein designated as the assignee, the mortgage executed by [home owner] recorded in LEE County, Florida at book INSTRUMENT NO . . .

\*scan4 "together with the note"



26. (26) Continued from above: **TOGETHER WITH THE NOTE** [Emphasis added by the author] and each and every other obligation described in said mortgage and the money due and to become due thereon TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned. Pursuant to the provision of Sec. 689.071, Florida Statutes, the within named **Trustee has the power** and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby. In Witness Whereof, the said **Assignor has hereunto** set his hand and seal or **caused these presents to be SIGNED** by its proper corporate officers and **its corporate seal** to be hereto affixed, **THIS** 9<sup>th</sup> **DAY** of December, 2008, **BUT EFFECTIVE AS OF** the 8<sup>th</sup> day of May, **2008** [Emphasis added by the author].
27. (27) [“recorded on”] recorded with the clerk of court on **12/11/2008**; and
28. [“recording number”] the recoding number is \_\_\_\_\_, DOC TYPE ASG, Rec. Fee \$10.00
29. [“notary location”] the Notary Public is located in **Florida**;
30. [“notary commission”] the Notary Public’s **commission expires** on \_\_\_\_\_;
31. [“affiant location”] the Affiant is located in the County of Broward, State of **Florida**;
32. [“signed by”] **Beth Cerni**; as
33. [“title”] **Assistant Secretary**;
34. [“company”] Mortgage Electronic Registration Systems, Inc.;
35. (35) [“**corporate seal**”] none present;
36. (36) “Personally appeared before me, the undersigned authority in and for the aforesaid county and state, on this the 9<sup>th</sup> day of December, 2008, within my jurisdiction, the within named BETH CERNI who is personally known to me and who acknowledged to me that (s)he is **ASSISTANT SECRETARY** and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and

as its act and deed (s)he executed the above and foregoing instrument, after first **having been duly authorized** by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO DO SO.”

37. The name of the document is “Assignment of Mortgage - Know All Men By These Presents” (from MERS to another entity).

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Step 5: The mortgage agreement, in our example, was—

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38. (38) [“assigned”] assigned (again) on **June 7, 2010;**
39. (39) [“from / to”] From MERS to: as follows: **“Assignment of Mortgage Know all men by these presents:** That Mortgage Electronic Registration Systems, Inc. Residing or located at **C/O GMAC MORTGAGE, LLC., C/O GMAC MORTGAGE, LLC, 1100 Virginia Drive,** Ft. Washington, PA 19034, herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and **set over unto THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE BANK N.A. AS TRUSTEE** residing or located at: **C/O GMAC MORTGAGE LLC, 1100 Virginia Drive,** Ft. Washington, PA 19034 herein designated as the **assignee,** the mortgage executed by [home owner] recorded in LEE County, Florida at book INSTRUMENT NO . . .

\*scan4 “but effective as of”

\*scan4 “effective as of”

40. (40) Continued from above: **together with the note** [Emphasis added by the author] and each and every other obligation described in said mortgage and the money due and to become due thereon TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned. Pursuant to the provision of Sec. 689.071, Florida Statutes, the within named **Trustee has the power** and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby. In Witness Whereof, the said

**ASSIGNOR HAS** hereunto set his hand and seal or  
**CAUSED** these presents to be signed **BY** its proper corporate officers

and **ITS CORPORATE SEAL** to be hereto affixed, this 7<sup>th</sup> day of June, 2010, but **effective as of** the 3<sup>th</sup> day of May, **2008**” [Emphasis added by the author].

\*scan4 “corporate seal”

41. (41) [“recorded on”] recorded with the \_\_\_\_\_ clerk of court on **6/17/2010**; and
42. [“recording number”] the recoding number is \_\_\_\_\_, DOC TYPE ASG, Rec. Fee \$10.00

\*scan4 “notary affiant location”

43. [“notary location”] the Notary Public is located in **Pennsylvania**;
44. [“notary commission”] the Notary Public’s **commission expires** on \_\_\_\_\_;
45. [“affiant location”] the Affiant is located in the County of Broward, State of **Pennsylvania**;
46. (46) [“signed by”] **Kristine Wilson**; as

\*scan4 “vice president”

47. (47) [“title”] **Vice President**;
48. (48) [“company”] “Mortgage Electronic Registration Systems, Inc.  
**(CORPORATE SEAL)**”

\*scan4 “corporate seal”

49. (49) [“**corporate seal**”] none present;
50. (50) “Personally appeared before me, the undersigned authority in and for the aforesaid county and state, on this the 9<sup>th</sup> day of December, 2008, within my jurisdiction, the within named BETH CERNI who is personally known to me and who acknowledged to me that (s)he is **ASSISTANT SECRETARY** and that **for and on behalf of** MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first **having been duly authorized** by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO DO SO.”
51. The name of the document is “Assignment of Mortgage - Know All Men By These Presents” (from MERS to another entity, again ...).

To see examples of an assignment of mortgage, see Appendices 300.1.2, 300.1.3, and 300.1.5. Before proceeding with a legal analysis regarding the assignments, here are a few preliminary questions to consider.

1. Re the WMC-to-MERS assignment on December 7, 2007, WMC has ceased its operation in **late 2007**, but has assigned the “Assignment of Mortgage” on **December 7, 2007**.
2. If indeed the mortgage was assigned from WMC Mortgage Corporation—let’s refer to them as “WMC”—to MERS a certain date after WMC ceased its operation, is the assignment a lawful assignment?
3. Re the December 9, 2008, assignment, only the mortgage has been assigned and not the note.
4. Re the December 9, 2008, assignment, MERS is located at c/o; the Bank of New York Trust Company ... is also located at c/o.
5. Re the December 9, 2008, assignment, MERS is located at 1100 Virginia Drive; the Bank of New York Trust Company ... is also located at 1100 Virginia Drive.
6. Re the December 9, 2008, assignment, the document claims that the Trustee has certain powers.
7. Re the December 9, 2008, assignment, the document states that the “. . . said Assignor has . . . caused . . . its proper corporate officers **and its corporate seal** to be hereto affixed, but MERS’ corporate seal is not affixed.
8. Re the December 9, 2008, assignment: “. . . signed by its proper corporate officers and its corporate seal to be hereto affixed, this **9<sup>th</sup> day of December**, 2008, but **effective as of** the 8<sup>th</sup> day of May, 2008.”
9. Re the December 9, 2008, assignment, the **assignment was dated Dec. 9, 2008**, the assignment made effective as of May 8, 2008, and the **lawsuit was filed on May 29, 2008**, and service was effected on May 31, 2008.
10. Re the December 9, 2008, assignment, the location of the Public Notary is in the State of Florida; the location of the affiant is also in the State of Florida.
11. Re the December 9, 2008, assignment, the commission expired on \_\_\_\_\_ and after the assignment was notarized.
12. Re the December 9, 2008, assignment, the assignment was signed by Beth Cerni who appears to be an employee of MERS.

13. Re the December 9, 2008, assignment, Beth Cerni has “ . . . acknowledged . . . that (s)he is **ASSISTANT SECRETARY** and that **for and on behalf of** MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first **having been duly authorized** by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO DO SO,” and Beth Cerni has signed the assignment as assistant secretary.
14. Re the December 9, 2008, assignment, Beth Cerni has “ . . . acknowledged . . . that (s)he is **ASSISTANT SECRETARY** and that **for and on behalf of** MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first **having been duly authorized** by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. TO DO SO,” and Beth Cerni has signed the assignment for and on behalf of MERS.



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## CHAPTER 31.10: CITATIONS THAT STAND OUT & RESPONSE TO PRACTICAL STUDY: ASSIGNMENTS AND MASTER PIECES OF DECEPTION: PART I

[Re (26) Making “Assignment Effective As Of” in Violation of Law]

[Florida, Pasco County, has addressed “backdating”]

[New York has addressed “effective as of”]

[Tool: Motion to dismiss] \*scan4 “m2d”

[Egregious failure to comply with discovery rules]

[Dismissed with prejudice]

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*Attempted Gimmick by Bankster and Smart Fighting Solution by Home Owner: The suing party bank has attempted to assign a mortgage by making the assignment effective as of an earlier date. You fight back by telling the court that, pursuant to case law, the suing party is incapable of doing so.*

*History of the Situation: Complaint was filed on June 20, 2007; assignment was dated June 28, 2007; assignment was made effective May 31, 2007.*

*Procedural Issues: Home owner’s failure to Appear or Answer*

*Case Law Cross Benefit: Case law provided whether a court erred in acting sua sponte.*

*Smart Tool: Objection*

*Smart Tool: Moving the Court*

*Smart Tool: Judicial Notice*

I'd like to mention that the Order, below, is brief and powerful. You will not want to miss this reading!

Case Law—Plaintiff “commenced the instant mortgage foreclosure action by filing of the summons and complaint on **June 20, 2007**. After service of said summons and complaint on all defendants and their **failure to appear or answer**, plaintiff made the instant **application for default judgment** and/order of reference” (Order, Pages 1 and 2) (Emphasis added by the author of this book) [FN-1126].

Continued from above: “The original lender of the subject June 7, 2004 mortgage is America’s Wholesale Lender (hereinafter “America’s Wholesale”). In support of plaintiff’s application, it submits a purported assignment of the mortgage from [MERS], acting as nominee for America’s Wholesale, to plaintiff. The purported **assignment is dated** [and notarized **June 28, 2007** and stated in pertinent part ‘this assignment is **effective as of** the 31<sup>st</sup> day of May, 2007’ “ (Order, Page 1) (Emphasis added by the author of this book) [FN-1126].

\*scan4 “effective as of”

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Continued from above: “However, **such an attempt to retroactively assign** the mortgage is **insufficient to establish plaintiff’s ownership interest** at the time the action was commenced. See Countrywide Home Loans, Inc. v. Taylor, 17 Misc3d 595 (Sup. Ct. Suffolk Co. 2007)” (Order, Page 2) (Emphasis added by the author of this book) [FN-1126].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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Continued from above: “Plaintiff’s attempt to foreclose upon a mortgage in which it had no ‘legal or equitable interest was without foundation in law or fact ...’ Katz v. East-Ville Reality Co., 249 AD2d 243 (1<sup>st</sup> Dept. 1998). See U.S. Bank Nat. Ass’n v. Merino, 16 Misc3d 209, 212 (Sup. Ct. Suffolk Co. 2007). Moreover, ‘foreclosure of a **mortgage may not be brought by one who has no title** to it....’ Kluge v. Fugazy, 145 AD2d 537, 538 (2d Dept. 1998). See RCR Services Inc. v. Herbil Holding Co., 229 AD2d 379 (2d Dept 1996)” (Order, Page 2) (Emphasis added by the author of this book) [FN-1126].

Let’s turn to the question of sua sponte.

Continued from above: “Finally, plaintiff’s **standing** to bring the within action **goes to the basis of a court’s authority** to adjudicate a dispute. See Stark v. Goldberg, 297 AD2d 203 (1<sup>st</sup> Dept 2002) (wherein the court held that **sua sponte dismissal** of the action was warranted **despite the lack** of any assertion by defendants of an objection to plaintiffs’ standing). In view of the foregoing, the Court finds that plaintiff had no standing to commence this action. Plaintiff’s application for a default judgment and order of reference is hereby **denied and its complaint is hereby dismissed sua sponte**” (Order, Page 2) (Emphasis added by the author of this book) [FN-1126].

\_\_\_\_\_.  
[FN=1126] Bank of New York as Trustee for the Certificate Holders SWABS, Inc., Asset Backed Certificates, Series 2004-6 C/O Countrywide Home Loans, Inc. v. Eserdai Singh et al., Supreme Court of the State of New York, December 14, 2007, Index No. 22434/07, Order by Judge Donald Scott Kurtz. See Appendix.

As a suggestion, a home owner might want to move the court, at the hearing, the judge to take what’s called judicial notice of the fact that the court in [FN-1126] has stated that (and put whatever sentence of which you would like the judge to take judicial notice). For information about judicial notice and the inherent powers thereof, See Frederick Graves’ course on [www.jurisdictionary.com](http://www.jurisdictionary.com). For example: “Your honor, I move this court to take judicial notice of the fact that ... .”

\*scan4 “fraud”

Case Law—Florida: "4) The three motions of the Defendant were properly before the court: a Motion to Compel Responses to Interrogatories and Request for Production; Amended Motions in Limine regarding the Promissory Note and a Second Motion in Limine/Motion to Strike based on **an allegation of fraud on the court**; and finally a Motion for Rehearing." (Page 1, Order) [FN-2224].

Continued from above—Case Law—Florida: "5) Regarding the Motion to Compel, the court finds that the Plaintiff has failed to produce answers to the Interrogatories for a period of 26 months, between the time the Interrogatories and the Request for Production were served on January 8, 2008 and the date of the hearing on the Motion to Compel took place on March 1, 2010. Additionally, the court finds that the Plaintiff failed to produce responses to the Request for Production propounded in July 2009" (Page 1, Order) [FN-2224].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Continued from above—Case Law—Florida: "6) The Defendant's Motion in Limine/Motion to Strike was based on an allegation that the Assignment of Mortgage was created after the filing of this action, but the document date and notarial date were purposely backdated by the Plaintiff to a date prior the filing of this foreclosure action" (Page 1, Order) [FN-2224].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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\*scan4 "fraud"

\*scan4 "notary stamp"

Continued from above—Case Law—Florida: "7) The Assignment, as an instrument of fraud in this Court intentionally perpetrated upon this court by the Plaintiff, was made to appear as though it was created and notarized on December 5, 2007. However, that purported creation/notarization date was facially impossible: the stamp on the notary was dated May 19, 2012. Since Notary commissions only last four years in Florida (see F.S. Section 117.01 (1)), the notary stamp used on this instrument did not even exist until approximately five months after the purported date on the Assignment" (Page 2, Order) [FN-2224].

Continued from above—Case Law—Florida: "8) Confirming this, the Notary Bonding Company's representative, Erika Espinoza, stated in a sworn affidavit that the Notary Stamp used by Terry Rice, the Notary, did not exist on the purported date is was notarized. Specifically, Espinoza testified in her affidavit that the notary stamp didn't come into existence until sometime in April 2008, five months after the date on the Assignment. 9) The affidavit of Erika Espinoza was un-rebutted by any pleading, testimony, or affidavits of the Plaintiff" (Page 2, Order) [FN-2224].

\*scan4 "newly discovered evidence"

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Continued from above—Case Law—Florida: "10) The Motion for Rehearing alleged proper legal grounds for rehearing the Defendant's Motion to Dismiss, based on newly discovered evidence and discovery of fraud on the Court" (Page 2, Order) [FN-2224].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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\*scan4 “backdating”

\*scan4 “m2d”

Continued from above—Case Law—Florida: "11) The court **specifically finds that the purported Assignment did not exist** at the time of filing of this action; that the purported Assignment was subsequently created and the execution date and notarial date were fraudulently backdated, in a purposeful, intentional effort to mislead the Defendant and this Court. The Court **rejects the Assignment** and finds that is **not entitled to introduction in evidence for any purpose**. The Court finds that the Plaintiff does not have standing to bring its action. (See BAC Funding Consortium, Inc. ISOA/ATIMA v. Genelle Jean-Jacques, Serge Jean-Jacques, Jr. and U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset Backed Certificates, Series 2006-CBS (2nd DCA Case No. 2D08-3553) Feb. 12, 2012.)" (Page 2, Order) [FN-2224].

"13) The Court finds that the Defendant is the prevailing party in this litigation . . . " (Page 2, Order) [FN-2224].

\*scan4 “failure to comply with discovery”

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Continued from above—Case Law—Florida: "IT IS THEREFORE. ORDERED AND ADJUDGED THAT: 1) The Motion to Compel is granted. As a sanction for **egregious failure to comply with discovery Rules** the Plaintiff shall be prohibited from presenting the alleged Promissory Note to this Court” (Page 3, Order) [FN-2224].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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Continued from above—Case Law—Florida: “2) The Motion in Limine is granted. The Plaintiff shall be prohibited from introducing into evidence the alleged Promissory Note” (Page 3, Order) [FN-2224].

Continued from above—Case Law—Florida: “3) The Second Motion in Limine is granted. The Plaintiff’s recording and **filing regarding the fraudulent Assignment of Mortgage is**

**stricken**, and the Plaintiff is prohibited from entering the Assignment of Mortgage into evidence” (Page 3, Order) [FN-2224].

\*scan4 “dismissed with prejudice”

\*scan4 “dismiss power upon showing of fraud”

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Continued from above—Case Law—Florida: “4) The Motion for Rehearing of Defendant's Motion to Dismiss is granted and the Motion to Dismiss is granted. The Plaintiff's complaint is **dismissed with prejudice**, based on the fraud intentionally perpetrated upon the Court by the Plaintiff. This Court has the power to dismiss a case upon a showing of a **commission of fraud** on the Court by a party. (See Taylor v. Martell (4<sup>th</sup> DCA, 2005). Also, F.R. C.P. 1.150 allows the striking of sham pleadings upon a proper showing. The Defendant shall go henceforth without day” (Page 3, Order) [FN-2224].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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\_\_\_\_\_.  
[FN=2224] U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ET AL. vs. ERNEST E. HARPSTER, IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY. STATE OF FLORIDA, CASE NO. SI-2007-CA-6684ES, Judge Tepper, Order, Amended Order Granting Motion to Compel, Granting Motion in Limini and Granting Motion for Rehearing, March 25, 2010. (Note: David Stern, P.A., attorney for Plaintiff.)



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## CHAPTER 31.20: CITATIONS THAT STAND OUT & RESPONSE TO PRACTICAL STUDY: ASSIGNMENTS AND MASTER PIECES OF DECEPTION: PART II

[Re (26) Making “Assignment Effective As Of” in Violation of Law]

[The allonge]

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*Attempted Gimmick by Bankster and Smart Fighting Solution by Home Owner:*

*Motion before the court: Defendant home owner’s motion to dismiss complaint*

*Procedural Posture: Lawsuit filed on: October 1, 2007*

*Assignment of mortgage notarized on: October 4, 2007*

*Assignment of mortgage recorded on: October 17, 2007*

**NOTE: THE ASSIGNMENT WAS NOTARIZED AND RECORDED AFTER THE LAWSUIT WAS FILED. THIS IS A FATAL ISSUE.**

*Assignment of mortgage made effective: as of September 21, 2007*

**NOTE: THE ASSIGNMENT WAS MADE EFFECITVE AFTER THE LAWSUIT WAS FILED. THIS IS A FATAL ISSUE.**

*Purported Movement of Mortgage Assignment:*

1. (1) Mortgage delivered to CITIBANK, N.A. as security
2. (2) Mortgage assigned from CITIBANK, N.A. to MERS
3. (3) Mortgage purportedly assigned, somehow, to CITIMORTGAGE, INC.

**NOTE: THE ASSIGNMENT FROM (1) TO (2) IS NOT AN ISSUE. (2) TO (3) IS AN ISSUE.**

*Purported Movement of Promissory Note Assignment:*

1. (1) Note was delivered to CITIBANK, N.A.
2. (2) Power of attorney (to act on behalf of CITIBANK, N.A.) was made by SHEEHAN (a “stranger to this proceeding”)
3. (3) SHEEHAN (“stranger”) appoints GULDI to act as SHEEHAN’S attorney in fact.
4. (4) BERGMAN signs the endorsement, as indicated below, and assigns the note from CITIBANK, N.A. to CITIMORTGAGE, INC, whereby the court notes that the “unrelated power of attorney” in () “was submitted to the Court in between the note and endorsement.

\_\_\_\_\_(Signature)  
“JIM BERGMAN, as attorney in fact for CITIBANK, N.A.,

*NOTE: IT APPEARS THAT THE DOCUMENT WHICH GIVES POWER OF ATTORNEY TO BERGMAN IN (4) IS MISSING.*

*NOTE IT: APPEARS THAT, HERE, THE SUING PARTY ATTEMPTED TO CONFUSE THE HOME OWNER BY INSERTING A “STRANGER.” ON A LIGHT READING OF THE ORDER, ONE COULD ERRONEOUSLY PRESUME THAT IT WAS CITIBANK, N.A., WHICH GAVE BERMAN THE AUTHORITY TO ACT AS POWER OF ATTORNEY.*

*Case Law Cross Benefit: The allonge*

*Smart Tool: Objection*

*Smart Tool:*

*Smart Tool: Judicial Notice*

Here’s what the court has said:

Case Law—“This is an action to foreclose a mortgage allegedly held by plaintiff . . . . “ “Defendant alleges that plaintiff was not the holder of the subject note and mortgage at the time the instant action was commenced, and therefore had no standing to commence the action.” “The complaint alleges that on . . . March 22, 2006, defendant . . . executed and delivered a note in the amount of . . . to CITIBANK, N.A., and a mortgage as security therefor to [MERS] as nominee for CITIBANK, N.A.” As such defendant challenges the standing of the plaintiff, CITIMORTGAGE, INC., to commence this action to foreclose the aforementioned mortgage” (Order, Page 2) [FN-1558].

Continued from above: “In opposition, plaintiff claims that it is the assignee of the subject note and mortgage. In support thereof, plaintiff has annexed an assignment of mortgage, notarized on October 4, 2007, and effective as of September 21, 2007, wherein [MERS] as nominee . . . “ (Order, Page 2) [FN-1558].

Continued from above: “. . . wherein [MERS] as nominee for CITIBANK, N.A., assigned the mortgage to CITIMORTGAGE, INC.” (Order, Page 2) [FN-1558].

Continued from above: “In order to prove standing, plaintiff must demonstrate that it was the owner of the note and [the owner of the] mortgage at the time it commenced this foreclosure action (see e.g. Fannie Mae v Youkelsone, 303 AD2d 546 [2003])” (Order, Page 2) [FN-1558].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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Continued from above: “In order to prove standing, plaintiff must demonstrate that it was the owner of the note and [the owner of the] mortgage at the time it commenced this foreclosure action (see e.g. Fannie Mae v Youkelsone, 303 AD2d 546 [2003])” (Order, Page 2) [FN-1558].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Case Law—Continued from above: “Foreclosure of a mortgage may not be brought by one who has no title to it, and absent transfer of the debt, the assignment of the mortgage is a nullity (Kluge v Fugazy, 145 AD2d 537 [1988])” (Order, Page 2) [FN-1558].

Here, it is important to know that the above statement by the court addresses two issues: The mortgage and, separately, the note. The court is saying that the party who desires to foreclose on a property must show that it possesses title to the property. Here, the court is talking about the showing of a proper chain of title. In other words, if the mortgage was not properly assigned to the suing party, the suing party cannot sue.

Secondly, and as an independent matter, the court is saying that the party who desires to foreclose on a property must also show that it possesses ownership of the debt. Here, the court is talking about the showing of a proper chain of the promissory note. In other words, if the promissory note was not properly assigned to the suing party, the suing party cannot sue.

Both conditions must be met. If the suing party cannot make a showing of either of the two, the litigation against the home owner stops.

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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Case Law—Continued from above: “The note secured by the mortgage is a negotiable instrument (see UCC 3-104), which requires indorsement [sic.] on the instrument itself ‘ or on a paper so firmly affixed thereto as to become a part thereof ’ (UCC 3-202[2]) in order to effectuate a valid assignment of the entire instrument” (Order, Page 2) [FN-1558].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Case Law—Continued from above: “Here, plaintiff has submitted an assignment of mortgage which was made effective as of September 21, 2007, ten days prior to the commencement of the action” (Order, Page 2) [FN-1558].

Here, you should know that the court did not offer any further discussion as to the assignment of mortgage. The court, instead, turned to a discussion about the note. I believe, however, that the court, given the context of the statement immediately above, was implicitly stating that the suing party had no standing to sue given the fact that the “assignment of mortgage which was made effective . . . ten days prior to the commencement of the action.” I also believe that the court could have stopped any further analysis, e.g., the analysis of the note, in that the suing party is required to prove up both the proper ownership of the note and, separately, of the mortgage. The court, however, continued by offering a discussion on the note, as follows:

Case Law—Continued from above: “Plaintiff has also submitted the note, a power of attorney, and an undated ‘allonge to promissory note’ purportedly as an indorsement [sic.] of the note to plaintiff” (Order, Page 2) [FN-1558].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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Case Law—Continued from above: “Plaintiff has also submitted the note, a power of attorney, and an undated ‘allonge to promissory note’ purportedly as an indorsement [sic.] of the note to plaintiff” (Order, Page 2) [FN-1558].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Unfortunately, the court did not offer an analysis pertaining to the “undated” allonge, above. I have, nevertheless and for important reasons, repeated the text for emphasis.

To ensure that we have a proper understanding, an allonge is simply a piece of paper one would attach much in a similar fashion. If I were to give you a check, I would sign it and make it payable to you “Mr. Sunshine” and sign it. If you then wanted to give the check to another (third-party) you would then write on the check (somewhere where you can) “payable to Mr. Friendly Hills” and sign it (over to). If, for some reason you didn’t have room to write these words, you could then, take a sheet of paper and a stapler or a piece of tape and tape the sheet of paper directly and security onto the check. Now you know what an allonge is. By law, you are required to attach a sheet in case you run out of room.

Case Law—Continued from above: “The indorsement [sic.] is signed by JIM BERGMAN, as attorney in fact for CITIBANK, N.A. However, the aforementioned power of attorney was made by JOHN E. SHEEHAN, a stranger to this proceeding, appointing GEORGE O. GULDI as his attorney in fact” (Order, Page 3) [FN-1558].

If you are confused at this point—I certainly was—please refer to the *Purported Movement of Promissory Note Assignment*: section, above. It will become fairly clear to you what the suing party has done. For convenience, I restate:

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

1. (1) Note was delivered to CITIBANK, N.A.
2. (2) Power of attorney (to act on behalf of CITIBANK, N.A.) was made by SHEEHAN (a “stranger to this proceeding”)
3. (3) SHEEHAN (“stranger”) appoints GULDI to act as SHEEHAN’S attorney in fact.
4. (4) BERGMAN signs the endorsement, as indicated below, and assigns the note from CITIBANK, N.A. to CITIMORTGAGE, INC, whereby the court notes that the “unrelated power of attorney” in () “was submitted to the Court in between the note and endorsement.

\_\_\_\_\_(Signature)  
“JIM BERGMAN, as attorney in fact for CITIBANK, N.A.,



*END OF RESTATEMENT*

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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Case Law—Continued from above: “This unrelated power of attorney was submitted to the Court in between the note and indorsement [sic.]. As such, it does not appear that the indorsement [sic.] is part of the note itself, nor does it appear to be so firmly affixed thereto as to become a part thereof (see UCC 3-202[2]). As such, the indorsement [sic.] fails to conform with UCC 3-202(2) (see *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208 [1989])” (Order, Page 3) [FN-1558].

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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*NOTE: THE ABOVE STATED TEXT REFERS TO THE UCC!*

Here, the court essentially stated that it was weird that the power of attorney was inserted “in between the” time the note and the endorsement had been filed. This is so because the endorsement—recall that the endorsement (signature) was made on the allonge I earlier referred to as a sheet of paper attached to the check with a stapler or tape—was supposed to have been a part of the promissory note because the note and the allonge are to be treated as inseparable. Here, the court was suspicious of fraudulent activity and, in essence, kicked out the lawsuit. Again, the law is the law and it’s the law again, and this is so no matter how desperately the opposing attorney in your case wants to minimize the issue. In this case, the sheet of paper was supposed to have been permanently attached to the note for the “life” of the note but was, for some reason, floating around in space and which the suing party has filed as a separate item a time certain. Opposing attorney will attempt to minimize pretty much anything that you do, and you must remain in control at all times. If you are uncertain as to what that is, I refer to you to the chapter which is entitled “How to really win at a hearing.”

Case Law--Continued from above: “As such, on the record, plaintiff failed to prove with competent evidence that it was the holder of the note on the date of commencement to be entitled to the relief demanded in the complaint. Accordingly, defendant’s motion to dismiss the complaint is GRANTED upon the ground that plaintiff lacks standing to maintain this action (see *Wells Fargo Bank Minn. V. Mastropaolo*, 42 AD3d 239 [2007]; *TPZ Corp. v Debbs*, 25 AD3d 787 [2006]; *Fannie Mae v Youkelsone*, 303 AD2d 548, supra; *Aurora Loan Servs. V Grant*, 17 Misc 3d 1102[A] [Sup Ct, Kings County 2007])” [FN-1558].

\_\_\_\_\_.  
[FN-1558] Citimortgage Inc. v. Gretchen Brown, Fourt Laura Court Co. Inc., Laura Court Co. Inc., New York State Department of Taxation and Finance et al., Supreme Court of the State of New York, March 13, 2008, Index No. 30755/2007, Order by Judge Joseph Farneti (Acting Justice Supreme Court).

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## CHAPTER 31.30: CITATIONS THAT STAND OUT & RESPONSE TO PRACTICAL STUDY: DULY AUTHORIZED AND ASSISTANT SECRETARY CONTRARY TO LAW

[Re (36)]

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Case Law—New York: “Both plaintiff’s counsel . . . and Keri Selman, who claims to be an **Assistant Vice-President of Bank of New York**, in her . . . affidavit, asserted that [MERS] as nominee for Encore for the purpose of recording the mortgage, assigned the mortgage to plaintiff BANK OF NEW YORK, on August 21, 2007” (Order, Page 2) [FN-2104].

Continued from above: “Plaintiff’s application is the third application for an order of reference received by me in the past several days that contain an affidavit from Keri Selman. On November 16, 2007, I denied an application for an order of reference . . . in which Keri Selman, in her affidavit of merit claims to be ‘**Vice President of COUNTRYWIDE HOME LOANS**, Attorney in fact for BANK OF NEW YORK.’ The Court is concerned that Ms. Selman might be engaged in a subterfuge, **wearing various corporate hats**. Before granting an application for an order of reference, the Court requires an affidavit from Ms. Selman describing her **employment history** for the past three years” (Order, Page 3) [FN-2104].

\_\_\_\_\_.  
[FN-2104] Bank of New York as Trustee for the Noteholders of CWABS, Inc., Asset-backed notes, Series 2006-SD2 v. Sandra Orosco, Et. Al., Supreme Court of the State of New York, November 19, 2007, Index No. 32052/07, Order by Judge Arthur M. Schack.

See more in Appendix 5-1-3 for further reading of a noteworthy case and a pro-active judge!





[Page 16:] Although we have an adversary system of justice, it is one founded on the rule of law. Might does not make right, at least in the courtroom . . . the lawyers [sic.] is required to disclose the law favoring his adversary when the court is obviously under an erroneous impression as to the law's requirements. Forum . . . v. . . . " (Order, Pages 15 and 16) [FN-1210].

[FN-1210] Mortgage Electronic Registration Systems, Inc. vs. Enzo Cabrera, Et. Al., Circuit Court of the 11th Judicial Circuit in and for Miami Dade County, Florida, Case No.: 05-2425 CA 05, 05-11570 CA 05, 05-12531 CA 05, 05-15138 CA 05, Sept. 28, 2005. See Appendix 1.2.1. and 1.2.2.

*END OF RESTATEMENT*

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE OR BELOW:*

Case Law—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.

*END OF RESTATEMENT*

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## CHAPTER 33.20: CITATIONS THAT STAND OUT: MERS' BOGUS BENEFICIARY STATUS AND THE BOGUS ARGUMENT THAT POSSESSION OF THE NOTE IS NOT REQUIRED

[The topic of the Trust]

[The mortgage as a security instrument]

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Case Law—"MERS must have both constitutional and prudential standing, and be the real party in interest under Fed. R. Civ. P. 17 . . . in order to be entitled to lift-stay relief. Constitutional standing under Article III requires, at a minimum, that a party must have suffered some actual or threatened injury as a result of the defendant's conduct, that the injury be traced to the challenged action, and that it is likely to be redressed by a favorable decision. Valley . . . v. . . ., 454 U.S. 464, 472 (1982)(citations omitted and internal quotations omitted)" "14 The standing doctrine 'involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.' Kowalski v. Tesmer, 543 U.S. 125, 128-29 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))" (Order, Page 4) [FN-1315].

Continued from above: "Beyond the Article III requirements of injury in fact, causation, and redressibility, MERS must also have prudential standing, which is judicially-created set of principles that places limits on the class of persons who may invoke the courts' powers. See Warth v. Seldin, 422 U.S. 490, 499 (1975) [Page 5:] As a prudential matter, a plaintiff must assert "his own legal interest as the real party in interest," Dunmore v. United States, 358 F.3d 1107, 1112 (9<sup>th</sup> Cir. 2004) . . . " (Order, Page 5) [FN-1315].

Continued from above: "MERS' primary contention is that it has standing by virtue of the fact that it was named as the beneficiary under the deeds of trust and that the trustor (the maker of the note) recognized MERS could take actions of the beneficiary or that it is the nominee of the beneficiary. 'In non-judicial foreclosure states [MERS] **must at least be the record beneficiary** under the Deed of Trust, with the powers expressly set forth therein, including

the power of foreclosure; in addition . . . it *may* become the holder on the note under some circumstances” (Order, Page 5) [FN-1315].

Continued from above: “MERS does **not** have standing merely because it is the alleged beneficiary under the deed of trust. It is not a beneficiary and, in any event, the mere fact that an entity is a named beneficiary of a deed of trust is insufficient to enforce the obligation. The deed of trust attempts to name MERS as both a beneficiary and a nominee. The document first says this:

MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. MERS is the beneficiary under this Security Instrument . . . And later it says this:

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lenders successors and assigns) and the successors and assigns of MERS” (Order, Page 6) [FN-1315].

Continued from above: “MERS ‘Terms and Conditions’ . . . identifies MERS’ interest. The Terms and Conditions say this:

MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have **no rights whatsoever to any payments** made on the account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans” (Order, Page 7) [FN-1315].

Continued from above: “A ‘beneficiary’ is defined as ‘one designated to benefit from an appointment, disposition, or assignment . . . or to receive something as a result of a legal arrangement or instrument.’ Black’s Law Dictionary 165 (8<sup>th</sup> ed. 2004). But it is obvious from the MERS’ ‘Terms and Conditions’ that MERS is not a beneficiary as it has **no rights whatsoever to any payments**, to any servicing rights, or to any of the properties secured by the loans. To reverse an old adage, if it doesn’t walk like a duck, talk like a duck, and quack like a duck, then it’s not a duck . . . “ (Order, Page 7) [FN-1315].

Continued from above: “But more importantly, if MERS is the nominee of the beneficiary, or the motion was brought by the beneficiary, that mere allegation is not sufficient to confer standing. Under Nevada law a negotiable promissory note . . . is enforceable by: (1) the holder 29 of the [Page 8:] note; or (2) a nonholder in possession of the note who has the rights of a holder. 30” “29 A ‘holder’ is the person in possession of a negotiable instrument that is payable either to a bearer or to an identified person who has possession. N.R.S. Section 104.1201(a)” “30 N.R.S. Section 104.3301. A negotiable promissory is also enforceable under N.R.S. Section 104.3301(c) by a nonholder of a note that has been stolen, destroyed, or paid by mistake. There has been no allegation in this case making this provision relevant

here” (Order, Page 8) [FN-1315].

Continued from above: “Thus if MERS is not the holder of the note, then to enforce it MERS must be a transferee in possession who is entitled to the rights of a holder or have authority under state law to act for the holder” (Order, Page 8) [FN-1315].

Continued from above: “Simply being a beneficiary or having an assignment of a deed of trust is not enough to be entitled to foreclose on a deed of trust. For there to be a valid assignment for purposes of foreclosure both the note and the deed of trust must be assigned. A **mortgage loan consists of a promissory note and a security instrument, typically a mortgage or a deed of trust**. 31“ 31 Nevada recognized that parties may secure the performance of an obligation or the payment of a debt by means of a deed of trust. N.R.S. Section 107.020. The maker of the note is the trustor, and the payee is the beneficiary” (Order, Page 8) [FN-1315].

Continued from above: “When the note is split from the deed of trust, ‘the note becomes as a practical matter, unsecured.’ Restatement (Third) of Property (Mortgages) Section 5.4 cmt. A (1997). **A person holding only a note** lacks the power to foreclose because it lacks the security, and **a person holding only a deed of trust** suffers no default because only the holder of the note is entitled to payment on it. See Restatement (Third) of Property (Mortgages) Section 5.4 cmt. e (1997). ‘Where the mortgagee has ‘transferred’ only the mortgage, the transaction is a nullity and his ‘assignee,’ having received no interest in the underlying debt or obligation, has a worthless piece of paper.’ 4 Richard R. Powell, Powell on Real Property, Section 37.27 [2] (2000)” (Order, Page 8) [FN-1315].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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“**A person holding only a note** lacks the power to foreclose because it lacks the security, and **a person holding only a deed of trust** suffers no default because only the holder of the note is entitled to payment on it.”

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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If your property is located in a State in which foreclosures are accomplished by filing a foreclosure action against you in a court of law (a.k.a. a judicial State), you may substitute the phrase contained in the above paragraph “holding only a deed of trust” (and this applies if the property is located in a non-judicial State) with the phrase “holding only a mortgage.”



Case Law—Continued from above: “Given this, **it is troubling that MERS apparently believes** that in states such as Nevada [Page 9:] possession of the note is not required if no deficiency is sought . . . In order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note’s holder. See Restatement (Third) of Property (Mortgages) Section 5.4 cmt. c (1997). See also, In re Vargus, 396 B.R. 511, 516-17 (Bankr. C.D. Calif. 2008)” (Order, Pages 8 and 9) [FN-1315].

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[FN=1315] In re Joshua & Stephanie Mitchell, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.

Case Law—Florida: In Florida, the prosecution of a foreclosure action is by the owner and holder of the mortgage and the note. Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note that Plaintiff does not own. Your Construction Center, Inc. v. Gross, 316 So.2d 596 (Fla. 4<sup>th</sup> DCA 1975).

Case Law—Florida: In re Shelter Development Group, Inc., 50 B.R. 588 (Bankr.S.D.Fla. 1985) [It is axiomatic that a suit cannot be prosecuted to foreclosure a mortgage which secures the payment of a promissory note, unless the Plaintiff actually holds the original note, citing Downing v. First National Bank of Lake City, 81 So.2d 486 (Fla. 4<sup>th</sup> DCA 1975)]; Your Construction Center, Inc. v. Gross 316 So. 2d 596 (Fla. 4<sup>th</sup> DCA 1975), See also 37 Fla. Jur. Mortgages and Deeds of Trust 240 (One who does not have the ownership, possession, or the right to possession of the mortgage and the obligation secured by it, may not foreclose the mortgage).



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CHAPTER 33.30: CITATIONS THAT STAND OUT:  
MERS' BOGUS "TOGETHER WITH THE NOTE"

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See also Chapter 33.50.

