

ACLU – Public Records Request

Senior Judges:

Honorable John E. Fennelly

Honorable James W. Midelis

Honorable George A. Shahood

Case Managers:

Tasha Scott

Karen Wood

Senior Secretary:

Fran Massey

MORTGAGE FORECLOSURE SUMMARY JUDGMENT CHECKLIST

Date Complaint Filed: _____ AO: 09-01 _____ 09-15 _____ 10-03 _____ None _____

Case No. _____ IRC/MC/SLC

Plaintiff: _____ Date of Hearing: _____

First Defendant: _____ Time of Hearing: _____

1. Is there a Notice of Hearing? Yes No
 Were Motion for SJ and Affidavits filed at least 20 days before hearing?
 Yes No (If NO go no further, if YES to #2)

2. Is there a FORM A? Yes No NA Homestead Yes No
 (If NO proceed no further. If yes go to #3) Owner Occupied Yes No

3. Were all D's served? Yes No
 If YES go to #4. If NO which D not served: _____
 (If D not served proceed no further)

4. Did any D file an Answer? Yes No
 If YES do any Answers include an Affirmative Defense? Yes No
 (If there is an affirmative defense please attach)

5. Is there a Notice of Borrower Nonparticipation with RMFM Program?
 Yes No NA (If YES go to #7. If NO go to #6)

6. Is there a Mediation Report from the Collins Center? Yes No NA
 (If NO go no further, if YES please attach. If the Mediation report indicates an IMPASSE and shows that the Plaintiff or their representative with full settlement authority did not appear the court may dismiss the action, order the plaintiff to appear at mediation, or impose appropriate sanctions.)

7. Original Promissory Note in file? Yes No
 If YES go to #8. If NO is there a count to Re-Establish Promissory Note AND a Affidavit of Lost Note? Yes No If No explain _____
 (If NO proceed no further, if YES go to #8)

8. Is the P the original lender? Yes No
 If NO is there an Allonge, Recorded Assignment, or does Note have Endorsement either in blank or with P's name? Yes No

9. Is there an affidavit filed stating P is the owner & holder of note or the servicer with full authority to foreclose? ___ Yes ___ No
10. Does file show that there has been a Bankruptcy filed by D? ___ Yes ___ No If YES, is there an Order from the Bankruptcy Court lifting the stay or dismissing Bankruptcy? ___ Yes ___ No
11. Counsel for P has filed a Certificate of Compliance with a copy of the most recently filed Form A and the mediators report or notice of borrower's nonparticipation? ___ Yes ___ No ___ NA
12. Are the following documents provided and consistent with amount in SFJ? (*circle*)
- | <u>Provided</u> | | | <u>Consistent</u> | |
|-----------------|----|---|-------------------|----|
| Yes | No | Affidavit of Indebtedness | Yes | No |
| Yes | No | Affidavit of Costs | Yes | No |
| Yes | No | Affidavit of Attorney Fees | Yes | No |
| Yes | No | Affidavit of Reasonableness of Attorney Fees | | |
| Yes | No | Notice of Sale | | |
| Yes | No | Certificate of Title | | |
| Yes | No | Certificate of Disbursements | | |
| Yes | No | SFJ and sufficient copies and self addressed stamped envelopes for Clerk to mail out copies to all parties. | | |
13. Are there affidavits in opposition to SJ? ___ Yes ___ No. (*If YES please attach*)

NOTES TO JUDGE:

CM Name: _____

Date: _____

Michelle Spector

Subject: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

From: Thomas Genung

Sent: Thursday, October 14, 2010 3:25 PM

To: Burton Conner; Paul Kanarek; Elizabeth Metzger; Larry Schack; William Roby; Steve Levin

Cc: Marc Traum; Corrie Johnson; Karen Wood; Tasha Scott; Fran Massey

Subject: FW: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

FYI

From: Melissa Henderson [HendersM@flcourts.org]

Sent: Thursday, October 14, 2010 12:10 PM

To: Trial Court Chief Judges; Trial Court Administrators

Cc: Susan Leseman; OSCA-JUDED; Blan Teagle

Subject: New Publication Announcement from Judge Mark King Leban, Chair, FCEC Publication Committee

To: Chief Judges and Trial Court Administrators

From: Judge Mark King Leban, Chair, Florida Court Education Council's Publications Committee

Re: New Publication: *Residential Foreclosure Bench Book*

The Publications Committee of the Florida Court Education Council is pleased to announce the posting of the *Residential Foreclosure Bench Book* in the Court Education Resource Library on the Florida State Courts intranet. The *Residential Foreclosure Bench Book* was written by the Eleventh Circuit's Judge Jennifer Bailey and Assistant General Counsel Doris Bermudez-Goodrich. Used for a recent judicial education course for judges assigned to hear foreclosure cases, this bench book presents readers with the nuts and bolts of current foreclosure law and procedures.

