Dissecting Affidavits Under Supreme Court Rule 191(a)

BY MATTHEW R. DAVISON

Too often, attorneys confronting a 2-619 Motion to Dismiss or a Motion for Summary Judgment are transfixed with launching a blunderbuss assault on the substantive motion and overlook the opportunity to scrutinize the attached supporting affidavit. Illinois Supreme Court Rule 191(a) governs such affidavits in support of (or in opposition to): motions for summary judgment under Section 2-1005; motions for involuntary dismissal under Section 2-619; and motions to contest jurisdiction over the person under Section 2-301.

Rule 191(a) is only three sentences in length and ostensibly straightforward. But unpacking its language reveals a litany of requirements an affidavit must meet to survive a motion to strike. Attorneys preparing these affidavits, and those attorneys opposing them, both benefit from a careful review of 191(a)'s requirements.

SCOPE & APPLICATION

The Rule's applicability is limited to the aforementioned motions (summary judgment under §2-1005, involuntary dismissal under §2-619, and objections to personal jurisdiction under §2-301). Motions for summary judgment under §2-1005 or for involuntary dismissal under §2-619 must be filed before the last date, if any, set by the trial court for the filing of dispositive motions.[1] Is an affidavit required each time an attorney files such a motion? No. For instance, in situations involving a §2-619 Motion, the grounds for the motion may appear on the face of the pleading and no affidavit may be needed.[2] However, if such motion is supported by affidavit and the facts within the affidavit are not contradicted with a counter-affidavit, they must be taken as true.[3]

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1 Il. Sup. Ct. R. 191(a).

2 See 735 ILCS 5/2-619(a) ("If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit.") (emphasis added).

3 *Ardisana v. Northwest Community Hosp., Inc.*, 342 Ill. App. 3d 741, 748 (1st Dist. 2003).

OBEY THE 'SHALLS'

Strict compliance with Rule 191(a)'s requirements for affidavits is a necessity as, for example, "[a]n affidavit submitted in the summary judgment context serves as a substitute for testimony at trial."[4] Consequently, Rule 191(a) sets forth a variety of "shalls" that the affiant must meet: the affidavits "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."[5]

The first "shall" mandates that the facts contained in the affidavit must be made on the personal knowledge of the affiant. Mere assertions, opinions, and self-serving or conclusory statements are inappropriate and should be stricken.[6] Moreover, statements based on an affiant's information and belief are insufficient.[7] For instance, where an affidavit asserted that a plaintiff was owed "no less than $221,652.91" the appellate court found that such approximation reflected a conclusion and did not evince personal knowledge.[8] Naturally, this rule applies with equal force to counter-affidavits. A counter-affidavit containing an engineer's hypothetical possibilities for why a chemical abruptly entered a harbor was mere speculation, not personal knowledge, and thus insufficient to create an issue of material fact.[9]

The second "shall" requires the affidavit to "set forth with particularity the facts upon which the claim, counterclaim, or defense is based."[10] This is a subtle but strict reminder to the attorney to maintain consistent focus throughout the case—from the outset when drafting a pleading, to later on when preparing the relevant motion—consistency in theme and fact is critical. The affidavit should not be drafted as an unmoored, independent vessel, but instead directly tethered to the claim of the case. For example, where a plaintiff's affidavit in support of summary judgment asserted a set of facts for breach of a guaranty, but the plaintiff's complaint otherwise asserted failure to pay an invoice, the affidavit failed to meet the requirements of 191(a).[11]

Next, the affidavit shall have attached sworn or certified copies of all documents upon which the affiant relies. This requirement serves as a safeguard against the court considering any improper evidence with the relevant motion, such as hearsay.[12] Indeed, on motions for summary judgment, a court should not consider evidence that would otherwise be inadmissible at trial.[13] And, without proper authentication, no document is admissible.[14] Thus, an affidavit should provide the authentication needed to make an attached document compliant with Rule 191 and properly before the court. Usually, the failure to attach the documents is fatal,[15] though some courts indicate that the failure to attach the documents is a technical violation of Supreme Court Rule 191(a) which should be disregarded in limited scenarios when it appears the affiant would be a competent witness at trial.[16]

> "Deference to the Rule's 'shalls' can successfully avoid or defend against any motions to strike."

Similarly, the fourth "shall" requires that the affidavit consist of facts, not conclusions. Where an affidavit of a correctional center supervisor merely recited the results of a recalculation of "good-conduct credit" provided to an inmate, without any supporting facts displaying the method for such recalculation (or any attached documentation), the recitation was deemed a conclusion and improper.[17]

The final "shall" mandates that the affidavit should affirmatively show that the affiant, if sworn as a witness, can testify competently to the facts set forth. There are two key components of this requirement. First, the affidavit must affirmatively show that the affiant could testify to the facts. Although not required,[18] best practice