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

Case Law—"For there to be a valid assignment for purposes of foreclosure both the note and the deed of trust must be assigned. A **mortgage loan consists of a promissory note and a security instrument, typically a mortgage or a deed of trust.** 31" 31 Nevada recognized that parties may secure the performance of an obligation or the payment of a debt by means of a deed of trust. N.R.S. Section 107.020. The maker of the note is the trustor, and the payee is the beneficiary" (Order, Page 8) [FN-1315].

Continued from above: "When the note is split from the deed of trust, 'the note becomes as a practical matter, unsecured.' Restatement (Third) of Property (Mortgages) Section 5.4 cmt. A (1997). A person holding only a note lacks the power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it See Restatement (Third) of Property (Mortgages) Section 5.4 cmt. e (1997). 'Where the mortgagee has 'transferred' only the mortgage, the transaction is a nullity and his 'assignee,' having received no interest in the underlying debt or obligation, has a **worthless piece of paper.**' 4 Richard R. Powell, Powell on Real Property, Section 37.27 [2] (2000) [FN-1315]

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[FN=1315] In re Joshua & Stephanie Mitchell, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.

*END OF RESTATEMENT.*



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CHAPTER 33.40: CITATIONS THAT STAND OUT:  
MERS' BOGUS CORPORATE RESOLUTION

[Standing]

[Certifying Officials]

[Membership Agreement]

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Case Law—"In the remaining cases, MERS has attempted to establish its standing through the affidavits of 'Certifying Officials.' Under the Membership Agreement, MERS provides Members a corporate resolution designating one or more employees of the Member a MERS Certifying Officer. This resolution, among other things, appoints the individual as an assistant [Page 11:] secretary and vice president of MERS. They are given the power to 'take any and all actions and execute all documents necessary to protect the interest of the Member, the beneficial owner of such mortgage loan, or MERS in any bankruptcy proceeding regarding a loan registered on the MERS System that is shown to be registered to the Member . . . " (Order, Pages 10 and 11) [FN-1315].

Continued from above: "There appears to be absolutely no requirement that these Certifying Officials **have any knowledge of the loan in question** [FN-1705]. From the MERS website it appears that the 'Certifying Official' (the person who works for the holder of the note) is not an employee of the servicer either" (Order, Page 11) [FN-1315].

\_\_\_\_\_.  
[FN=1315] In re Joshua & Stephanie Mitchell, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.

\_\_\_\_\_.  
[FN-1705] Be sure to attack this point. A witness is required to have personal knowledge.



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## CHAPTER 33.50: CITATIONS THAT STAND OUT: MERS IS A THIRD PARTY AND HAS NO AUTHORITY TO FORECLOSE AND NO AUTHORITY TO ASSIGN

[Kansas Supreme Court Decision]

[MERS has no standing]

[Splitting]

[Industry standards]

[Attorney Ellen Brown]

[Attorney Lynn Szymoniak]

[Together with the note]

[Nominee]

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*NOTE: THE HEREIN STATED INFORMATION BELOW WAS REPRODUCED WITH  
PERMISSION OF ELLEN BROWN.*

A landmark ruling in a recent Kansas Supreme Court case may have given millions of distressed homeowners the legal wedge they need to avoid foreclosure. In Landmark National Bank v. Kesler, 2009 Kan. LEXIS 834, the Kansas Supreme Court held that a nominee company called MERS has no right or standing to bring an action for foreclosure.

The significance of the holding is that if MERS has no standing to foreclose, then nobody has standing to foreclose – on 60 million mortgages. That is the number of American mortgages currently reported to be held by MERS. Over half of all new U.S. residential mortgage loans are registered with MERS and recorded in its name. Holdings of the Kansas Supreme Court are not binding on the rest of the country, but they are dicta of which other courts take note; and the reasoning behind the decision is sound” (Ellen Brown, 2009).

Eliminating the “Straw Man” Shielding Lenders and Investors from Liability—The development of “electronic” mortgages managed by MERS went hand in hand with the “securitization” of mortgage loans – chopping them into pieces and selling them off to investors. In the heyday of mortgage securitizations, before investors got wise to their risks,

lenders would slice up loans, bundle them into “financial products” called “collateralized debt obligations” (CDOs), ostensibly insure them against default by wrapping them in derivatives called “credit default swaps,” and sell them to pension funds, municipal funds, foreign investment funds, and so forth. There were many secured parties, and the pieces kept changing hands; but MERS supposedly kept track of all these changes electronically. MERS would register and record mortgage loans in its name, and it would bring foreclosure actions in its name. MERS not only facilitated the rapid turnover of mortgages and mortgage-backed securities, but it has served as a sort of “corporate shield” that protects investors from claims by borrowers concerning predatory lending practices. California attorney Timothy McCandless describes the problem like this:

“[MERS] has reduced transparency in the mortgage market in two ways. First, consumers and their counsel can no longer turn to the public recording systems to learn the identity of the holder of their note. Today, county recording systems are increasingly full of one meaningless name, MERS, repeated over and over again. But more importantly, all across the country, MERS now brings foreclosure proceedings in its own name – even though it is not the financial party in interest. This is problematic because MERS is not prepared for or equipped to provide responses to consumers’ discovery requests with respect to predatory lending claims and defenses. In effect, the securitization conduit attempts to use a faceless and seemingly innocent proxy with no knowledge of predatory origination or servicing behavior to do the dirty work of seizing the consumer’s home. . . . So imposing is this opaque corporate wall, that in a “vast” number of foreclosures, MERS actually succeeds in foreclosing without producing the original note – the legal sine qua non of foreclosure – much less documentation that could support predatory lending defenses.”

The real parties in interest concealed behind MERS have been made so faceless, however, that there is now no party with standing to foreclose. The Kansas Supreme Court stated that MERS’ relationship “is *more akin to that of a straw man* than to a party possessing all the rights given a buyer.” The court opined:

“By statute, assignment of the mortgage carries with it the assignment of the debt. . . . Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable. **The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose**, unless the holder of the deed of trust is the agent of the holder of the note. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. **The mortgage**

**loan becomes ineffectual when the note holder did not also hold the deed of trust.**” [Citations omitted; emphasis added.]

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THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:

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“By statute, assignment of the mortgage carries with it the assignment of the debt.

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THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:

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“Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.”

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THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:

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**The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose,** unless the holder of the deed of trust is the agent of the holder of the note. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. **The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.**”

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THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.

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MERS as straw man lacks standing to foreclose, but so does (sic.) original lender, although it was a signatory to the deal. The lender lacks standing because title had to pass to the secured parties for the arrangement to legally qualify as a “security.” The lender has been paid in full and has no further legal interest in the claim. Only the securities holders have skin in the game; but they have no standing to foreclose, because they were not signatories to the original agreement. They cannot satisfy the basic requirement of contract law that a plaintiff suing on a written contract must produce a signed contract proving he is entitled to relief.

The Potential Impact of 60 Million Fatally Flawed Mortgages—The banks arranging these mortgage-backed securities have typically served as trustees for the investors. When the trustees could not present timely written proof of ownership entitling them to foreclose, they would in the past file “lost-note affidavits” with the court; and judges usually let these foreclosures proceed without objection. But in October 2007, an intrepid federal judge in Cleveland put a halt to the practice. U.S. District Court Judge Christopher Boyko ruled that Deutsche Bank had not filed the proper paperwork to establish its right to foreclose on fourteen homes it was suing to repossess as trustee. Judges in many other states then came out with similar rulings.

Following the Boyko decision, in December 2007 attorney Sean Olender suggested in an article in *The San Francisco Chronicle* that the real reason for the bailout schemes being proposed by then-Treasury Secretary Henry Paulson was not to keep strapped borrowers in their homes so much as to stave off a spate of lawsuits against the banks. Olender wrote:

“The sole goal of the [bailout schemes] is to prevent owners of mortgage-backed securities, many of them foreigners, from suing U.S. banks and forcing them to buy back worthless mortgage securities at face value – right now almost 10 times their market worth. The ticking time bomb in the U.S. banking system is not resetting subprime mortgage rates. The real problem is the contractual ability of investors in mortgage bonds to require banks to buy back the loans at face value if there was fraud in the origination process.”

“. . . The catastrophic consequences of bond investors forcing originators to buy back loans at face value are beyond the current media discussion. **The loans at issue dwarf the capital available at the largest U.S. banks combined, and investor lawsuits would raise stunning liability sufficient to cause even the largest U.S. banks to fail, resulting in massive taxpayer-funded bailouts of Fannie and Freddie, and even FDIC . . .**”

“What would be prudent and logical is for the banks that sold this toxic waste to buy it back and for a lot of people to go to prison. If they knew about the fraud, they should have to buy the bonds back.”



Needless to say, however, the banks did not buy back their toxic waste, and no bank officials went to jail. As Olender predicted, in the fall of 2008, massive taxpayer-funded bailouts of Fannie and Freddie were pushed through by Henry Paulson, whose former firm Goldman Sachs was an active player in creating CDOs when he was at its helm as CEO. Paulson also hastily engineered the \$85 billion bailout of insurer American International Group (AIG), a major counterparty to Goldmans' massive holdings of CDOs. The insolvency of AIG was a huge crisis for Goldman, a principal beneficiary of the AIG bailout.

In a December 2007 *New York Times* article titled "The Long and Short of It at Goldman Sachs," Ben Stein wrote:

"For decades now . . . I have been receiving letters [warning] me about the dangers of a secret government running the world . . . . [T]he closest I have recently seen to such a world-running body would have to be a certain large investment bank, whose alums are routinely Treasury secretaries, high advisers to presidents, and occasionally a governor or United States senator."

The pirates seem to have captured the ship, and until now there has been no one to stop them. But 60 million mortgages with fatal defects in title could give aggrieved homeowners and securities holders the crowbar they need to exert some serious leverage on Congress – serious enough perhaps even to pry the legislature loose from the powerful banking lobbies that now hold it in thrall.

Ellen Brown developed her research skills as an attorney practicing civil litigation in Los Angeles. In *Web of Debt*, her latest book, she turns those skills to an analysis of the Federal Reserve and "the money trust." She shows how this private cartel has usurped the power to create money from the people themselves, and how we the people can get it back. Her earlier books focused on the pharmaceutical cartel that gets its power from "the money trust." Her eleven books include *Forbidden Medicine*, *Nature's Pharmacy* (co-authored with Dr. Lynne Walker), and *The Key to Ultimate Health* (co-authored with Dr. Richard Hansen). Her websites are [www.webofdebt.com](http://www.webofdebt.com) and [www.ellenbrown.com](http://www.ellenbrown.com).

*NOTE: THE HEREIN STATED INFORMATION ABOVE WAS REPRODUCED WITH PERMISSION OF ELLEN BROWN.*

Case Law—Vermont: MERS did not service the loan in any way and undisputed facts [FN-1953].

Case Law—Arizona: MERS has no authority to foreclose on a mortgage (The Rutland, Vermont Superior Court has expressly rejected any authority of MERS to foreclose either in its own name or as "nominee.") [FN-1953] [FN-2019].

[FN=1953] MERS v. Johnston et al., Rutland, Vermont Superior Court Docket No. 420-6-09.

[FN=2019] See also Landmark National Bank v. Kesler. See also Blau v., U.S. District Court

of Arizona.

Case Law—Vermont: Who can enforce a mortgage? (Vermont Court raised the issue of MERS’ standing “sua sponte” after the Landmark decision was issued and vacated its prior default judgment which had been entered in favor of MERS) [FN-1953].

Case Law—Vermont: Purposefully using “nominee” [FN-1953].

Case Law—Vermont: Mortgagee, without ownership, has no enforceable right [FN-1953]. (“If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right.”) [FN-1953].

Case Law—Vermont: Legal title does not necessarily signify title [FN-1953]. (“Legal title does not necessarily signify full and complete title or a beneficial interest” and that “solely as nominee,” with all rights as to notice, payment and interest in the property being kept with the lender, that there was no indication that MERS was an agent or power-of-attorney for the lender . . . “as it ignores black letter mortgage law.”

Case Law—Vermont: Legal title and equitable ownership are severed (Citing Idaho Law Review) [FN-1953].

Case Law—Vermont: “Ownership interest was transferred into tranches of ... trusts” [FN-1953].

Case Law—Vermont: “MERS cannot ‘assign’ anything” [FN-1953].

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[FN=1953] MERS v. Johnston et al., Rutland, Vermont Superior Court Docket No. 420-6-09.

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[FN=2019] See also Landmark National Bank v. Kesler. See also Blau v., U.S. District Court of Arizona.

Case Law—Arkansas: “The deed of trust is a deed conveying title to real property to a trustee as security until the grantor repays the loan” [FN-1954].

Case Law—Arkansas: “Trustee is limited in use of the title to passing it back to the grantor/borrower in the event of payment or to the lender in the event of foreclosure” [FN-1954].

Case Law—Arkansas: “MERS, which is not a trustee, is not conveyed title; the deed of trust does not convey title to MERS” [FN-1954].

Case Law—Arkansas: “MERS is not the beneficiary even though so designated in the deed of trust: the lender (not MERS) is the beneficiary; as it receives payments on the debt” [FN-

1954].

Case Law—Texas: “MERS has ‘no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans’ [fn-23]. MERS acts as the agent only for its members; once a note is transferred out of the MERS system to a non-member, MERS cannot act as the agent [fn-24].

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[fn-23] In re Hawkins, No. BK-S-07-13593-LBR, 2009 WL 901766, at \*3 (Bankr. D. Nev. Mar. 31, 2009) (mem. op.).  
[fn-24] Id. at \*4” [FN-1652].

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[FN=1652] The Texas Court of Appeals for the Second District of Texas in Fort Worth, Texas, Mortgage Electronic Registration Systems, As Nominee for Lender and Lender’s Successors and Assigns v. Kim Young et al., Case No. 2-08-088-CV, Order delivered on June 4, 2009.

Case Law—Arkansas: MERS’ alleged authority to do anything other than perhaps clerical recordkeeping is a fantasy [FN-1954].

\_\_\_\_\_.  
[FN=1954] Mortgage Electronic Registration Systems, Inc. (MERS) v. Southwest Homes of Arkansas, 2009 WL 723182 (Ark.).

Case Law—MERS cannot assign the note [FN-2032].

\_\_\_\_\_.  
[FN=2032] Wilhelm v.; Idaho U.S. District Court.

\_\_\_\_\_.  
[FN=0000] Sheridan decision from the Bankruptcy Court of Ohio.

Case Law—South Carolina: “[T]he MERS method of operation, as reported in its contracts with its ‘members’ and as found by the Nebraska Court, would indicate that [MERS] doesn’t . . . even see . . . the mortgage, the note, or any of the loan documents. [T]here is no reason for [MERS] to do so since it has nothing invested in the transaction and will receive payment from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the affidavit would be disingenuous, if not an outright misrepresentation” [FN-1209].

\*scan 4 “together with the note”

Case Law—South Carolina: “[T]he assignment to MERS . . . purports to convey the mortgage **‘together with the note’** thereby secured,’ MERS contractual relationship with lenders is such that **the lender retains the note**, the debt thereby represented, and the right to collect the debt” (Page 1, Order) [FN-1209].

Case Law—South Carolina: “The Court in [MERS] v. Nebraska Dept. of Banking and Finance [FN-1210], stated: ‘MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans’ ” (Page 1, Order) [FN-1209].

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[FN=1210] Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance, 270 Neb. 529, 704 N.W. 2d 784, 787” (MERS v. G., Page 1, Order).

Continued from above—Case Law—South Carolina: “In the Nebraska case [FN-1210] . . . , MERS represented to the Court and/or the Court found that ‘**MERS ... does not own the promissory notes secured by the mortgages** [emphasis added by the court]’ (Page 2, Paragraph 2, Order) [FN-1209]; that ‘MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members.’ ‘Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes’ (Page 2, Paragraph 4, Order) [FN-1209]. ‘MERS serves as legal title holder in a nominee capacity, permitting lenders to sell their interest in the notes and servicing rights to investors without recording each transaction. **But, simply stated, MERS has not independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money** [emphasis added by the court]’” (Page 2, Paragraph 4, Order) [FN-1209].

Continued from above—Case Law—South Carolina: The court in South Carolina [FN-1209] in its concluding statements said: “Since MERS initiated the Nebraska litigation and prevailed in it, it is **judicially estopped** to disavow the positions it advanced during the litigation process there or to avoid the findings and conclusions articulated by the Nebraska Court. State v. McCall, 364, S.C. 205, 612 S.E. 2d 453, (S.C. App., 2005); Hawkins v. Bruno Yacht Sales, Inc. 353 S.C. 31, 577 S.E. 2d 202 (S.C., 2003)” (Page 2, Order) [FN-1209].

Continued from above—Case Law—South Carolina: “The affiant’s representation that Guaranty assigned the note and mortgage to MERS ‘for valuable consideration’ is diametrically opposed to the way MERS operates, as described in the Nebraska case” (Page 2, Order) [FN-1209].

Continued from above—Case Law—South Carolina: “MERS does not acquire the notes or the debts thereby represented for or without consideration. It has neither the right nor the obligation to service the debts represented by the notes and/or secured by the mortgages. As its sole source of revenue ‘MERS is compensated for its services through fees charged to participating MERS members’ ” (Page 2, Last Paragraph, Order) [FN-1209].

Continued from above—Case Law—South Carolina: The court in South Carolina [FN-1209] in its concluding statements said: “The principal/agent (**nominee**) relationship between its members and MERS is such that the ‘close-connectedness doctrine’ would prevent MERS from qualifying as a holder in a due course without notice, even if it did acquire some ownership interest in the debt. Midfirst Bank, SSB v. C.W. Haynes & Co., Inc. 893 F.Supp. 1304 (1994), \*1318 – 1319 (D.S.C., 1994: “A transferee does not take an instrument in good

faith when the transferee is so closely connected with the transferor that the transferee may be charged with knowledge of an infirmity in the underlying transaction” (Page 3, First Paragraph, Order) [FN-1209].

Continued from above—Case Law—South Carolina: The court in South Carolina [FN-1209] also said: “[T]he affiant [suing party] does not state whether MERS even sees . . . the mortgage, the note, or any of the loan documents. However, the MERS method of operation, as reported in its contracts with its ‘members’ . . . would indicate that it doesn’t [see the note]. Certainly, it has no reason for it to do so, since it has nothing invested in the transaction and will receive payments from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the affidavit would be disingenuous, if not an outright misrepresentation” (Page 3, Second Paragraph, Order) [FN-1209].

\_\_\_\_\_.  
[FN=1209] Mortgage Electronic Registration Systems, Inc., v. Leonard F. Girdvainis, Jr., Et. Al., State of South Carolina, County of Sumter—In the Court of Common Pleas for the Third Judicial Circuit Civil Action #: 2005-CP-43-0278, Supplemental Order Denying Rule 59(e) Motions, January 19, 2006. See Appendix 1.1.1.

Case Law—Florida “In order to prevail in a mortgage foreclosure action, the Plaintiff must produce the original note or reestablish the note pursuant to law. National . . . v. . . . (3<sup>rd</sup> D.C.A., Fla. 2000); Pastore-Borroto . . . v. . . . (3<sup>rd</sup> D.C.A. Fla. 1992); Steet Bank . . . v. . . . (4<sup>th</sup> D.C.A. Fla. 2003); Lawyers Titles . . . v. . . . (4<sup>th</sup> D.C.A. Fla. 2004)” (Order, Page 14) [FN-1210].

Continued from above—Case Law--Florida: “Was MERS ‘entitled to enforce’ the Notes when loss of possession occurred? There are no facts alleged which would demonstrate when the Notes were lost; who had [Page 15:] possession of the notes at the time of loss; and by what authority MERS asserts that it was entitled to enforce the notes when loss occurred” (Order, Pages 14 and 15) [FN-1210].

Continued from above—Case Law--Florida: “It is clear based upon the evidence that MERS is not an ‘owner’ or ‘holder’ of the notes; nor does MERS take actual possession of the notes themselves. The evidence is clear and convincing the MERS’ allegations that it ‘owned’ ‘held’ and ‘possessed’ the Mortgage Notes in questions are clearly, palpably and inherently false based upon the plain and conceded facts in the case” (Order, Page 15) [FN-1210].

Continued from above—Case Law—Florida: “The evidence is likewise clear and convincing that MERS at all times prior to making these allegations acted in bad faith knowing them to be false and indeed, it was forewarned of the potential consequences for making such false allegations” (Order, Page 15) [FN-1210].

Continued from above—Case Law—Florida: “MERS created a world of electronic transactions . . . it chose to fabricate the facts and to create a charade to give it appearance of proceeding lawfully . . .” (Order, Page 15) [FN-1210].

Case Law—Florida: “The heart of all legal ethics is in the lawyer’s duty of candor to a tribunal. . . . [Page 16:] Although we have an adversary system of justice, it is one founded on the rule of law. Might does not make right, at least in the courtroom . . . the lawyers [sic.] is required to disclose the law favoring his adversary when the court is obviously under an erroneous impression as to the law’s requirements. Forum . . . v. . . . “ (Order, Pages 15 and 16) [FN-1210].

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[FN=1210] Mortgage Electronic Registration Systems, Inc. vs. Enzo Cabrera, Et. AL, Circuit Court of the 11th Judicial Circuit in and for Miami Dade County, Florida, Case No.: 05-2425 CA 05, 05-11570 CA 05, 05-12531 CA 05, 05-15138 CA 05, Sept. 28, 2005. See Appendix 1.2.1. and 1.2.2.

Case Law—Nevada: “MERS may not enforce the note as the alleged beneficiary . . . there is no evidence that the named nominee is entitled to enforce the note or that MERS is the agent of the note’s holder. Indeed, the evidence is to the contrary, the note has been sold, and the named nominee no longer has any interest in the note” (Order, Page 14) [FN-1315].”

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[FN=1315] In re Joshua & Stephanie Mitchell, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.

For further reading turn to Lynn Szymoniak’s article “Mortgage Assignments as Evidence of Fraud.” See Appendix 25.1.1.



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## CHAPTER 33.60: CITATIONS THAT STAND OUT: MERS CANNOT ASSIGN THE NOTE

[Contracts with its members]

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The note. See Appendix 3.1.1. See [FN-2002].

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[FN=2002] MERS / Florida / Judge Genden / Transcript / Pages 54 – 107

MERS cannot assign the note [FN-2032].

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[FN=2032] Wilhelm v.; Idaho U.S. District Court.

“[T]he MERS method of operation, as reported in its contracts with its ‘members’ and as found by the Nebraska Court, would indicate that [MERS] doesn’t . . . even see . . . the mortgage, the note, or any of the loan documents. [T]here is no reason for [MERS] to do so since it has nothing invested in the transaction and will receive payment from its members irrespective of any defect in the transaction. Consequently, any implication to the contrary in the affidavit would be disingenuous, if not an outright misrepresentation” [FN-1209].

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[FN=1209] Mortgage Electronic Registration Systems, Inc., Plaintiff, v. Leonard F. Girdvainis, Jr., Et. Al., Defendants, State of South Carolina, County of Sumter—In the Court of Common Pleas for the Third Judicial Circuit Civil Action #: 2005-CP-43-0278, Supplemental Order Denying Rule 59(e) Motions, January 19, 2006. See Appendix 1.1.1.

“In order to prevail in a mortgage foreclosure action, the Plaintiff must produce the original note or reestablish the note pursuant to law. National . . . v. . . . (3<sup>rd</sup> D.C.A., Fla. 2000); Pastore-Borroto . . . v. . . . (3<sup>rd</sup> D.C.A. Fla. 1992); Steet Bank . . . v. . . . (4<sup>th</sup> D.C.A. Fla. 2003); Lawyers Titles . . . v. . . . (4<sup>th</sup> D.C.A. Fla. 2004)” (Order, Page 14) [FN-1210].

“Was MERS ‘entitled to enforce’ the Notes when loss of possession occurred? There are no facts alleged which would demonstrate when the Notes were lost; who had [Page 15:] possession of the notes at the time of loss; and by what authority MERS asserts that it was

entitled to enforce the notes when loss occurred” (Order, Pages 14 and 15) [FN-1210].

Continued from above: “It is clear based upon the evidence that MERS is not an ‘owner’ or ‘holder’ of the notes; nor does MERS take actual possession of the notes themselves. The evidence is clear and convincing the MERS’ allegations that it ‘owned’ ‘held’ and ‘possessed’ the Mortgage Notes in questions are clearly, palpably and inherently false based upon the plain and conceded facts in the case” (Order, Page 15) [FN-1210].

Continued from above: “The evidence is likewise clear and convincing that MERS at all times prior to making these allegations acted in bad faith knowing them to be false and indeed, it was forewarned of the potential consequences for making such false allegations” (Order, Page 15) [FN-1210].

Continued from above: “MERS created a world of electronic transactions . . . it chose to fabricate the facts and to create a charade to give it appearance of proceeding lawfully . . . ” (Order, Page 15) [FN-1210].

“The heart of all legal ethics is in the lawyer’s duty of candor to a tribunal. . . . [Page 16:] Although we have an adversary system of justice, it is one founded on the rule of law. Might does not make right, at least in the courtroom . . . the lawyers [sic.] is required to disclose the law favoring his adversary when the court is obviously under an erroneous impression as to the law’s requirements. Forum . . . v. . . . ” [FN-1210] (Order, Pages 15 and 16) [FN-1210].

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[FN=1210] Mortgage Electronic Registration Systems, Inc. vs. Enzo Cabrera, Et. Al., Circuit Court of the 11th Judicial Circuit in and for Miami Dade County, Florida, Case No.: 05-2425 CA 05, 05-11570 CA 05, 05-12531 CA 05, 05-15138 CA 05, Sept. 28, 2005. See Appendix 1.2.1 and 1.2.2.





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## CHAPTER 33.70: CITATIONS THAT STAND OUT: MERS AS A NOMINEE AND AGENT

[Decisions in Nevada]

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Case Law—"Does MERS have standing as the agent of the member or in its own right? The mere statement that the movant is a member of MERS does nothing but lay the groundwork for agency. In order to enforce rights as the agent of the holder, MERS must establish that its **principal is entitled to enforce the note**" (Order, Page 9) [FN-1315].

Case Law—"Each motion has been brought in the name of the lender and 'its successors and/or assigns.' Under Fed. R. Civ. Proc. 17 an action must be prosecuted in the name of the real party in interest. 'As a general rule, a person who is an attorney-in-fact or an agent solely for the purpose of bringing suit is viewed as a nominal rather than a real party in interest and will be required to **litigate in the name of his principal** rather than in his own name.' 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Section 1553 (2d ed. 1990)" (Order, Page 12) [FN-1315].

Continued from above: "An agent with ownership interest in the subject matter of the suit is a real party in interest. *Id.* There is no evidence, however, of an agency relationship here or that MERS has any ownership interest [Page 13:] making it the real party in interest under Rule 17" (Order, Pages 12 and 13) [FN-1315].

\_\_\_\_\_.  
[FN=1315] In re Joshua & Stephanie Mitchell, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.

Case Law—Nevada: "MERS was unable to show that a **MERS Certifying Officer was in physical possession of the Note** at the time the Motion was filed" (Page 2, Line 24, Order) [FN-2040].

Continued from above— Case Law—Nevada: "In holding that MERS did not have standing as the real party in interest to bring the motion for relief from stay, the Bankruptcy Court

determined that **MERS was not a beneficiary in spite of language that designated MERS as such in the Deed of Trust** at issue. MERS seeks to overturn the Bankruptcy Court's determination that it is not a beneficiary. However, the Court must affirm the Bankruptcy Court's order under the facts presented because MERS failed to present sufficient evidence demonstrating that it is a real party in interest" (Page 4, Line 4, Order) [FN-2040].

Continued from above— Case Law—Nevada: "Since MERS admits that it **does not actually receive or forfeit money when borrowers fail to make their payments**, MERS must at least provide evidence of its alleged agency relationship with the real party in interest in order to have standing to seek relief from stay. See *Jacobson*, 402 B.R. at 366, n.7 (quoting *Hwang*, 396 B.R. at 767 ("the right to enforce a note on behalf of a noteholder **does not convert the noteholder's agent** into a real party in interest")). An agent for the purpose of bringing suit is "viewed as a nominal rather than a real party in interest and **will be required to litigate in the name of his principal** rather than his own name." *Hwang*, 396 B.R. at 767" (Page 4, Line 18, Order) [FN-2040].

Continued from above— Case Law—Nevada: "Instead of presenting the evidence to the Bankruptcy Court, MERS . . . **citing the failure** of a MERS Certifying Officer to demonstrate **that a member was in physical possession** of the promissory note **at the time** the motion was filed[.]. [Line 14:] The only evidence provided by MERS was a declaration that MERS had been **identified as a beneficiary** in the deed of trust and that it had been **named nominee** for the original lender. [Line 16:] Since MERS provided **no evidence** that it was the agent or nominee for the current owner of the beneficial interest in the note, it has **failed to meet its burden of establishing** that it is a real party in interest with standing. Accordingly, the order of the Bankruptcy Court must be affirmed" (Page 5, Line 11, Order) [FN-2040].

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[FN=2040] Mortgage Electronic Registration Systems, Inc., v. Lisa Marie Chong, Lenard E. Schwartz, Bankruptcy Trustee, et al., United States District Court, District of Nevada, District Court Case No. 2:09-CV-00661-KJD-LRL, Bankruptcy Court Case No. BK-S-07-16645-LBR, Judge Dawson, Order, December 4, 2009. See Appendix 1.3.2.

Case Law—Nevada: Offering a discussion on Beneficiary, Possession of the Note (Order) [FN-2126].

Case Law—Nevada: The bankruptcy court " . . . denied MERS' motion for stay not because it filed its claim as a nominee, but because it brought its motion 'as nominee of an entity that no longer has any ownership interest in the note.' (In re Mitchell, 07-16226.)" (Page 8, Line 7, Order) [FN-2126].

Continued from above— Case Law—Nevada: "Although holders of negotiable instruments in Nevada are entitled to enforce the instruments (NRS 104.3301), MERS, even if it did have possession of the promissory note, is not a holder under the statute. First, there is no disputing that [Line 19:] MERS obtained the note as a nominee on behalf of Meridias. Thus, while MERS may have physically possessed the note, true (or beneficial) ownership of the note surely remained with [Line 21:] Meridias. Second, Meridias transferred its interest in the note

to another party, which negated MERS' right to enforce the instrument, since MERS' actual possession was based simply on its [Line 23:] status as a nominee. Although Nevada law does not specifically address this issue, the purpose behind NRS 104.3301 would be frustrated if a party with bare possession of the note could seek relief from stay as the nominee of a lender that had since transferred its rights to a third party. Thus, [Line 26:] while MERS relies on the strict wording of the statute and its alleged possession of the note, the fact remains that MERS cannot enforce the note because it is no longer the nominee of Meridias, the original noteholder. For this reason, the bankruptcy court correctly held that MERS lacked standing to seek relief from stay" (Page 8, Line 16, Order) [FN-2126].

Continued from above— Case Law—Nevada: "Conclusion: This holding is limited to the specific facts and procedural posture of the instant case. Since the Bankruptcy Court denied the Motion **without prejudice**, nothing prevents Appellant from refileing the Motion in Bankruptcy Court providing the evidence it admits should be readily available in its system. The Court is not finding that MERS would not be able to seek relief from stay as the agent of a real party in interest **if** it identifies the holder of the note **or** provides sufficient evidence of the source of its authority" (Page 9, Line 4, Order) [FN-2126].

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[FN=2126] Mortgage Electronic Registration Systems, Inc., v. William Jay Zeigler and Dawn M. Zeigler, United States District Court, District of Nevada, District Court Case No. 2:09-CV-0676-RLH-RJJ, Bankruptcy Court Case No., Judge Hunt, Order affirming Order of the Bankruptcy Court, December 4, 2009 (Also listed as "Case 2:09-cv-00676-RLH-PAL Document 40"). See Appendix 1.3.3.



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## CHAPTER 39.10: SETTING ASIDE A DEFAULT JUDGMENT

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Setting aside a default judgment: See Appendix 2.1.1., pages 4 (and more); See [FN-1934].  
Standard of review to set aside a default judgment: See Appendix 2.1.1., page 5; See [FN-1934].

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[FN-1934] Landmark National Bank, Plaintiff/Appellee, v. Boyd A. Kesler, Appellee/Cross-appellant; Millennia Mortgage Corporation, Defendant; Mortgage Electronic Registration Systems, Inc. and Sovereign Bank, Appellants/Cross-appellees; and Dennis Bristow and tony Woydziak, Intervenor/Appellees. **Kansas Supreme Court**, No. 98,489



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## CHAPTER 43.10: RULES: FLORIDA RULES OF CIVIL PROCEDURE

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Fla.R.Civ.P. 1.080—Service of Pleadings and Papers

Fla.R.Civ.P. 1.090—Time

Fla.R.Civ.P. 1.090 (e)—“add five days”

Fla.R.Civ.P. 1.120 (a)—Capacity

Fla.R.Civ.P. 1.120 (b)—Fraud, Mistake, Condition of the Mind.

Fla.R.Civ.P. 1.130—Attaching copy of cause of action and exhibits.

Fla.R.Civ.P. 1.140—Defenses

Fla.R.Civ.P. 1.140 (a)—“20 days”

Fla.R.Civ.P. 1.140 (a) (2)—“official capacity claims”

Fla.R.Civ.P. 1.140 (a) (2) (B)—“department of financial services”

Fla.R.Civ.P. 1.140 (a) (3)—“10 days”

Fla.R.Civ.P. 1.140 (a) (4)—“10 days”

Fla.R.Civ.P. 1.140 (b)—“lack of jurisdiction” “failure to state cause of action”

Fla.R.Civ.P. 1.140 (b)—“Any ground not stated shall be deemed waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.”

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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Fla.R.Civ.P. 1.140 (b)—“Any ground not stated shall be deemed waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time.”

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Fla.R.Civ.P. 1.140 (b)—“20 days”

Fla.R.Civ.P. 1.140 (c)—“move for judgment”

Fla.R.Civ.P. 1.140 (e)—“motion for more definite statement”

Fla.R.Civ.P. 1.140 (f)—“motion to strike”

Fla.R.Civ.P. 1.150—Sham Pleadings

Fla.R.Civ.P. 1.150 (b)—“shall be verified”

Fla.R.Civ.P. 1.190 (a)—“10 days to plead in response”

Fla.R.Civ.P. 1.190 (a)—“may amend a pleading only by leave of court”

Fla.R.Civ.P. 1.190 (b)—“allow pleadings to be amended to conform with evidence”

Fla.R.Civ.P. 1.190 (d)—Supplemental Pleadings.

Fla.R.Civ.P. 1.190 (e)—Amendments Generally.

Fla.R.Civ.P. 1.210 (a)—

Fla.R.Civ.P. 1.330 (a)—Use of Depositions.

Fla.R.Civ.P. 1.330 (d) (4)—“errors waived” “motion to suppress deposition”

Fla.R.Civ.P. 1.340 (b)—“if a party introduces an answer to an interrogatory” “may require that party to introduce any other interrogatory and answer that in fairness ought to be

considered with it”

Fla.R.Civ.P. 1.410 (b) (2)—“on oral request of an attorney or party” “subpoena”

Fla.R.Civ.P. 1.410 (b)—Subpoena for Testimony before the Court.

Fla.R.Civ.P. 1.420 (e) “failure to prosecute” “10 months” “60 days”

Fla.R.Civ.P. 1.510—Summary Judgment

Fla.R.Civ.P. 1.510 (a)—“20 days”

Fla.R.Civ.P. 1.510 (b)—“at any time”

Fla.R.Civ.P. 1.510 (c)—“materials as would be admissible in evidence”

Fla.R.Civ.P. 1.510 (d)—“what material facts exists”

Fla.R.Civ.P. 1.510 (e)—“on personal knowledge”

Fla.R.Civ.P. 1.510 (g)—“affidavits” “in bad faith”

Fla.R.Civ.P. Form 1.900—Forms

Fla.R.Civ.P. Form 1.902 (c) (1)—“waiver of service of process”

Fla.R.Civ.P. Form 1.907 (b)—“garnishee”

Fla.R.Civ.P. Form 1.934 “promissory note”

Fla.R.Civ.P. Form 1.944 “complaint” “foreclosure” “mortgage”

Fla.R.Civ.P. Form 1.989 (a)—Notice of Lack of Prosecution

*NOTICE: THE HEREIN STATED TEXT BELOW AS WELL AS ANY OTHER TEXT IN THIS BOOK WHICH REFERS TO RULES CONTAINS OMISSIONS. REFER TO THE FLORIDA RULES OF CIVIL PROCEDURE OR OTHER RELEVANT RULES FOR THE FULL TEXT.*

Topics: “Time” “Saturdays, Sundays” “7 days”

Fla.R.Civ.P. 1.090—(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is neither a

Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Topics: “Time” “Hearing”

Fla.R.Civ.P. 1.090—(d) For Motions. A copy of any written motion which may not be heard ex parte and a copy of the notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing.

Topics: “Mail”

Fla.R.Civ.P. 1.090—(e) Additional Time after Service by Mail. When a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon that party and the notice or paper is served upon that party by mail, 5 days shall be added to the prescribed period.

Topics: “Pleadings” “Motions”

Fla.R.Civ.P. 1.100—(a) Pleadings. There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it . . .

Topics: “Affirmative Defense”

Continued from above: Fla.R.Civ.P. 1.100—(a) If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed.

Topics: “writing is fulfilled if”

Fla.R.Civ.P. 1.100—(b) Motions. An application to the court for an order shall be by motion which shall be made in writing unless made during a hearing or trial, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. All notices of hearing shall specify each motion or other matter to be heard.

Analysis of the above—It is presumed that if a party “moves the court” that the court is required to actually respond. However, I have personally observed that at least one judge has not done this. In one case, the pro se litigant moved the court to strike the suing party bank’s amended complaint (—this is a request to have the amended complaint removed from the docket—) because the suing party did not file a motion for leave (—this means permission—) to file the amended complaint, as required by Fla.R.Civ.P. Rule 1.190 (a), See below. Pursuant to the rules, the suing party is supposed to file the motion for leave AND attach the proposed amended complaint in support of the motion for leave. The suing party, however, did neither. However, when, subsequent to the home owner’s motion to strike, the suing party



filed a motion for leave, the court immediately—and this means that the motion for leave was filed on, say, a Wednesday—issued an order regarding the suing party bank’s motion on Thursday. Here, the court has refused to give a response to the home owner’s motion to strike but did immediately give an order in response to the suing party bank.