In addition to this bench book, the Court Education Resource Library, developed by OSCA's Court Education Section and Publications Unit, contains a plethora of judicial education materials, among them, court publications (benchguides, bench books, toolkits, and case summaries); court education program materials; and other useful resources (a catalog of books, manuals, and other publications, including materials by state and national organizations).

A PDF of the bench book is attached, but you can also access it from the Court Education Resource Library, at [https://intranet.flcourts.org/osca/Judicial Education/Library/librarymain.shtml](https://intranet.flcourts.org/osca/Judicial%20Education/Library/librarymain.shtml) (As the bench book will be periodically updated to reflect changes in foreclosure law and procedure, please visit the site for update notifications.)

Please share this information with judges and court staff who are handling residential mortgage foreclosure cases.

If you have any questions, contact Susan Leseman, OSCA Publications Attorney, at (850) 922-5085 or lesemans@flcourts.org

RESIDENTIAL FORECLOSURE BENCH BOOK

Prepared by

Honorable Jennifer D. Bailey
Administrative Judge
Circuit Civil Jurisdiction Division
Eleventh Judicial Circuit of Florida

and

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Assistant General Counsel
Eleventh Judicial Circuit of Florida

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Introduction

1. Foreclosure is the enforcement of a security interest by judicial sale of collateral. All mortgages shall be foreclosed of equity. § 702.01, Fla. Stat. (2010).

2. **Definitions:**

(a) **Mortgage:** any written instrument securing the payment of money or advances including liens to secure payment of assessments for condominiums, cooperatives and homeowners' associations. § 702.09, Fla. Stat. (2010).

A mortgage creates only a specific lien against the property; it is not a conveyance of legal title or of the right of possession. § 697.02, Fla. Stat. (2010); *Fla. Nat'l. Bank & Trust Co. of Miami v. Brown*, 47 So. 2d 748 (1949).

(b) **Mortgagee:** refers to the lender; the secured party or holder of the mortgage lien. § 721.82(6), Fla. Stat. (2010).

(c) **Mortgagor:** refers to the obligor or borrower; the individual or entity who has assumed the obligation secured by the mortgage lien. § 721.82(7), Fla. Stat. (2010). The mortgagor holds legal title to the mortgaged property. *Hoffman v. Semet*, 316 So. 2d 649, 652 (Fla. 4th DCA 1975).

3. To foreclosure the mortgage lien and extinguish equities of redemption, secured parties must file a civil action. § 45.0315, Fla. Stat. (2010).

Lender's Right to Foreclose

1. Constitutional obligation to uphold mortgage contract and right to foreclose. F. S. A. Const. Art 1 § 10.

(a) Right unaffected by defendant's misfortune. *Lee County Bank v. Christian Mut. Found., Inc.*, 403 So. 2d 446, 449 (Fla. 2d DCA 1981); *Morris v. Waite*, 160 So. 516, 518 (Fla. 1935).

(b) Right not contingent on mortgagor's health, good fortune, ill fortune, or the regularity of his employment. *Home Owners' Loan Corp. v. Wilkes*, 178 So. 161, 164 (Fla. 1938).

(c) Contract impairment or imposition of moratorium is prohibited by court. *Lee County Bank v. Christian Mut. Foundation, Inc.*, 403 So. 2d 446, 448 (Fla. 1981).

Default

1. Right to foreclosure accrues upon the mortgagor's default.
2. Basis for default:
 - (a) mortgagor's failure to tender mortgage payments; or
 - (b) impairment of security, including failure to pay taxes or maintain casualty insurance.

Acceleration

1. Acceleration - gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default.
2. Mortgage Acceleration Clause - confers a contract right upon the note or mortgage holder which he may elect to enforce upon default. *David v. Sun Fed. Sav. & Loan Ass'n.*, 461 So. 2d 93, 94 (Fla. 1984).
 - (a) Absent acceleration clause, lender can only sue for amount in default. *Kirk v. Van Petten*, 21 So. 286 (Fla. 1896).
3. Commencement - upon delivery of written notice of default to the mortgagor; prior notice is not required unless it is a contractual term. *Millett v. Perez*, 418 So. 2d 1067 (Fla. 3d DCA 1982); *Fowler v. First Sav. & Loan Ass'n. of Defuniak Springs*, 643 So. 2d 30, 34 (Fla. 1st DCA 1994), (filing of complaint is notice of acceleration).
4. Pre-acceleration - mortgagor may defeat foreclosure by the payment of arrearages, thereby reinstating the mortgage. *Pici v. First Union Nat'l. Bank of Florida*, 621 So. 2d 732, 733 (Fla. 2d DCA 1993).