4 *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (Ill. 2002) *Robidoux* is required reading for any practitioner when it comes to 191 affidavits. For example, this case also outlines how notarization is not required for 191 affidavits.
5 Il. Sup. Ct. R. 191(a).
6 See *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 699 (1st Dist. 2003).
7 See *Jaffe v. Fogelson*, 137 Ill. App. 3d 961, 964 (1st Dist. 1985).
8 *Id.*
9 See *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90 (Ill. 1992).
10 Il. Sup. Ct. R. 191(a).
11 See *Standard Oil Co., Division of American Oil Co. v. Lachenmyer*, 6 Ill. App. 3d 356, 360 (1st Dist. 1972).
12 See *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 973 (1st Dist. 1990).
13 See *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 484 (1st Dist. 2006).
14 *Id.*
15 See *Preze v. Borden Chemical, Inc.*, 336 Ill. App. 3d 52, 57 (1st Dist. 2002) citing *Robidoux*, 201 Ill. 2d at 339–40.
16 See *Andrews v. Northwestern Memorial Hosp.*, 184 Ill. App. 3d 486, 492 (1st Dist. 1989).
17 See *Simpson v. Irving*, 99 Ill. App. 3d 176, 179 (3rd Dist. 1981).
18 See *Streams Club, Ltd. v. Thompson*, 180 Ill. App. 3d 830, 836 (2nd Dist. 1989)(If it appears from the document as a whole that the affiant would be a competent witness if called, such a detailed recitation is not required by Rule 191).

suggests that the affidavit specifically recite language at the outset of the affidavit, such as: "My name is John Doe. I am the Plaintiff in the above-captioned matter. I am over the age of 18 and of sound mind. I have personal knowledge of the facts set forth in this affidavit. I could competently testify to the facts set forth herein if called to do so in court." The second component of this "shall" requires that the affiant could testify to the facts set forth, not that the affiant will testify.[19]

CHALLENGING THE AFFIDAVIT

It is incumbent on any attorney giving serious consideration to attacking an affidavit to first assess the affidavit alongside Rule 191(a) and review it for compliance. After all, it is the responsibility of the party objecting to the sufficiency of a Rule 191(a) affidavit to challenge it in the circuit court and secure a ruling.[20] A failure to do so results in waiver.[21] Common practice is to attack the defective affidavit (or portions of it) via motion to strike.

19 See *Brooks v. Illinois Masonic Hosp. and Medical Center*, 240 Ill. App. 3d 521, 524-25 (1st Dist. 1992) ("[A] literal reading of Rule 191 requires that the affiant could testify competently, not that affiant will testify. If the Supreme Court had intended that Rule 191 affiants be disclosed as expert trial witnesses, it could have specifically provided for such.")

20 See *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (1st Dist. 2008).

21 *Id.* at 393.

Indeed, Illinois courts reason it "is poor practice for a circuit court to simply strike affidavits, *sua sponte*, without some sort of motion pending, be it oral or written."[22] Rather than striking an affidavit in its entirety, a circuit court should only strike those sections that it deems improper.[23]

APPELLATE REVIEW

Appellate review of a motion to strike an affidavit isn't as clear-cut as the rule itself. The standard of review for such motions is an ongoing debate. As the Second District recently outlined, "there is no unanimity among appellate courts as to the proper standard for reviewing a motion to strike an affidavit for lack of compliance with Rule 191(a)."[24] While the Illinois Supreme Court once indicated that motions to strike affidavits are evidentiary in nature and subject to an abuse of discretion standard,[25] some appellate courts have since applied a *de novo* standard when reviewing a ruling on a motion to strike an affidavit in conjunction with a motion for summary judgment.[26]

CONCLUSION

The foregoing comments detail how attorneys on both sides of a case may benefit from a careful review of Rule 191(a). For attorneys drafting an affidavit in support of a motion, the affiant's statements (as well as any attached documents) are subject to strict requirements. Deference to the Rule's "shalls" can successfully avoid or defend against any motions to strike. Likewise, attorneys confronting a motion for summary for judgment or 2-619 motion should methodically review the motion's attached affidavit for any deviations from 191(a)'s "shalls." This surgical approach may yield results that an otherwise wide-ranging attack on the motion could not. If no motion to strike the affidavit is made, the deficiency is waived and an opportunity is lost. Such missed opportunities make for disappointed clients and inflexible appeals.

22 *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387, 398 (1st Dist. 2005).

23 See *Cincinnati Companies v. West American Ins. Co.*, 287 Ill. App. 3d 505, 514 (2nd Dist. 1997).

24 *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482 (2nd Dist. 2014) comparing *American Service Insurance Co. v. China Ocean Shipping Co., Inc.*, 402 Ill. App. 3d 513, 524 (1st Dist. 2010) (abuse of discretion standard), with *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (4th Dist. 2001) (*de novo* standard).

25 In *re Estate of Hoover*, 155 Ill. 2d 402, 420 (Ill. 1993).

26 *Jackson v. Graham*, 323 Ill. App. 3d 766, 774 (4th Dist. 2001) (explaining that, while the Illinois Supreme Court case of In *re Estate of Hoover* detailed an abuse of discretion standard, the Court did not directly address the proper standard of review for when the circuit court rules on a motion to strike an affidavit in conjunction with a motion for summary judgment.)