Analysis of the above, continued—The following is critical and requires careful reading. Again, every word has a meaning. 1.090 (b) states that “the requirement of writing [the motion] is fulfilled if the motion is stated in a written notice of the hearing of the motion.” In other words, there are two components. First, you need to write the motion. Then, you need to write a notice, which essentially states that “Hey, opposing counsel, there will be a hearing regarding my motion on xyz date and that’ when the judge will hear the motion and hear what, also, you have to say about it.” In yet other words, if you write the motion, file the motion , but do nothing else. It’s as if nothing were ever written and filed by you. You must set the motion for hearing. This is a case breaker, meaning, you lose your case if you don’t follow this rule.

Fla.R.Civ.P. 1.100 (c) (3)—A final disposition form (form 1.998) shall be filed with the clerk by the prevailing party at the time of the filing of the order or judgment which disposes of the action . . . or when the action is dismissed by court order for lack of prosecution pursuant to rule 1.420(e).

Fla.R.Civ.P. 1.110 (b)— Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim . . .

Fla.R.Civ.P. 1.110 (c)—The Answer. In the answer a pleader shall state in short and plain terms the pleader’s **defenses** to each claim asserted and shall **admit** or **deny** the averments on which the adverse party relies. If the defendant is without knowledge, the defendant **shall so state** and such statement **shall operate as a denial**. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny the remainder.

Continued from above: Fla.R.Civ.P. 1.110 (c)—The Answer: Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or may generally deny all of the averments except such designated averments as the pleader expressly admits, but when the pleader does so intend to controvert all of its averments, including averments of the grounds upon which the court’s jurisdiction depends, the pleader may do so by general denial.

It is important that you know, here, what Graves means by a “flurry of motions.” See Jurisdictionary®

Fla.R.Civ.P. 1.110 (d)—Affirmative Defenses. In pleading to a preceding pleading a party shall **set forth affirmatively** accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res

judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or . . . Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained.

Again, Graves does an outstanding job explaining all of these in his Jurisdiction@ course. There simply isn't a need for me to restate what he has written about in an easy-to-understand format.

Fla.R.Civ.P. 1.110 (e)—Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, **are admitted when not denied** in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Fla.R.Civ.P. 1.110 (h)—Subsequent Pleadings. When the nature of an action permits pleadings subsequent to final judgment and the jurisdiction of the court over the parties has not terminated, the initial pleading subsequent to final judgment shall be designated a supplemental complaint or petition. The action shall then proceed in the same manner and time as though the supplemental complaint or petition were the initial pleading in the action, including the issuance of any needed process. This subdivision shall not apply to proceedings that may be initiated by motion under these rules.

Fla.R.Civ.P. 1.120 (b)—Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated **with such particularity as** the circumstances **may permit**. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred **generally**.

Topic: “attaching copy” “exhibits”

Fla.R.Civ.P. 1.130 (a)—Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

Topic: “20 days”

Fla.R.Civ.P. 1.140 (a) (1)—DEFENSES When Presented. Unless a different time is prescribed in a statute of Florida, a defendant shall serve an answer within 20 days after service of original process and the initial pleading on the defendant, or not later than the date fixed in a notice by publication. A party served with a pleading stating a crossclaim against that party shall serve an answer to it within 20 days after service on that party. The plaintiff shall serve an answer to a counterclaim within 20 days after service of the counterclaim. If a reply is required, the reply shall be served within 20 days after service of the answer.

Fla.R.Civ.P. 1.140 (a) (3)— The service of a motion under this rule, except a motion for judgment on the pleadings or a motion to strike under subdivision (f), alters these periods of time so that if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be served within 10 days after notice of the court's action or, if the court grants a motion for a more definite statement, the responsive pleadings shall be served within 10 days after service of the more definite statement unless a different time is fixed by the court in either case.

Fla.R.Civ.P. 1.140 (a) (4)—If the court permits or requires an amended or responsive pleading or a more definite statement, the pleading or statement shall be served within 10 days after notice of the court's action. Responses to the pleadings or statements shall be served within 10 days of service of the pleadings or statements.

Fla.R.Civ.P. 1.140 (b)—How Presented. Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the **subject** matter, (2) lack of jurisdiction over the **person**, (3) improper **venue**, (4) insufficiency of **process**, (5) insufficiency of **service of process**, (6) **failure to state a cause of action**, and (7) failure to **join** indispensable parties. A **motion** making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert any defense in law or fact to that claim for relief at the trial, except that the objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply.

Fla.R.Civ.P. 1.140 (c)—Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Fla.R.Civ.P. 1.140 (d)—Preliminary Hearings. The defenses 1 to 7 in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment in subdivision (c) of this rule **shall** be heard and determined before trial on application of any party unless the court orders that the hearing and determination shall be deferred until the trial.

If the court does not determine the defenses, it's your job to let the court know and be sure to cite the respective rule!

Fla.R.Civ.P. 1.140 (e)—Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Fla.R.Civ.P. 1.140 (f)—Motion to Strike. A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.

Fla.R.Civ.P. 1.140 (h) (1)—A party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the party has made no motion, in a responsive pleading except as provided in subdivision (h)(2).

Fla.R.Civ.P. 1.140 (h) (2)—The defenses of failure to state a cause of action or a legal defense or to join an indispensable party **may be raised by motion for judgment on the pleadings or at the trial** on the merits in addition to being raised either in a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised **at any time**.

Fla.R.Civ.P. 1.140 (h) (2)—Committee Notes. 1972 Amendment. Subdivision (a) is amended to eliminate the unnecessary statement of the return date when service is made by publication, and to accommodate the change proposed in rule 1.100(a) making a reply mandatory under certain circumstances. Motions to strike under subdivision (f) are divided into 2 categories, so subdivision (a) is also amended to accommodate this change by eliminating motions to strike under the new subdivision (f) as motions that toll the running of time.

Continued from above: Fla.R.Civ.P. 1.140 (h) (2)—Committee Notes. 1972 Amendment. A motion to strike an insufficient legal defense will now be available under subdivision (b) and continue to toll the time for responsive pleading. Subdivision (b) is amended to include the defense of failure to state a sufficient legal defense. The proper method of attack for failure to state a legal defense remains a motion to strike.

Continued from above: Fla.R.Civ.P. 1.140 (h) (2)—Committee Notes. 1972 Amendment. Subdivision (f) is changed to accommodate the 2 types of motions to strike. The motion to strike an insufficient legal defense is now in subdivision (b). The motion to strike under subdivision (f) does not toll the time for responsive pleading and can be made at any time, and the matter can be stricken by the court on its initiative at any time. Subdivision (g) follows the terminology of Federal Rule of Civil Procedure 12(g).

Continued from above: Fla.R.Civ.P. 1.140 (h) (2)—Committee Notes. 1972 Amendment. Much difficulty has been experienced in the application of this and the succeeding subdivision

with the result that the same defenses are being raised several times in an action. The intent of the rule is to permit the defenses to be raised one time, either by motion or by the responsive pleading, and thereafter only by motion for judgment on the pleadings or at the trial. Subdivision (h) also reflects this philosophy. It is based on federal rule 12(h) but more clearly states the purpose of the rule.

Fla.R.Civ.P. 1.140 (h) (2)—Committee Notes. 1988 Amendment. The amendment to subdivision (a) is to fix a time within which amended pleadings, responsive pleadings, or more definite statements required by the court and responses to those pleadings or statements must be served when no time limit is fixed by the court in its order. The court's authority to alter these time periods is contained in rule 1.090(b).

Fla.R.Civ.P. 1.150 (a)—SHAM PLEADINGS. Motion to Strike. If a party deems any pleading or part thereof filed by another party to be a sham, that party may move to strike the pleading or part thereof before the cause is set for trial and the court shall hear the motion, taking evidence of the respective parties, and if the motion is sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment on the merits may be entered in the discretion of the court or the court may permit additional pleadings to be filed for good cause shown.

Fla.R.Civ.P. 1.150 (b)—Contents of Motion. The motion to strike shall be verified and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.

Topics: “amend a pleading once” “shall”

Fla.R.Civ.P. 1.190 (a)—Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires.

Continued from above: Fla.R.Civ.P. 1.190 (a)—Amendments. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.

Fla.R.Civ.P. 1.190 (b)—Amendments to Conform with the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when

the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.

The above is very important. As a side note, Graves also talks about this issue in the Jurisdictionary® course, which you can purchase online at [www.jurisdictionary.com](http://www.jurisdictionary.com). Why important? If you are being sued, and the party who is suing you states its allegations in the complaint, only those issues which are stated in the complaint are an issue. Beware! It happens that the suing party will expand on these issues and add additional ones. Protest this conduct immediately. For further information on this topic, See Jurisdictionary®

Fla.R.Civ.P. 1.190 (d)—Supplemental Pleadings. Upon motion of a party the court may permit that party, upon reasonable notice and upon such terms as are just, to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Fla.R.Civ.P. 1.190 (e)—Amendments Generally. At any time in furtherance of justice, upon such terms as may be just . . .

Fla.R.Civ.P. 1.420 (a) (2) (b)—DISMISSAL OF ACTIONS. Involuntary Dismissal. Any party may move for **dismissal of an action** or of any claim against that party **for failure of an adverse party to comply** with these rules or any order of court. Notice of hearing on the motion shall be served as required under rule 1.090(d). After a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of evidence, any other party may move for a dismissal on the ground that on the facts and the law the party seeking affirmative relief has shown **no right to relief**, without waiving the right to offer evidence if the motion is not granted. The court as trier of the facts may then determine them and render judgment against the party seeking affirmative relief or may decline to render judgment until the **close of all the** evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, **operates as** an adjudication on the merits.

Fla.R.Civ.P. 1.420 (e)—Failure to Prosecute. In all actions in which it **appears on the face** of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If **no such record activity has occurred within** the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days **immediately following the service of such notice**, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court **on its own motion** or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the

motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

Fla.R.Civ.P. 1.420 (f)—Effect on Lis Pendens. If a notice of lis pendens has been filed in connection with a claim for affirmative relief that is dismissed under this rule, the notice of lis pendens connected with the dismissed claim is automatically dissolved at the same time. The notice, stipulation, or order shall be recorded.

Fla.R.Civ.P. 1.420 (e)—Committee Notes. 1976 Amendment. Subdivision (e) has been amended to prevent the dismissal of an action for inactivity alone unless 1 year has elapsed since the occurrence of activity of record. Nonrecord activity will not toll the 1-year time period.

Fla.R.Civ.P. 1.420 (e)— Committee Notes. 1980 Amendment. Subdivision (e) has been amended to except from the requirement of record activity a stay that is ordered or approved by the court.

Fla.R.Civ.P. 1.420 (e)— Committee Notes. 1992 Amendment. Subdivision (f) is amended to provide for automatic dissolution of lis pendens on claims that are settled even though the entire action may not have been dismissed.

Fla.R.Civ.P. 1.420 (e)— Committee Notes. 2005 Amendment. Subdivision (e) has been amended to provide that an action may not be dismissed for lack of prosecution without prior notice to the claimant and adequate opportunity for the claimant to re-commence prosecution of the action to avert dismissal.

Fla.R.Civ.P. 1.420 (e)—Court Commentary. 1984 Amendment. A perennial real property title problem occurs because of the failure to properly dispose of notices of lis pendens in the order of dismissal. Accordingly, the reference in subdivision (a)(1) to disposition of notices of lis pendens has been deleted and a separate subdivision created to automatically dissolve notices of lis pendens whenever an action is dismissed under this rule.

Topic: “offer of proof” See also Jurisdictionary®

Fla.R.Civ.P. 1.450 (a)—EVIDENCE. Record of Excluded Evidence. In an action tried by a jury if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a **specific offer** of what the attorney expects **to prove** by the answer of the witness. The court may require the **offer to be made out of the hearing** of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried **without a jury** the same procedure may be followed except that the court upon request shall take and report the evidence in full unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

Fla.R.Civ.P. 1.450 (b)—Filing. When documentary **evidence** is **introduced** in an action, the clerk or the judge shall endorse an **identifying number** or symbol on it and when **proffered** or **admitted** in evidence, it shall be filed by the clerk or judge and considered in the custody of the court and not withdrawn except with written leave of court.

Fla.R.Civ.P. 1.450—Committee Notes. 1971 Amendment. Subdivision (d) is amended to eliminate the necessity of a court order for disposal of exhibits. The clerk must retain the exhibits for 1 year unless the court permits removal earlier. If removal is not effected within the year, the clerk may destroy or dispose of the exhibits after giving the specified notice.

Fla.R.Civ.P. 1.450—Committee Notes. 1996 Amendment. Former subdivision (a) entitled “Adverse Witness” is deleted because it is no longer needed or appropriate because the matters with which it deals are treated in the Florida Evidence Code.

Fla.R.Civ.P. 1.450—Court Commentary. Subdivision (e): This rule was originally promulgated by the supreme court in *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla.1976). In *The Florida Bar, in re Rules of Civil Procedure*, 391 So. 2d 165 (Fla. 1980), the court requested the committee to consider the continued appropriateness of rule 1.450(e). In response, the committee recommended its deletion. After oral argument in *The Florida Bar: In re Rules of Civil Procedure*, 429 So. 2d 311, the court specifically declined to abolish the rule or to adopt a similar rule for other types of actions.

Continued from above: Fla.R.Civ.P. 1.450—Court Commentary. Subdivision (e): The committee again considered rule 1.450(e) in depth and at length and again recommends its deletion for the reason that no exception should be made in the rule to a particular type of action. Subdivision (f): The West’s Desk Copy Florida Rules of Court, at page 62, points out: “The per curiam opinion of the Florida Supreme Court of June 21, 1979 (403 So.2d 926) provides: ‘On March 8, 1979, the Court proposed new Rule 1.450 of the Florida Rules of Civil Procedure which would provide for the disposal of exhibits and depositions in civil matters.

Continued from above: Fla.R.Civ.P. 1.450—Court Commentary. Subdivision (e): Absent further action by the Court, the proposed rule was to become effective July 2, 1979. The Court has carefully considered the responses received regarding proposed Rule 1.450(f) and now feels that the July 2, 1979, effective date does not allow sufficient time for full reflection on matters raised in these responses. Therefore, the effective date for Rule 1.450(f) is, by this order, delayed until further order of the Court.” The retention of court records is the subject of Florida Rule of Judicial Administration 2.075.

Fla.R.Civ.P. 1.490 (a)—MAGISTRATES. General Magistrates. Judges of the circuit court may **appoint** as many general magistrates from among the members of the Bar in the circuit as the judges find necessary, and the general magistrates shall continue in office until removed by the court. The order making an appointment shall be recorded. Every person appointed as a general magistrate shall take the oath required of officers by the Constitution and the oath shall be recorded before the magistrate discharges any duties of that office.



Fla.R.Civ.P. 1.490 (b)—Special Magistrates. The court may appoint members of The Florida Bar as special magistrates for any particular service required by the court, and they shall be governed by all the provisions of law and rules relating to magistrates except they shall not be required to make oath or give bond unless specifically required by the order appointing them. Upon a showing that the appointment is advisable, a person other than a member of the Bar may be appointed.

Fla.R.Civ.P. 1.490 (d)—General Powers and Duties. Every magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and under the direction of the court. Process issued by a magistrate shall be directed as provided by law. Hearings before any magistrate, examiner, or commissioner shall be held in the county where the action is pending, but hearings may be held at any place by order of the court within or without the state to meet the convenience of the witnesses or the parties. All grounds of disqualification of a judge **shall** apply to magistrates.

Topics: Duties of a Magistrate!

Topics: Is the court moving slowly? If so, read this section!

Topics: Be sure to read the committee notes: powerful stuff!

Fla.R.Civ.P. 1.490 (f)—Hearings. The magistrate shall assign a time and place for proceedings as soon **as reasonably possible** after the reference is made and give notice to each of the parties. If any party fails to appear, the magistrate may proceed **ex parte** or may adjourn the proceeding to a future day, giving notice to the absent party of the adjournment. The magistrate shall proceed with reasonable diligence in every reference and with the least practicable delay. Any party may **apply to the court for an order** to the magistrate **to speed** the proceedings and to make the report and to certify to the court the reason for any delay.

Continued from above: Fla.R.Civ.P. 1.490 (f)—Hearings. The evidence **shall** be taken in writing by the magistrate or by some other person under the magistrate's authority in the magistrate's presence and shall be filed with the magistrate's **report**. The magistrate shall have authority to examine the parties **on oath** upon all matters contained in the reference and **to require** production of all books, papers, writings, vouchers, and other documents applicable to it and to **examine on oath orally** all witnesses produced by the parties.

Continued from above: Fla.R.Civ.P. 1.490 (f)—Hearings. The magistrate **shall** admit evidence by deposition or that is otherwise admissible in court. The magistrate may take all actions concerning evidence that can be taken by the court **and in the same manner**. All parties accounting before a magistrate **shall bring** in their accounts in the form of accounts **payable and receivable**, and any other parties who are not satisfied with the account **may examine the accounting party orally** or by interrogatories or deposition as the magistrate directs. All depositions and documents that have been taken or used previously in the action may be used before the Magistrate.

Fla.R.Civ.P. 1.490 (g)—Magistrate’s Report. In the reports made by the magistrate **no** part of any statement of facts, account, charge, deposition, examination, or answer used before the magistrate **shall** be recited. The matters shall be identified to inform the court **what items were** used.

Fla.R.Civ.P. 1.490 (g)—Filing Report; Notice; Exceptions. The magistrate **shall** file the report and serve copies on the parties. The parties may serve exceptions to the report within **10 days from the time it is served** on them. If no exceptions are filed within that period, the court shall take appropriate action on the report. If exceptions are filed, they **shall be heard** on reasonable notice by either party.

Topic: There’s a huge point in these Committee Notes! Huge! “right to use affidavits”

Topic: If you can cite this rule, the opposing counsel will know you are above board!

Fla.R.Civ.P. 1.490—Committee Notes. 1971 Amendment. The entire rule has been revised. Obsolete language has been omitted and changes made to meet objections shown by the use of local rules in many circuits. Subdivisions (a) and (b) are not substantially changed. Subdivision (c) is shortened and eliminates the useless priority for setting the matter for hearing to permit either party to go forward. Subdivision (d) eliminates the right of the parties to stipulate to the place of hearing. Subdivision (e) is not substantially changed. Subdivisions (f), (g), (h), and (i) are combined.

Topics: You better read this one!

Continued from above: Fla.R.Civ.P. 1.490—Committee Notes. The **right to use affidavits is eliminated** because of the **unavailability** of cross-examination and possible **constitutional** questions. The vague general authority of the magistrate under subdivision (g) is made specific by limiting it to actions that the court could take. Subdivision (j) is repealed because it is covered in the new subdivision (f). Subdivision (g) is the same as former subdivision (k) after eliminating the reference to affidavits. Subdivision (h) is the same as former subdivision (l).

Fla.R.Civ.P. 1.490—Committee Notes. 1980 Amendment. Subdivision (d) is amended to delete the specific reference to the direction of process so that process issued by the master will be governed by the law applicable to process generally.

Fla.R.Civ.P. 1.490—Court Commentary. 1984 Amendment. The consent of all parties is required for any reference to a special master. Special masters may be used as provided by statute even with the rule change. See *Slatcoff v. Dezen*, 74 So. 2d 59 (Fla. 1954).

Fla.R.Civ.P. 1.500 (a)—DEFAULTS AND FINAL JUDGMENTS THEREON. By the Clerk. When a party against whom affirmative relief is sought has failed to file or serve any paper in the action, the party seeking relief may have the clerk enter a default against the party failing to serve or file such paper.

Fla.R.Civ.P. 1.500 (b)—By the Court. When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; provided that if such party has filed or served any paper in the action, that party shall be served with notice of the application for default.

Topic: “plead” “defend” “at any time before default”

Fla.R.Civ.P. 1.500 (c)—Right to Plead. A party may plead or otherwise defend at any time before default is entered. If a party in default files any paper after the default is entered, the clerk shall notify the party of the entry of the default. The clerk shall make an entry on the progress docket showing the notification.

Topic: It’s within the court’s inherent authority to set aside a default!

Fla.R.Civ.P. 1.500 (d)—Setting aside Default. The court may set aside a default, and if a final judgment consequent thereon has been entered, the court may set it aside in accordance with rule 1.540(b).

Fla.R.Civ.P. 1.500 (e)—Final Judgment. Final judgments after default may be entered by the court at any time, but . . .

Fla.R.Civ.P. 1.500—Court Commentary. 1984 Amendment. Subdivision (c) is amended to change the method by which the clerk handles papers filed after a default is entered. Instead of returning the papers to the party in default, the clerk will now be required to file them and merely notify the party that a default has been entered. The party can then take whatever action the party believes is appropriate. This is to enable the court to judge the effect, if any, of the filing of any paper upon the default and the propriety of entering final judgment without notice to the party against whom the default was entered.

Fla.R.Civ.P. 1.510 (a)—SUMMARY JUDGMENT. For Claimant. A party seeking to recover upon a claim, counterclaim, crossclaim, or third-party claimor to obtain a declaratory judgment may . . .

Fla.R.Civ.P. 1.510 (d)—SUMMARY JUDGMENT. Case Not Fully Adjudicated on Motion. On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the **taking of testimony** and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the **evidence** before it and by interrogating counsel, **shall** ascertain, if practicable, **what material** facts exist **without** substantial controversy and what material facts are actually and in good faith **controverted**. It **shall** thereupon make an **order specifying** the facts that appear **without substantial** controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

Fla.R.Civ.P. 1.530 (g)—Motion to Alter or Amend a Judgment. A motion to **alter** or **amend** the judgment shall be served not later than **10 days** after entry of the judgment, except that this rule does not affect the remedies in rule 1.540(b).

Fla.R.Civ.P. 1.530—Committee Notes. 1992 Amendment. In subdivision (e), the reference to assignments of error is eliminated to conform to amendments to the Florida Rules of Appellate Procedure.

Fla.R.Civ.P. 1.530—Court Commentary. 1984 Amendment. Subdivision (b): This clarifies the time in which a **motion for rehearing** may be served. It specifies that the date of filing as shown on the face of the judgment in a non-jury action is the date from which the time for serving a motion for rehearing is calculated. There is no change in the time for serving a motion for new trial in a jury action, except the motion may be served before the rendition of the judgment.

Fla.R.Civ.P. 1.540 (a)—RELIEF FROM JUDGMENT, DECREES, OR ORDERS. Clerical Mistakes. Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time **on its own initiative** or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Topics: Is the previous order the fruit of the poisoned tree?

Fla.R.Civ.P. 1.540 (b)—Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such **terms as are just**, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) **mistake**, inadvertence, surprise, or excusable neglect; (2) **newly** discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) **fraud** (whether heretofore denominated intrinsic or extrinsic), **misrepresentation**, or other misconduct of an adverse party; (4) that the judgment or decree is **void**; or (5) that the judgment or decree has been **satisfied**, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

Continued from above: Fla.R.Civ.P. 1.540 (b)—(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation.

Continued from above: Fla.R.Civ.P. 1.540 (b)—(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. This rule does not limit the power of a

court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

Fla.R.Civ.P. 1.540—Committee Notes. 2003 Amendment. Subdivision (b) is amended to clarify that motions must be filed.

Topic: Move the court to issue . . . so you get paid!

Fla.R.Civ.P. 1.550 (a)—EXECUTIONS AND FINAL PROCESS. Issuance. Executions on judgments shall issue during the life of the judgment on the oral request of the party entitled to it or that party's attorney without praecipe. No execution or other final process shall issue until the judgment on which it is based **has been recorded** nor within the time for **serving a motion for new trial or rehearing**, and if a motion for new trial or rehearing is timely served, until it is determined; provided execution or other final process may be issued on special order of the court at any time after judgment.

Fla.R.Civ.P. 1.550 (b)—Stay. The court before which an execution or other process based on a final judgment is returnable may stay such execution or other process and suspend proceedings thereon for good cause on motion and notice to all adverse parties.

Fla.R.Civ.P. 1.560 (a)—DISCOVERY IN AID OF EXECUTION. In General. In aid of a judgment, decree, or execution the judgment creditor or the successor in interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Fla.R.Civ.P. 1.560 (b)—Fact Information Sheet. In addition to any other discovery available to a judgment creditor under this rule, the court, at the request of the judgment creditor, shall order the judgment debtor or debtors to complete form 1.977, including all required attachments, within 45 days of the order or such other reasonable time as determined by the court. Failure to obey the order may be considered contempt of court.

Fla.R.Civ.P. 1.560 (c)—Final Judgment Enforcement Paragraph. In any final judgment, the judge shall include the following enforcement paragraph if requested by the prevailing party or attorney: "It is further ordered and adjudged that the judgment debtor(s) shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor(s) to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney."

Topic: “If you owe money, you need to do this.”

Fla.R.Civ.P. 1.560 (d)—Notice of Compliance. The judgment debtor shall file with the clerk of court a notice of compliance with the order to complete form 1.977, and serve a copy of the notice of compliance on the judgment creditor or the judgment creditor’s attorney.

Fla.R.Civ.P. 1.560—Committee Notes. 1972 Amendment. The rule is expanded to permit discovery in any manner permitted by the rules and conforms to the 1970 change in Federal Rule of Civil Procedure 69(a).

Topic: “small Claims”

Fla.R.Civ.P. 1.560—Committee Notes. 2000 Amendment. Subdivisions (b)–(e) were added and patterned after **Florida Small Claims** Rule 7.221(a) and Form 7.343. Although the judgment creditor is entitled to broad discovery into the judgment debtor’s finances, Fla. R. Civ. P. 1.280(b); *Jim Appley’s Tru-Arc, Inc. v. Liquid Extraction Systems*, 526 So. 2d 177, 179 (Fla. 2d DCA 1988), inquiry into the individual assets of the judgment debtor’s **spouse may be limited** until a proper predicate has been shown. *Tru-Arc, Inc.* 526 So. 2d at 179; *Rose Printing Co. v. D’Amato*, 338 So. 2d 212 (Fla. 3d DCA 1976). Failure to complete form 1.977 as ordered may be considered contempt of court.

Fla.R.Civ.P. 1.570 (a)—ENFORCEMENT OF FINAL JUDGMENTS. Money Judgments. Final process to enforce a judgment solely for the payment of money shall be by execution, writ of garnishment, or other appropriate process or proceedings.

Fla.R.Civ.P. 1.570 (b)—Property Recovery. Final process to enforce a judgment for the recovery of property shall be by a writ of possession for real property and by a writ of replevin, distress writ, writ of garnishment, or other appropriate process or proceedings for other property.

Fla.R.Civ.P. 1.570 (c)—Performance of an Act. If judgment is for the performance of a specific act or contract: (1) the judgment shall specify the time within which the act shall be performed. If the act is not performed within the time specified, the party seeking enforcement of the judgment shall make an affidavit that the judgment has not been complied with within the prescribed time and the clerk shall issue a writ of attachment against the delinquent party. The delinquent party shall not be released from the writ of attachment until that party has complied with the judgment and paid all costs accruing because of the failure to perform the act.

Continued from above: Fla.R.Civ.P. 1.570 (c)—Performance of an Act. If the delinquent party cannot be found, the party seeking enforcement of the judgment shall file an affidavit to this effect and the court shall issue a **writ of sequestration** against the delinquent party’s property. The writ of sequestration shall not be dissolved until the delinquent party complies with the judgment; (2) the court may hold the disobedient party in contempt; or (3) the court

may appoint some person, not a party to the action, to perform the act insofar as practicable. The performance of the act by the person appointed shall have the same effect as if performed by the party against whom the judgment was entered.

Fla.R.Civ.P. 1.570 (d)—Vesting Title. If the judgment is for a conveyance, transfer, release, or acquittance of real or personal property, the judgment shall have the effect of a duly executed conveyance, transfer, release, or acquittance that is recorded in the county where the judgment is recorded. A judgment under this subdivision shall be effective notwithstanding any disability of a party.

Fla.R.Civ.P. 1.580 (a)—WRIT OF POSSESSION. Issuance. When a judgment or order is for the delivery of possession of real property, the judgment or order shall direct the clerk to issue a writ of possession. The clerk shall issue the writ forthwith and deliver it to the sheriff for execution.



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## CHAPTER 44.10: RULES: FLORIDA RULES OF EVIDENCE

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Rules of evidence: You must read them. It's not optional! Knowing how to apply them is what might save your home.

The Florida Rules of Evidence or any other State rules of evidence are modeled after the Federal Rules of Evidence. The Federal Rules of Evidence are only about twenty pages long. Download them and/or your respective States' rules of evidence. They are available online as are any other rules which you will need in order to fight your case.

Arm yourself with the rules of the game attorneys play! If you don't, you will lose your case!





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## CHAPTER 44.50: RULES: FEDERAL RULES OF EVIDENCE

[See also Appendix 650.1.1]

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Federal Rules of Evidence: If you proceed in federal court, you would use the Federal Rules of Evidence. If you proceed in State court, you would use your respective State's rules of evidence. Generally, most State's rules of evidence are modeled after and/or are similar to the Federal Rules of Evidence. See also Appendix 650.1.1.



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## CHAPTER 45.10: RULES: FLORIDA RULES OF JUDICIAL ADMINISTRATION

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Florida Rules of Judicial Administration: Read the respective rules in your State. What follows is a selection concerning the disqualification (or recusal) of judges in Florida. These might vary from State to State. Be aware! Read! Pay attention to detail! Every word has a meaning.

Fla.R.Jud.Admin. 2.330. DISQUALIFICATION OF TRIAL JUDGES [FN-0100]

Fla.R.Jud.Admin. 2.330 (c) (3). DISQUALIFICATION OF TRIAL JUDGES [FN-0100]

Fla.R.Jud.Admin. 2.330 (d) (1). DISQUALIFICATION OF TRIAL JUDGES [FN-0100]

Fla.R.Jud.Admin. 2.330 (e). DISQUALIFICATION OF TRIAL JUDGES [FN-0100]

Inphynet Contracting Svcs. Inc. v. Soria, 37 So. 3d 299 (Fla. 4<sup>th</sup> DCA 2010) [FN-0100]

\_\_\_\_\_.  
[FN-0100] In an order, the court responded to a home owner's (Defendant's) motion to recuse with these citations. The court denied the motion for recusal because, it is believed [FN-1010], the home owner did not file the motion for recusal within the 10-day window in which to file a motion for recusal.

\_\_\_\_\_.  
[FN-1010] Reviewed by this author were the Fla.R.Jud.Admin listed in [FN-0100] and the decision in Inphynet Contracting Svcs. Inc. v. Soria. Read this decision, and you might find—you just might—that the case will offer little, if anything in support of the court's ruling on the motion to recuse the judge with one exception: The court in Inphynet Contracting Svcs. Inc. stated that "Fla.R.Jud.Admin. 2330 (e) . . . require[s] filing of a motion to disqualify not later than '10 days after the discovery of the facts constituting the grounds for the motion' " See Appendix 17.1.1. In the experience of the author, courts, generally, conclude motions written by pro se litigants *against* them by arriving, in their order, at a conclusion which is rested on partial facts, omitting a portion of those facts which otherwise would lead to a

different and favorable conclusion on the matters presented to the court.

In other words, assuming that, e.g., facts A, B, C, and D are present where, say, facts A, B, and D are adverse and where fact C is favorable to the pro se litigant when fact C is a fact which would have required that the court conclude a motion in favor of the pro se litigant on that ground (fact C) alone, the courts, in the author's experience, would hone in on the facts which are not well presented by or were not favorable to the pro se litigant; the courts would ignore the one fact—fact C—which would otherwise have required the court to adjudicate in favor of the pro se litigant. This, of course, is grossly unfair and a corrupt application of judicial resources.



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## CHAPTER 45.50: RULES: FLORIDA RULES OF APPELLATE PROCEDURE

[Petition for a writ of mandamus]

[Petition for a writ of prohibition]

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It is obvious that you would need to consult with these rules if you wanted to appeal the lower court's judicial errors.

What is not so obvious is the fact that any person can hold any governmental agency accountable—say, I want to know why a certain county or city ordinance requires me to do x y or z, or I want them to stop doing x y or z and here are the reasons why—by filing what is called a petition for a writ of mandamus or a petition for a writ of prohibition.

One refers to the conduct by a governmental entity—think about your daughter's school—the other refers to the conduct by a lower court!

What I have stated in a separate chapter of this book is this: Someone ought to sue the clerk of court or file a petition for a writ of prohibition or a petition for a writ of mandamus in the appropriate next-highest court to force the clerk of court (or other responsible entity) to charge not \$1 per page for court records but no more than 10 cents a page; the procedure for these types of relief is outlined in the Florida Rules of Appellate Procedure; if you intend to fight and win, you must become familiar with them also.



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## CHAPTER 46.10: STATUTES: FLORIDA STATUTES

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Florida Statutes, Sections:

90.803(6) About business records  
45.031 (2005) Judicial Sales Procedure  
45.0315 (2005) Right of Redemption  
494.0078 (2005) Florida Fair Lending Act  
687.01 (2005) Rate of Interest in Absence of Contract  
695.01 (2005) Conveyances to be Recorded  
697.01 (2005) Instruments Deemed Mortgages  
701.01 (2005) Assignment  
702.01 (2005) Equity



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## CHAPTER 47.10: CODE: UNIFORM COMMERCIAL CODE - UCC

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The Uniform Commercial Code is the homeowner's best friend. This is so whether you are in default. (Are you capable of paying your mortgage, but, knowing that you are "upside down," do you want to take possession of your home without any further obligation to pay?)

"UCC 3-501 requires a lender to "exhibit the note" when the lender makes **demand for payment**, and the borrower **demands to see the note**. Technically a demand for payment occurs every month, and it also occurs when a bank begins foreclosure proceedings." Source: <http://loanworkout.org/2008/06/the-mers-fifty-million-mortgage-meltdown>

Continued from above: "UCC 3-501 also requires a servicer to show authority to make a demand for payment, if it does not own the note, but is merely servicing it. In the event a noteholder or servicer will not exhibit the note or perform other legal requirements when requested to do so by the borrower, this UCC section allows the borrower to discontinue payments WITHOUT DISHONOR until such time as the noteholder or servicer complies with all laws or contract provisions." Source: <http://loanworkout.org/2008/06/the-mers-fifty-million-mortgage-meltdown>

Continued from above: "Also helpful is UCC 3-309. UCC 3-309 requires the lender go through certain steps to prove up a note (make it enforceable) that is lost or destroyed. This is not easy for the lender to do, if one is willing to contest everything the lender does to try to prove up the note. This proof takes witnesses, who may not be able to say what the law requires, if the witnesses are thoroughly cross-examined. (Don't let the lender get by with self-serving affidavits; take their witnesses' depositions). Moreover, this section requires the lender to give adequate protection in the event the lender can make the lost note enforceable.

That may be difficult for a lender that is under FDIC scrutiny and whose stock is in the tank.”  
Source: <http://loanworkout.org/2008/06/the-mers-fifty-million-mortgage-meltdown>

Uniform Commercial Code Committee: “Where’s the note, who’s the holder?” See Appendix 700.1.1. Uniform Commercial Code: Definitions. See Appendix 700.2.1. Both Appendix 700.1.1 and 700.2.1 will serve you well!

\*scan4 “ucc”



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## CHAPTER 47.50: STANDARDS: SUMMARY JUDGMENT

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Summary Judgment: See Appendix 11.1.1, Page 2.





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## CHAPTER 48.10: EVIDENCE CONTROL AND OBJECTIONS: PART I: EVIDENTIARY OBJECTIONS FOR APPEAL: WHY OBJECT, WHEN OBJECT, HOW OBJECT!

[Conversely, make an offer of proof!]

[Examples of types of objections]

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Why to object—According to Kolczynski, “[a] party or the party’s lawyer must ‘object’ to the admissibility of evidence on the record, if it affects a substantial right of a party. FRCP 46; FRE 103(a)” (Task 117).

“Normally, an objection or offer of proof must be made unless ‘plain error’ exists. FRE 103(d). The court(s) may take notice of ‘plain error’ even if it is not brought to their attention by the parties” (Kolczynski, Task 117).

“Generally, once a party objects to evidence, the party need not renew the same objection or make an offer of proof with regard to that evidence, to preserve the right to appeal. However, a party is relieved from making an objection or offer of proof only if the court has made a ‘definitive’ ruling. FRE Rule 103, Advisory Committee Notes” (Kolczynski, Task 117).

I suggest that you insist that the court rule on your objection. For example:

You: Objection, your honor!

Judge: I don’t have time for this, let’s move on.

You: Objection, your honor! I object to the court’s refusal to rule on the objection.

“If the court’s evidentiary ruling is not definitive, the party must renew the objection at trial or make an offer of proof. ‘Definitive’ in this context means a final decision with regard to the objection on the specific evidence. The burden is on the losing party’s lawyer to clarify whether the ruling was definitive or provisional. FRE Rule 103, Advisory Committee Notes” (Kolczynski, Task 117).

“An objection to evidence must be ‘timely’; that is, it must normally be made when the evidence is admitted. FRE 103(a)(1). Similarly, for an Offer of Proof to be timely, it must be made when the evidence is excluded” (Kolczynski, Task 117).

When to object—According to Kolczynski, “[o]bjections to evidence should be made as soon as it is apparent that evidence is, for any reason, objectionable. Isaacs v. U.S., (8th Cir. 1962), 301 F.2d 706, certiorari denied 83 S. Ct. 32, 371 U.S. 818, 9 L.Ed.2d 58” (Task 117).

I suggest that you object immediately when the attorney for the opposing party begins to testify. (When the attorney, in a hearing, is talking to the judge about facts that have not been introduced into evidence, and when the attorney is talking about these facts in support of a legal argument, you need to stop him. Objection, counsel is testifying!)

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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When to object—According to Kolczynski, “[o]bjections to evidence should be made as soon as it is apparent that evidence is, for any reason, objectionable. Isaacs v. U.S., (8th Cir. 1962), 301 F.2d 706, certiorari denied 83 S. Ct. 32, 371 U.S. 818, 9 L.Ed.2d 58” (Task 117).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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“Realistically, the most important deadline has to do with avoiding harm. The objection should be made before the prejudice from the inadmissible evidence can occur. This is critical when the evidence is offered in front of a jury. Frederick v. Kirby Tankships, Inc., 205 F.3d 1277 (11th Cir. 2000)” (Kolczynski, Task 117).

“Circumstances may arise in which previously admitted testimony becomes objectionable only in light of subsequent testimony. Thus, if grounds for objection are not known until after objectionable testimony is given, an ‘after-objection’ may be interposed when grounds become apparent. Government of Virgin Islands v. Archibald, 987 F. 2d 180 (3rd Cir. 1993). See also FRCP 46” (Kolczynski, Task 117).