Statute of Limitations

1. Five year statute of limitations period - applies specifically to mortgage foreclosure actions. § 95.11(2)(c), Fla. Stat. (2010); *Farmers & Merch. Bank v. Riede*, 565 So. 2d 883, 885 (Fla. 1st DCA 1990).
2. Commencement of limitations period:
 - (a) General rule – commencement upon accrual of the cause of action; this occurs when the last element of the cause of action is satisfied (for example, default).

§ 95.031(1), Fla. Stat. (2010); *Maggio v. Dept. of Labor & Employment Sec.*, 910 So. 2d 876, 878 (Fla. 2d DCA 2005).

(b) A note or other written instrument - when the first written demand for payment occurs. *Ruhl v. Perry*, 390 So. 2d 353, 357 (Fla. 1980).

(c) Oral loan payable on demand - commencement upon demand for payment. *Mosher v. Anderson*, 817 So. 2d 812, 813 (Fla. 2002).

3. Tolling of the limitations period - acknowledgment of the debt or partial loan payments subsequent to the acceleration notice toll the statute of limitations. § 95.051(1)(f), Fla. Stat. (2010); *Cadle Company v. McCartha*, 920 So. 2d 144, 145 (Fla.5th DCA 2006).

(a) Tolling effect - starts the running anew of the limitations period on the debt. *Wester v. Rigdon*, 110 So. 2d 470, 474 (Fla. 1st DCA 1959).

Jurisdiction

1. Court's judicial authority over real property based on *in rem* jurisdiction.

2. Two part test to establish *in rem* jurisdiction: (1) jurisdiction over the class of cases to which the case belongs, and (2) jurisdictional authority over the property or *res* that is the subject of the controversy. *Ruth v. Dept. of Legal Affairs*, 684 So. 2d 181, 185 (Fla. 1996).

(a) Class of case - jurisdictional parameters defined by Article V Section 5(b), Florida Constitution, implemented by Section 26.012(2)(g), Fla. Stat. (2010). *Alexdex Corp. v. Nachon Enter., Inc.*, 641 So. 2d 858 (Fla. 1994), (concurrent equity jurisdiction over lien foreclosures of real property that fall within statutory monetary limits). *Id.*, at 863.

(b) Jurisdictional authority over real property only in the circuit where the land is situated. *Hammond v. DSY Developers, LLC.*, 951 So. 2d 985, 988 (Fla. 2d DCA 2007). *Goedmakers v. Goedmakers*, 520 So. 2d 575, 578 (Fla. 1988); (court lacks *in rem* jurisdiction over real property located outside the court's circuit). If real property lies in two counties, the foreclosure suit may be maintained in either county, however, the notice of sale must be published in both. § 702.04, Fla. Stat. (2010).

Parties to the Foreclosure Action

Plaintiff

1. Must be the owner/holder of the note as of the date of filing suit. *Jeff-Ray Corp. v. Jacobsen*, 566 So. 2d 885 (Fla. 4th DCA 1990); see also, *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th DCA 2004).

(a) The holder of a negotiable instrument means the person in possession of the instrument payable to bearer or to the identified person in possession. § 671.201(21), Fla. Stat. (2010).

(1) Endorsement in blank – where unsigned and unauthenticated, an original note is insufficient to establish that the plaintiff is the owner and holder of the note. Must have affidavits or deposition testimony establishing plaintiff as owner and holder. *Riggs v. Aurora Loan Services, LLC*, 2010 WL 1561873 (Fla. 4th DCA 4/21/10).

(b) The holder may be the owner or a nominee, such as a servicer, assignee or a collection and litigation agent. Rule 1.210(a), Fla. R. Civ. P. (2010) provides that an action may be prosecuted in the name of an authorized person without joinder of the party for whose benefit the action is brought. See also, *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1184 (Fla. 3d DCA 1985).