How to object—According to Kolczynski, “[a]n objection to evidence must be made by stating the specific legal, policy or factual ground(s) for the objection, unless it is obvious from context. FRE 103(a)(1) and (2)” (Task 117).

“When a jury is present, the method for making objections or offers of proof must prevent the jury from hearing inadmissible evidence. Many federal judges expect anticipated objections to evidence, already known before trial to be raised for determination at the final pretrial conference. The purpose is to streamline the trial and minimize the risk of the jury being tainted by hearing inadmissible evidence or argument about admissibility. In jury trials, Federal Courts are strict about “speaking objections” in which counsel openly discusses evidence that has not been approved for admission in evidence. When making objections in a jury trial, counsel should state the specific legal ground(s) for the objections. Example: [Law enforcement officer attempts to testify on something that you know he/she does not have the

training or experience to testify about] Proper: “Objection—lack of foundation for opinion,” or Objection—lack of competency.” Improper: “Objection the officer has had no training or experience in detecting . . . .” During trial the court may entertain arguments for objections at side bar (conversation between the judge and trial counsel, normally before the bench but out of ear shot of the jury). If the judge rules from the bench without removing the jury from the courtroom, it is incumbent on counsel to have the court reporter later, record the basis for the objection or the substance of the Offer of Proof, which was ruled on at side bar. This can be done after the jury is out of the courtroom during a recess, or at the end of the trial day” (Kolczynski, Task 117).

“For an objection to be sufficiently “specific,” it must be phrased to constitute an objection and not just a comment, even if the word “objection!” is not used. McEwen v. City of Norman, Okla., 926 F.2d 1539 (10th Cir. 1991). Sufficiently specific objections should: Tell the court that the moving party wants the evidence excluded and legal ground(s) for the exclusion. Although specific terminology may not be required, it is important to state both the relevant and appropriate ground(s) for objection. The failure to state a valid ground may not preserve the right of appeal. Williams v. Union Pac. R.R., 286 F.2d 50 (9th Cir. 1960). Identify the party(s) against whom the evidence should not be admissible or other limitations on the scope of the objection. *See* FRE 105. The grounds for objections are more complicated when the issues are covered by a court’s discretionary ruling under FRE 403. Under FRE 403, the court may determine that prejudice outweighs relevance; thus, the objection must be more extensive to preserve an error of abuse of discretion for appeal. *See generally*, Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985). Recognize that at different phases of a case and even different times in a trial, evidence on a particular issue may change and new grounds for an objection may become apparent. Counsel will need to assert an objection on the record supported by the new ground(s) to preserve that issue for appeal. An example may be a Motion In Limine, denied before trial starts but apparently sustainable in light of evidence adduced during trial” (Kolczynski, Task 117).

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS BEGINS:*

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“An offer of proof is required where the significance of the excluded evidence is not obvious or where it is not clear what the testimony of the witness would have been or that he was even qualified to give any testimony at all. Fortunato v. Ford Motor Co., 464 F.2d 962 (2nd Cir. 1972)” (Kolczynski, Task 117).

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*THE HEREIN STATED TEXT HIGHLIGHTED FOR EMPHASIS ENDS.*

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“General examples of types of objections:

The form of the question is improper in that ambiguous or misleading answers may result;

The substance of the Question is improper for any of the reasons covered by the FRE;

The substance of the answer sought is improper for any of the reasons covered by the FRE;

The witness is not competent (qualified) to answer the question posed;

There is not sufficient foundation for the document or physical object sought to be admitted into evidence;

It would be improper to admit the proposed exhibit;

Although potentially relevant and admissible, the unfair prejudice resulting from admission outweighs relevancy” (Kolczynski, Task 117).

According to Kolczynski, “[c]ounsel must zealously advocate the client’s case; thus, if an objection is granted denying the admissibility of important evidence, an offer of proof should be made. Conversely, if unfairly prejudicial evidence is about to be admitted after objection, it behooves counsel to find a proper basis or explanation to have the evidence excluded. Perhaps the ground(s) for the initial ruling were insufficient, and new or better grounds can be asserted. Perhaps other evidence has been admitted that clarifies the need for a change of the earlier ruling. Most federal judges have a keen sense to discern whether counsel is renewing an objection on different grounds or offering proof on a different basis such that genuine efforts will be considered. Counsel has an obligation to “make the record for appeal”; however, sheer persistence by making the same arguments in the face of an adverse ruling, is usually unsuccessful and may lead to an admonition or sanction” (Task 117).



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## CHAPTER 49.10: EVIDENCE CONTROL AND OBJECTIONS: PART II: LACK OF PERSONAL KNOWLEDGE

[Attorney not allowed to testify]

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If testimony is not rested on personal knowledge, it's hearsay. If testimony is not rested on personal knowledge, it's not admissible testimony; the witness is incompetent. Opposing counsel is not allowed to testify [FN-2310]!

\_\_\_\_\_.  
[FN=2310] 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.

If he does, he becomes a witness, and he is no longer an attorney, representing his or her client. If an attorney wants to testify, he should be placed under oath!

It's, again, very simple. If you know! Let's walk through it, step by step.

Assume that you have been summoned to appear in court. You are the type of home owner who believes that a good thing is worth fighting for. So, you decide to go to court.

Surprise!

You will not know beforehand that your rights will have been violated by the time you step into that court room.

"Case number so and so. Bank versus home owner.

You then step up to the area that separates the audience from the area where attorneys get to sit. You, the pro se litigant are not permitted to step into that area, but you ought to be entitled to do so, but they let you know that you don't belong there because you are

proceeding without an attorney, pro se. (I wouldn't put up with it, but you'll have to pick your own battles.)

Opposing counsel will then present legal arguments to the Court, reciting facts and documents as if they had been admitted into evidence when, clearly, they had not.

They were not admitted into evidence, because, for one reason, neither you nor the opposing counsel has put them into evidence. They were not because this is the very first hearing.

The opposing counsel gets to speak first because he or she is the one who is suing you, attempting to foreclose on your property.

The opposing attorney will go on and tell the judge something about the assignment and that the chain of assignment is in order. What do you do?

Immediately object!

You: Objection, your honor!

Judge: What's the basis for the objection?

You: Facts not in evidence!

Now, wait a minute! In the previous chapter, you already objected to the statements by the attorney. So, why are we doing it again? I am repeating the information so that you can see that you can object to the facts which are not in evidence. You can, however, use a somewhat different approach. In this case, the opposing attorney is not only talking about facts that are not in evidence, he is also testifying as to the truthfulness of the facts or documents despite the fact that he does not have first-hand or personal knowledge about these facts.

In other words, you can object "facts not in evidence!" or use another tool in your tool box and object "counsel is testifying."

Again:

You: Objection, your honor!

Judge: What's the basis for the objection?

You: Counsel is testifying, your honor!

You can pick your objection. If I were you, I would use both. Object to both the fact that the facts are not in evidence and object to the fact that the opposing attorney is testifying!

Is an attorney allowed to testify? Of course not!

He is not allowed to testify for two reasons. The first reason is that he is the attorney on the case. An attorney cannot be both the attorney for the party he is representing and be a witness for the party he is representing.

The second reason is that the attorney is testifying as to which he has no clue about: The attorney is testifying about something about which he has no first-hand knowledge. This lack of first-hand knowledge or personal knowledge amounts to hearsay. So, do this:

You: Objection, Your honor!

Judge: What's the objection?

You: Hearsay, your honor!

Judge: Sustained!

A good judge will sustain your objection. To sustain an objection is to agree with your objection.

If the judge wants to know more, you could say this:

You: Hearsay, your honor, lack of personal knowledge. Attorney is not a first-hand witness.

As you can see, you could object to the opposing counsel's statements in three varying ways:

- 1) Objection, facts not in evidence!
- 2) Objection, counsel is testifying!
- 3) Objection, hearsay!

According to Kolczynski, "[t]o testify at trial, a non-expert witness must [h]ave personal knowledge of the matter about which he or she is testifying. FRE 602. Hallquist v. Local 276, Plumbers and Pipefitters Union, 843 F.2d 18 (1st Cir. 1988) (extent of witness's knowledge is a jury question)" (Task 83). "As long as the testimony is relevant to the issues in the case, the court will not prevent a witness from testifying about facts, unless no reasonable jury could find that the witness had personal knowledge of the facts. FRE 602" (Kolczynski, Task 83). "A witness may make inconsistent or inaccurate statements and be entitled to testify. United States v. Gutman, 725 F.2d 417 (7th Cir. 1984)" (Kolczynski, Task 83). "Lack of clarity about the facts is not a basis for striking a witness's testimony. United States v. Peyro, 786 F.2d 826 (8th Cir. 1986)" (Kolczynski, Task 83).

Kolczynski states that testimony should be limited "in the form of opinions or inferences. FRE 701" (Task 83). "Witness may testify to factual matters known to him. A witness who is not an expert may testify in the form of opinions or inferences but is limited to those opinions or inferences which are [i] [r]ationally based on the perception of the witness; [ii] [helpful to a clear understanding of the witness' testimony or a determination of a fact in issue; [iii] [n]ot based on scientific, technical or other specialized knowledge within the scope of F.R.E. 702" (Kolczynski, Task 83).

According to Kolczynski (Task 83), per F.R.E. 701, as amended on December 1, 2000, a lay witness may offer opinions on:

1. An automobile's speed. Ho v. United States, 331 F.2d 144 (9th Cir. 1964).
2. Poor lighting. Lang v. Texas and Pac. Ry. Co., 624 F.2d 1275 (5th Cir. 1980).
3. Someone's character. FRE 405.
4. Handwriting identification. FRE 901(b); United States v. Gallagher, 576 F.2d 1028 (3rd Cir. 1978); Schaefer v. United States, 265 F.2d 750 (8th Cir. 1959), cert. denied, 361 U.S. 844 (1959).
5. Pain suffered by another. Chicago and N.W. Ry. Co. v. Green, 164 F.2d 55 (8th Cir. 1947).
6. Physical injuries. Franklin v. Shelton, 250 F.2d 92 (10th Cir. 1957).

7. Mental condition. Mason v. United States, 402 F.2d 732 (8th Cir. 1968)
8. Property value. Baldwin Cooke Co. v. Keith Clark, Inc., 420 F.Supp. 404 (N.D.Ill. 1976).
9. Value of services. Builders Steel Co. v. C.I.R., 179 F.2d 377 (8th Cir. 1950).
10. State of mind. United States v. Hoffner, 777 F.2d 1423 (10th Cir. 1985).
11. Voice identification. United States v. Rizzo, 492 F.2d 443 (2nd Cir. 1974).
12. Intoxication. Gaynor v. Atlantic Greyhound Corp., 183 F.2d 482 (3rd Cir. 1950).





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## CHAPTER 50.10: EVIDENCE CONTROL, BUSINESS RECORDS AND MERS: ELEMENTS OF LAW, THE RECORD CUSTODIAN, AND THE CERTIFYING OFFICER

[Appointed as Assistant Secretary of MERS]

[Business Record authentic and relevant]

[“Certifying officers have” no adequate knowledge]

[Credit card power weapon]

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Here’s the scoop on business records: Getting a record custodian or some other qualified witness to testify that the suing party’s business record fails to meet the FRE 803(6) criteria (listed below) might establish that the necessary document [FN-1550] relevant to the foreclosure litigation is not authentic, and, therefore, the foreclosure litigation stops.

\_\_\_\_\_.  
[FN-1550] E.g. an assignment of MERS.

What does it all mean? What do you mean by business record?

Here, the suing party relies on a certain document by which it claims it can prove that it is entitled to foreclose on the home owners’ property. Of course, when you step into a court room, neither the judge nor you (unless you have read this book) will have a clue about the “inner and hidden” as well as the “hideous” workings of that certain document. (It is indeed an evil document, and I am talking about the “Assignment of mortgage” by MERS; it was created in order to deceive you and the court; the suing party will attempt to show that the suing party is capable of suing you on the reasons of that document.) The good news here is that you do not, in most, if not all, cases, even need to know what those ‘workings’ are nor will you have to make an attempt to explain to the court what they are. (The assignment of MERS will be explained in a separate chapter.)

It is critical to your case that you understand a relatively simple concept. When a person or entity claims to have some kind of right (—in this case it is a right to foreclose on a property—) and that right is rested on a document, then there’s a procedure in place which needs to be followed. This procedure is in place pursuant to long-standing rules. (These rules

will be explained below.) If a suing party claims to have some kind of a right on the basis of a certain document, then you, the party who is being sued, has the right to call a witness in order to testify as to the truthfulness and origin of that document. In this case, the witness might say something, like, “Yes, I have signed the document, and the signature on the bottom of it is my signature.”

Additionally, this certain document has to be kept in a certain manner during the course of business, and the rules are very specific about how you might want to go about in order to establish that the person who kept the document stored did the act of “storing” according to law.

In yet other words, it is not enough for the suing party to establish that the document in question is a legitimate document (—which we know it is not, but that’s reserved for another chapter—), but the suing party has to *also* establish that the document was kept in a certain manner. How would the suing party establish that the document was kept in a certain manner? Think about this for a moment; how would you?

It might be a less obvious point, but nearly everybody who has ever had to pay a bill has kept his or her bills and stored them at a certain location (—perhaps, in your bedroom or living room?—) in a certain manner (—say, in a lock box to which only you have the key—) at a certain time. Imagine now that you own a large corporation, and it now becomes immediately apparent that a corporation, large or small, must have a procedure in place by which to keep the hundreds of various types of documents with which the company comes into contact on a day-to-day basis during the course of business.

Businesses are expected to keep a record of their documents, and you benefit from it if they screw it up.

As much as you would keep a record by, say, recording on a sheet of paper when you receive your personal telephone bill and when you actually pay for it, a business is also required to keep track of the documents it receives, sends, or creates. That’s it. That’s a business record.

Now, if you are being sued and the suit is rested on a document, you are entitled to inquire about whether the document has been kept pursuant to law. You are therefore entitled to know if the document was:

1. (“1”) “**Recorded** at or near the time the act, event, opinion, agreement or diagnosis occurred [pursuant to FRE 803(6)].”
2. (“2”) “**Made** by or from information transmitted by a person with knowledge of the act, event, opinion, agreement or diagnosis” [pursuant to FRE 803(6)].”
3. (“3”) “**Kept** in the course of a regularly conducted business activity, and it was the regular practice of that business activity to make the record, as shown by the testimony of the custodian or other qualified witness [pursuant to FRE 803(6)]. U.S. v. Franks, 939 F.2d 600, 601-2 (8th Cir. 1991).”

Kolczynski, Task 89: Prepare to Offer Business Records.

Case Law—“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.)” (Author Unknown).

As you can see, the elements of law which pertain to the **admissibility** of **the contents of the record** are nearly identical. Let's restate some of the essential information: To be admissible, a **business record** pursuant to section 90.803(6), Florida Statutes, **must**:

1. (a) **be made** at or near the time of an act, event, condition, opinion, or diagnosis;
2. (b) **contain** information supplied by or transmitted by a person with knowledge acting within the course of a regularly conducted business activity;
3. (c) **be kept in the course of a regularly conducted** business activity;
4. (d) be the type of document **the business regularly makes** when engaging in its particular business activity; and
5. (e) be shown by the testimony of the custodian of the record . . . **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.
6. (f) 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**.

Furthermore, “[a] business record is defined in FRE 803(6) as any memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, if the record was . . . “recorded, made, and kept, as enumerated above (Kolczynski, Task 89).

Are you beginning to see the process which intends to protect the home owner (or any other litigant) who is being sued? Let's review the order of what needs to be done:

1. (“A”) A person or entity claims to have a right to bring suit on the grounds of a certain document. This document is a useless piece of paper unless it is admitted into evidence.

2. (“B”) Opposing counsel calls his or her party’s witness (record custodian) who will testify as to whether a certain document was kept and stored pursuant to law. You get to cross-examine the witness in order to arrive at the truth.
3. (“C”) You then cross-examine the witness in order to elicit testimony about the contents of the document.

In addition to what I have already stated above, it is also important for you to know that “[t]he hearsay exception for business records, FRE 803(6), allows business records to be admitted into evidence at trial if: (1) [a] records custodian or some other qualified witness testifies that the business record **meets** the FRE 803(6) criteria listed above, See liberalized criteria under F.R.E. 803(c) as amended Dec. 1, 2000; and (2) [t]he source of information or the method or circumstances of preparation **do not indicate lack** of trustworthiness. U.S. v. Bachsian, 4 F.3d 796, 798-99 (9th Cir. 1993)” (Kolczynski, Task 89).

In other words, if the suing party’s (“bank’s”) “qualified witness” fails to establish that the business record kept by the company meets the FRE criteria in (“1”), (“2”), and (“3”), above, and that the suing party’s qualified witness fails to establish that the manner in which the company has kept the “information” or that the company’s “method or circumstances of preparation” of the information indicates a “lack of trustworthiness,” where the suing party has kept the document in question as part of the so-called business record, this document won’t be entered into evidence against you in the foreclosure litigant. This mean, that, for the most part (if not all of it), the foreclosure litigation stops because the case is hinged, in most, if not all, cases on that document in question.

Recall that when a document has been authenticated by a witness (who is testifying that, say, the document was created and/or signed by him or her or that she knows about the document as permitted by law), this same document has to also have been kept in a proper place, in a certain manner, and if the company’s business records are a “mess,” this document won’t come in into the record as evidence against you or for you. It is said as being inadmissible evidence.

Only when all the above requirements are fulfilled can it then be said that the document is coming in into evidence against you or for you. Only then, upon such time, can the opposing attorney open his mouth in court and talk about the document. Again, as soon as the opposing attorney attempts to make legal arguments as to why you should be kicked out of your home on the grounds of any documents which have not been authenticated, you need to object or you will lose your case.

These rules are designed to protect you, but it is your responsibility to enforce the rules. Worse, the judge will not protect and enforce your rights unless you demand in court that he follows the rules and enforces them. You must object with the rules at your finger tips. You must be able to waive them in front of the judge’s face, or, sadly being said, he or she will disregard what you are attempting to accomplish. Your rights are meaningless to him or her unless you speak up.

Now you know.

Also, you might have wondered about the phrase, “the document won’t come into the record as admissible evidence against you or for you.” Here, it is important that you know that, yes, you might want a certain document to come into the record as evidence. More

specifically, it would be of interest to you that the “assignment of MERS” comes into the record when upon a showing of certain facts you could win your foreclosure litigation. However, the fraud by those who have securitized mortgages for Billions of Dollars in profits because they would not have otherwise been able to create those Billions of Dollars in profits had it not been for your signature (as well as your credit and not theirs) on the mortgage contract and promissory note is well-orchestrated (—and I would go as far as stating that it’s an “Einstein-like” invention of a financially engineered instruments which hardly a person is capable of understanding much less being able to explain it to somebody else—) and being capable of eloquently explain the numerous deceptions which are built into that document is a task reserved for a few.

Kolczynski also makes another very important point: “In addition to the FRE 803(6) requirements, also show that the business record is authentic (FRE 901, 902) and relevant (FRE 401). Use business records to prove your case whenever appropriate. Business records provide strong, very persuasive evidence. Juries tend to believe what they see even more than what they hear from a witness. The jury may take the business records to the jury room during deliberations” (Task 89).

Here, what you need to know is that a jury will never see the “assignment of MERS;” I will add that, even if it sees it, the jury will be on your side because the document is loaded with deception and fraud. (Again, it’s just a matter of having to prove the fraud.) However, the suing party bank will not provide the witness required by the rules because there is no such witness; the documents a fraud and no low-paid employee will show up at the hearing in fear of going to prison for fraud and/or perjury.

In short, demanding and knowing how to demand that the suing party authenticate the document in question, that the document be established as having been kept in a proper place during the course of business, and demanding that the suing party identify the business records, these are your tools by which to shake off the suing party bank.

Kolczynski additionally recommends—

1. (1) obtain business records or copies of the business records and identify the custodian who will establish their admissibility (Task 89);
2. (2) determine which witnesses will be responsible for authenticating your business records at trial (usually record custodians) and whether they will be available to testify (Task 89);
3. (3) and depose any authenticating witness who will be unavailable for trial (Task 89).

Kolczynski's recommendations, above, are written with the suing party in mind. In other words, it is the suing party who will need to prove (—I talked about burden of proof in a separate chapter—) that certain business records are admissible. All you have to do is object in court to any words that are coming out of the attorneys mouth, especailly when he begins to talk about documents x y or z and how these docuemnts supposedly give the suing party the right to kick you out of your home. Once you object—a hearsay objection will do and/or an objection on the grounds that cousnel is not allowed to testify and that, therefore, none of the words that are coming out of his mouth are admissible evidence—the burden is then on the suing party bank to show that they have the right documents by which they can win their foreclsoure litigation. In additional words, the suing party bank needs to show that the document is authentic and not you. So, they need to bring in the witness which supposedly created and/or signed the document, and, as an additional step, the suing party needs to bring in the record cusotdian or other authorized person in an attempt to show compliance with the relevant FRE, discussed, above. The deposiotn of any authenticating witness is reserved for a separate chapter. However, this will cause you to incur additional expenses. Typically, a court reporter will cost you about \$50 per hour, and a depsoition might continued for several hours.

What's really neat is the fact that “[t]he nonexistence of a business record is admissible evidence. Under FRCP 44(b), a witness’s statement that, after diligent search, no record or entry was found to exist is admissible as evidence. United States v. Gentry, 925 F.2d 186, 188 (7th Cir. 1991)” (Kolczynski, Task 89). In other words, if the suing party bank cannot show that a business record existed, you might have a reason to legally challenge the integrity of the document in question. Also, you should know that “[t]he qualified witness who lays the foundation for the admissibility of business records need not be the actual person who recorded the entry, as long as the other requirements of FRE 803(6) are satisfied. Conoco v. Doe, 99 F.3d 387 (Fed. Cir. 1996)” (Kolczynski, Task 89). And, if you were the suing party bank (and I know you are not) and “[i]f you cannot find the person who recorded the information in the document, depose, the current custodian who has knowledge regarding the documents, the way they are prepared and the manner in which they are stored. Alternatively, find any qualified and trustworthy persons familiar with the contents of the documents who can verify that they are business records of the party involved. MRT Constr., Inc. v. Hardrives, Inc., 158 F. 3d 478 (9th Cir. 1998)” (Kolczynski, Task 89). Again, producing this witness is the suing party’s (“bank’s”) problem and not yours, the home owner’s. But, the information should give you an indication of what the suing party will need to do in order to continue with their litigation.

For additional and necessary information, I refer you to Frederick Graves’ Jurisdictionary course available online, and, as it pertains to this section you should read and become thoroughly grounded with his teachings in two of his courses, including, but not limited, in “Evidence Made Easy” and “Objections.” Additionally, I recommend that you consider purchasing Philip Kolczynski’s “Preparing for Trial in Federal Court,” Second Edition, available through James Publishing, Inc., also online.

Let's then put what we have just learned into practice. MERS, in the context of the affiant purporting to be a competent witness, does not stand up to the court's scrutiny. (If at this time there's confusion as to what MERS is and why, let's just say, for the moment, that MERS is a third-party entity which is claiming to have standing to sue when it does not. The relevant purpose of MERS will be explained in a separate chapter.). By reading about the court's evaluation below, you will see that the court has an issue with the affiant because he or she was deemed as not being a competent witness. (You might want to call him or her a liar if it pleases you.). The court stated that "... the testimony in these cases is neither competent nor admissible. Each of the affiants in the remaining cases testify as follows:

I have been appointed as Assistant Secretary of Mortgage Electronic Registration Systems, Inc. ("MERS") under a Corporate Resolution that was executed on [date]. I make this affidavit in support of Movant. I have reviewed the loan file relating to the above-referenced matter, and if called upon to testify as to the facts set forth in this Affidavit, I could and would testify competently based upon my review" (Order, Page 13) [FN-1315].

Continued from above: "The affiant then purports to set forth the history of the negotiation and transfer of the note and who now has possession . . . First, this testimony is not admissible because there is no evidence that the affiants are competent witnesses. The Federal Rules of Evidence apply in bankruptcy . . . yet there is no evidence that these Certifying Officers have adequate personal knowledge of the facts under Fed. R. Evid. 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.') . . . " (Order, Page 13) [FN-1315].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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The Federal Rules of Evidence apply in bankruptcy . . . yet there is no evidence that these Certifying Officers have adequate personal knowledge of the facts under Fed. R. Evid. 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.') . . . " (Order, Page 13) [FN-1315].

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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Continued from above: “Ms. Mech’s bald assertion that she has ‘reviewed the loan file’ is inadequate to show that she is personally knowledgeable of the facts. Neither are the purported notes and deeds admissible” (Order, Page 14) [FN-1315].

Continued from above: “For business records to be admissible as an exception from the hearsay rule under Fed. R. Evid. 803(6) there must be a showing that the records were:

1. made at or near the time by, or from information transmitted by, a person with knowledge;
2. made pursuant to a regular practice of the business activity;
3. kept in the course of regularly conducted business activity; and
4. the source, method, or circumstances of preparation must not indicate lack of trustworthiness.

These elements must be established either by the testimony of the custodian or other qualified witness or must meet certification requirements. See *In re Vee Vinhnee* . . . “ (Order, Page 14) [FN-1315].

In other words, the affiant purporting to know about the “. . . history of the negotiation and transfer of the note and [about] who now has possession . . . “ thereof has failed to establish admissible evidence regarding the “transfer of the note” and, therefore, the suing party has failed to prove what it needed to prove in order to foreclose on the home owner’s property.

\_\_\_\_\_.  
[FN=1315] *In re Joshua & Stephanie Mitchell*, Debtor(s), United States Bankruptcy Court, District of Nevada, Case No. BK-S-07-16226-LBR, Chapter 7, March 31, 2009 (Entered on docket), Order, Judge Riegle. See Appendix 1.3.1.





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CHAPTER 50.50: EVIDENCE CONTROL  
AND FOUNDATION:  
ADMISSIBILITY FOUNDATION FIRST  
AND CONTENT TESTIMONY SECOND

[Lay first the foundation for the business record]

[Florida Statute, Section 90.803(6)]

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“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.)” (Author Unknown).

See Chapter 50.10.



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## CHAPTER 51.10: AFFIDAVIT AND EVIDENCE CONTROL: INTRODUCTION TO PERSONAL KNOWLEDGE OR HEARSAY

[Affidavit sufficient where procedures described]

[Ultimate facts carry no weight]

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Merely stating that a person has “personal knowledge” of an event is insufficient:

Case Law—“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; *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.*” (Author Unknown).

Case Law: Florida—Continued from above: “*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)” (Author Unknown).

Case Law: Florida—Continued from above: “*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)” (Author Unknown).

Mere belief or conjecture is not permissible:

Case Law—“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)” (Author Unknown).

How the affiant possesses knowledge:

Case Law—“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)” (Author Unknown).

Affidavit not necessarily rendered deficient

Affidavit sufficient where procedures described

True and correct copies

Continued from above—Case Law—Florida: “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)” (Author Unknown).

Affidavits based upon information and belief are insufficient. However, there are cases when such affidavits are *sufficient*.

Affidavits based on information and belief insufficient.

Case Law—“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)” (Author Unknown).

Affidavits based on ultimate facts are legally insufficient.

Case Law—“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)” (Author Unknown).

Affidavits based on conclusions of law legally insufficient.

Case Law—“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)” (Author Unknown).

The court has discretion.

Case Law—Florida: 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).

See also Appendix 11.1.1.



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## CHAPTER 51.20: AFFIDAVIT AND EVIDENCE CONTROL: WHEN AFFIDAVITS SUPPORT THE ADMISSIBILITY OF SUPPORTING DOCUMENTS

[The first and second layer]

[Document authentication]

[Attorney's attempted authentication]

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In short, the text below is stating that, in the context of a litigation, it is not enough to make a showing of documents in an attempt to support the facts stated in a motion or a complaint; the party intending to proffer (or show) these documents as admissible evidence is required to do more. I believe this case law to be important because the litigation against you is likely to stop in the event the suing party is incapable of laying the required evidentiary foundation!

Affidavit in support of a motion to proof a claim in litigation. I suggest you commit this case to memory!

Case Law—"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 some 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." (Author Unknown).

Attorney's attempted authentication

Continued from above—Case Law—Florida: “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)” (Author Unknown).

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## CHAPTER 51.30: AFFIDAVIT AND EVIDENCE CONTROL: BUSINESS RECORDS, HISTORY, PERSONAL KNOWLEDGE, AND HEARSAY

[Attorney, affidavit, authentication, custodian]

[History of loan transaction]

[Business records]

[Affidavit legally insufficient to defeat summary judgment]

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If the suing party's (so-called) witness attempts to file an affidavit, claiming to know about the **history of a loan transaction** and about the **relevant business records associated** with the transaction, the witness had better be prepared to establish that it has personal knowledge. In most, if not all, cases, however, this witness (—if she or he indeed exists!—) will not be capable of knowing about the history of the transactions because it wasn't the entities' (which had been involved in the securitization of mortgages) primary "concern" to keep accurate records as they played "fast and loose" with your loan documents.

Affiant was incapable of possessing personal knowledge.

Case Law—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).

The attorney was unable to authenticate.

Case Law—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).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS BEGINS:*

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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).

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*THE HEREIN STATED TEXT REPEATED FOR EMPHASIS ENDS.*

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In a case where the success of your litigation hinges on a showing of where the promissory is located, be sure to object to any kind of affidavit in which the affiant purports to have personal knowledge of the whereabouts of the note when it is evident that the affiant is lacking personal knowledge as to the history of the loan transaction and the relevant business record.

Also know that if you are being sued by a debt collector for, say, a credit card debt, it is likely that he or she will attempt to include an affidavit in an attempt to show the history of your transactions and relevant business record to which you, of course, will object, won't you? The litigation should, at that juncture, stop.





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## CHAPTER 51.40: AFFIDAVIT AND EVIDENCE CONTROL: BUSINESS RECORDS, COMPUTER RECORDS

[Computer printout]

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Ask, who prepared the document? How was the document prepared? Who was sitting on the computer, printing out the documents? Was the employee reliable?

Case Law—“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); see Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121 (Fla. 2d DCA 1988)” (Author Unknown).



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## CHAPTER 51.50: AFFIDAVIT AND EVIDENCE CONTROL: BUSINESS RECORDS: AFFIDAVIT BASED UPON EXAMINATION OF BUSINESS RECORDS WITHOUT MORE IS INSUFFICIENT

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Case Law—Insufficiency of an affidavit based upon examination of business records or the contents of records (Page 20) [FN-2057]. (“THE COURT: . . . Zoda and CSX. Both of those cases deal with an insufficiency of an affidavit based upon examination of business records or the contents of records, and they both are 2<sup>nd</sup> District cases which seem to be very closely on point with the case that we have today.”).

Affiant must not only have examined the business records but satisfy the court’s inquiry as to how the Affiant has obtained his or her knowledge of the facts contained in these records.

Case Law—An affidavit **must set forth the basis** upon which the personal **knowledge of the facts** contained in the business record **can be determined** (Page 15) [FN-2057]. (“THE COURT: . . . But the affidavit does not constitute a basis upon which the personal knowledge of the facts contained therein can be determined. It’s a business record qualification affidavit is what it is.”)

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[FN=2057] GMAC Mortgage, LLC v. Debbie Visicaro, Case No. 07013084CI, Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida Civil Division, April 7, 2010, Transcribed Proceeding, Opinion Pending. (“THE COURT: We’re here today in GMAC versus Visicaro. Motion for rehearing regarding the previously drafted motion for summary judgment.” Transcript of proceedings before the Honorable Anthony Rondolino, April 7, 2010). See Appendix 1.2.5.



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CHAPTER 51.60: AFFIDAVIT AND EVIDENCE  
CONTROL: BUSINESS RECORDS: UNSWORN RECORD  
ATTACHED TO SWORN AFFIDAVIT IS HEARSAY

[Failure to attach defendants' letter]

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Case Law—Unsworn report attached to records custodian affidavit for purposes of summary judgment motion is hearsay (Page) [FN-2057]. (“THE COURT: . . . I just put ‘summary judgment and hearsay’ in Westlaw. The very first case that comes up is a January 12 case out of the 1<sup>st</sup> District. And it said, ‘Unsworn medical record review report attached to records custodian affidavit presented by insured in opposition to the uninsured motorist’s motion for summary judgment motion was hearsay and could not be considered when ruling on the summary judgment motion.’”)

Case Law—Attached schedule was hearsay (Pages 13, 14) [FN-2057]. (“THE COURT: The next case, Mitchell versus [page 14:] Westfield, ‘Objected on the ground the affidavit and attached schedule was hearsay, insufficient to establish damages on summary judgment. We agree.’”)

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE OR BELOW:*

Case Law—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.

*END OF RESTATEMENT*



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## CHAPTER 51.70: AFFIDAVIT AND EVIDENCE CONTROL: ATTORNEY WAS NOT CUSTODIAN OF PUBLIC RECORDS

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The attorney was unable to authenticate.

Case Law—“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)” Author Unknown).

The court should not have considered affidavit by party’s attorney.

Case Law—Florida: “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” (Author Unknown).

Case Law—New Jersey: Attorney Jeff Barnes, in a Legal Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, writes: “Plaintiff also attempts to support its Motion for Summary Judgment with the Certification of . . . Esq., who is counsel for the Plaintiff . . . The subject Certification is not made on personal knowledge, and admits that it is based on a ‘review of the computerized records of the plaintiff.’ As the Certification is not

based on personal knowledge, the statements in the Certification can only be based on information and belief. Rule 1:6-6 requires that Certifications in support of Motions be made on personal knowledge. Personal knowledge excludes matters based on information and belief. See, e.g. *Wang v. Allstate Ins. Co.*, 125 N.J. 2, 16 (1991); *Lamb v. Global Landfill Reclaiming*, 111 N.J. 134, 153 (1988). The [] Certification [by counsel] which is based on a ‘review of computerized records’ (which are per se incompetent hearsay) by someone without personal knowledge, is thus incompetent to support the Plaintiff’s Motion for Summary Judgment as a matter of law and New Jersey procedure.”



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## CHAPTER 51.80: AFFIDAVIT AND EVIDENCE CONTROL: WHERE DOCUMENTS SUPPLY BASIS FOR KNOWLEDGE

[Attorney was not custodian of records]

[Attorney familiar with records: inadmissible hearsay]

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Affidavit insufficient where document supplying the basis for ... not attached.

Case Law—“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)”

Affidavit insufficient where attorney was not the custodian of public records.

Case Law—“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)” (Author Unknown).

Affidavit inadmissible hearsay where attorney claimed to be familiar with client’s records

Case Law—“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)” (Author Unknown).

Plaintiff failed to attach defendant’s letters.

Case Law—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.





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## CHAPTER 52.10: AFFIDAVIT AND EVIDENCE CONTROL: AFFIDAVIT CONTRADICTS PRIOR TESTIMONY

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When an affidavit contradicts prior testimony.

Cast Law—“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)” (Author Unknown).



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## CHAPTER 53.10: AFFIDAVIT AND EVIDENCE CONTROL: EX PARTE

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Ex parte affidavits are hearsay.

Case Law—“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” (Author Unknown).



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## CHAPTER 54.10: AFFIDAVITS: OTHER

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Affidavits pertaining to pre-judgment interest:

Case Law—“Affidavits in proof of claim should . . . 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 . . . “ (Author Unknown).

Affidavits of non-military service.

Case Law—“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” (Author Unknown).

Affidavits as to attorneys’ fees and cost,

Case Law—“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)” (Author Unknown).

Affidavits as to reasonable attorneys' fees.

Case Law—"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" (Author Unknown).



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## CHAPTER 55.10: AFFIDAVIT AND EVIDENCE CONTROL: SUMMARY JUDGMENT: INADMISSIBLE AFFIDAVIT

[Summary Judgment]

[Beyond the slightest doubt]

[See also Appendix 11.1.1.]

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Case Law—“Proof Requirements for Entry of Summary Final Judgments. Summary Judgment Affidavits in Particular. Governed by Fla. R. Civ. P. 1.510(e). 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. 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)” (Author Unknown).

Continued from above: “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)” (Author Unknown).

Continued from above: “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)” (Author Unknown).

Continued from above: “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” (Author Unknown).

An affidavit must be based on admissible evidence.

Case Law—“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”)” (Author Unknown).

Case law—“THE COURT: In regard to the inadmissibility and hearsay, this Court has determined that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> and 5<sup>th</sup> Districts have all recited in cases the fact that inadmissible hearsay cannot be considered at a summary judgment and applies this rule, not only to the affidavits of the plaintiff in support of . . . or a movant in support of a summary judgment, but also affidavits in opposition” (page 21) [FN-2057].

Case law—Inadmissible affidavit over non-objection was inadmissible hearsay and not competent to support summary judgment (Pages 22, 23) [FN-2057]. (“THE COURT: And to perhaps address the concerns that I brought up about the non-objection, I have found one case which appears to stand for the proposition that even under circumstances where . . . there was an unopposed affidavit, the appellate court reversed lower court. And this was in a forfeiture case, 2<sup>nd</sup> District Court of Appeal . . . Forfeiture of a 1980 Ford Pickup, 779 So.2d 450. There was a summary judgment proceeding. The detective’s affidavit was inadmissible hearsay and, thus, was not competent to support the summary judgment of forfeiture in the case, even though it’s noted in the opinion that ‘We reversed the forfeiture because it was based upon a summary judgment that the trial court had entered in reliance on unopposed but insufficient [page 23:] affidavits, pursuant to the Florida Rule of Civil Procedure 1.510 (e).’ “).

\*Scan4 “slightest doubt”

\*Scan4 “summary judgment”

Case law—Objection to hearsay in affidavits about facts prohibit summary judgment. The **evidence before the court on summary judgment have to be shown beyond the slightest doubt.** A non-movant in summary judgment enjoys a **higher burden than a criminal defendant enjoys** (Pages 18, 19) [FN-2057]. (“MR. WASYLIK: . . . with respect to **hearsay in affidavits** when that hearsay is objected to, I think . . . that both the rule expressly

**prohibits** it and the case law interpreting that rule also expressly prohibits it. And I think the reason for that . . . the Bifulco case, Bifulco v. State Farm, 693 So.2d 707 and that's a 4<sup>th</sup> DCA case . . . [t]he courts are to - - this is my word - - rigidly apply the requirements of 1.510 (e) regarding evidence - - summary judgment evidence is because granting of summary judgment cuts off a party's right to trial, which the Bifulco court observes is a constitutional right. The standard . . . in granting summary judgment [page 19:] is that the facts, the **evidence before the Court on summary judgment, have to be shown beyond the slightest doubt.** And that's Mivan . . . Florida versus Metric Constructors, Inc., 857 So.2d 901, and that's a 5<sup>th</sup> DCA case from 2003, talking about the slightest doubt." "[W]here there is the **slightest doubt** of - - that's a higher burden than a criminal defendant enjoys. A non-movant in summary judgment enjoys an actual **higher burden**. A slightest doubt is, of course, a stricter standard than a more reasonable - - than a reasonable doubt.")

Case Law—"MR. WASYLIK [counsel for homeowner] . . . CSX Transport case . . . says, 'Thus, the affidavit is based on hearsay [page 17:] and is not sufficient to support summary judgment' (Page 16) [FN-2057]. 'MR WASYLIK: The next case . . . Zoda v. Hedden says, 'His affidavit was based on hearsay and was incompetent to support summary judgment' (Page 17) (FN-2057].

Case Law—Hearsay is inadmissible for purposes of summary judgment (Page 15) [FN-2057]. ("THE COURT: . . . I haven't even found any cases which support the proposition I can rely on hearsay even if it's not objected to.")

Case Law—Affidavit was hearsay and insufficient to establish damages on summary judgment (Pages 13 and 14) [FN-2057]. ("THE COURT: The next case, Mitchell versus [page 14:] Westfield, 'Objected on the ground the affidavit and attached schedule was hearsay, insufficient to establish damages on summary judgment. We agree.').

Case Law—Your Honor, summary judgment was reversed based upon inadmissible hearsay (Pages 22 and 23) [FN-2057]. ("THE COURT: The 5<sup>th</sup> DCA in Mullan versus the Bishop of the Diocese at 540 So.2d 174 [page 22:] reversed a summary judgment based upon hearsay. The 1<sup>st</sup> District in Rose versus ADT, 989 So.2d 1244, reversed a summary judgment. And the 1<sup>st</sup> District in Pawlik, at 528 So.2d 965 had some observations about the inadmissible hearsay, the 3<sup>rd</sup> District in Capello, 625 So.2d 474.")

Case Law—Rule 1.510(e) requires that an affidavit be made on personal knowledge or it is hearsay (Page 17) [FN-2057] ("MR WASYLIK: . . . I believe that the Rule 1.510(e), which sets out the requirements for affidavits, requires that the affidavit be made on personal knowledge. Hearsay, of course, is not personal knowledge. Business records, unless they meet the hearsay exception, do not qualify. And I think . . . that conclusively addresses the issue of whether or not **affidavits** that are hearsay can be used to support for **summary judgment.**"

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[FN=2057] GMAC Mortgage, LLC v. Debbie Visicaro, Case No. 07013084CI, Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida Civil Division, April 7, 2010,

Transcribed Proceeding, Opinion Pending. (“THE COURT: We’re here today in GMAC versus Visicaró. Motion for rehearing regarding the previously drafted motion for summary judgment.” Transcript of proceedings before the Honorable Anthony Rondolino, April 7, 2010). See Appendix 1.2.5.

Affidavit insufficient to defeat summary judgment where affiant had no knowledge of the history

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE OR BELOW:*

Case Law—Florida: 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).

*RESTATEMENT ENDS*

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE OR BELOW:*

Case Law—Unsworn report attached to records custodian affidavit for purposes of summary judgment motion is hearsay (Page) [FN-2057]. (“THE COURT: . . . I just put ‘summary judgment and hearsay’ in Westlaw. The very first case that comes up is a January 12 case out of the 1<sup>st</sup> District. And it said, ‘**Unsworn** medical record review **report attached** to **records custodian affidavit** presented by insured in opposition to the uninsured motorist’s motion for summary judgment motion was hearsay and could not be considered when ruling on the summary judgment motion.”)

Case Law—Attached schedule was hearsay (Pages 13, 14) [FN-2057]. (“THE COURT: The next case, Mitchell versus [page 14:] Westfield, ‘Objected on the ground the affidavit and attached schedule was hearsay, insufficient to establish damages on summary judgment. We agree.”)

*RESTATEMENT ENDS*

*THE HEREIN STATED TEXT IS RESTATED FROM ABOVE OR BELOW:*

Case Law—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.

*END OF RESTATEMENT*

Summary Judgment Standard: See Appendix 11.1.1. See Chapter 47.50. Standards:  
Summary Judgment.



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## CHAPTER 56.10: AFFIDAVIT AND EVIDENCE CONTROL: COMPLAINT: AFFIDAVIT RE COMPLAINT IS INSUFFICIENT

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Affidavit in which it is alleged that assertions and allegations in the complaint are true is insufficient affidavit (Pages 20, 21) [FN-2057]. (“THE COURT: I’m also enlightened by Jones versus Florida Workers’ Compensation, which is a 2001 2<sup>nd</sup> District case that finds that the affidavit was insufficient in that it had allegations that all the assertions and allegations in the complaint are true, that kind of an affidavit is insufficient.” “THE COURT: I also reviewed Hurricane Boats versus Certified Industrial Fabricators and found that affidavit to be insufficient when it [page 21:] related to the allegations in the complaint being true.”)

\_\_\_\_\_.  
[FN-2057] GMAC Mortgage, LLC v. Debbie Visicaro, Case No. 07013084CI, Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida Civil Division, April 7, 2010, Transcribed Proceeding, Opinion Pending. (“THE COURT: We’re here today in GMAC versus Visicaro. Motion for rehearing regarding the previously drafted motion for summary judgment.” Transcript of proceedings before the Honorable Anthony Rondolino, April 7, 2010).



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## CHAPTER 59.10: DISCOVERY: INTRODUCTION

[When discovery incomplete]

[When summary judgment inappropriate]

[Dispute as to the absence of factual issues]

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Case Law—New Jersey—Attorney Jeff Barnes, in a Legal Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, writes: “In addition to the disputed issues of material fact set forth in the Defendants’ Statements of Material Facts filed separately but simultaneously herewith, the Defendants have propounded a First Request for Production, First Request for Admission, and First Set of Interrogatories upon Plaintiff, none of which have been responded to as of the date of this Response. These discovery requests seek information as to the Plaintiff’s legal standing including the chain of title to the mortgage and note which are factual issues material to not only the Plaintiff’s claim but also the Counterclaim of the Defendants.”

Continued from above: “As there is a dispute as to the absence of factual issues at this early stage of the proceedings where the case is not fully developed, summary judgment is inappropriate. *Velantzas v. Colgate-Palmolive Company, Inc.*, 109 N.J. 189, 193, 536 A.2d 237 (N.J. 1987):

Generally, we seek to afford ‘every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case,’ and ‘when critical facts are peculiarly within the moving party’s knowledge,’ it is especially inappropriate to grant summary judgment when discovery is incomplete.

109 N.J. at 193, citing *United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co.*, 74 N.J. 92, 99, 376 A.2d 1183 (1977) (citing *Robins v. Jersey City*, 23 N.J. 229, 240-41, 128 A.2d 673 (1957), and *Martin v. Educational Testing Serv., Inc.*, 179 N.J. Super 317, 326, 431 A.2d 868 (Ch. Div. 1981).”

Continued from above: “In cases where a suit is in an early state and not fully developed, the standard by which a court ought to review a judgment terminating it now is from the standpoint of whether there is any basis upon which the plaintiff should be entitled to proceed further. Velantzas, supra at 193, citing Bilotti v. Accurate Forming Corp., 39 N.J. 184, 193, 188 A.2d 24 (1963).”



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## CHAPTER 59.20: DISCOVERY: STRATEGY: HIT THE PLAINTIFF WITH A DEPOSITION ON DAY ONE

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This isn't anything new: Some legal tactic books recommend that a suing party should immediately upon the filing of a complaint also serve the opposing party with interrogatories and other discovery tools, including a notice of deposition. This has the effect of overloading the opposing party, and they will have to scramble to respond.

One source tells me that the opposing party should immediately be served with a notice of deposition. He [Grant McEwan] explains that the point of it all is to catch the "bank" in a lie. McEwan also says that the home owner should ask the bank (—the bank's representative whether the workings of the adjustable mortgage rate was explained to the prospective home owner at the closing table. It is expected that the bank's witness will state in deposition that he or she did not explain (at the closing table) that the adjustable mortgage rate not only can go up but that it can also go down. Questioning would also reveal or the reasoning can be made that the representative did not explain this to the prospective home owner because the bank did not want the home owner to know that the rate can go down because the adjustable mortgage rate would never go down, and the bank would make sure of it in order to maximize its profits. Whether this amounts to fraud is for our readers to decide. Please consult an attorney to discuss the various issues involving fraud at the closing table.

Here is how you could set up the questioning during deposition:

You: Mr. banker, what was the prevailing interest rate when the home owner received the loan?

Bank . . .

Grant says to repeat the same questions asked during deposition before the judge during an evidentiary hearing but to be sure to ask them in a different order. Grant says the witness will then be forced into a lie or at least will speak the truth, which, of course, would be in the home owner's favor. I believe a good case for fraud would be closed at that juncture. Also, a lawsuit that is based on fraud has no standing; any lawsuit that's based on fraud has no standing. The suing party bank simply cannot sue if fraud was involved in the transaction.

You: According to your testimony in deposition, you did not tell the prospective home owner that the adjustable rate mortgage can go down, isn't that correct?

Bank: No

You . . .

Bank . . .

You: Did you adjust the rate down?

Bank: No

You: You did not tell the home owner because don't allow the interest to go down, isn't that correct?

Bank . . .

Also, another source [Malcolm Doney] tells me that brokers enriched themselves with hidden fees that were not disclosed to prospective home owners at the closing table. Worse—and that's good for our home owners—when a prospective home owner did inquire about what appeared to be a weird-looking charge to the home owner, the bank's representative attempted to marginalize the issue. The prospective home owner was left to believe that this was just some standard industry practice, totally okay with governmental oversight and pursuant to law. Not so!

Now you know.



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## CHAPTER 61.10: FRAUD: NON-PERFORMING LOANS

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Case Law—New York: "Defendant did not answer or interpose any response in this foreclosure action. Plaintiff's renewed application, upon the default of all defendants, for an order of reference, for the premises located at . . . is denied. The complaint is dismissed with prejudice for plaintiff's failure to comply with my January 30, 2008 decision and order in this matter. (18 Misc 3d 1123 [\*2][A]). The May 7, 2007 notice of pendency filed against the above-named real property is cancelled" (About page 2, Order) [FN-2344].

Continued from above—Case Law—New York: "I ordered on January 30, 2008 that leave is granted to plaintiff . . . to renew its application for an order of reference for the premises located at . . . [ordered] an affidavit from Scott Anderson, describing his employment history for the past three years; an affidavit from an officer of plaintiff HSBC BANK N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSETBACKED NOTES, SERIES 2005-3, explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation and why plaintiff HSBC BANK N.A., shares office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and Goldman Sachs" (About pages 2 and 3, Order) [FN-2344].

\*scan4 "nonperforming loan"

Continued from above—Case Law—New York: "Plaintiff renewed its application for an order of reference . . . However, plaintiff's renewed application for an order of reference fails to present an affidavit of merits by "someone with a valid power of attorney," and, an affidavit from an officer of HSBC "explaining why plaintiff would purchase a nonperforming loan from Delta Funding Corporation and why plaintiff HSBC BANK N.A., shares office space at Suite 100, 1661 Worthington Road, West Palm Beach, Florida 33409, with Ocwen Federal Bank FSB, Mortgage Electronic Registration Systems, Inc., Deutsche Bank and

Goldman Sachs." "(About pages 2 and 3, Order) [FN-2344].

\*scan4 “certify true and complete copy”

Continued from above—Case Law—New York: "However, this photocopy of the limited power of attorney is unacceptable because plaintiff's counsel failed to comply with CPLR § 2105, that "an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy." Plaintiff's counsel failed to certify that the limited power of attorney in exhibit B is a true and complete copy" (Page, Order) [FN-2344].

\*scan4 “lie”

Continued from above—Case Law—New York: "Further, Mr. Anderson claims, in ¶ 7, claims that the Valentin loan was transferred "to the Trust on September 30, 2005," and, in ¶ 10, "the loan was transferred to the Trust in September 2005 when it was a performing loan. The loan remained in the name of MERS as nominee in title, but the holder changed from Delta to HSBC Bank, USA, N.A. as Trustee." If these statements are true, then Mr. Anderson lied in executing the May 1, 2007 assignment of the Valentin loan from MERS to HSBC, which was recorded on June 13, 2007 . . . " (Page, Order) [FN-2344].

\*scan4 “assignor and signee”

Continued from above—Case Law—New York: "The Court is troubled that Mr. Anderson acted as both assignor of the instant mortgage loan, and then as the Vice President of Ocwen, as signee HSBC's servicing agent. He admits to this conflict . . . " (Page, Order) [FN-2344].

\*scan4 “toxic”

Continued from above—Case Law—New York: "The stockholders of HSBC and the noteholders of the Trust probably are not aware that Mr. Anderson, on behalf of the servicer, Ocwen, claims to have the right to assign "toxic" nonperforming mortgage loans to them" (Page, Order) [FN-2344].

\*scan4 “share space”

Continued from above—Case Law—New York: "In addition, no officer of HSBC, in violation of my January 30, 2008 order, executed an affidavit explaining why plaintiff purchased a nonperforming loan and why HSBC shares office space "at Suite 100 . . . " (Page, Order) [FN-2344].

\*scan4 “cancellation of notice of pendency”

Continued from above—Case Law—New York: "CPLR § 6514 (a) provides for the mandatory cancellation of a notice of pendency by:[t]he court, upon motion of any person



aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519" (Page, Order) [FN-2344].

Continued from above—Case Law—New York: "Further, Nastasi at 36, held that "[c]ancellation of a notice of pendency can be granted in the exercise of the **inherent power of the court** where its filing fails to comply with CPLR 6501 (see 5303 Realty Corp. v O & Y Equity Corp. at 320-321; Rose v Montt Assets, 250 AD2d 451, 451-452 [1st Dept 1998]; Siegel, NY Prac § 336 [4th ed])." Thus, the dismissal of the instant complaint must result in the mandatory cancellation of HSBC's notice of pendency against the property "in the exercise of the inherent power of the Court." Therefore, since plaintiff failed to comply with my January 30, 2008 order, the instant renewed application for an order of reference is denied, the complaint is dismissed with prejudice, and the notice of pendency against the subject property is cancelled" (Page, Order) [FN-2344].

\*scan4 "dismissed with prejudice"

Continued from above—Case Law—New York: "Conclusion Accordingly, it is ORDERED, that the renewed application of plaintiff . . . for an order of reference for the premises located at . . . is denied; and it is further ORDERED, that the instant complaint, Index Number 15368/07, is dismissed with prejudice because of the failure of plaintiff . . . to comply with my January 30, 2008 decision and order in this action; and it is further . . . ORDERED, that the Notice of Pendency in the instant action, filed with the Kings County Clerk on May 7, 2008, by plaintiff . . . in an action to foreclose a mortgage for real property located at . . . is cancelled" (Page, Order) [FN-2344].

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[FN=2344] HSBC Bank USA, N.A., AS INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS OF RENAISSANCE HOME EQUITY LOAN TRUST 2005-3, RENAISSANCE HOME EQUITY LOAN ASSETBACKED NOTES, SERIES 2005-3 v. Candida Valentin, Candide Ruiz, et al., In the Supreme Court of the State of New York, Index No. 15968/07, 2008 NY Slip Op 52167(U) [21 Misc. 3d 1124(A)], Judge Schack, Order, November 3, 2008.



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## CHAPTER 61.20: FRAUD: BACKDATING AND THE SIZE OF MADISON SQUARE GARDEN

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According to Lavalley “[o]ne New York State judge, Arthur Schack has been thorough, meticulous, just, and articulate with rulings and orders that schematically detail his suspicion of abuses and frauds. Due to the nature of our judicial system, it is often difficult for judges to accuse lawyers practicing in front of their courts of fraud and abuse.”

“Yet, the Gordon and Logan MERS’ decisions in Florida followed by Ohio Federal judge Boyco’s decision that resulted in the dismissal of dozens of foreclosures in the Ohio Federal Court have led to an avalanche that is cascading across the foreclosure landscape of America” (Lavalley).

“Judge Schack and others have confirmed one of Mr. Lavalley’s foreclosure scams he uncovered in the 90s by finding that servicers and lenders were “**backdating**” mortgages and assignments to support their false pleadings” (Lavalley).

“However, these assignments . . . show a pattern of deception, forgery, and even fraud” (Lavalley). For instance, “[p] aramount . . . are the actions of Scott Anderson and his employer, Ocwen Financial. Ocwen has been sued in various courts around the nation for a plethora of predatory servicing abuses and has been sued for fraudulent affidavits and assignments of mortgages” (Lavalley).

According to Lavalley, upon a review of “over 10,000 assignments of mortgages, powers of attorneys, affidavits, and satisfaction of liens in public records across the nation . . . “

1. “servicers, default servicing outsourcers, and their lawyers are forging documents with ‘squiggle marks’ that are not the marks or signatures of the actual officer that is notarized to be the signatory;”
2. “Squiggle marks with ‘initials only’ are designed so that anyone can sign an officer’s or vice president’s signature, instead of the signatory;”
3. “Dozens of variations of a squiggle mark that are consistently different than several or a dozen other squiggle marks of the same signatory, notary, and/or witness to the document;”

4. “Squiggle marks and full signatures that are diametrically opposed to the known signature of the signatory;”
5. “The same “officer” or “vice president” of a bank or lender being an officer and/or vice president **for dozens of other banks and lenders;**”
6. “The same “officer” or “vice president” of a bank or lender signing and being located in various cities across the United States;”
7. “The named “officer” or “vice president” of a bank or lender being a notary public or witness on other identical assignments, affidavits, and satisfactions;”
8. “Pre-stamped assignments and notary signatures on assignments, affidavits and proof of claims;”
9. “Second page notarizations that are attached to documents that do not conform in type and style to the first page of the document;”
10. “Automated signatures on computer of ‘both’ the notary and the signatory; and
11. “Backdating of dates on assignments and signatures of officers dating years after a company has been out of business or gone bankrupt” (Lavalle).

According to Lavalle, “Judge Schack in New York appears to have identified these scams and actions as well. In one ruling, Judge Schack wrote: ‘The Court ponders if Suite 100 is the size of Madison Square Garden to house all of these financial behemoths or if there is a more nefarious reason for this corporate togetherness,’ he wrote, adding that HSBC would have to write an affidavit explaining the popularity of suite 100” (Lavalle).

Lavalle explains that “[t]he reference to the location is actually Ocwen’s headquarters in West Palm Beach, Florida.”

According to Lavalle, “[o]n Jan. 30, 2008 in the Supreme Court, Kings County, New York in the case no. 15968/07 styled: HSBC BANK USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2005-3, Renaissance Home Equity Loan Asset-Backed Notes, Series 2005-3., Plaintiff, vs. Candida VALENTIN, Candide Ruiz, et. al., Defendants Judge Schack made the following observation in his ruling:

‘Additionally, plaintiff HSBC must address a third matter if it renews its application for an order of reference. As noted above, Scott Anderson, as Vice President of MERS, assigned the instant mortgage to HSBC on May 1, 2007.’

‘Doris Chapman, the Notary Public, stated that on May 1, 2007, ‘personally appeared Scott Anderson, of 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409.’ In HSBC Bank, N.A. v. Cherry,

at 3, I observed that: Scott Anderson, in his affidavit, executed on June 15, 2007, states he is Vice President of OCWEN. Yet, the same Scott Anderson as Vice President of MERS signs the June 13, 2007 assignment from MERS to HSBC.’

‘Did Mr. Anderson change his employer between June 13, 2007 and June 15, 2007. The Court is **concerned that there may be fraud** on the part of HSBC, or at least malfeasance. Before granting an application for an order of reference, the Court requires an affidavit from Mr. Anderson describing his employment history for the past three years.’

‘Lastly, the court notes that Scott Anderson, in the MERS to HSBC assignment gave his address as Suite 100. This is also the address listed for HSBC in the assignment. In a foreclosure action that I decided on May 11, 2007 (Deutsche Bank Nat. Trust Company v. Castellanos, 15 Misc.3d 1134[A] ), Deutsche Bank assigned the mortgage to MTGLQ Investors, L.P. I noted, at 4-5, that MTGLQ Investors, L.P.:’

‘On April 25, 2008 in the Supreme Court, Kings County, New York in the case no. 39192/07 styled: DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME LOAN TRUST 2006 OPT2, ASSET-BACKED) CERTIFICATES, SERIES 2006-OPT2, Plaintiff, versus ELAINE GRANT, OPTION ONE MORTGAGE, CORPORATION, et. al., Defendants, Judge Schack made the following observation in his ruling:’

‘However, my subsequent decision, HSBC Bank N.A. v Cherry, 18 Misc 3d 1 102 (A), issued on December 17, 2007, observed that Scott Anderson, on June 13, 2007, as Vice President of Mortgage Electronic Registration Systems, Inc. (MERS) assigned a mortgage and note to HSBC Bank, N.A., as Trustee for various collateralized debt obligations. Mr. Anderson’s assignment lists 1661 Worthington Road, Suite 100, West Palm Beach, Florida 33409 (Suite 100), as MERS address. The assignment also lists Suite 100 as the ‘affidavit of merit’ as ‘Senior Vice President of Residential Servicing for Ocwen Federal Bank, FSB, servicing agent of HSBC Bank, N.A’ “ (Lavalle).

Lavalle explains that “Scott Anderson of Ocwen seems to be an officer and signatory for a multitude of servicers, trustees, and lenders and has signed as an agent for others (permissible) and as a direct officer for others (must be scrutinized). Signatures of witnesses shown are also problematic. While Ocwen may attempt to explain Mr. Anderson’s roles via various agreements and authorizations of others, what cannot be easily explained away are the many gestations of Mr. Anderson’s signature or marks on the documents being submitted to courts across America. Mr. Anderson’s alleged marks and signatures under the witness and notarization of his name and title on affidavits, assignments of mortgages, and satisfaction of

mortgages filed in court and public records are suspect at best, and most likely intentional forgeries.”

According to Lavalley, “Mr. John Klotz, an attorney practicing election law in New York who has represented the likes of Ted Kennedy and Pat Buchanan, is very familiar with handwriting analysis and the validation of signatures on ballot petitions. He has scrutinized the marks and signatures and consents with Mr. Lavalley’s opinion that they were not made by the same person. April Charney, a prominent foreclosure attorney in legal aid in Jacksonville, Florida also finds the various gestations of Anderson’s signature suspect in comparison to documents Anderson has allegedly executed in cases before her.”

“While Ocwen’s actions may or may not be authorized by power of attorneys . . . such agreements do not allow for misrepresentations, fraud, or forgery on each party’s behalf. The powers of attorney seem to reference several trustees and servicers, but they do not reference the specific trusts and pools such authorizations are for. In addition, Mr. Anderson often signs as an officer of a company as well as an agent or attorney-in-fact. Such distinctions are important in executing these important legal documents and for courts and opponents to clearly understand who not only has the right to sue, but collect on the debts of borrowers. At Ocwen’s business website, they advertise the “best loss mitigation in the industry” as illustrated by the below chart” (Lavalley).

According to Lavelle, “[i]n 2005, a Galveston, Texas jury awarded a Texas City woman \$11.5 million after finding that Ocwen engaged in a scheme of unfair, unlawful and deceptive business practices in its servicing of her home equity loan. In February 2002, Ms. Davis, 64, took out a \$31,000 home equity loan on the Texas City residence where she had lived for over sixty years. Ocwen acted as the servicing agent on the loan unlawfully foreclosed on Ms. Davis’ home.”

“The circumstance surrounding the foreclosure and other similar patterns should shed light to not only the lack of compassion of such a servicer, but to highly aggressive and predatory techniques that would be an indicia of a culture of greed and corruption” (Lavalley).

“In 2003, Ms. Davis became ill and spent four days in the hospital, which forced her to miss one loan payment. Ocwen informed her it would put her on a payment plan, but never did. Ocwen also **failed to credit** Ms. Davis for the money she did paid, and began to foreclose on her house **while continuing to assure her** she was on a payment plan. Ocwen then foreclosed on Ms. Davis’ home, and she filed for Chapter 13 bankruptcy in the hopes of ending Ocwen’s harassment and saving her home of sixty years” (Lavalley)!

“In the bankruptcy, Ocwen requested an additional \$390 to cover its costs and fees related to the default she already cured in prior payments. At trial, a former Ocwen employee testified to the company’s unfair practices, including paying incentives to its loan collectors for moving properties with equity into foreclosure. Evidence also showed that the company engaged in predatory servicing by not informing borrowers of how to make their loans current and failing to give credit for payments on the dates they were made” (Lavalley).

“In a 10-2 vote, the jury found that Ocwen knowingly and intentionally deceived Ms. Davis, and awarded her \$10 million in punitive damages and \$1.15 million in attorneys fees” (Lavalley).

“In another similar Ocwen case in Corpus Christi, the same law firm obtained another million-plus verdict against Ocwen. In *Guzman v Ocwen*, in a Corpus Christi County Court, the jury awarded over 3 Million Dollars and found that Ocwen acted with “malice” in their

conduct supported by testimony adduced by two witnesses, both of which were former employees of Ocwen” (Lavalley).

“One employee was a PhD Internet Technologist specializing in Sarbanes-Oxley Compliance Assessments. The second employee was a former foreclosure specialist who quit after his conscience got the better of him - after nearly seven years of making 7-10 thousand dollars per month manufacturing foreclosures against innocent victims of Ocwen” (Lavalley).

“The evidence presented included making up numbers for payoffs with the numbers dreamed up so high that they insured a foreclosure posture instead of payoff, forgery of forbearance agreements, and testimony from two employees saying that the business of Ocwen is to create foreclosures by any means” (Lavalley).

“It was reported that another companion suit, that involved a deceased individual and her estate in San Antonio, was settled out of court 15 minutes after Guzman was voir dired before the court, but before his testimony was restated before a jury. It seems that Ocwen simply did not want to face another Texas jury a second time in the same month” (Lavalley).

“One would think that Ocwen, after receiving several warning shots across its bow, would clean up its act and corporate culture. Instead, even after multi-million jury awards . . . and court rulings such as Judge Schack’s, Ocwen continues its tack of sailing aggressively and even arrogantly into the winds of the subprime marketplace. Yet, the Internet and court dockets are replete with stories of predatory servicing abuse, forgery, and fraud. Allegations by former and current employees include the intentional destruction of information and document forgery” (Lavalley).

*NOTE: PERMISSION TO QUOTE WAS GRANTED BY THE AUTHOR, NYE LAVALLEY.*

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## CHAPTER 62.10: COUNTER-TOOLS: CAUSE OF ACTION FOR ABUSE OF PROCESS

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According to a April 17, 2009 post by livinglies on <http://livinglies.wordpress.com>, “Many home owners are now considering filing damage actions for abuse of process and lawyers are getting the point. Several actions have shown the inherent conflict between the apparent

authority of the Trustee on the Deed of trust, the trustee of the pooled assets and the trustee for the holders of mortgage backed securities. Similar conflict exists between MERS, the ‘depositor’ (custodian of the alleged mortgages and notes that were securitized), the Trustees, and the certificate holders (investors).”



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## CHAPTER 62.20: COUNTER-TOOLS: FRAUD IN THE INDUCEMENT

[Elements of law for fraud in the inducement]

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In an internet post in February 2007, attorney Frederick Graves, in regard to a lost foreclosure case, states that he would look “into fraud in the inducement. The statute of limitation may not yet have run, since the cause is predicated in fraud.” This means that, after you, the home owner, have lost your home, you might be able to bring a lawsuit and a cause of action for fraud in the inducement and do so long after the property has been vacated. The elements of law which you would need to prove up in order to win this cause of actions are, as follows:

Elements of law for fraud in the inducement: the information below was reprinted by permission (Berger):

Case Law—Florida First District Court of Appeal: “To state a cause of action for fraud in the inducement, a plaintiff must allege facts that, if taken as true, would show:

1. a false statement concerning a material fact;
2. knowledge by the person making the statement that the representation is false;
3. intent by the person making the statement that the representation induce another to act on it; and
4. reliance on the representation to the injury of the other party. W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc., 728 So.2d 297, 304 (Fla. 1st DCA 1999).”

Case Law—Florida Second District Court of Appeal: “The elements necessary to state a cause of action for fraud in the inducement are:

1. a false statement concerning a material fact;
2. knowledge by the person making the statement that the representation is false;
3. intent by the person making the statement that the representation will induce another to act upon it; and



4. reliance on the representation to the injury of the other party. Mettler, Inc. v. Ellen Tracy, Inc., 648 So.2d 253, 255 (Fla. 2d DCA 1994). See also C & J Sapp Publishing Co. v. Tandy Corp., 585 So.2d 290, 292 (Fla. 2d DCA 1991).”

Case Law—Florida Third District Court of Appeal: “In order to state a cause of action for fraud in the inducement, a plaintiff must allege that:

1. the representor made a misrepresentation of a material fact;
2. the representor knew or should have known of the falsity of the statement;
3. the representor intended that the representation would induce another to rely and act on it; and
4. the plaintiff suffered injury in justifiable reliance on the representation. Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc., 903 So.2d 251, 255 (Fla. 3d DCA 2005). See also Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc., 842 So.2d 204, 209 (Fla. 3d DCA 2003); Suntogs of Miami, Inc. v. Burroughs Corp., 433 So.2d 581, 585 (Fla. 3d DCA 1983), quashed and remanded, 472 So.2d 1166 (Fla. 1985), judgment vacated to the extent inconsistent with the opinion of the Supreme Court of Florida, 482 So.2d 391 (Fla. 3d DCA 1985).”

Case Law—Florida Fourth District Court of Appeal: “To state a cause of action for fraud in the inducement, the Plaintiff must allege:

1. a misrepresentation of a material fact;
2. that the representor of the misrepresentation knew or should have known of the statement’s falsity;
3. that the representor intended that the representation would induce another to rely and act on it; and
4. that the plaintiff suffered injury in justifiable reliance on the representation. Samuels v. King Motor Company of Fort Lauderdale, 782 So.2d 489, 497 (Fla. 4th DCA 2001). See also Hillcrest Pacific Corporation v. Yamamura, 727 So.2d 1053, 1055 (Fla. 4th DCA 1999); Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So.2d 306, 308 (Fla. 4th DCA 1990), rev. denied, 581 So.2d 165 (Fla. 1991); Spitz v. Prudential-Bache Securities, Inc., 549 So.2d 777, 778 (Fla. 4th DCA 1989); Alexander/Davis Properties, Inc. v. Graham, 397 So.2d 699, 706 (Fla. 4th DCA 1981), petition for rev. denied, 408 So.2d 1093 (Fla. 1981).”

Case Law—Florida Fifth District Court of Appeal: “In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that:

1. the defendant made a false statement regarding a material fact;
2. the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity;
3. the defendant intended that the plaintiff rely and act on the false statement; and
4. the plaintiff justifiably relied on the false statement to his detriment. Simon v. Celebration Co., 883 So.2d 826, 832 (Fla. 5th DCA 2004). See also Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 542 (Fla. 5th DCA 2003), rev. denied, 860 So.2d 977 (Fla. 2003); Palumbo v. Moore, 777 So.2d 1177, 1179 (Fla. 5th DCA 2001).”

While the elements, above, pertain to case law in Florida, they serve as an indicator of what it is you need to prove.

What does it all mean? Depending in which State and locale you are in, the elements of law might vary. Be sure to consult with an attorney.

Here's what you can do with the information presented: Take the time to review the actual case law. I am sure that you will find many of these online: Just Google them. When you read the actual case law (rather than the snippets above), you will learn how the judge has applied the fact in the case to the law. You must do the same in your case. Determine what the facts are and see if you can match them up with the elements of law. In short: If all of the facts in your case match the required element of law in your State and locale, you might have a case. You then would need to argue, at some point during the litigation, how each fact fits the required element of law. Of course, the first step is that you need to file a complaint, and the process of crafting a complaint is much different than what you might think it is. I recommend Graves' jurisdictionary course, available online; it is nothing short of excellent.

Here's some additional information:

"Statute of Limitations: Four Years. Fla. Stat. §95.11(3)(j)" (Berger).

"References: 27 Fla. Jur. 2d Fraud and Deceit §§7, 9, 56, 76 (2000); 37 Am. Jur. 2d Fraud and Deceit §§2, 411 (2001); Fla. Std. Jury Instr. (Civ.) MI 8" (Berger).

"In Pari Delicto: One who himself engages in a fraudulent scheme, that is, acts in *pari delicto*, may forfeit his right to any legal remedy against a co-perpetrator. Kulla v. E.F. Hutton & Company, Inc., 426 So.2d 1055, 1057 (Fla. 3d DCA 1983)" (Berger).

"Promise Not Performed: As a general rule, fraud cannot be predicated upon a mere promise not performed. However, under certain circumstances, a promise may be actionable as fraud where it can be shown that the promisor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established. Alexander/Davis Properties, Inc. v. Graham, 397 So.2d 699, 706 (Fla. 4th DCA 1981), petition for review denied, 408 So.2d 1093 (Fla. 1981). See also Noack v. Blue Cross and Blue Shield of Florida, Inc., 742 So.2d 433, 434 (Fla. 1st DCA 1999)" (Berger).

"Opinion: Generally, the misrepresentation, to be actionable, must be one of fact rather than of opinion. Tonkovich v. South Florida Citrus Industries, Inc., 185 So.2d 710, 713 (Fla. 2d DCA 1966), *cert. granted and remanded*, 196 So.2d 438 (Fla. 1967), *affirmed on remand*, 202 So.2d 579 (Fla. 2d DCA 1967)" (Berger).

"Constructive Trust: A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another. Although this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at

the expense of a third party. *Logie v. J.P. Morgan, Florida, F.S.B.*, 716 So.2d 319, 320 (Fla. 4th DCA 1998)” (Berger).

“Pleading with Particularity: In order for a claim of fraud in the inducement to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla.R.Civ.P. 1.120(b), including who made the false statement, the substance of the false statement, the time frame in which it was made, and the context in which the statement was made. *Bankers Mutual Capital Corporation v. United States Fidelity and Guaranty Company*, 784 So.2d 485, 490 (Fla. 4th DCA 2001)” (Berger).

If you, the home owners, at this juncture, are confused about how to bring a cause of action (a lawsuit) against the party who is claiming to have an interest in your property, be it for fraud or any other cause of action, I direct you to Frederick Graves jurisdictionary course, available online. There, you can easily learn how to bring a cause of action and what it is that you need to do. I would be wasting my time to cover the information in this book—my book—because Graves has so adequately said what needed to be said.



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## CHAPTER 63.10: COUNTER-TOOLS: QUIET TITLE ACTION

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According to a April 17, 2009 post by livinglies on <http://livinglies.wordpress.com>, “We are getting daily reports of many cases that have gone as far as a writ of possession being completely reversed, putting the homeowner not only in possession of the house, but free from the threat of foreclosure. In many cases we are seeing quiet title actions being granted. It would seem that the foreclosing parties are not likely to appeal because the result, if negative, will apply not only to the case the appealed but to all their cases, past, present and future.”



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## CHAPTER 65.10: CONCLUDING THOUGHTS: ABUSIVE TACTICS: TACTICS BY THE COURT: STATEMENT OF PARTIAL FACTS, APPELLATE AUTOCRACY

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In one case, as I have personally observed that in the Florida First District Court of Appeals, the judge's decision was rested on his written statement of just a portion of the facts, conveniently omitting other but critical facts. The inclusion of the omitted facts would have resulted in an opposite outcome of the case. One might say that the judge's conduct in which to arbitrarily pick and choose the facts at his leisure is prejudice if not criminal.

Furthermore, this book is loaded with examples that illustrate abuses by the courts; I have merely created this chapter to highlight upon the above stated violation, which I believe permeates throughout the courts in the United States.

In addition, courts are abusive to the extent that pursuant to the Florida Rules of Appellate Procedure a litigant is not entitled to take an appeal to the Florida Supreme Court if the appellate judge decides to not provide the reasons for his decision. These rules of appellate procedure explicitly deny rights. Legislature ought to take immediate action on this issue. It is an abuse of enormous proportion.

Furthermore, as you might have guessed, an appellate judge in the State of Florida is not required to provide the reasons for his decision. He or she simply confirms the trial judge's decision by stating, "Affirmed." Excuse me?

It is needless to say that a person who has been aggrieved and who is looking to the courts to resolve an issue—rather than turning to "swords and bullets"—is getting the raw deal. Importantly, the autocrat judge probably laughs at him when he complains. In yet other words, if a local judge is, say, corrupt, and he decides a case one way, then an appellate judge reviewing the case ought to, at the very least, explain *why* he is agreeing with the "corrupt" judge, you would think. But again, in Florida the monarch has its way and not justice. There is no real justice. This behavior also has permeated not only Florida but most, if not all, other States' courts. Who is allowing these people, in a civilized society, to have these powers? We the people! It's time to take our country and courts back.

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## CHAPTER 65.20: CONCLUDING THOUGHTS: DUE PROCESS! DUE PROCESS! DUE PROCESS! IT IS PROCESS DUE TO YOU!

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I want you to understand this. I know the courts don't. That's why I am dedicating a separate chapter to an important concept.

First, the basics: A litigant's due process rights are protected by the U.S. Constitution Fourteenth Amendment's Procedural Due Process Clause as well as by the respective States Constitution.

Everything you do is protected by due process in a court of law.

You must enforce this right. However, in a foreclosure court the judge will turn a blind eye. If you don't insist that this right be given to you, you will lose your case.

I believe that if you know how to enforce your due process rights in a court of law the foreclosure litigation against you will stop. This is so because these folks who have securitized your mortgages, who have squeezed Billions of Dollars out of your good name and credit when you signed for a mortgage have accomplished the fleecing of America through fraud and deception. Most judges, with the exception of only a few good ones are turning a blind eye. Is it because judges receive campaign donations from financial institutions? Or, is it because judges play along a political script against the working class?

It's against you, the American people, and the machinery is well-lubed.

However, they can't escape "due process." Because, if they do, they have to get rid of it for everyone, including themselves.



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## CHAPTER 68.10: YOU’LL BE NERVOUS: THIS IS WHAT YOU WILL FORGET

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I know that you will be nervous when you step into the court room. When they call your name and you step up to the area where they make you stand to present your case—and that’s about fifteen feet from the area where the opposing attorney is allowed to stand and where the opposing attorney will be standing about five feet from the judge’s face because he is an attorney and you are not—you will forget an awful lot of things that are important to your case.

I have made an attempt to include a list of things that I consider important. These items are not listed in any order of importance, and you might only find a few entries at the time this version of this book was concluded for delivery to you. Let’s get to it then: The things you will forget to say—

Number 1: Your Honor, have you read my motion?