(c) Plaintiff's nominee has standing to maintain foreclosure based on real party in interest rule. *Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So. 2d 33 (Fla. 3d DCA 2007), (*MERS* was the holder by delivery of the note); *Mortgage Elec. Registration Systems, Inc. v. Azize*, 965 So. 2d 151 (Fla. 2d DCA 2007); *Philogene v. ABN AMRO Mortgage Group, Inc.*, 948 So. 2d 45 (Fla. 4th DCA 2006).

2. Assignment of note and mortgage - Plaintiff should assert assignee status in complaint. Absent formal assignment of mortgage or delivery, the mortgage in equity passes as an incident of the debt. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 2004); *Johns v. Gillian*, 134 Fla. 575, 579 (Fla. 1938); *Warren v. Seminole Bond & Mortg. Co.*, 127 Fla. 107 (Fla. 1937), (security follows the note, the assignee of the note secured by a mortgage is entitled to the benefits of the security). Assignments must be recorded to be valid against creditors and subsequent

purchasers. § 701.02, Fla. Stat. (2010). See also, *Glynn v. First Union Nat'l. Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 2005).

(a) No requirement of a written and recorded assignment of the mortgage to maintain foreclosure action where evidence establishes plaintiff as owner and holder of the note on date of filing suit. *Perry*, 888 So. 2d at 726; *WM Specialty Mortgage, LLC*, 874 So. 2d at 682; *Chem. Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998); *Clifford v. Eastern Mortg. & Sec. Co.*, 166 So. 562 (Fla. 1936). However, the incomplete, unsigned and unauthenticated assignment of mortgage attached as an exhibit to purported mortgage holder and note holder's response to motion to dismiss did not constitute admissible summary judgment evidence sufficient to establish standing. *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean Jacques*, 2010 WL 476641 (Fla. App. 2 DCA Feb. 12, 2010). If plaintiff has an assignment of mortgage recorded prior to the date of filing suit, then he can enforce even if possession of note never physically delivered. Florida courts recognize constructive delivery. "The absence of the note does not make a mortgage unenforceable." *Lawyers Title Ins. Co. Inc v. Novastar Mortgage, Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2004). Assignment may be by physical delivery (provide evidence) or by written assignment.

3. MERS – What is it? Mortgage Electronic Registration Systems is a corporation which maintains an electronic registry tracking system of servicing and ownership rights to mortgages throughout the United States. In many cases MERS is the mortgagee of record and is identified in the mortgage. On each MERS loan there is an 18 digit number used for tracking. Through the MERS servicer ID number, homeowners can identify their lender with borrower name and property address.

4. Since the promissory note is a negotiable instrument, plaintiff must present the original note or give a satisfactory explanation for its absence. § 90.953(1), Fla. Stat. (2010); *State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790, 791 (Fla. 4th DCA 2003). A satisfactory explanation includes loss, theft, destruction and wrongful possession of the note. § 673.3091(1), Fla. Stat. (2010). Reestablishment of the note is governed by § 673.3091(2), Fla. Stat. (2010).

Necessary and Proper Defendants

1. The owner of the fee simple title - only indispensable party defendant to a foreclosure action. *English v. Bankers Trust Co. of Calif., N. A.*, 895 So 2d 1120, 1121 (Fla. 4th DCA 2005). Foreclosure is void if titleholder omitted. *Id.* If a spouse fails to sign the mortgage, lender may still foreclose on property owned by husband and wife when both spouses knew of loan and purchased in joint names. *Countrywide Home Loans v. Kim*, 898 So. 2d 250 (Fla. 2005).

(a) Indispensable parties defined - necessary parties so essential to a suit that no final decision can be rendered without their joinder. *Sudhoff v. Federal Nat'l. Mortgage Ass'n.*, 942 So. 2d 425, 427 (Fla. 5th DCA 2006).

2. Failure to join other necessary parties - they remain in the same position as they were in prior to foreclosure. *Abdoney v. York*, 903 So. 2d 981, 983 (Fla. 2d DCA 2005).

3. Omitted party - only remedies are to compel redemption or the re-foreclosure in a suit de novo. *Id.*; *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 2d 690, 693 (Fla. 1930).

4. Death of titleholder prior to entry of final judgment - beneficiaries of the titleholder and the personal representative are indispensable parties. *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001).

(a) If indispensable parties not joined, action abated pending proper joinder. *Id.* As such, suit against a decedent alone will result in abatement.

(b) Post-judgment death of titleholder, these parties are not deemed indispensable parties. *Davis v. Scott*, 120 So. 1 (Fla. 1929).

5. Necessary parties to the foreclosure action - all subordinate interests recorded or acquired subsequent to the mortgage.