Number 2: Objection, Your Honor! I object because .... state why you object and then repeat the magic word: “Objection!” Then pause and let the judge rule on the objection. If he does not rule on the objection remind him of his duty to sustain or overrule.

Number 3: Objection, Your Honor! Objection to the court’s refusal to rule on the objection!

\*Scan4: “court reporter”

Number 4: Have your (paid-by-you) court reporter present to record every word spoken at the court hearing.

\*Scan4 “strawberry”

Number 5: A scoop of strawberry ice cream is a scoop of strawberry ice cream. No matter how much you are inclined to argue, a scoop of strawberry ice cream is *not* a scoop of strawberry ice cream with whipping cream on top unless you make it so! Do not allow the opposing attorney to marginalize anything, i.e., do not allow him to “make small” or trivialize any issue whatsoever. If you do, you will lose your case!

\*Scan4 “marginalize”

Number 6: Your honor, opposing counsel is marginalizing an important issue, and I will not stand for it.

\*Scan4 “order of presentation”

Number 7: Who, at the hearing, speaks first? Who speaks second? Read this book to learn these basics at motion hearings. You might also want to engage in the following dialogue: “Your Honor, if the attorney for opposing party is speaking [as he does at this very moment], I’d like to know on which motion he is making arguments or giving information. Because - if he is about to make an introduction about the motion that I have filed with this court and if we are going to talk about my motion, I get to speak first, and this attorney is out of order. It is my due process right to know upfront what it is that we are doing here today and on which motion we are about to speak. If this attorney is *not* talking in support of his motion but about the motion I have brought before this court for today’s hearing, I get to speak first. Rules are rules.

Number 8: Objection, The witness is not competent (qualified) to answer the question posed.

Number 9: Objection, There is not sufficient foundation for the document or physical object sought to be admitted into evidence.





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## CHAPTER 70.10: ADDITIONAL RESOURCES

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Fla. Jur. 2d

37 Fla. Jur. 2d Mortgages and Deeds of Trust Sections 245-274 (2004)

10A Fla. Jur. 2d Consumer & Borrower Protection Sections 114-121 (2003)

Am. Jur. 2d

55 Am. Jur. 2d Mortgages Sections 512-942 (1995)

C.J.S.

59, 49A C.J.S. Mortgages Sections 490-990 (1998)

Kendall Coffee, Florida Foreclosures, D&S Florida Practice Series, ISBN 0-327-01367-2



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## CHAPTER 72.10: RANDOM QUESTIONS

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*NOTE: AT THE TIME OF PUBLISHING, THIS CHAPTER'S ENTRIES ARE LIMITED. ADDITIONAL MATERIALS ARE INTENDED TO BE INCLUDED IN A SUBSEQUENT EDITION.*

Random questions and govern yourself accordingly, as follows:

[10] Is MERS the suing party?

[20] Is the party listed in the caption of the mortgage foreclosure litigation an entity which is registered with the Secretary of State (or similar state agency) to do business in your State? If not, this entity might not be capable of bringing a lawsuit against the home owner.

[30] Is the entity named as owning the promissory note the same party which is listed in the caption of the mortgage foreclosure litigation (or is it a different party)? If they are not the same, the suing party is not capable of bringing a lawsuit against the home owner.

[40] Is the entity named as owning the mortgage the same party which is listed in the caption of the mortgage foreclosure litigation (or is it a different party)? If they are not the same, the suing party is not capable of bringing a lawsuit against the home owner.

[50] Can the suing party show proof—admissible evidence—that the “successor” is indeed the successor, authorized by law to “succeed.” Where are the documents which prove that they are the legal “successor?”

[60] Was the “Assignment of Mortgage” made *effective* a certain date earlier than the notarized document was dated?

[80] Are the affiant signing the assignment of mortgage and the notary public located in the same State?

[90] Did you travel to your local court house and print every item or have in your possession every item which is located in the court docket, including the (copy of the) promissory note, the allonge, the mortgage, and the mortgage assignments? Have you seen the court docket pertaining to your case? Be prepared to spend as much as \$1.00 per page to print these items. (\$1.00 per page is, in my opinion, an excessively and unreasonably high fee which also deprives home owners of due process; someone ought to sue the clerk of court or file a petition for a writ of prohibition or a petition for a writ of mandamus in the appropriate next-highest court to force the clerk of court (or other responsible entity) to charge not \$1 per page for court records but no more than 10 cents a page; the procedure for this type of relief is outlined in the Florida Rules of Appellate Procedures; if you intend to fight and win, you must also become familiar with them.

[100] Are you aware that certain documents are only available to you if you travel to your local court house and that these documents are not necessarily available online (in the comfort of your home?) (It appears to me that the clerk of court wants to charge you its excessive fees, requiring you to travel to the court house.)

[110] Has the lender (or other entity) paid for document stamps regarding any relevant documents which the lender or other entity has recorded with the clerk of court? Courts have held that if document stamps have not been paid, the suing party cannot bring a foreclosure action. Also, note that there is a difference between “filing” and “recording.” A person records a document with the clerk recorder’s office (and pays a fee for it) so as to create a record for protection. A person files a (legal) document (and pays no fee for doing so) so that the document is included in the court’s docket in the course of litigation.

[120] Has the opposing party filed (a copy of) the promissory note, say, in 2008, and has the opposing party filed (a copy of) the allonge in 2009? If so, be sure to read this book because you might be in great shape!

[130] Has the opposing party filed a promissory note?

[131] Does the suing party have the original promissory note?

[140] Has the opposing party filed the allonge?

[141] Is the allonge securely and permanently attached to the promissory note?

[150] Has the opposing party filed the mortgage document?

[160] Has the opposing party filed the mortgage assignments?

*NOTE: AT THE TIME OF PUBLISHING, THIS CHAPTER’S ENTRIES ARE LIMITED. ADDITIONAL MATERIALS ARE INTENDED TO BE INCLUDED IN A SUBSEQUENT EDITION.*



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## CHAPTER 75.10: TRIAL BINDER: PROCEDURAL CITATIONS

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You might find it useful to create a trial binder. Why do you need it? When you are in court, be it at a hearing or during trial, you will want to have a few citations ready. As you now know, citations to case law and rules control the court. Nothing else does.

For example, if during a hearing the opposing attorney is talking about certain facts or documents and you make an objection on the grounds that these facts or documents have not been introduced into evidence and the judge tells you to “just go on with it,” you might want to remind him of your duty and right to object. (Foreclosure courts are brutal!) E.g. See Tab O/T (Objections/Timing).

\*scan4 “tab”

*NOTE: AT THE TIME OF PUBLISHING, THIS CHAPTER’S ENTRIES ARE LIMITED. ADDITIONAL MATERIALS ARE INTENDED TO BE INCLUDED IN A SUBSEQUENT EDITION.*

## TAB A/C (Attorney/Custodian) Florida (2DCA) Trial

Binder: Procedural Citations: *THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

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). *END OF RESTATEMENT*

## TAB A/D (Attorney/Documents) Florida (2DCA) Trial

Binder: Procedural Citations: *THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

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**). *END OF RESTATEMENT*

## TAB A/P (Attorney/Public - Record) Florida (2DCA) Trial

Binder: Procedural Citations: *THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

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). *END OF RESTATEMENT*



# TAB A/T (Attorney/Testify) Florida (2DCA)

**(Supreme)** Trial Binder: Procedural Citations: *THE HEREIN STATED TEXT IS*

*RESTATED FROM ABOVE:* 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. *END OF RESTATEMENT*

## TAB O/T (Objections/Timing) Federal (8<sup>th</sup> Cir.) Trial

Binder: Procedural Citations: *THE HEREIN STATED TEXT IS RESTATED FROM ABOVE:*

When to object—According to Kolczynski, “**[o]bjections** to evidence should be

made **as soon as** it is apparent that evidence is, for any reason,

**objectionable**. *Isaacs v. U.S.*, (8th Cir. 1962), 301 F.2d 706, certiorari denied

83 S. Ct. 32, 371 U.S. 818, 9 L.Ed.2d 58” (Task 117). *END OF RESTATEMENT*

## TAB P/D (Procedure/Document - Authentication) Federal (2<sup>nd</sup> Cir.)

Trial Binder: Procedural Citations: *THE HEREIN STATED TEXT IS RESTATED*

*FROM ABOVE:* According to Kolczynski, “[t]o use real **evidence** at trial, you

**must show that it is authentic.** FRE 901, 902. Real evidence usually

is **authenticated by** the testimony of a **witness with**

personal knowledge. FRE 901(b)(1). Authentication usually involves the **following**

**procedure:** (**1**) A witness **introduces** the real evidence as the item in question;

(**2**) The witness testifies that he or she is **familiar** with the item; (**3**) The witness explains

the **basis** for his or her familiarity with the item; (**4**) The witness testifies that in his or her

**opinion**, the exhibit is the item in question. The witness must state that the exhibit [**i**] is the

**same item** that was involved in the occurrence now being litigated, and [**ii**] [h]as not been

substantially changed in any way. When the exhibit has passed through **several**

**hands**, the proof of authentication is referred to as the ‘**chain of custody**.’ A chain of

custody is established by the testimony of **successive custodians** of the exhibit, each of whom states that he or she received the item from the previous custodian and passed it on, either unchanged or with designated changes, to the next custodian in the chain. *United States v. Mendel*, 746 F.2d 155, 166-67 (2nd Cir. 1984)” (Kolczynski, Task 88). *END OF*

*RESTATEMENT.* See also Chapters 19.20, 50.10 and 50.50. *AUTHOR'S COMMENT:*  
*YOUR HONOR, THESE PROCESSES ARE NON-NEGOTIABLE. THEIR PURPOSE IS TO*  
*PROTECT LITIGANTS FROM FRAUD AND TO ENSURE THAT JUSTICE IS SERVED!*

# TAB P/R (Procedure/Records, Business) Florida (4, 3, 1 DCA)

Trial Binder: Procedural Citations: *THE HEREIN STATED TEXT IS*

*RESTATED FROM ABOVE:* “**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.)” (Author Unknown). *END OF RESTATEMENT*



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## CHAPTER 85.10: THIS MIGHT BE YOUR ONLY WAY OUT: MOTION TO RECUSE

[Florida Rules of Judicial Administration]

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When you step into a court of law, there's a little surprise package waiting for you. Dare to open it!

Both the opposing attorney—this would be the attorney who is representing the suing party “bank”—and the judge know the procedures of the court, and they know that you do not.

You do not.

Can you sense what's coming?

Imagine for a moment that you are invited to play poker with a couple of other players, and you agree to play.

You, however, have no clue about the procedures of the game, i.e. you do not know how to play poker. You do not know the rules.

Worse, you believe, from the onset, that, somehow, these players will educate you about the procedures, that they will teach you or show you how to play the game so that you have a fighting chance.

They won't.

That's what will happen in a court room. The opposing attorney will not show you the procedures, but you knew this already. You knew and it is expected that the opposing attorney will fight you, and he will. On the other hand, you believe that the judge will be fair and impartial. And you know little else.

Your chances of meeting a judge who will help you are as remote as you becoming a werewolf or a magician.

Wait, you say! I am in a court of law, and I expect to be treated fairly.

Through my personal experiences, I know that the opposing attorney will twist the procedures in his way. I even caught the opposing attorney lying to me, stating that, don't worry about mandatory initial discovery because you can get whatever documents (evidence) you want through any of the discovery tools (including, for example, deposition, request for production of documents). The judges have also played unfairly. For instance, they have adjudicated one of my cases by stating that they have done so on the basis of facts A, B, and

F. Wait a minute, A, B, and F? What happened to facts C, D, and E? Here, the judges have conveniently excluded the facts they wanted to exclude, namely, facts C, D, and E, in order to arrive at the ruling they wanted to have. They have conveniently included the facts they wanted to include and “talk” about, and on the basis thereof they have adjudicated.

Worse, far worse than you can ever imagine, are people’s rights being violated when they step into the court room unrepresented; specifically, I am talking about homeowners with their homes in foreclosure.

I have observed numerous court cases, and I am shocked.

I am not going to give examples in this chapter since this chapter is not a reference section regarding the judges’ conduct and since this chapter is about one thing and one thing only: This chapter is about you and what you can do to get rid of all judges and do so infinitum.

Before I tell you how to do it, I want you to consider a couple of things.

Both the opposing attorney and the judge have a membership in the same organization. This organization is designed to promote the interests of those who are members of the organization, in this case, both the people who are privileged through their membership to be an attorney in a court of law and the judge who is authorized to be a judge, also based on his or her membership of the organization.

Both the attorney and the judge is a member of the Bar or, as it might be the case in your case, a member of your State’s respective Bar.

You, on the other hand, are not a member of (your State’s) Bar. If you made an attempt to apply for such a membership, you would be bluntly rejected. I presume that you would be told that you had to go to law school, graduate from law school, then take the bar examination, then receive a membership number from the bar organization and only then would you be allowed to “practice” law.

If this makes no sense to you at this time, I will elaborate on a couple of other points. In 2009, I observed a couple of cases in a foreclosure court.

Imagine, as follows: You are a brave home owner who has decided to fight for his home, and you do it for whatever reason, and, frankly, for the purposes of this discussion the reason does not matter.

Your case is called, and you stand up, ready to “face” the judge.

You, through your observation, sense that you are supposed to go to this area that has been designated just for you, the pro se “idiot,” because there happens to be a microphone conveniently placed at the dividing rail which separates the area where the attorneys and the judge are sitting from the audience pit.

You know that you, based on your observation, are supposed to be standing there, fighting for your cause. You are a brave young man or woman and you think nothing of it. So far, to you, it’s just a court room, just and fair, and you see little wrong with it.

Because you are excited, nervous, your palms clammy you see nothing else.

The opposing attorney, however, is located about three (3) feet away from the judge, nearly face to face. And, the two are having a conversation about you, about your case.

You are standing there, at the rail, patiently waiting for it to be your “turn,” observing a small chat about your case between the attorney and the judge.

You are waiting because you are a good “citizen” and you are simply waiting your turn.

The conversation between the attorney and the judge is as if you were not allowed to hear it. As if it was, somehow, magically, reserved between the judge and the attorney. The judge



might even say to you that the opposing counsel is just bringing him “up to speed” on the case. And you are willing to let them do what they are doing. You believe it’s simply protocol or a nice gesture.

What?

Are you crazy?

Have you completely lost your mind?

You are in a court of law!

Objection, your honor!

Judge: You have to wait your turn, wait your turn!

Home owner: I object, your honor! (Here, this second objection would be an objection to the Court’s refusal to rule on the home owner’s objection ...)

Judge: Mr. homeowner, it’s not your turn; you must wait for your turn.

Wrong! Wrong, and wrong again.

Here’s why: The opposing attorney is not allowed to have a private conversation with the judge. Any words that are coming out of the attorneys mouth with the obvious attention that you are not supposed to hear them—recall that you are twenty feet away when he or she nearly face to face with the judge—need to be objected to.

You are in a court of law.

(Perhaps, you might want to ask the judge: Your honor, are we in a court of law?)

You need to be in a position in which every word the opposing counsel says to the judge has to be heard by you. Every word he says need to be also heard by your court reporter (and that’s the one you hired to be at the court hearing).

If you cannot hear what the attorney is saying, you are being denied due process.

Furthermore and as I have personally observed it, the opposing counsel will show the judge three or four documents claiming that the assignment of the note has been properly conveyed. He will do this right under the judges’ nose while you are standing twenty feet away. This is a big one, and I want you to slow down and re-read the just stated two sentences. I believe you should re-read them about 1 million times.

Why, you ask?

It is so because this is a violation of your rights

It is so because this type of conduct will allow you to win your case on purely procedural grounds. And that means that you could be in the right or in the wrong about the merits of your case and still win your case. In other words, you could be sued for millions of Dollars and you know darn right that you owe the money. However, if you know your procedural rights and do it well, the other party is in big trouble.

The reason why the other party is in trouble is because you are entitled to due process. Due process is a Constitutional right. Due process cannot be had if there is a conversation between the opposing attorney and the judge with the obvious intent to conspire against you.

The attorney and the judge knows that you do not know the procedures of the court.

They will belittle you. They will embarrass you. They will deny you (Grant Mc Even, Interview, July 17, 2010).

I will add to it that they will confuse you.

You have no fighting chance to proceed in a foreclosure court if you are a home owner who is proceeding pro se. I will go as far as stating that you have no chance in hell even if you have read all of the text I can possibly refer you to, including the truly awesome

Jurisdiction® course by Frederick Graves, which is an eye opener. I am saying this because I have litigated for four years, have crafted legal documents worth 2,500 hours, have been in all levels of the court, including trial court, appellate court, supreme court, at both the State and federal level. I am very confident that you will lose.

However, if you truly understand what you are doing, if you understand what this chapter is about, if you understand what the Teenage Daughter's problem chapter is about, you might have a chance.

However, you will be buried in work, and you might as well go to law school and get a J.D. or spend in excess of 2,500 hours crafting legal documents as I have, from 2006 to 2010. It is this intensive amount of time spent on writing and researching which has enabled me to "see." The judges and the opposing attorney will not allow you to "see" as they will blindfold you in their court room. Some homeowners who simply don't show up might be actually better off. Less aggravation, I say.

One more thing: I earlier talked about the fact that the opposing counsel will show the judge a couple of documents. The problem here is that you are entitled to see these documents, and I presume that you are entitled to see them before the judge gets to see them. But, regardless of that, you are entitled to see them, period.

For a moment, imagine that you are being accused of murder. The prosecutor goes up to the judge and argues that based on xyz documents you are guilty as charged.

This is a rather big problem because a document that hasn't been put into evidence is not a document which can be used for any kind of legal argument.

If, say, during a jury trial, the jury were shown a document which you—the home owner—has never seen before, the jury would judge you on the basis of the document and do so regardless of whether it later turns out that the document was bogus or not. The law is very specific about this, and it talks about these types of things at great length. (I won't go into this law because that's not what this chapter is about).

If this were to happen—the jury is shown a document without your prior knowledge—the decision by such a jury would like be reversed upon an appeal.

This is critical because you, in the United States, have certain rights. Pose this question: Why should your rights which you are entitled to be any different in a court in which you are accused of murder than in a court in which you are accused of owing money to some strange bank in China, or whatever it might be.

It's not any different.

The good news is, it's not any different but 99 of the judges in foreclosure cases don't care about that. Somehow, magically, all the rules of procedures are ignored. They are being ignored in their favor. Now, why is that?

The beauty about what I am about to tell you is that it does not matter why certain rules of procedure, including due process procedures, are being ignored.

In fact, if you were to make a long, drawn out argument as to why you believe that the judge was treating you unfairly, with bias, the judge will counter-argue that, No, it is not so because bla bla bla and bla bla bla and the judge will say, no, it's not so, the home owner is wrong.

It's, in fact, difficult, especially as a pro se litigant, to keep arguments simple. One reason for that is that we get caught up in the details of our own case. It's fatal.

It is, however, actually very easy, but very few people have even thought about it.

So far, I have begun this journey by warming you up just a bit so that you can see that what you get in court is not what you believe you should be getting.

You also might have heard that a few souls have attempted to recuse a judge because he or she was supposedly unfair to you.

The judge then, has stated, No I was fair and this is what I did and bla bla bla.

You know this already.

Here is what you didn't know.

No person, none whatsoever, can make the argument that there isn't something fishy about the fact that both the opposing attorney and the judge belong to the same club or organization at which they meet, mingle, and socialize in furtherance of their professional careers.

Let's ask this question: How are you, the home owners supposed to get a fair trial when both the attorney and the judge are authorized to "hang out" at the same club and you don't. If you don't understand the severity of this yet, let me do it in another way. If you are charged to have committed murder, would you want to be brought before a judge who is a member of an organization which teaches judges and attorneys about how to prosecute a supposed murdered when the opposing attorney also is a member the same organization when you, the supposed murderer and pro se litigant, are excluded from such a membership. Perhaps, my example is a weird stretch ...

You can make the argument that you will not receive a fair trial (or hearing) because both the judge and the opposing attorney are members of the Florida bar while you the attorney in a pro se capacity on your own case are not permitted to be a member of the Florida bar, and I will show you how you might do that.

I repeat: They are permitted to be members of that club or association and you are not. They are permitted to know and to learn how to proceed against you and you are not allowed to learn about how to proceed against them. It is very clear. Is it clear to you?

I now want you to turn to Appendix A. Read the content. Then, return to this very spot.

*INSTRUCTIONS: TURN TO APPENDIX A.1.1 AND RETURN TO THIS SECTION UPON COMPLETION OF YOUR REVIEW.*

Now this: No doubt will you believe that what you have read is interesting but listen closely. It does not matter how much money you have. It does not matter how much attorney your money can buy. Let me repeat this:

It does not matter how much attorney your money can buy.

It does not matter how much attorney your money can buy.

It does not matter how much attorney your money can buy.

Did I annoy you?

I don't care because I want you to know this material. Otherwise, you'd be wasting your time reading this book.

Also, think about this: It also does not matter how brilliant your attorney might be. It does not matter how much attorney your money can buy. An attorney who is a member of the bar in the State in which he makes an appearance in court—and any attorney has to be a member of the respective State bar—is bound to operate within the rules, guidelines and procedures. You don't! Here's what I am talking about, and this is a point that's less obvious. Only a pro

se litigant can make the argument that both the judge and the opposing attorney are a member of the bar and that you are not and that therefore you are not going to get a fair trial!

Bingo!

Also, consider this: If you are the suing party, you have an expectation to be awarded damages. If you are being sued, your strategy is to win your case and avoid the obligation to pay damages. Here's a hint: If you are the suing party, a motion for recusal might not be what you want because your case might stall indefinitely. If you are being sued, you might want to take advantage of a recusal because it might stall your case indefinitely. And remember, use a motion for recusal for the appropriate reasons and not because you attempt to avoid a damage award against you. Be fair to others as you wish them to be fair to you.

Here is an unreported Connecticut Decision on Recusal: *Honan v. Dimyan*, No. CV 00-033 82 02 S (Nov. 6, 2001); 2001 Ct. Sup. 15086, 2001 WL 1479114, 2001 Conn. Super. LEXIS 3216:

"The proper procedure to disqualify a judge is set out in Practice Book § 1-23 which provide that '[a] motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion **shall** be filed **no less than ten days before the time the case is called for trial or hearing**, unless good cause is shown for failure to file within such time.' Further, '[t]he matter of a judge's recusal is in the reasonable discretion of that judge. . . . The decision to recuse oneself is an intrinsic part of the independence of a judge.'" *Consiglio v. Consiglio*, 48 Conn. App. 654, 661-662 (1998). "Therefore, the plaintiffs must follow the procedure outlined in Practice Book § 1-23 and make their motion to disqualify Judge Axelrod in front of him if and when he presides over any aspect of the present case. This court cannot and will not violate the independence of another Judge of the Superior Court by enjoining him from hearing this case."

However, be aware that in Florida the Florida Rules of Judicial Administration require that "[a] motion to disqualify shall be filed within a reasonable time **not to exceed 10 days after discovery of the facts** constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling."

They also require that, "[a]ny motion for disqualification **made during a hearing or trial** must be **based on facts discovered during the hearing or trial** and may be stated on the record, provided that it is also promptly reduced to writing in compliance with subdivision (c) and promptly filed . . . [and that a] motion made during hearing or trial **shall be ruled on immediately**."

The Florida Rules of Judicial Administration state, as follows:

#### RULE 2.330. DISQUALIFICATION OF TRIAL JUDGES

- (a) (a) Application. This rule applies only to county and circuit judges in all matters in all divisions of court.
- (b) (b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.
- (c) (c) Motion. A motion to disqualify shall:
  - 1. (1) be in writing;
  - 2. (2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;
  - 3. (3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and
  - 4. (4) include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith. In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080.
- (d) (d) Grounds. A motion to disqualify shall show:
  - 1. (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or
  - 2. (2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.
- (e) (e) Time. A motion to disqualify shall be filed within a reasonable time **not to exceed 10 days after discovery of the facts** constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification **made during a hearing or trial** must be **based on facts discovered during the hearing or trial** and may be stated on the record, provided that it is also promptly reduced to writing

in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial **shall be ruled on immediately.**

- (f) (f) Determination — Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.
- (g) (g) Determination — Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.
- (h) (h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.
- (i) (i) Judge's Initiative. Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.
- (j) (j) Time for Determination. The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.



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## CHAPTER 90.10: EXPLANATIONS, DISCLAIMERS AND NOTICES

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### Explanations:

\*scan4 “ ... “

In order to locate the sought information with ease, simply scan for the desired information by using the \*scan4 feature, e.g., \*scan4 “corporate seal”

### Disclaimers and Notices:

*DISCLAIMER: THE INFORMATION PROVIDED IN THIS BOOK IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY.*

*NOTICE: THE HEREIN STATED TEXT AS WELL AS ANY OTHER TEXT IN THIS BOOK WHICH REFERS TO RULES CONTAINS OMISSIONS. REFER TO THE FLORIDA RULES OF CIVIL PROCEDURE OR OTHER RELEVANT RULES FOR THE FULL TEXT.*



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## CHAPTER 90.20: DEFINITIONS AND WAR STORIES

[MERS]

[Nominee]

[Procedural and Substantive Law]

[Ripe for Recusal]

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MERS: MERS is an acronym for Mortgage Electronic Registration Systems, a private company that registers mortgages electronically and tracks changes in ownership. (Ellen Brown, 2009).

Nominee: “The word ‘nominee’ is subject to more than one interpretation” See Appendix 2.1.1., page 2; See [FN-1934].

\_\_\_\_\_.  
[FN-1934] Landmark National Bank, Plaintiff/Appellee, v. Boyd A. Kesler, Appellee/Cross-appellant; Millennia Mortgage Corporation, Defendant; Mortgage Electronic Registration Systems, Inc. and Sovereign Bank, Appellants/Cross-appellees; and Dennis Bristow and tony Woydziak, Intervenors/Appellees. **Kansas Supreme Court**, No. 98,489

Procedural law or substantive law [Ripe for recusal]: I will, here, provide my own explanation about what it means. Procedural law or substantive law is like a box filled with chocolate. You get to pick it up, move it around, and drop it off at your grand-ma’s house. That’s procedural law. It’s procedure: Where you go and how you get there. In this case, it’s the procedural rules which tell you, e.g., when to write a motion (a request to the judge to do something), where to file it and how many days you have and on which type of paper you need to put your words.

Or, it’s this: Once you have the box solidly in your hands (you are done moving around with it), you get to open the box and examine the chocolate that’s inside. See the facts: Can you see the chocolate? That’s substantive law: The actual thing you can touch and eat or the substance of it. When somebody, as an example, touches you, this might be harassment. In order to prove it, you’d be required to prove up certain elements of that law which addresses harassment: what harassment is and what it is not.



It's the substance of things versus procedure or where you need to go in order to assert the case of harassment. It's important to know that if you fail to step on that proverbial train that gets you there, you don't get to assert the elements of law of harassment (like touching, intent, repeated conduct, etc.) or whatever legal right you are trying to assert. In other words, if you don't know your procedure, and if you don't know how to assert your procedural rights, you might as well forget about your case, or the substance of the thing you are attempting to prove.

I once explained it in this way. If you intended to travel from California to Florida (and that's where you could "fight," for whatever reason that might be) but you landed up, by some mistake, in, say, New York, you would have missed your chance to do what you had set out to do (to fight).

More importantly, the courts are unforgiving. And, most procedural errors that you will make, you'd be lucky to hear about them. The judge and the attorney will just silently laugh about you.

Many times, however, it will appear as if the opposing counsel is trying to help the pro se litigant with some procedural thing the judge and the attorney know he or she is having trouble with; however, the opposing counsel will, in most times, just do this to set the pro se litigant up for failure. The judge simply watches on or is too dumb to understand it. (It's an either or.)

For instance, in one case in which I was present, the opposing counsel, in the presence of the judge, told the pro se litigant to just go ahead and file a certain motion and set it for hearing. (It was a motion to dismiss the complaint.)

It appeared, to an outsider, that the attorney was "helping" the pro se litigant and that he was assuring her that she could protect her rights by (her) simply filing the certain motion when in reality the attorney wanted (and succeeded) to direct the pro se litigant's attention (in light of her lack of procedural skills) away from another issue which had just been discussed.

This other issue was a matter which, had it been pursued by the pro se litigant (with vigor), would have caused the opposing attorney to concede an important procedural point, which could have led to the pro se litigant's victory.

More specifically, the pro se litigant had filed a motion to strike the opposing party's amended complaint because the opposing party had failed to request the permission of the court to file the amended complaint (—that's called a motion for leave to file an amended complaint—) and failed to verify the complaint—a requirement in Florida since 2010 in mortgage foreclosure litigation in light of the suspected frauds committed by MERS—pursuant to rules.

Here, the pro se litigant missed an important point: The court is required to issue an order for each and every motion and must address any and all motions directed to the court to do (request) a specific act. Thereupon, the court has to either deny or grant the request and provide the grounds upon which the denial is rested.

In this case, however, the court ignored the pro se litigant's motion but responded (instead) to the opposing party's motion and also granted the opposing party's motion for leave to file the amended complaint which the opposing party filed subsequent to the filing of the pro se litigant's motion to strike the amended complaint for failure to file a motion for leave to file the amended complaint and for failure to verify the complaint, thereby verifying that the contents of the amended complaint are true and correct.

The opposing counsel directed the pro se litigant's attention away from the issue of the motion to strike because, had it been granted, the opposing attorney would have had to verify the complaint, a thing which he would not do because it would require him to commit perjury, upon the time of which the case would stop (because the attorney would either not file the amended complaint or commit perjury and end his career).

All of this, the pro se litigant home owner missed while the judge watched on.

Moreover, the judge simply told the pro se litigant that she had no authority to change the order (which granted the suing party's attorney motion for leave but ignored the pro se litigant's motion to strike, condoning the attorney's failure to verify the amended complaint). She had no authority to change the order, so she stated, because she was not the judge who had given the order and that the home owner's motion now was, anyhow—and this thing was an attempt to marginalize a big issue—moot. (Moot means that the issue has been resolved by some other circumstance.)

However, the court couldn't have declared the home owner's motion moot because the motion contained a procedural issue for the court to resolve. And, the court did not resolve it but simply sided with the party who is represented by an attorney. The court could not have resolved the issue by ignoring the merits of the motion and by looking at one motion (the one filed by the attorney) and by ignoring the other (the one filed by the home owner).

The conduct of the court constitutes prejudice against the home owner litigant.

In that the court failed to issue a ruling on the home owner's motion and, additionally, it being that the home owner has an inherent procedural stake involving the issue of whether the home owner was entitled to a verified complaint, the court unduly prejudiced the home owner.

It appearing that the court issued a ruling on one party but failed to issue a ruling on the other party which happens to be a pro se litigant, the court has exhibited bias against the pro se litigant.

In other words, the pro se litigant got the short end of the stick. The attorney and, worse, the judge marginalized an important area of procedural law, and this is the law by which players involved in litigation are expected to maneuver in their "game" just as much as players involved in, say, a football game are expected to "play." No more, no less. You know as well as I do that we live in a world of rules and even players (in a fun game to watch! *have* to follow the rules. I ask myself day-in and day-out: Why are the judges not following the rules. Do they not know about them? Or, are they actually dumb?

Really?

In the situation presented above, a pro se litigant in this situation could, upon an observed violation by a judge, file a motion for re-consideration of the order which granted the suing party bank's motion for leave to file an amended complaint and file it timely within the maximum allowable number of days—this is about ten days in many jurisdictions—from the day the order was issued to the day it's being filed. This motion to reconsider is a motion to move the court to do a certain thing. The court cannot ignore it. The appellate court will not allow it. But, the courts do it every day because pro se litigants do not know about their rights and rules. Then, it doesn't matter (—this is only proverbially speaking—) if the other party files a motion for leave to file an amended complaint because the court now has to address the pro se litigant's motion. (It can, of course, also address the suing party bank's motion but it is required to address the pro se litigant's motion.)

And that, my friends, is my story about procedural law.  
Now you know.

Trustor: The maker of the note. For additional information, scan [FN-1315].

See also Chapter 47.10



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## GLOSSARY: DEFINITION OF A PONZI SCHEME

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*SOURCE: [http://en.wikipedia.org/wiki/Ponzi\\_scheme](http://en.wikipedia.org/wiki/Ponzi_scheme)*

A Ponzi scheme is a fraudulent investment operation that pays returns to separate investors from their own money or money paid by subsequent investors, rather than from any actual profit earned. The Ponzi scheme usually entices new investors by offering returns other investments cannot guarantee, in the form of short-term returns that are either abnormally high or unusually consistent. The perpetuation of the returns that a Ponzi scheme advertises and pays requires an ever-increasing flow of money from investors to keep the scheme going.

The system is destined to collapse because the earnings, if any, are less than the payments to investors. Usually, the scheme is interrupted by legal authorities before it collapses because a Ponzi scheme is suspected . . .

The scheme is named after Charles Ponzi,[1] who became notorious for using the technique in early 1920. He had emigrated from Italy to the United States in 1903. Ponzi did not invent the scheme (Charles Dickens' 1857 novel *Little Dorrit* described such a scheme decades before Ponzi was born, for example), but his operation took in so much money that it was the first to become known throughout the United States. His original scheme was in theory based on arbitraging international reply coupons for postage stamps, but soon diverted investors' money to support payments to earlier investors and Ponzi's personal wealth.

Knowingly entering a Ponzi scheme, even at the last round of the scheme, can be rational economically if government bails out those participating in the Ponzi scheme.

If governments use newly created currency to bail out the scheme victims, the newly printed currency will devalue the rest of the currency in circulation, meaning all holders of that currency will suffer inflation to the currency. However, Ponzi schemes cannot last forever.

Hypothetical example: Suppose an advertisement is placed that promises extraordinary returns on an investment — for example, 20 percent on a 30-day contract. The objective is usually to deceive laymen who have no in-depth knowledge of finance or financial jargon.

Verbal constructions that sound impressive but are essentially meaningless will be used to dazzle investors: terms such as "hedge futures trading," "high-yield investment programs," "offshore investment" might be used. The promoter will then proceed to sell stakes to investors — who are essentially victims of a confidence trick — by taking advantage of a lack of investor knowledge or competence. Claims of a "proprietary" investment strategy, which must be kept secret to ensure competitive edge, may also be used to hide the nature of the scheme.

Without the benefit of precedent or objective prior information about the investment, only a few investors are tempted, usually for small sums. Thirty days later, the investor receives the original capital plus the 20 percent return. At this point, the investor will have more incentive to put in additional money and, as word begins to spread, other investors grab the "opportunity" to participate, leading to a cascade effect deriving from the promise of extraordinary returns. However, the "return" to the initial investors is being paid out of the investments of new entrants, and not out of profits.

One reason that the scheme initially works so well is that early investors — those who actually got paid the large returns — commonly reinvest their money in the scheme (it does, after all, pay out much better than any alternative investment). Thus, those running the scheme do not actually have to pay out very much (net)—they simply have to send statements to investors showing them how much they earned by keeping the money, maintaining the deception that the scheme is a fund with high returns.

Promoters also try to minimize withdrawals by offering new plans to investors, often where money is frozen for a longer period of time, in exchange for higher returns. The promoter sees new cash flows as investors are told they could not transfer money from the first plan to the second. If a few investors do wish to withdraw their money in accordance with the terms allowed, the requests are usually promptly processed, which gives the illusion to all other investors that the fund is solvent.

This simplistic notion of the Ponzi scheme is typically embellished with several (or many) feints that help prove seeming legitimacy to the ruse. For example, Madoff famously refused some investors' money, even when they begged him to take it. To an outside observer, these sorts of often high-profile "exclusivity" acts tend to discredit doubts — if it was a fraud, why would Madoff refuse more cash? Such illusions of normal business-as-usual reinforce a Ponzi scheme as a real investment.

The ultimate unraveling of a Ponzi scheme: The catch is that at some point one of these things will happen:

11. The promoter will vanish, taking all the remaining investment money (minus the payouts to investors) with them.
12. The scheme will collapse under its own weight as investment slows and the promoter starts having problems paying out the promised returns (the higher the returns, the greater the chance of the Ponzi scheme collapsing). Such liquidity crises often trigger panics, as more people start asking for their money, similar to a bank run.
13. The scheme is exposed because the promoter fails to validate the claims when asked to do so by legal authorities.

14. External market forces, such as a sharp decline in the economy (e.g. Madoff and the market downturn of 2008), will cause many investors to withdraw part or all of their funds not due (at least initially) to loss of confidence in the investment, but simply due to underlying market fundamentals. In the case of Madoff, the fund could no longer appear normal after investors tried to withdraw \$7 billion from the firm in late 2008 as part of the major worldwide market downturn affecting all investments.



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## GLOSSARY: DEFINITION OF A PYRAMID SCHEME

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SOURCE: [http://en.wikipedia.org/wiki/Ponzi\\_scheme](http://en.wikipedia.org/wiki/Ponzi_scheme)*

Similar schemes: A pyramid scheme is a form of fraud similar in some ways to a Ponzi scheme, relying as it does on a mistaken belief in a nonexistent financial reality, including the hope of an extremely high rate of return. However, several characteristics distinguish these schemes from Ponzi schemes.

In a Ponzi scheme, the schemer acts as a "hub" for the victims, interacting with all of them directly. In a pyramid scheme, those who recruit additional participants benefit directly. (In fact, failure to recruit typically means no investment return.)

A Ponzi scheme claims to rely on some esoteric investment approach (insider connections, etc.) and often attracts well-to-do investors; whereas pyramid schemes explicitly claim that new money will be the source of payout for the initial investments.

A pyramid scheme is bound to collapse much faster because it requires exponential increases in participants to sustain it. By contrast, Ponzi schemes can survive simply by persuading most existing participants to "reinvest" their money, with a relatively small number of new participants.

A bubble: A bubble relies on the willing suspension of disbelief and an unrealistic expectation of large profits, but it is not the same as a Ponzi scheme. A bubble involves ever-rising (and unsustainable) prices in an open market (be that shares of a stock, housing prices, the price of tulip bulbs, or anything else). As long as buyers are willing to pay ever-increasing prices, sellers can get out with a profit, and there doesn't need to be a schemer behind a bubble. (In fact, a bubble can arise without any fraud at all — for example, housing prices in a local market that rise sharply but eventually drop sharply because of overbuilding.) Bubbles are often said to be based on the "greater fool" theory. Although, according to the Austrian Business Cycle Theory, bubbles are caused by expanding the money supply beyond what genuine capital investment supports, and in this case would qualify as a Ponzi scheme, with expanded credit taking the place of an expanded pool of investors.

“Robbing Peter to pay Paul”: When debts are due and the money to pay them is lacking, whether because of bad luck or deliberate theft, debtors often make their payments by borrowing or stealing from other investors they have. It does not follow that this is a Ponzi scheme, because from the basic facts set out there is no indication that the lenders were promised unrealistically high rates of return via claims of unusual financial investments. Nor (from these basic facts) is there any indication that the borrower (banker) is progressively increasing the amount of borrowing ("investing") to cover payments to initial investors.





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## EPILOGUE

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Winning isn't easy. It won't be. Winning is for winners, and winners do the work that's necessary in order to win. If you are being sued in a foreclosure litigation or if you are "upside down" on your mortgage and you attempt to maintain possession of your property, you will have one decision to make: Are you going to fight or are you going to quit? Quitting, of course, means to give in and lose. Fighting means to spend the time it takes to learn the craft of wining, to learn the rules, and to do it! There's no easy way. But, it can be done.

I recommend that you gain knowledge and do the following: First, read and learn about the rules of evidence, State or federal. Second, obtain the course available on [www.jurisdictionary.com](http://www.jurisdictionary.com), spend the \$250 (at the time of this writing) to obtain the course and learn how to object, how to craft pleadings and legal defenses, how to craft a flurry of motions, about your legal defenses, and so forth. Learn how to use the discovery tools available to you and the steps involved in litigation. Read this book and be especially alert to case law that talks about evidence, authentication, the record custodian, direct and cross examination, objections to counsel, and so forth. Additionally, you will need to become grounded in the rules that control the court, the rules of civil procedure and the rules of evidence in your State. If you proceed in a Federal court, the following applies to you: Federal courts have what's called the local "local" rules; read them!

If you haven't guessed it by now, winning your case has more to do with knowing the rules of procedure and the rules of evidence than anything else. It's like a poker game. It won't matter how "strong" your case or your "hand" is; if you don't know the rules of the game and how to apply them, you are out, and a game it is.

The game is on, isn't it? - So, go on and fight. The tools are available to you.



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## APPENDIX A.1.1: FORM MOTION TO RECUSE

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*DISCLAIMER: THE INFORMATION PROVIDED HEREIN IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY (AND DO SO AT YOUR OWN RISK). DISCLAIMER: THE LEGAL REQUIREMENTS FOR YOUR STATE AND JURISDICTION MAY VARY. THIS IS A SAMPLE ONLY*

\*scan4 “first appendix”

Form Motion to Recuse:

**UNITED STATES DISTRICT COURT  
FOR A SAMPLE DISTRICT**

|            |   |                      |
|------------|---|----------------------|
| [REDACTED] | ) |                      |
| Plaintiff, | ) |                      |
|            | ) |                      |
|            | ) |                      |
| v.         | ) | Case No.: [REDACTED] |
|            | ) |                      |
|            | ) |                      |
| [REDACTED] | ) |                      |
| Defendant. | ) |                      |
|            | ) |                      |
|            | ) |                      |

**DEFENDANT’S MOTION TO RECUSE**

COMES NOW the Defendant (INSERT LITIGANT’S NAME [REDACTED]), proceeding without an attorney (“Pro Se”), and files Defendant’s Motion to Recuse and states, as follows:

1. Plaintiff’s attorneys AND Judges (INSERT NAME OF JUDGES [REDACTED]) are members of a good ole’ boys’ association called the Bar.
  
2. Plaintiff’s attorneys and said Judges are members of an organization (the Bar) which promotes the sole interests of its members in the legal profession. The Bar is explicitly designed to exclusively promote the common interests of its members in the legal community at large from which litigant (INSERT LITIGANT’S NAME [REDACTED]), proceeding Pro Se, is excluded.
  
3. A conflict of interest exists because said attorneys and said Judges belong to an organization (good ole’ boys’ association) which promotes their commonalities and their clubs activities. The Bar is designed to serve the members in the legal profession.

4. A conflict of interest exists because the Bar excludes (INSERT LITIGANT'S NAME           ) (proceeding in his capacity as a Pro Se litigant) from participation in the attorneys' and judges' membership activities. This exclusion constitutes a "ganging up" on a person proceeding in his capacity as a Pro Se litigant by explicitly excluding Defendant (INSERT LITIGANT'S NAME           ) from club activities designed for attorneys and judges.

5. The Undersigned—Defendant (INSERT LITIGANT'S NAME           )—has a right to receive a fair trial and a fair hearing before the Court. The right to receive a fair trial and a fair hearing is a Constitutional right, protected by the United States Constitution Seventh Amendment.

6. The Undersigned who is excluded from Bar membership fears that he will not receive a fair trial.

*INSERT THE FACTS PERTAINING TO YOUR CASE: SAMPLE TEXT STARTS HERE:*  
*INSERT THE FACTS PERTAINING TO YOUR CASE: SAMPLE TEXT STARTS HERE:*

7. During the hearing on (INSERT DATE           ), Judge (INSERT JUDGE'S NAME           ) and the opposing attorney met at the Judge's bench and had a conversation. They were speaking with each other head-to-head at a distance of about three (3) (INSERT THE CORRECT DISTANCE           ) feet and out of the Undersigned's reach while the Undersigned (proceeding Pro Se) had to stand at a distance of about twenty (20) (INSERT THE CORRECT DISTANCE           ) feet from where the Judge and the opposing attorney were conversing with each other. Both Judge (INSERT JUDGE'S NAME           ) and the

opposing attorney were enjoying a one-on-one conversation about the Undersigned's case, were conversing with each other in a familiar tone, and they were doing so without the Undersigned's inclusion in the conversation. Because of this conduct, the Undersigned fears that **he / she** cannot get a fair trial.

8. Furthermore, the opposing attorney was showing off certain documents, parading them right under the Judge's nose while the Undersigned was excluded from reviewing these documents. Additionally, the opposing attorney was making legal arguments on the basis of these documents. Because of this conduct in which the Undersigned (proceeding Pro Se) was excluded from the conversation and the showing of these documents, the Undersigned fears that he cannot get a fair trial.

9. (9) The Undersigned, proceeding Pro Se (and who is not a member of the Bar) was also told by Judge (INSERT JUDGE'S NAME **\_\_\_\_\_**) at the hearing on (INSERT DATE **\_\_\_\_\_**) that the Undersigned **needed** to have an attorney present for an upcoming hearing and/or evidentiary hearing [FN-0802].

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[FN-0802] In DeLeon v. Aguilar, 127 SW3d,1 (Tex. Crim. App. 2004) (The Court of Criminal Appeals granted mandamus relief to a movant in a recusal motion because the record established bias of a judge against the lawyers as a matter of law, based on remarks made off the bench by the judge against the lawyers.)

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[FN-0802] Christopher Vaeth, Annotation, *Prejudicial Effect Of Trial Judge.s Remarks, During Civil Jury Trial, Disparaging Litigants, Witnesses, Or Subject Matter Or Litigation*.Modern Cases, 35 ALR5th 1 (1996).

10. (10) The Undersigned states that the Undersigned is a pro se litigant and does not need an attorney. Because of the conduct by which the Court implicitly stated that the Undersigned could not proceed in this Court of law without representation by one who is a

member of the good ole's boys' association, a.k.a. the Bar, the Undersigned (who is excluded from Bar membership) fears that he cannot get a fair trial.

*INSERT THE FACTS PERTAINING TO YOUR CASE: SAMPLE TEXT STOPS HERE.*  
*INSERT THE FACTS PERTAINING TO YOUR CASE: SAMPLE TEXT STOPS HERE.*

11. **The Undersigned who is not a member of the Bar therefore moves this Court and demands that this Court appoint the Undersigned a Judge who is not a member of the Bar nor has ever been a member of the Bar. The Undersigned moves this Court and demands that this Court recuse any replacement Judge who is a member of the Bar or who has ever been a member of the Bar.**

### **MEMORANDUM OF LAW**

12. In a case where both judges and opposing counsels are members of a club (the Bar) which promotes a common and self-serving interest (interest group function), it is impossible for said respective judges to be impartial. Dag E. Ytreberg, Annotation, *Membership In Fraternal Or Social Club Or Order Affected By A Case As Ground For Disqualification Of Judge*, 75 ALR3d 1021 (1977). Jay M. Zitter, Annotation, *Disqualification Of Judge Because Of Political Association Or Relation To Attorney In Case*, 65 ALR4th 73 (1988).

13. The Undersigned, proceeding Pro Se and proceeding without club membership (in the good ole' boys' association, a.k.a., the Bar) [FN-0735], fears that he cannot get a fair trial and/or hearing. In Aberdeen Prop. Owners Assoc. Inc. v. Bristol Lakes Homeowners Assoc.

Inc. (4D08-4467), the Fourth DCA reversed the circuit court and ordered the circuit court judge disqualify himself due to the **defendant's reasonable fear** that it could not receive a fair trial. It is not necessarily relevant whether the Judge could in fact provide the party with a fair trial.

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[FN-0735] The Undersigned, proceeding Pro Se, is not capable of being a member of the Bar because he is not allowed.

14. In Mines (proceeding Pro Se) the Court directed the trial judge to enter an order of recusal. Joseph W. Mines, Jr. et al., v. Countrywide Home Loan, Inc., case No. 1D09-5669, District Court of Appeal of Florida, First District; Opinion filed February 5, 2010; Per Curiam (“This court finds that these facts, taken as true as they must be, **would prompt a reasonably prudent person to fear that he or she will not obtain a fair and impartial hearing.**”) (“We therefore grant the petition and direct the trial judge to enter an order of recusal, requesting that the chief circuit judge appoint a new judge to preside over the cause.”)

15. The Fourth DCA held: Rule 2.330(f) requires a judge to enter an order granting disqualification if the motion to disqualify is "**legally sufficient.**" The motion is legally sufficient **if it shows the party's well-grounded fear** that the party will not receive a fair trial. See Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001); Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). It is **not a question of what the judge feels**, but the feeling in the mind of the party seeking to disqualify and the basis for that feeling. See Goines v. State, 708 So. 2d 656, 659 (Fla. 4th DCA 1998) (“[T]he facts underlying the well-grounded fear must be judged **from the perspective of the moving party.**”), disagreed with on other grounds by Thompson v. State, 949 So. 2d 1169 (Fla. 1st DCA 2007), quashed, 990 So. 2d 482 (Fla.

2008); Wargo v. Wargo, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996). The party seeking disqualification has the burden of showing that the party has a well-grounded fear of not receiving a fair trial. See Adkins v. Winkler, 592 So. 2d 357 (Fla. 1st DCA 1992).

16. See also: Ordering recusal, the Court in Potashnick (p. 1111) stated that “a judge faced with a potential ground for disqualification ought to consider **how his participation in a given case looks to the average person on the street.**” Potashnick v. Port City Construction Co., 609 F. 2d 1101, (5th Circuit, 1980).

17. See also Abington Limited Partnership v. Heublein, 246 Conn. 815, 820, 717 A.2d 1232 (1998): Whether another reasonably might question the Judge’s impartiality:

“We use an objective rather than a subjective standard in deciding whether there has been a violation of canon 3 (c) (1). Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety . . . that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard. . . . The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might **reasonably question his . . . impartiality**, on the basis of all of the circumstances. . . . (Citations omitted; internal quotation marks omitted.) Papa v. New Haven Federation of Teachers, 186 Conn. 725, 745-46, 444 A.2d 196 (1982); Dubaldo v. Dubaldo, 14 Conn. App. 645, 649, 542 A.2d 750 (1988).”

18. In the case at bar, both the opposing counsels and the Judges are members of the good ole’ boys’ association (the Bar). The Undersigned, proceeding Pro Se, is not capable of being a member of the Bar because he is not allowed. The Undersigned fears that he will not get a fair trial and/or hearing. The Undersigned fears that the herein stated Judges will not adjudicate impartially. Both the attorneys and the respective Judges have signed up for a club membership (the Bar) which is exclusively dedicated to serve those situated in the legal



profession for the purpose of advancing their knowledge and their skills for their benefit. Both the opposing attorneys and the judges are members of the same good ole' boys' association called the Bar. The Undersigned **does not trust** the decisions (Orders) of the Judges **to be impartial and/or fair** on the grounds that they are **members of an organization to which also the opposing attorney belongs**. The Bar promotes a common and professional interest, the interests of the organization (or club) of which is, by exclusion of membership to any person who, pursuant to the club's rules, is not eligible, designed to promote and protect the interests of the attorneys and the judges, i.e., the Bars' activities are designed to promote and protect the attorneys' and judges' legal work tactics and their concerted legal efforts, and these activities do, therefore, inherently discriminate against outsiders, including a person who is not a member of the bar. This includes a person who is not authorized, by the very rules of the respective bars, to be a club member of the organization.

19. The Bars' explicit mission by which attorneys and judges are nurtured and by which the Bar excludes outsiders to hold membership, requires the strict recusal of Judges Edmondson and Birch and any replacement judge(s) who is (are) a member(s) of the Bar. Judges Edmondson and Birch (and any replacement judges who are members of the Bar) are incapable of being impartial by the virtue of the good ole' boys' (the Bars') explicit mission; they are incapable of being impartial by virtue of the Bars' inherently discriminatory mission against persons who are not members of the Bar and who are not permitted to be members of the Bar.

20. The Undersigned fears and believes that the herein stated Judges are not capable of adjudicating without bias. Constitutional due process requires that a judge be unbiased. The

Undersigned fears and believes that the respective Judges are not capable of being impartial. A judge is duty-bound to be impartial. Due process [FN-1028] demands that a judge be unbiased. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a **basic requirement of due process**. Fairness of course requires an absence of actual bias in the trial of cases." (Emphasis added by the Undersigned.)

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[FN-1028] U.S. Constitution Fourteenth Amendment's Procedural Due Process Clause

21. As a result of the herein stated conduct; (2) as a result of the fact that the Undersigned is precluded from attaining Bar membership; (3) as a result of the fact that the Undersigned (proceeding Pro Se) is prohibited from becoming a member in the good ole' boys' association (known as the Bar) of which the opposing attorneys and the Judge(s) are members); (4) as a result of the herein stated fear, the Undersigned **does not trust the decisions** (Orders) of the Judges **to be impartial and/or fair** and **fears** that the Undersigned **cannot get a fair trial and/or hearing**; the recusal of Judges Edmondson and Birch is therefore warranted.

22. In that both the attorney(s) and the Judge(s) are members of the Bar (and the Undersigned is not a member of the Bar by exclusion) a conflict of interest exists; because a conflict of interest exists, the Undersigned demands that said Judges be recused.

23. As a result of the said inclusion and exclusion and the segregation of the respected individuals and the Undersigned's fear, the Undersigned **moves this Court to recuse** Judges Edmondson and Birch and any replacement judge who is a member of the Bar and **appoint a replacement Judge** who is **not a member of the Bar** nor has **ever** been a member of the Bar.

24. The United States Court of Appeals for the Sixth Circuit has ruled wherein an order of dismissal had already been entered:

28 U.S.C.S. § 455 should, in proper cases, be applied retroactively in order to rectify an oversight and to take the steps necessary to maintain public **confidence in the impartiality of the judiciary.**

Our view of the procedure to be followed in dealing with issues under § 455 is reinforced by the Supreme Court's recent decision in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 56 U.S.L.W. 4637, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988), applying § 455 strictly and holding that § 455 should "in proper cases, be applied retroactively" in order "to rectify an oversight and **to take the steps necessary to maintain public confidence in the impartiality of the judiciary.**" Id. at 4641.

Barksdale v. Emerick, 853 F.2d 1359 at 1362 (6<sup>th</sup> Cir. 1988) (Emphasis added by the Undersigned).

25. See also Potashnick v. Port City Construction Co., 609 F. 2d 1101, (5th Circuit, 1980) (p. 1111) (Ordering recusal, the Court reasoned that the overriding concern with the appearance of propriety stems from a need for unwavering confidence by the public in an unimpeachable judiciary.). See also Felix v. Hall-Brooke Sanitarium, 140 Conn. 496, 501, 101 A.2d 500 (1953) ("No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge **must be characterized by the highest degree of impartiality.** If he departs from this standard, he casts **serious reflection upon the system** of which he is a part.").

26. To require that (INSERT LITIGANT'S NAME [REDACTED]) continue the Instant case in a case where Judge (INSERT JUDGE'S NAME [REDACTED]) and/or any replacement Judge and opposing attorneys are members of an organization (good ole' boys' association) which promotes their common interests is to expose (INSERT LITIGANT'S NAME [REDACTED]) to unfairness and bias. A judge can and should be disqualified for "**bias**, [] a **likelihood** of

bias[,] or [even] an **appearance** of bias [Emphasis added by the Undersigned]." See Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); see also Murchison, 349 U.S. at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness."); accord Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988) (opining that due process "require[s] not only an absence of actual bias, but an **absence of even the appearance of judicial bias** [Emphasis added by the Undersigned].") See also, generally, Railey v. Webb, 540 F.3d 393, 399-400 (6<sup>th</sup> Cir. 2008).

27. "Justice must satisfy the appearance of justice." Murchison, 349 U.S., at 136 (citation omitted). Cameron v. Cameron, 187 Conn. 163, 170-171, 444 A.2d 915 (1982) ("**Proof of actual bias is not required** for disqualification . . . . The appearance as well as the actuality of impartiality on the part of the trier is an essential ingredient of a fair trial . . . [Emphasis added by the Undersigned]").

28. Any previous orders entered by Judges Edmondson or Birch or any other judge who is a member of the Bar are therefore null and void.

29. Upon recusal, the Judge has no further involvement in the case. (Repeated for emphasis.)

30. Upon recusal, the **Judge has no further involvement in the case.** Consiglio v. Consiglio, 48 Conn. App. 654, 661, 711 A.2d 765 (1998) (When the trial judge decided to recuse himself from all future matters involving Chiarelli, this should have ended any concern for either Chiarelli or the trial judge over his hearing of cases involving Chiarelli. It was **inappropriate for the presiding judge to instruct the trial judge** to hear this case. [Emphasis added by the Undersigned]).

31. Case law as referenced in Michael Guttentag's Motion for Judicial Disqualification,

Case 9:09-cv-80160-K L R, Document 15, Entered on FLSD Docket 03/27/2009), as follows:

- a. "Canon 2 [of the Code of Conduct for United States Judges] tells judges to **'avoid impropriety and the appearance of impropriety in all activities,'** on the bench and off." Dinkins v. Leavitt, 2008 U.S. App. Lexis 22847, \*14 (11th Cir. 2008) (citations omitted). The Code of Conduct for United States Judges and case law make clear that judges should avoid even the appearance of impropriety. U.S. v. South Florida Water Management District, 290 F.Supp. 2d 1356, 1358 (S.D. Fla. 2003). Emphasis added by the Undersigned.
- b. Above, continued: "The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process **from any hint or appearance of bias** is the palladium of our judicial system." U.S. v. Alabama, 828 F. 2d 1532, 1539 (11th Cir. 1987). To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. §§ 144 and 455. Emphasis added by the Undersigned.
- c. Above, continued: 28 U.S.C. § 455 provides, in pertinent part: (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- d. Above, continued: (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
- e. Above, continued: Regarding subsection (a) of §455, the Eleventh Circuit repeatedly has stated: The test for determining whether a judge's impartiality might reasonably be questioned is an objective one, and requires asking **whether a disinterested observer fully informed of the facts would entertain a significant doubt** as to the judge's impartiality. Bivens Gardens Office v. Barnett Banks of Florida, 140 F.3d 898, 912 (11th Cir. 1998) (citing Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991) and Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988)); see also Christo v. Padgett, 223 F.3d 1324, 1333 (11th Cir. 2000) (citing United States v. Kelly, 888 F.2d 732, 744-45 (11th Cir. 1989)). The intent underlying § 455(a) is "to promote public confidence in the integrity of the judicial process" and "to promote confidence in the judiciary by **avoiding even the appearance of impropriety whenever possible**." Liljeberg v. Health Services Corp., 486 U.S. 847, 860 (1988); see also Parker, 855 F.2d at 1523 (quoting Liljeberg, 486 U.S. at 860, 865)). Emphasis added by the Undersigned.
- f. Above, continued: Moreover, in light of the intent of the statute, disqualification should be granted under § 455(a) where a judge would **harbor any doubt concerning whether** disqualification is appropriate. Parker, 855 F.2d at 1524

(citing United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987)). **Neither actual partiality, nor knowledge** of the disqualifying circumstances on the part of the judge during the affected proceeding, are **prerequisites to disqualification** under this section. U.S. v. Kelly, 888 F. 2d 732, 744-45 (11th Cir. 1989). The standard for recusal under section 455(a) is "'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" Id. (citing, United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) (quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988), cert. denied, 490 U.S. 1066, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989)). Emphasis added by the Undersigned.

- g. Above, continued: Because § 455(a) focuses on the **appearance** of impartiality, as opposed to the existence in fact of any bias or prejudice, the statute **does not give a judge discretion as to whether to recuse himself**. U.S. v. Garruda, 869 F. 2d 1574, 1581 (S.D. Fla. 1994) (citing, 28 U.S.C. §455(a)). Rather, the statute tells the judge to disqualify himself if the public may perceive him, or his rulings, as being affected. U.S. v. Kelly, 888 F.2d at 744-45. Thus, "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case **looks to the average person on the street**." Garruda, 869 F. 2d at 1581 (citations omitted). Section 455(a) requires judges to resolve any doubts they may have as to whether they should hear a case in favor of disqualification. Id. Emphasis added by the Undersigned.
- h. Above, continued: In United States v. Franco-Guillen, 196 Fed. Appx. 718 (10th Cir. 2006), the court found that the district court reversibly erred in failing to recuse itself under § 455. During sentencing, the district court made the following comments:
  - i. Above, continued: Oh yeah. Listen, I'm setting this aside. This is going to trial. I will not put up with this from these Hispanics or anybody else, any other defendants. You didn't have any kind of agreement like that with [counsel]. [Counsel] probably may have given you some idea of what he thought your sentence was; but when I took your guilty plea, you told me under oath that you understood that whatever he told you was merely his advice and was not a promise. Now, I'm not putting up with this. I've got another case involving a Hispanic defendant who came in here and told me that he understood what was going on and that everything was fine and now I've got a 2255 from him saying he can't speak English. And he is lying because he told me he could. So this--the plea agreement is set aside. You're going to trial my friend. When can you be ready. (sic.)

- i. Above, continued: The Tenth Circuit found that that the district court's references to the defendant's ethnicity, especially where those comments seemed to link ethnicity with a propensity to lie, created an appearance of bias sufficient for recusal: "[t]he judge's statements on the record would cause a reasonable person to harbor doubts about his impartiality, **without regard to whether the judge actually harbored bias** against Franco-Guillen on account of his Hispanic heritage." Id. at 719 (citing, Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (giving as an example of an appearance of bias requiring recusal when a trial judge in a World War I espionage case allegedly said, "[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against German-Americans" because their "hearts are reeking with disloyalty"))). Emphasis added by the Undersigned.
- j. Above, continued: Disqualification/recusal under § 455(b) is mandatory because "the potential for conflicts of interest are readily apparent." Brown v. Brock, 169 Fed. Appx. 579, 583 (11th Cir. 2006)\_(citations omitted).
- k. Above, continued: 28 U.S.C. § 144: Section 144 provides: Whenever a party to any proceeding in a district court makes and files a timely and sufficient **affidavit** that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, **such judge shall proceed no further therein**, but another judge shall be assigned to hear such proceeding. Emphasis added by the Undersigned.
- l. Above, continued: The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
- m. Above, continued: 28 U.S.C. § 144. Where a litigant submits a sufficient affidavit and certificate, recusal is **mandatory**; the presiding judge may **take no further action in the litigant's case**. United States v. Alabama, 828 F.2d at 1540. Moreover, the district court must take as true all of the facts stated in the affidavit. Id.; Berger v. United States, 255 U.S. 22, 36 (1921) ("The section withdraws from the presiding judge a decision upon the truth of the matters alleged."). The alleged facts must "show that the bias is personal, as opposed to judicial, in nature." Id. To warrant disqualification the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Berger, supra at 33-34.
- n. Above, continued: In U.S. v. Townsend, 478 F. 2d 1072 (3d Cir. 1972), the court found that the district court reversibly erred in failing to recuse itself under §

- o. The Townsend court concluded that these comments demonstrated "fair support to the charge of a 'bent of mind' that may prevent or impede impartiality of judgment" in selective service cases. *Id.*; see also, U.S. v. Thompson, 483 F. 2d 527 (3d Cir. 1973).
- p. Disqualification/Recusal is Mandatory under §455(a) and (b) (1). In the instant case, Plaintiff respectfully submits that Judge Ryskamp's conduct demonstrates, at a minimum, an apparent bias or prejudice against Plaintiff and Plaintiff's counsel, such that disqualification/recusal is mandatory. Judge Ryskamp has made numerous comments which give the appearance of a lack of impartiality, thereby warranting dismissal under § 455. U.S. v. Holland, 655 F. 2d 44 (5th Cir. 1981)
- q. Above, continued: In Hamm v. TBC Corp., Case No. 07-808-29-CIV-RYSKAMP, Plaintiff's counsel in the instant case represented the Hamm plaintiff in a collective action for overtime wages brought pursuant to the FLSA. The district court in the instant case, Judge Ryskamp, also presided over the Hamm case. In the course of the Hamm proceedings, the district court made comments which, at best, only can be perceived as having an actual or apparent bias or prejudice against Plaintiff's counsel and FLSA plaintiffs in general:
  - i. . . . I have had our law clerk check and the Shavitz firm has filed 1,332 cases in the Southern District of Florida since 2000, so we see these things continually, virtually never see them go to trial, I think that I have had one trial with all the cases that have been filed. In looking at the statistical numbers, they are usually closed within three months of the time they are filed, so what is very clear to me is that most defendants are saying how much is it going to cost me to defend this case and what is the claim and the claim is so small it would cost most to have the lawyers defend it, **so they are basically nuisance type claims that get bought off**, of course the lawyer's fees are always – not always, but very often considerably more than the claim itself – and I think this is certainly an area for some Congressional oversight, I think there ought to be written into the statute a provision that a letter demand must be made upon the employer before a lawsuit can be filed because the way this thing is working **is just a lawyer's retirement bill**. . . . this has gotten out of hand, I think we have more of these cases in the Southern District of Florida than there are anyplace else in the country and **that's probably because of the Shavitz law firm**. . . . I think the problem needs to be



resolved. Transcript of Proceedings, Case No. 07-80829-CIV-RYSKAMP, at pp. 28-30 (emphasis added),\_copy attached to Guttentag Decl. as Exhibit "A." Emphasis added by the Undersigned.

- r. Above, continued: In addition to the Hamm case, Judge Ryskamp repeatedly has **personally challenged the integrity of Plaintiff's counsel**: "Counsel's reason for filing the motion was solely to increase the dollar amount of his yet to be paid compensation;" "[t]he Court will not allow this litigation to proceed merely for compensation of counsel." Gathagan v. The Rag Shop/Hollywood, Inc., Case No. 04-80520-CIV-RYSKAMP, D.E. 36, 29. In the case at bar, the Undersigned was told by the Judge that the Undersigned **needed** to have an attorney present. See paragraphs 9 and 10, above. Emphasis added by the Undersigned.
- s. Above, continued: Based upon these comments, the district court's impartiality might reasonably be questioned. Like the plaintiffs in Hamm and Gathagan, Plaintiff in the instant case also is represented by the Shavitz Law Group in a collective action for overtime wages brought pursuant to the FLSA. Judge Ryskamp's comments, particularly in Hamm, demonstrate an apparent, if not actual, bias or prejudice against Plaintiff's counsel and FLSA plaintiffs. Judge Ryskamp personally accused Plaintiff's counsel, the Shavitz Law Group, as responsible for the filing of what he considers to be large amounts of "nuisance" claims where employers are "bought off." See *supra*. He also disparages Plaintiff's counsel's FLSA practice "just a lawyer's retirement bill." See *supra*.
- t. Above, continued: Based upon these comments, a "disinterested observer fully informed of the facts would entertain a significant doubt as to the judge's impartiality." See, Bivens, *supra*. Moreover, while this is not even a close case for disqualification/recusal under § 455(a), **any doubts concerning whether disqualification is appropriate must be resolved in Plaintiff's favor**. See, Parker, Garruda, *supra*. Because Judge Ryskamp's comments would cause the "average person on the street" to "entertain a significant doubt" about Judge Ryskamp's impartiality in the instant case, **there is no discretion** and **disqualification/recusal is mandatory**. See, Kelly, Garruda, *supra*. Emphasis added by the Undersigned.
- u. Above, continued: Further, Judge Ryskamp's generalized comments on the nature of FLSA claims – that they are nuisance claims where employers are bought off -- are analogous to the comments of the disqualified judge in Franco-Guillen. Judge Ryskamp is pre-judging every FLSA case that comes before him based upon his own biases or prejudices. More disturbing, taken together, the comments regarding the number of cases, the months within which they are closed, along with the alleged nuisance and fee-driven nature, demonstrate Judge Ryskamp's apparent bias or prejudice regarding the merits of any FLSA claim to which he is assigned. Indeed, Judge Ryskamp's comments, like the judge's

comments in Franco-Guillen, personally attack the veracity of a party, in this case the Plaintiff, solely based upon matters extraneous to the merits of the claim. Any objective, reasonable person would, under the circumstances, have reason to doubt Judge Ryskamp's impartiality. Accordingly, disqualification is mandated under §455(a).

- v. Above, continued: Judge Ryskamp's comments in Hamm also evince his propensity to step out of his role of an impartial judge, which provides additional grounds for disqualification/recusal. In U.S. v. Whitman, 209 F. 3d 619, 625 (6th Cir. 2000), the Sixth Circuit found that the case would be transferred upon remand to a different district judge. The Whitman court based its decision, in part, upon the haranguing of the defendant's counsel by the district court. However, the Whitman court was even more disturbed by the district court's perceived "mission:"
- w. Above, continued: [The Whitman court stated] In addition to chastising Whitman's counsel, the district judge also spoke at length about his perceived mission as a federal judge:
  - i. Above, continued: "I'm not attacking you personally. . . . That's the furthest thing from my mind, but I'm trying to begin the process of educating the bar so that the lawyers, the last bastion of making up their own mind and doing what they want to do[,] will start to conform their conduct to the rules." "**I'm trying to teach people**, because I have decided there is not much left in the United States for me to try to do except improve the practice of law . . . ." "I didn't reach this conclusion overnight, it has taken me almost eight years to get to this point where I have resolved as to what the problems are and what we need to start to address . . . ." "The question at the end of the day is have you had a serious intellectual discussion--whether the person listened or not--on issues which would improve the practice of the law, that's all I want to do . . . ." In the case at bar, the Undersigned was **told by the Judge** that the Undersigned **needed** to have an attorney present. See paragraphs 9 and 10, above. Emphasis added by the Undersigned.
- x. Above, continued: With all due deference to the district judge, the primary function of a judge is neither to "educate the bar" nor to "improve the practice of the law." Above all else, the mission of a federal judge is to "**administer justice without respect to persons, and . . . faithfully and impartially discharge and perform all the duties incumbent upon** [him] . . . under the Constitution and laws of the United States." 28 U.S.C. § 453 (judicial oath of office). In the case at bar, the Undersigned was told by the Judge that the Undersigned **needed** to

have an attorney present. See paragraphs 9 and 10, above. Emphasis added by the Undersigned.

- y. Above, continued: In the instant case, Judge Ryskamp similarly assumed a “mission,” which is improper in his role as district court judge. Judge Ryskamp called for Congressional oversight, as well **stated as his personal belief** that there ought to be a prefilng written demand as a condition precedent to filing an FLSA suit. See supra. All of these suggestions are to ameliorate what Judge Ryskamp referred to as “just a lawyer’s retirement bill.” See supra. However, Judge Ryskamp’s function as an Article III judge is not to legislate or to ameliorate perceived deficiencies in federal law. His “mission” is to “administer justice . . . faithfully and impartially.” See, Whitman, supra. Judge Ryskamp’s personal distain for the FLSA as “just a lawyer’s retirement bill” demonstrates that he cannot fulfill his mission to faithfully and impartially administer justice to the Plaintiff in the instant case. In the case at bar, the Undersigned was told by the Judge that the Undersigned **needed** to have an attorney present. See paragraphs 9 and 10, above. Emphasis added by the Undersigned.
- z. Above, continued: For the same reasons disqualification/recusal is mandated under §455(a), it also is mandated under § 455(b)(1), as Judge Ryskamp’s comments demonstrate a personal bias or prejudice concerning FLSA plaintiffs. Judge Ryskamp has made the generalized conclusion, without regard to the facts, that the numerous FLSA claims filed in the Southern District of Florida are all nuisance claims which seek to buy off employer as a way of building a “retirement fund” for attorneys. See supra. Judge Rykamp’s personal bias or prejudice to FLSA Plaintiffs constitutes mandatory grounds for disqualification/recusal under § 455(b)(1) because "the potential for conflicts of interest are readily apparent." See, Brown, 169 Fed. Appx. at 583. For all these reasons, Judge Ryskamp’s disqualification/recusal is mandatory under § 455 (a) and (b)(1).

32. Case law setting precedent: Subject: Constitutional Law, Due Process: In Caperton et al. v. A.T. Massey Coal Co., Inc., et al., certiorari to the Supreme Court of Appeals of West Virginia, argued March 3, 2009, Decided June 8, 2009, No. 08-22. 2009—Justice Kennedy delivered the opinion of the Court—the Court stated, as follows:

- a. “(a) The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, Tumey v. Ohio, 273 U. S. 510, 523, but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," Withrow v. Larkin, 421 U. S. 35, 47. Two such

instances place the present case in proper context. Pp. 6-11.”

- b. “(b) Because the objective standards implementing the Due Process Clause **do not require proof of actual bias**, this Court does not question Justice Benjamin's subjective findings of impartiality and propriety and need not determine whether there was actual bias. Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U. S., at 47.” Emphasis added by the Undersigned.
- c. “Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U. S. 35, 47 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.” Emphasis added by the Undersigned.
- d. “The Court stressed that it was "not required to decide whether in fact [the justice] was influenced." Id., at 825. The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.' " Ibid. (quoting Monroeville, supra, at 60, in turn quoting Tumey, supra, at 532). The Court underscored that "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' " 475 U. S., at 822 (quoting Murchison, 349 U. S., at 136). In the Court's view, however, it was important that the test have an objective component.”
- e. “Following Murchison the Court held in Mayberry v. Pennsylvania, 400 U. S. 455, 466 (1971), "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." The Court reiterated that this rule rests on the relationship between the judge and the defendant: "[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." Id., at 465.”
- f. “Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, *The Nature of the*

Judicial Process 9 (1921).”

- g. Above, continued: “The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.”
- h. Above, continued: “The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the **Due Process Clause** has been **implemented by objective standards that do not require proof of actual bias.** See Tumey, 273 U. S., at 532; Mayberry, 400 U. S., at 465-466; Lavoie, 475 U. S., at 825. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U. S., at 47.” Emphasis added by the Undersigned.
- i. “The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3E(1); see also 28 U. S. C. §455(a) ("Any justice, judge, or magistrate judge of the United States **shall** disqualify himself **in any** proceeding **in which his impartiality might reasonably be questioned**"). Under Canon 3E(1), " '[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.' " State ex rel. Brown v. Dietrick, 191 W. Va. 169, 174, n. 9, 444 S. E. 2d 47, 52, n. 9 (1994); see also Liteky v. United States, 510 U. S. 540, 558 (1994) (*Kennedy, J.*, concurring in judgment) ("[U]nder [28 U. S. C.] §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion,

hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute"). Indeed, some States require recusal based on campaign contributions similar to those in this case. See, e.g., Ala. Code §§12-24-1, 12-24-2 (2006); Miss. Code of Judicial Conduct, Canon 3E(2) (2008)." Emphasis added by the Undersigned.

- j. Above, continued: "These codes of conduct serve to maintain the **integrity of the judiciary and the rule of law**. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:" Emphasis added by the Undersigned.
- k. Above, continued: " 'Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. **Judicial integrity** is, in consequence, a state **interest of the highest order**.' Republican Party of Minn. v. White, 536 U. S. 765, 793 (2002) (*Kennedy, J.*, concurring)." Emphasis added by the Undersigned.
- l. Above, continued: "It is for this reason that States may choose to 'adopt recusal standards more rigorous than due process requires.' *Id.*, at 794; see also Bracy v. Gramley, 520 U. S. 899, 904 (1997) (distinguishing the 'constitutional floor' from the ceiling set 'by common law, statute, or the professional standards of the bench and bar')." "
- m. Above, continued: " 'The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.' Lavoie, supra, at 828. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."
- n. "The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered."

33. Herein incorporated is the Undersigned's (Pro Se's) Affidavit, attached.

**WHEREFORE**, based upon the foregoing, Defendant (INSERT PRO SE

LITIGANT'S NAME [REDACTED]), proceeding Pro Se, hereby moves this Court and demands that this Court Grants the Defendant's Motion to Recuse.

**RESPECTFULLY SUBMITTED,**

\_\_\_\_\_  
(INSERT NAME [REDACTED]), Pro Se Litigant  
(INSERT ADDRESS [REDACTED])  
(INSERT TELEPHONE [REDACTED])

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that a copy of the document has been served, by First Class, United States Mail, properly addressed and postage prepaid, by mailing a copy of the document on (INSERT DATE [REDACTED]) to the following counsel of record: (INSERT NAME OF OPPOSING ATTORNEY [REDACTED]), (INSERT ADDRESS OF OPPOSING ATTORNEY [REDACTED]).

Date: \_\_\_\_\_

\_\_\_\_\_  
(INSERT NAME [REDACTED]), Pro Se Litigant

~

~~~~~

## APPENDIX A.1.2: FORM AFFIDAVIT IN SUPPORT OF MOTION TO RECUSE

~~~~~

*DISCLAIMER: THE INFORMATION PROVIDED HEREIN IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY (AND DO SO AT YOUR OWN RISK). DISCLAIMER: THE LEGAL REQUIREMENTS FOR YOUR STATE AND JURISDICTION MAY VARY. THIS IS A SAMPLE ONLY.*

\*scan4 “appendix affidavit”

Form Affidavit in Support of Motion to Recuse



**UNITED STATES DISTRICT COURT  
FOR A SAMPLE DISTRICT**

|            |   |                 |
|------------|---|-----------------|
| _____      | ) |                 |
| _____      | ) |                 |
| Plaintiff, | ) |                 |
|            | ) |                 |
|            | ) |                 |
| v.         | ) | Case No.: _____ |
|            | ) |                 |
|            | ) |                 |
| _____      | ) |                 |
| Defendant. | ) |                 |
|            | ) |                 |
| _____      | ) |                 |

**AFFIDAVIT OF** (INSERT YOUR NAME \_\_\_\_\_)

COMES NOW (INSERT YOUR NAME \_\_\_\_\_) and having been duly sworn hereby  
deposes and states:

34. I, (INSERT YOUR NAME \_\_\_\_\_), am over 18 years of age, under no legal disability  
and am otherwise competent to give the instant affidavit.