(a) Includes: junior mortgagees, holders of judgments and liens acquired after the superior mortgage, lessees and tenants/parties in possession of the real property. *Posnansky v. Breckenridge Estates Corp.*, 621 So. 2d 736, 737 (Fla. 4th DCA 1993); *Commercial Laundries, Inc., v. Golf Course Towers Associates*, 568 So. 2d 501, 502

(Fla. 3d DCA 1990); *Crystal River Lumber Co. v. Knight Turpentine Co.*, 67 So. 974, 975 (Fla. 1915).

(b) If junior lien holders are not joined, their rights in the real property survive the foreclosure action.

(c) Joinder of original parties to the deed or mortgage are essential when a reformation count is needed to remedy an incorrect legal description contained in the deed and/or mortgage. *Chanrai Inv., Inc. v. Clement*, 566 So. 2d 838, 840 (Fla. 5th DCA 1990). As such, the original grantor and grantee are necessary parties in an action to reform a deed. *Id.*

6. Prior titleholders that signed the note and mortgage do not have to be named in the foreclosure action unless:

(a) Mortgagee seeks entry of a deficiency judgment against the prior unreleased mortgagors in the foreclosure action. *PMI Ins. Co. v. Cavendar*, 615 So. 2d 710, 711 (Fla. 3d DCA 1993).

Superior Interests

1. First or senior mortgagees are never necessary or proper parties to the foreclosure action by the junior mortgagee. *Garcia v. Stewart*, 906 So. 2d 1117, 1119 (Fla. 4th DCA 2005); *Poinciana Hotel of Miami Beach, Inc. v. Kasden*, 370 So. 2d 399, 401 (Fla. 3d DCA 1979).

(a) Senior liens are unaffected by the foreclosure of a junior mortgage.

2. **Purchase money mortgage defined** - proceeds of the loan are used to acquire the real estate or to construct improvements on the real estate. § 7.2(a), Restatement (Third) of Property; Mortgages (2008). The purchase and conveyance of real property occur simultaneously and are given as security for a purchase money mortgage.

(a) Purchase money mortgages - priority over all prior claims or liens that attach to the property through the mortgagor, even if latter be prior in time. *BancFlorida v. Hayward*, 689 So. 2d 1052, 1054 (Fla. 1997); *Sarmiento v. Stockton, Whatley, Davin & Co.*, 399 So. 2d 1057, 1058 (Fla. 3d DCA 1981).

(1) Priority does not extend beyond the amount of the purchase money advanced. *Citibank v. Carteret Sav. Bank, F.A.*, 612 So. 2d 599, 601 (Fla. 4th DCA 1992).

Association Liens and Assessments

1. Condominium Associations - Section 718.116(1)(b), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for condominium assessments and maintenance as the lesser of:

(a) unit's unpaid common expenses and regular periodic assessments which came due 6 months prior to title acquisition; or

(b) one per cent of the original mortgage debt (provided condominium association is joined as a defendant).

(1) The law is clear that the purchaser of a condominium unit has liability for unpaid condominium assessments. § 718.1176, Fla. Stat (2010). This statutory cap, limits the liability of foreclosing mortgagees for unpaid condominium assessments that become due prior to acquisition of title. This safe harbor applies only to the first mortgagee or a subsequent holder of the first mortgage. *Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Ass'n.*, 895 So. 2d 1197 (Fla. 3d DCA 2005). The term "successor or assignee" as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage. § 718.116(1)(g), Fla. Stat. (2010). Other entities that acquire title are not entitled to this limitation of liability and are "jointly and severally liable for all unpaid assessments that come due up to the time of transfer of title." § 718.116(1)(a), Fla. Stat. (2010).

2. Homeowners' Association's - Section 720.3085(2)(c)(1), Fla. Stat. (2010) establishes the liability of the first mortgagee, its successor or purchaser for homeowner's assessments and maintenance as the lesser of:

(a) parcel's unpaid common expenses and regular periodic or special assessments which accrued 12 months prior to acquisition of title; or

(b) one per cent of the original mortgage debt.

(c) Homeowners' Association's lien for assessments had priority over purchase money mortgage where Association's declaration of covenants contained express

provision establishing priority. *Ass'n. of Poinciana Vill. v. Avatar Props.*, 724 So. 2d 585, 587 (Fla. 5th DCA 1999).

(d) The limitations on the first mortgagee's liability only apply if the lender filed suit and initially joined the homeowner's association as a defendant. § 720.3085(2)(c), Fla. Stat. (2010).