35. All statements contained herein are based upon my personal knowledge and  
experience.

36. On (INSERT DATE \_\_\_\_\_), I went into courtroom (INSERT ROOM  
NUMBER \_\_\_\_\_) in front of Judge (INSERT JUDGE'S NAME \_\_\_\_\_).

37. During the hearing on (INSERT DATE \_\_\_\_\_), Judge (INSERT JUDGE'S  
NAME \_\_\_\_\_) and the opposing attorney met at the Judge's bench and had a conversation.  
They were speaking with each other head-to-head at a distance of about three (3) (INSERT

THE CORRECT DISTANCE [REDACTED] feet and out of my reach while I (proceeding Pro Se) had to stand at a distance of about twenty (20) (INSERT THE CORRECT DISTANCE [REDACTED]) feet from where the Judge and the opposing attorney were conversing with each other in a familiar tone. Both Judge (INSERT JUDGE'S NAME [REDACTED]) and the opposing attorney were enjoying a one-on-one conversation about my case and they were doing so without my inclusion in the conversation. Because of this conduct, I fear that I cannot get a fair trial.

38. Furthermore, the opposing attorney was showing off certain documents, parading them right under the Judge's nose while I was excluded from reviewing these documents. Additionally, the opposing attorney was making legal arguments on the basis of these documents. Because of this conduct in which I (proceeding Pro Se) was excluded from the conversation and the showing of these documents, I fear that I cannot get a fair trial.

39. I, (INSERT YOUR NAME [REDACTED]) was told by Judge (INSERT JUDGE'S NAME [REDACTED]) at the hearing on (INSERT DATE [REDACTED]) that I needed to have an attorney present for an upcoming hearing and/or evidentiary hearing.

The Statements made herein are true and correct based upon my own personal knowledge, and they are made under penalty of perjury.

FURTHER AFFIANT SAYETH NAUGHT.

\_\_\_\_\_  
(INSERT YOUR NAME \_\_\_\_\_)

Subscribed and sworn to before this \_\_\_\_\_ day of (INSERT MONTH \_\_\_\_\_), (INSERT YEAR \_\_\_\_\_), by (INSERT AFFIANT'S NAME \_\_\_\_\_), who is personally known to me or who has produced \_\_\_\_\_ as identification.

Notary Public, State of (INSERT STATE \_\_\_\_\_)  
Print Name of Notary Public  
Expiration Date & Commission Number

### **CERTIFICATE OF SERVICE**

I certify that a copy of the document has been served, by First Class, United States Mail, properly addressed and postage prepaid, by mailing a copy of the document on (INSERT DATE \_\_\_\_\_) to the following counsel of record: (INSERT NAME OF OPPOSING ATTORNEY \_\_\_\_\_), (INSERT ADDRESS OF OPPOSING ATTORNEY \_\_\_\_\_).

\_\_\_\_\_  
(INSERT NAME \_\_\_\_\_), Pro Se Litigant  
(INSERT ADDRESS \_\_\_\_\_)  
(INSERT TELEPHONE \_\_\_\_\_)

Date: \_\_\_\_\_



~~~~~

## APPENDIX A.2: FORM CERTIFICATE OF INTERESTED PERSONS

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*DISCLAIMER: THE INFORMATION PROVIDED HEREIN IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS LEGAL ADVICE. YOU MUST CONSULT AN ATTORNEY (AND DO SO AT YOUR OWN RISK). DISCLAIMER: THE LEGAL REQUIREMENTS FOR YOUR STATE AND JURISDICTION MAY VARY. THIS IS A SAMPLE ONLY.*

\*scan4 “appendix certificate”

Form Certificate of Interested Persons and Corporate Disclosure Statement

## U.S. COURT OF APPEALS FOR A SAMPLE CIRCUIT

### CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

\_\_\_\_\_ vs. \_\_\_\_\_ Dkt. No. \_\_\_\_\_

11th Cir. R. 26.1 requires that a Certificate of Interested Persons and Corporate Disclosure Statement be included with each brief, petition, answer, motion or response filed by any party. You may use this form to fulfill this requirement. In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

\_\_\_\_\_, [INSERT NAME OF] Plaintiff  
\_\_\_\_\_, [INSERT NAME OF] Plaintiff  
\_\_\_\_\_, [INSERT NAME OF] Plaintiff

\_\_\_\_\_, [INSERT NAME OF] Defendant  
\_\_\_\_\_, [INSERT NAME OF] Defendant  
\_\_\_\_\_, [INSERT NAME OF] Defendant

U.S. District Magistrate Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR  
U.S. District Magistrate Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR  
U.S. District Magistrate Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR

U.S. District Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR  
U.S. District Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR  
U.S. District Judge, \_\_\_\_\_ [INSERT NAME] —MEMBER OF THE BAR

\_\_\_\_\_, [INSERT NAME OF] Attorney —MEMBER OF THE BAR  
\_\_\_\_\_, [INSERT NAME OF] Attorney —MEMBER OF THE BAR  
\_\_\_\_\_, [INSERT NAME OF] Attorney —MEMBER OF THE BAR



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## APPENDICES

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\*scan4 “appendices”

Appendix 1.1.1  
Appendix 1.1.2  
Appendix 1.2.1  
Appendix 1.2.2  
Appendix 1.2.3  
Appendix 1.2.4  
Appendix 1.2.5  
Appendix 1.2.6  
Appendix 1.3.1  
Appendix 1.3.2  
Appendix 1.3.3  
Appendix 2.1.1  
Appendix 4.1.1  
Appendix 5.1.1  
Appendix 5.1.2  
Appendix 5.1.3  
Appendix 5.1.4  
Appendix 5.1.5  
Appendix 5.1.5.2  
Appendix 5.1.6  
Appendix 5.1.7  
Appendix 6.1.1  
Appendix 6.1.1.2  
Appendix 6.2.1  
Appendix 6.2.2  
Appendix 10.1.1  
Appendix 11.1.1

Appendix 12.1.1  
Appendix 15.1.1  
Appendix 16.1.1  
Appendix 17.1.1  
Appendix 20.2.1  
Appendix 20.3.1  
Appendix 25.1.1  
Appendix 30.1.1  
Appendix 50.1.1  
Appendix 50.2.1  
Appendix 100  
Appendix 200  
Appendix 300.1.2  
Appendix 300.1.3  
Appendix 300.1.5  
Appendix 400  
Appendix 600  
Appendix 650.1.1  
Appendix 700.1.1  
Appendix 700.2.1  
Appendix 700.3.1  
Appendix 800.1.1



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## APPENDIX 1.1.1

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MERS in South Carolina, Sumter County

(Judge Evans)

**Order**

Case No. 2005-CP-43-0278

January 19, 2006

dix-1-1-1-09-0628-2331.pdf

\*scan4 “appendix order”

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*NOTE: THIS APPENDIX HAS NOT BEEN INCLUDED AT THE TIME OF PUBLICATION OF THIS BOOK.*

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## APPENDIX 1.1.2

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MERS in South Carolina, Sumter County

(Judge Campbell)

**Affidavit**

Case No. 2005-CP-43-0278

2006

dix-1-1-2-sc.pdf

\*scan4 “appendix affidavit”

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*NOTE: THIS APPENDIX HAS NOT BEEN INCLUDED AT THE TIME OF PUBLICATION OF THIS BOOK.*

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## APPENDIX 1.2.1

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MERS in Florida, Miami Dade County

(Judge Gordon)

**Order**

Case No. 05-2425

September 28, 2005

09-0629-0044.pdf

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# APPENDICES HAVE BEEN OMITTED FROM THIS PRINT VERSION

The following pages have been removed:

341 – 882

892 – 913

936 - 1205

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## APPENDIX 300.1.2

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“Assignment of Mortgage Know all Men by These Presents:” “hereby . . . assign . . . unto. . . HSBC . . . “signed . . . 13 . . . May, 2009” “effective 3<sup>rd</sup> day of December, 2007”

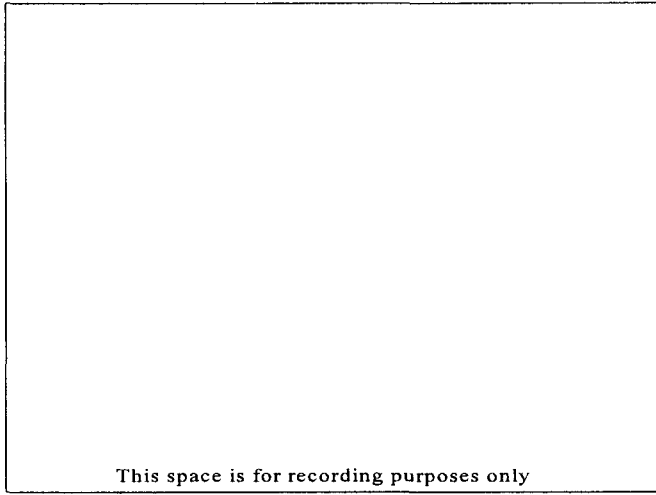
“mortgage executed by . . . alexander”

### **Purported Assignment**

dix-300-1-2-alex-mers-2-hsbc-may.pdf

~

Prepared by: DAVID J. STERN, ESQ  
Record & Return to: 900 South Pine Island Road Suite 400  
Plantation, FL 33324-3920  
07-23048(ASCF)



This space is for recording purposes only

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o WELLS FARGO BANK, N.A., 3476 STATEVIEW BLVD., FT. MILL, SC 29715 herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 residing or located at: C/O AMERICA'S SERVICING COMPANY 3476 STATEVIEW BLVD. FT. MILL, SC 29715 herein designated as the assignee, the mortgage executed by ELLINGTON C. ALEXANDER, A MARRIED MAN recorded in LEE County, Florida at book and page encumbering the property more particularly described as follows:

LOTS 11 & 12, BLOCK 5604, UNIT 84, CAPE CORAL SUBDIVISION, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 24, PAGES 30 THROUGH 48, INCLUSIVE, PUBLIC RECORDS OF LEE COUNTY, FLORIDA

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within named Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed, this 13 day of May, 2009, but effective as of the 3rd day of December, 2007.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
(CORPORATE SEAL)

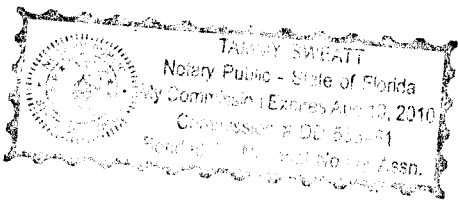
BY: \_\_\_\_\_  
PRINT NAME: CHERYL SAMONS  
TITLE: ASSISTANT SECRETARY

STATE OF FLORIDA  
COUNTY OF BROWARD

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the 13 day of May, 2009, within my jurisdiction, the within named CHERYL SAMONS who is personally known to me and who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first having been duly authorized by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to do so.

WITNESS my hand and official seal in the County and State last aforesaid this 13 day of May, 2009.

\_\_\_\_\_  
NOTARY PUBLIC



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## APPENDIX 300.1.3

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“Assignment of Mortgage Know all Men by These Presents:” “hereby . . . assign . . . unto. . . HSBC . . . “ “signed . . . 27 . . . April, 2009” “effective 3<sup>rd</sup> day of December, 2007”

“mortgage executed by . . . alexander”

### **Purported Assignment**

dix-300-1-3-alex-mers-2-hsbc-april.pdf

~



Prepared by: DAVID J. STERN, ESQ  
Record & Return to: 900 South Pine Island Road Suite 400  
Plantation, FL 33324-3920  
07-22199(ASCF)

This space is for recording purposes only

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o WELLS FARGO BANK, N.A., 3476 STATEVIEW BLVD., FT. MILL, SC 29715 herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 residing or located at: C/O AMERICAS SERVICING COMPANY 3476 STATEVIEW BLVD FT. MILLS, SC 29715 herein designated as the assignee, the mortgage executed by ELLINGTON C. ALEXANDER, A SINGLE MAN due to inadvertance and excuseable neglect, said mortgage was lost and/or destroyed prior to recordation in th public records of LEE County, Florida encumbering the property more particularly described as follows:

LOTS 25 & 26, BLOCK 5558, UNIT 84, CAPE CORAL SUBDIVISION, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 24, PAGES 30 THROUGH 48, INCLUSIVE, PUBLIC RECORDS OF LEE COUNTY, FLORIDA.

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within named Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed , this 27 day of Apr 1, 2009, but effective as of the 3 day of December, 2007.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
(CORPORATE SEAL)

BY:  
PRINT NAME: CHERYL SAMONS  
TITLE: ASSISTANT SECRETARY

STATE OF FLORIDA  
COUNTY OF BROWARD

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the 27 day of April, 2009, within my jurisdiction, the within named CHERYL SAMONS who is personally known to me and who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first having been duly authorized by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to do so

WITNESS my hand and official seal in the County and State last aforesaid this 27 day of April, 2009.

NOTARY PUBLIC



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## APPENDIX 300.1.5

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“Assignment of Mortgage Know all Men by These Presents:” “hereby . . . assign . . . unto . . . Deutsche Bank . . . “ “signed . . . 21 . . . July, 2007 “ “effective December 14, 2007”

“mortgage executed by . . . alexander”

### **Purported Assignment**

dix-300-1-5-alex-mers-2-deut-july.pdf

~

Prepared by: DAVID J. STERN, ESQ  
Record & Return to: 900 South Pine Island Road Suite 400  
Plantation, FL 33324-3920  
07-25388(GMAP)

This space is for recording purposes only

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o GMAC MORTGAGE, LLC, C/O GMAC MORTGAGE, LLC 1100 VIRGINIA DRIVE, FT. WASHINGTON, PA 19034, herein designated as the assignor, for and in consideration of the sum of \$1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE residing or located at: C/O GMAC MORTGAGE, LLC 1100 VIRGINIA DRIVE, FT. WASHINGTON, PA 19034 herein designated as the assignee, the mortgage executed by ELLINGTON C. ALEXANDER, A MARRIED MAN recorded in LEE County, Florida at book and page encumbering the property more particularly described as follows:

LOTS 61 & 62, BLOCK 5604, UNIT 84, CAPE CORAL SUBDIVISION, ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK 24, PAGES 30 THROUGH 48, INCLUSIVE, PUBLIC RECORDS OF LEE COUNTY, FLORIDA.

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within named Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed, this 21 day of July, 2008, but effective as of the 14th day of December, 2007.

Signed in the presence of: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

ATTEST: BY: Beth Cerni  
PRINT NAME: BETH CERNI

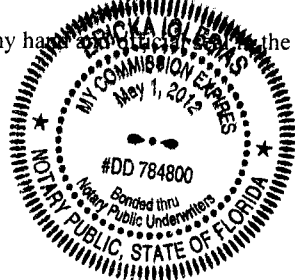
WITNESS: Erica Iglesias TITLE: ASSISTANT SECRETARY

Print Name: ERICKA IGLESIAS  
WITNESS: Raquel Vargas  
Print Name: RAQUEL VARGAS

STATE OF FLORIDA  
COUNTY OF BROWARD

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the 21 day of July, 2008, within my jurisdiction, the within named BETH CERNI who is personally known to me and who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first having been duly authorized by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to do so.

WITNESS my hand and seal this 21 day of July, 2008



NOTARY PUBLIC

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## APPENDIX 400

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Knowledge at a glance: Conspiracy theory? Media?

Author: Christian Meister

### **Overview**

Quick Facts—Part I: The second part of the truth media does not talk about

dix-400-truth-media-reposs-1

Quick Facts—Part II: Profiting by securitization and by repossession of devalued properties

dix-400-truth-media-reposs-2



# QUICK FACTS—PART I

## The Second Part Of The Truth Media Does Not Talk About

- Home owners were coaxed into getting an adjustable rate mortgage (“ARM”).
- Financial institutions knew that home owners could not afford their homes.
- During the process of rapid securitization of mortgages the financial institutions made SHORTCUTS in an attempt to securitize as quickly as possible for the purpose of—
  - Maximizing their profits by Billions of Dollars
  - Being able to immediately shift liability of these high risk “garbage” mortgages to Wall Street investors
- As a result of these SHORCUTS, the financial institutions’ PAPERWORK is not in order.
- When the economy collapsed, financial institutions attempted to foreclose well knowing that these SHORTCUTS presented a problem because their required PAPERWORK was not in order.
- “SHORTCUTS” also means that these institutions have lost or deliberately lost the documents necessary in order to legally foreclose.
- “SHORTCUTS” also means that these institutions, arising out of their knowledge that the PAPERWORK deficiency exists, have addressed the deficiency by creating a third party entity called MERS which they claim has the authority to foreclose.
- “SHORTCUTS” also means that promissory notes are transferred without signature, a.k.a. endorsement in blank. “Signing” would have slowed down the process of securitization.
- Courts are dysfunctional.
  - The financial institutions’ strategies work well because 95% of the home owners do not bother to show up in court and accept “as is” as being irrefutable.
- Home owners have legal tools available to them in order to fight foreclosure and enforce the rules of the court and stop the foreclosures.
  - 99.9% of home owners are unaware of the facts and of their rights.

## QUICK FACTS—PART II

### Profiting by securitization and by repossession of devalued properties

- Media controlled by government does not want to talk about the facts, court decisions ...
- Government pressured financial institutions to “give” all people a home IN THE NAME OF EQUALITY and GREED.
  - As a result, incumbents were re-elected (because people now had homes).
  - As a result, those who performed legislative favors but were not re-elected, received cushy executive positions at the financial institutions for which they performed or they became lobbyists.
  - E.g., the Glass-Steagall Act, enacted during the Great Depression and intended to protect consumers by preventing investment firms (“gambling institutions”) from perusing deposits consumers place in commercial banks, was revoked, and it enabled the securitization on a grand scale.
- People were “given” homes regardless of whether they could afford them.
  - Investment banks have lied to people by telling them they could own a home for \$500 a month when their mortgage payment would reset to \$2,000 in the 3<sup>rd</sup> year.
  - Giving a home which required a \$70,000 income to support payments following the expiration of the teaser rate and mortgage rate reset to people who earned \$35,000 per annum was not a problem for the banking industry.
- These financial institutions knew that Billions of Dollars could be generated through the process of securitization and over and above what they could earn by just collecting the home owner’s mortgage interest payments.
- Investment banks didn’t care that they created a rush on real estate. This artificially created rush—
  - Drove up real estate prices and artificially stimulated the economy
  - Was enabled by giving “everybody” a home
  - Was “financed” with home owners’ credit and their good name (the bank’s didn’t even have to use their own credit) (see also fractional banking)
  - Was fueled by rating agencies which supported the “scheme” by providing AAA ratings to garbage (sub-prime) mortgages which instilled confidence onto potential investors to purchase securities secured by garbage mortgages
- Investment banks didn’t care that the housing market would eventually collapse; they made Billions of Dollars in profits and they continue to accumulate real estate wealth today by foreclosing on properties
  - E.g., executives like the Lehman Brothers’ shipped profits to the Cayman Islands, hidden in trusts (“Colossal Failure Of Common Sense,” Audio CD), and “the beat goes on” ...

# APPENDICES HAVE BEEN OMITTED FROM THIS PRINT VERSION

The following pages have been removed:

341 – 882

892 – 913

936 - 1205

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## APPENDIX 650.1.1

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Federal Rules of Evidence, Selected Topics:: I'm at the hearing and what do I tell the judge?

- Article I. Ruling on Evidence: **FRE 103**
- Article II. Judicial Notice of Adjudicative Facts: **FRE 201**
- Article III: Presumptions in General in Civil Actions and Proceedings: **FRE 301**
- Article IV: Relevancy of Evidence: **FRE 403**
- Article IX: Authentication: Procedure; Witness with personal knowledge: **FRE 901, 902**
- Article IX: Authentication: Authentication and Identification: **FRE 901 (a), 901 (b)**
- Article IX: Authentication: Self Authentication: **FRE 902**
- Article X: Authentication: Definitions: **FRE 1001**
  
- Article X: Authentication—Originals: Requirement: **FRE 1002**
- Article X: Authentication—Originals: Admissibility of Duplicates: **FRE 1003**
- Article X: Authentication—Originals: Admissibility ... Contents: **FRE 1004**
  
- Article X: Authentication: Public Record: Certified: Testified: **FRE 1005**
- Article X: Authentication: Summary, first; Volume, second: **FRE 1006**
- Article X: Authentication: Testimony if - without accounting for nonproduction of original:  
**FRE 1007**
  
- Article X: Authentication: Ever existed; Trier of fact: **FRE 1008**
- Article XI: Authentication: Rules apply: **FRE 1101**

### **Rules**

dix-650-1-1-fre-select





*“I’m at the hearing and what do I tell the judge?” Stop the opposing attorney from testifying—  
“Objection, Hearsay!” Does the opposing attorney present documents? Object!—“Objection,  
Authentication of evidence is required!” If the Judge does not either Sustain or Overrule the  
Objection, object again—“Objection, Objection on the Court’s refusal to rule on the Objection!”*  
=====

## *Article I. Rulings on Evidence*

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### FRE 103

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#### **Rule 103. Rulings on Evidence**

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.—The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(As amended Apr. 17, 2000, eff. Dec. 1, 2000.)

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=====

## *Article II. Rulings on Evidence: Judicial Notice of Adjudicative Facts*

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### **FRE 201**

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#### **Rule 201. Judicial Notice of Adjudicative Facts**

- (a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts.—A judicially noticed fact must be one not subject to reasonable dispute in that it is either
- (1) generally known within the territorial jurisdiction of the trial court or
  - (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When discretionary.—A court may take judicial notice, whether requested or not.
- (d) When mandatory.—A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be heard.—A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.
- (g) Instructing jury.—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

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## *Article III. Presumptions in General in Civil Actions and Proceedings*

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### **FRE 301**

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#### **Rule 301. Presumptions in General in Civil Actions and Proceedings**

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.



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## *Relevancy of Evidence:*

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Article I: FRE 104 (B)

Article IV: FRE 401

Article IV: FRE 403

867 F.2d 617, 625 n.11 (D.C. Cir. 1989)

754 F.2d 573, 584 (5th Cir. 1985)

=====

Secondly, you must show that the “evidence is relevant.” FRE 104(b).

According to Kolczynski, “Relevant evidence is ‘evidence  
having any tendency to make the existence of any  
fact that is of consequence to the determination of the action more  
probable or less probable than it would be  
without the evidenc.’ FRE 401. It is a

COMBINATION of probative value (a tendency to  
make the truth of a proposition more or less probable) and materiality (of  
consequence to the determination of the action). United States v. Yunis, 867 F.2d 617, 625 n.11

(D.C. Cir. 1989). If the evidence’s probative value PROBATIVE  
VALUE outweighs its PREJUDICIAL

**EFFECT**, the court probably will admit the evidence. See **FRE 403**; Dixon v. Int'l Harvester, 754 F.2d 573, 584 (5th Cir. 1985)” (Kolczynski, Task 88).

Evidence or, more specifically, “ ‘real evidence’ is the physical evidence that actually was involved in the occurrence being litigated,” including, for example, the “knife that killed the decedent, the engine from the aircraft that crashed, the drill that severed a finger, the contract that was breached, the contested will or patent” (Kolczynski, Task 88).



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## *Article IX. Authentication:*

### *Procedure; Witness with personal knowledge* =====

FRE 901

FRE 901 (b) (1)

FRE 902

746 F.2d 155, 166-67 (2<sup>nd</sup> Cir. 1984)  
=====

According to Kolczynski (Task 88), “[t]o use real evidence at trial, you must show that it is authentic. **FRE 901, 902.** Real **Evidence** usually **is authenticated by the testimony of a witness with personal knowledge. FRE 901(b)(1).**”

According to Kolczynski (Task 88), “**Authentication** usually involves the following **procedure**:

A **witness introduces** the real evidence as the item in question.

1. The witness **testifies** that he or she is **familiar** with the item.
2. The witness **explains** the **basis** his or her **familiarity** with the item.

3. The witness **testifies** that in his or her opinion, the **exhibit is** the **item in question**. The witness must state that the exhibit—
- a. [i] is **the same item** that was involved in the occurrence now being litigated, and
- b. [ii] **has not been substantially changed** in any way. When the exhibit has passed through several hands, the proof of authentication is referred to as the **‘Chain of Custody’**. A chain of custody **is established by** the **testimony of successive custodians** of the exhibit, **each** of whom **states** that he or she received the item **from** the previous custodian and passed it on, either unchanged or with designated changes, to the next custodian in the chain. United States v. Mendel, 746 F.2d 155, 166-67 (2nd Cir. 1984).”

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## *Article IX. Authentication: Authentication and Identification*

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FRE 901 (a)

FRE 901 (b)

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### **Rule 901. Requirement of Authentication or Identification**

(a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.—Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting.—Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness.—Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like.—Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification.—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations.—Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or



(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports.—Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation.—Evidence that a document or data compilation, in any form,

(A) is in such condition as to create no suspicion concerning its authenticity,

(B) was in a place where it, if authentic, would likely be, and

(C) has been in existence 20 years or more at the time it is offered.

(9) Process or system.—Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule.—Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.



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=====

## *Article IX. Authentication: Self Authentication*

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### **FRE 902**

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#### **Rule 902. Self-authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.—A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph

(1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.—A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position

(A) of the executing or attesting person, or

(B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or

accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications.—Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.—Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like.—Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents.—Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents.—Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.—Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity.—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000.)



*“I’m at the hearing and what do I tell the judge?” Stop the opposing attorney from testifying—  
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## *Article X. Authentication: Definitions*

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### **FRE 1001**

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#### **Rule 1001. Definitions**

For purposes of this article the following definitions are applicable:

- (1) Writings and recordings.—“Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
- (2) Photographs.—“Photographs” include still photographs, X-ray films, video tapes, and motion pictures.
- (3) Original.—An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.
- (4) Duplicate.—A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.



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## *Article X. Authentication: Originals*

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FRE 1002: Requirement

FRE 1003: Admissibility of Duplicates

FRE 1004: Admissibility ... Contents

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### **Rule 1002. Requirement of Original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

### **Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless

(1) a **genuine question is raised** as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

### **Rule 1004. Admissibility of Other Evidence of Contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed.—All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable.—No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent.—At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the

contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters.—The writing, recording, or photograph is not closely related to a controlling issue.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)



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## *Article X. Authentication: Public record: Certified: Testified*

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### FRE 1005

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#### **Rule 1005. Public Records**

The **contents of an official record**, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a **witness who has compared it** with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.





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## *Article X. Authentication: Summary first; Volume second*

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### FRE 1006

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#### **Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which **cannot conveniently be examined** in court **may be presented** in the form of a chart, summary, or calculation. The

**originals**, or duplicates, **shall** be **made available for examination** or copying, or both, by other parties at reasonable time and place.

The court may order that they **be produced in court**.

Author’s comment: “Think allonge ... securely attached to the promissory note!”



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## *Article X. Authentication:*

### *Testimony if ...without accounting for the nonproduction of the original* =====

## **FRE 1007** =====

### **Rule 1007. Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)



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## *Article X. Authentication: Ever existed; trier of fact*

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### FRE 1008

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#### **Rule 1008. Functions of Court and Jury**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104.

**However**, when an issue is raised

(a) **whether the asserted writing ever existed**,  
or

(b) **whether** another writing, recording, or photograph produced at the trial **is the original**, or (c) **whether other evidence of contents correctly reflects the contents**, the issue is for the trier of fact to determine as in the case of other issues of fact. 1 Pub. L. 102–572, title IX, § 902(b) (1), Oct. 29, 1992, 106 Stat. 4516, provided that reference in any other Federal law or any document to the “United States Claims Court” shall be deemed to refer to the “United States Court of Federal Claims”.

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## *Article XI. Authentication: Rules apply*

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### FRE 1101

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#### **Rule 1101. Applicability of Rules**

(a) Courts and judges.—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, 1 and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.—These rules **apply generally to civil actions and proceedings, including** admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of

warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities.



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## APPENDIX 700.1.1

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Uniform Commercial Code Committee, “Where’s the note, who’s the holder?”

**Treatise**, April 3, 2009

(Judge Bufford) (Judge Ayers) (American Bankruptcy Institute)

dix-700-1-1-ucc-trea.pdf

\*scan4 “m2d”

\*scan4 “vip”

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# APPENDICES HAVE BEEN OMITTED FROM THIS PRINT VERSION

The following pages have been removed:

341 – 882

892 – 913

936 - 1205

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## APPENDIX 800.1.1

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Frederick Graves foreclosure defense

(Attorney)

**Article**

dix-800-1-1-graves-defense.pdf





Foreclosure Defense by Attorney Frederick Graves: In a newsletter Graves wrote (Some text omitted):

### **Foreclosure Defense Toolbox #1**

Here are a few foreclosure defense tools you can use to fight abusive lenders and their attorneys.

These should be filed with memoranda of law citing controlling appellate court opinions that rule the trial judge where your case is pending. Merely stating the rule is no substitute for citing the controlling case law that controls the judge!

To learn more about memoranda and citations, use my affordable step-by-step Jurisdictionary course (if you don't already have it) to learn how to do it correctly!

### **#1 Failure of Condition Precedent**

Mortgages and promissory notes are contracts.

Before a party may obtain judicial enforcement of any contract (including mortgages and notes) there may be certain acts it must perform before filing suit. These are called conditions precedent.

For example, some notes and mortgages contain what is called an "acceleration clause" that provides that the full amount will become due and payable in the event of the borrower's default (failure to pay on time, failure to keep insurance current, etc.). Some of these may require that the borrower be provided written notice of acceleration. Failure to provide that or other notices deprives the plaintiff of the right to proceed in court.

There may be other such provisions requiring the lender to perform other conditions precedent to bringing a lawsuit to enforce the contract (mortgage/note). Carefully read your copy of the mortgage and note. (You did insist on receiving a copy on the day you signed, didn't you?)

If the borrower is entitled to an opportunity to cure the default and was not given that opportunity, this too may be a condition precedent preventing a lender from getting its case before the court.

The court should grant a motion to dismiss, at least until the plaintiff performs all conditions precedent.

## **#2 Failure of Authority to Sue**

Many states require out-of-state companies (including lenders) to register with the Secretary of State (or other state office) as a prerequisite to maintaining lawsuits in the state.

Failure to register is fatal to the plaintiff's cause.

This can be easily checked online in many states.

If a company has not registered, it is not authorized to litigate, and a motion to dismiss is in order.

## **#3 Failure to Attach Necessary Documents**

Many states require plaintiffs to attach to complaints copies of documents (e.g., mortgages, promissory notes, and other contracts or instruments) that form the basis for the plaintiff's claim.

If your state has this requirement, you will find it set out in your state's Rules of Civil Procedure. (You have studied your state's Rules of Civil Procedure and Rules of Evidence, haven't you?)

Failure to attach necessary documents upon which the plaintiff's case is based, creates your opportunity to file a motion to dismiss.

My affordable step-by-step Jurisdictional course will tell you much, much more about how to prosecute and defend lawsuits ... including mortgage foreclosures!

My course is the only course that makes it easy enough for an 8th grader to learn what it takes to win in court!

There's a lot to it, but none of it is rocket science, and you can learn it all in a single weekend.

If you already have my powerful, popular course, urge everyone to get it immediately so they can learn how to win in court and protect their families by using the official rules to control and overcome crooked lawyers and corrupt judges.

I've given you a few ideas in today's Tips & Tactics, but you need my course to learn more. There's much more to winning than I can tell in a single newsletter.



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## BIBLIOGRAPHY

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Barnes, W. Jeffrey, J.D., 2010. Internet address: <http://foreclosuredefensenationwide.com>.

Berger, Arthur L., J.D., and Marc Wites, 2007. “Florida Causes of Action.” James Publishing, Inc.

Bostonherald. Internet address: [http://www.bostonherald.com/business/real\\_estate/view/2009\\_06\\_09\\_Court\\_puts\\_legal\\_cloud\\_over\\_foreclosure\\_sales/srvc=home&position=also](http://www.bostonherald.com/business/real_estate/view/2009_06_09_Court_puts_legal_cloud_over_foreclosure_sales/srvc=home&position=also)

Brown, Ellen, 2009. “Landmark Decision Promises Massive Relief for Homeowners and Trouble for banks.” Internet address: <http://www.webofdebt.com/articles/mers.php>

—. 2009. “A Colossal Failure of Common Sense.” Audio CD.

Doney, G. Malcolm, 2009. “The Bankster Busters’ Bible: How to Fight the Banks and Win.” Twenty-First Century Publishing LLC - Educational Book Publishers.

Doney, G. Malcolm, 2009. Interview.

Doney, G. Malcolm, 2010. Interview.

Friedman, Andrew H., J.D., 2006. “Litigating Employment Discrimination Cases.” James Publishing, Inc.

Foreclosuredefensenationwide. Internet address: <http://foreclosuredefensenationwide.com>

Garfield, Neil, J.D., 2010. Internet address: <http://livinglies.wordpress.com>.

Graves, Frederick D., J.D., 2005. “Evidence Made Easy.” *Jurisdiction*.

- Graves, Frederick D., J.D., 2007. "Objections." *Jurisdictionary*.
- Graves, Frederick D., J.D., 2005. "Causes of Action and Civil Defenses." *Jurisdictionary*.
- Graves, Frederick D., J.D., 2006. "Affirmative Defenses." *Jurisdictionary*.
- Graves, Frederick D., J.D., 2007. "Motions and Hearings." *Jurisdictionary*.
- Graves, Frederick D., J.D., 2005. "Forms for Civil Cases." *Jurisdictionary*.
- Kolczynski, Phillip J., J.D., 1994. "Preparing for Trial in Federal Court," Second Edition. James Publishing, Inc.
- Lincoln, Charles Edward, J.D., 2009. Interview.
- Lipson, Ashley, J.D., 2007. "Guerrilla Discovery." James Publishing, Inc.
- Lavalle, Nye, 2008. "Sue First and Ask Questions Later!: A Pew Mortgage Investigations Report on the Predatory Servicing Practice of False & Forged Signatures Employed by Ocwen and Others." Pew Mortgage Investigations. Brochure.
- Msfraud. Internet address: <http://msfraud.org>
- PBS. Internet address: <http://www.pbs.org/moyers/journal/04032009/watch.html>
- Schleier, Tod F., J.D., 2007. "Deposing & Examining Employment Witnesses." James Publishing, Inc.
- Szymoniak, Lynn, J.D. 2009. "Mortgage Assignments as Evidence of Fraud." Fraud Digest



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## NOTES

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## INDEX TO CHAPTERS

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*NOTE: BECAUSE THIS BOOK CONTINUES TO GROW AND EXPAND AS COURTS ADD NEW CASE LAW, REFERENCES TO PAGE NUMBERS ARE OMITTED. IF YOU HAVE PURCHASED THE ELECTRONIC VERSION OF THIS BOOK, SIMPLY SCAN FOR THE DESIRED ITEMS MARKED AS, E.G., \*scan4 “corporate seal” IN ORDER TO LOCATE THE SOUGHT INFORMATION. TO ACTIVATE THE FIND (SEARCH) FEATURE PRESS AND HOLD THE CTRL KEY AND PRESS THE F KEY.*

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*NO ENTRY AT THIS TIME*

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“ . . . an insight account about the workings of the American legal system . . . ”—Christian Meister

“It’s about what government can do and what it will not do.”—Christian Meister

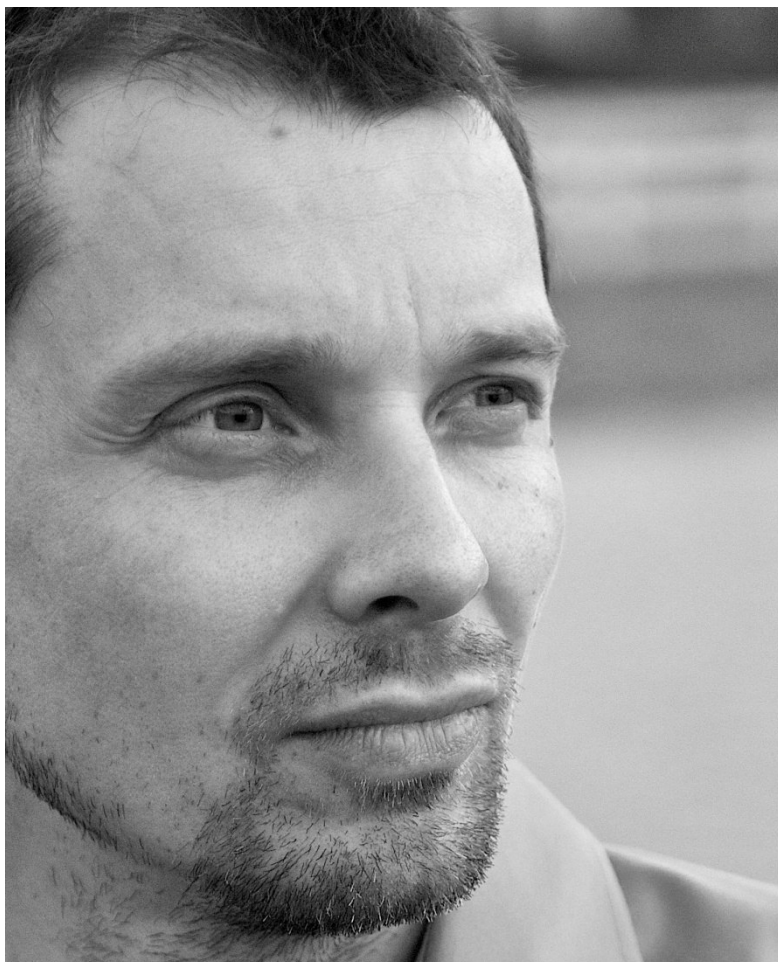
“ . . . people in power can and do retool what they want in order to get what they want . . . others would go to jail for the same conduct.”—Christian Meister

“If the American public knew what this is all about, they would stage protests at court houses and legislative offices in every corner of our nation.”—Christian Meister

“Money buys you the right to maneuver through the legal system in the United States . . . otherwise, you have little, if any, rights.”—Christian Meister

“The rules of our trial and appellate courts are designed so that a person without an attorney has no chance . . . in essence, they toss the Constitution out the window.”—Christian Meister

“There are many good judges . . . there are many good attorneys . . . but many do what they do for money and little else for you.”—Christian Meister



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