(e) Statutory revisions of the 2008 Legislature failed to remedy the potential super-priority of liens recorded prior to July 1, 2008. (Prior statutory version amended by the 2007 Legislature gave homeowner's association liens a priority, even if the mortgage was filed first in time.) Arguably, many homeowners' associations have subordination language in their declaration of covenants providing that their lien is subordinate to the mortgage. However, the subordination language is not standard in all declarations. Any challenge to the priority if the mortgage will likely be resolved on the basis of impairment of contract.

3. "Reverse foreclosures" defined – where association takes title and pursues lender or where association sets done the motion for summary judgment due to delays by lenders.

4. Cannot force lenders to pay association fees during pendency of foreclosure. *U. S. Bank Nat'l. Ass'n. as Trustee v. Tadmire*, 2009 WL 4281301 (Fla. 3d DCA 12/2/09).

Judgment Liens

1. Section 55.10(1), Fla. Stat. (2010) applies to judgment liens.

(a) Requirements: (1) must contain address of the party in the judgment or in an accompanying affidavit; and (2) a certified copy of judgment lien must be recorded in the official records of the county.

(b) Judgment liens recorded after July 1, 1994 retain their judgment lien status for a period of 10 years from recording. A judgment lien is renewable by recording a certified copy of the judgment containing a current address prior to the expiration of the judgment lien. § 55.10(2), Fla. Stat. (2010).

Filing of the Lis Pendens

1. Filing of lis pendens - cuts off the rights of any person whose interest arises after filing. *Bowers v. Pearson*, 135 So. 562 (Fla. 1931).

(a) Constitutes bar to the enforcement against the subject real property of any other unrecorded interests and liens unless the holder of the unrecorded interest intervenes within twenty days of the notice of the lis pendens. § 48.23(1)(b), Fla. Stat. (2010).

2. Validity of a notice of lis pendens is one year from filing. § 48.23(2), Fla. Stat. (2010).

(a) Exception: One year period may be tolled by the trial court's exercise of discretion or appellate review. *Olesh v. Greenberg*, 978 So. 2d 238, 242 (Fla. 5th DCA 2008); *Vonmitschke-Collande v. Kramer*, 841 So. 2d 481, 482 (Fla. 3d DCA 2002).

3. Lis pendens automatically dissolved upon dismissal of foreclosure. Rule 1.420(f), Fla. R. Civ. P. (2010).

(a) Lis pendens revived or reinstated upon the reversal of dismissal. *Vonmitschke-Collande*, 841 So. 2d at 482.

The Foreclosure Complaint

1. Florida Supreme Court Form for foreclosure - Form 1.944, Fla. R. Civ. P. (2010). Requisite allegations assert: jurisdiction, default, acceleration and the legal description of the real property. As of 2/11/10, complaint must be verified. Rule 1.110(b), Fla. R. Civ. P. (2010).

(a) Plaintiff must allege that he is the present owner and holder of the note and mortgage. *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).

(b) If plaintiff is a nonresident corporation, it must comply with the condition precedent of filing a nonresident bond, upon commencement of the action. § 57.011, Fla. Stat. (2010). If plaintiff has failed to file the requisite bond within 30 days after commencement, the defendant may move for dismissal (after 20 days notice to plaintiff).

(c) Rule 1.130(a), Fla. R. Civ. P. (2010) mandates that a copy of the note and mortgage be attached to the complaint. *Eigen v. FDIC*, 492 So. 2d 826 (Fla. 2d DCA 1986).

(d) If note and mortgage assigned, complaint should allege assignment. Attachment of the assignment is preferred but may not be required since the cause of action is based on the mortgage; not the assignment. Rule 1.130(a), Fla. R. Civ. P. (2010), *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th DCA 2004); *Chemical Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998); *Johns v. Gillian*, 184 So. 140, 144 (Fla. 1938).

(e) Junior lien holders - allegation is sufficient if it states that the interest of a defendant accrued subsequent to the mortgage and he is a proper party. *InterNat'l. Kaolin Co. v. Vause*, 46 So. 3, 7 (Fla. 1908).

(f) Federal tax lien allegation must state interest of the United States of America, including: the name and address of the taxpayer, the date and place the tax lien was filed, the identity of the Internal Revenue office which filed the tax lien and if a notice of tax lien was filed. Title 28 U. S. C. § 2410(b). A copy of the tax lien must be attached as an exhibit.

(g) Local taxing authority or State of Florida party defendant - allegation should state with particularity the nature of the interest in the real property. § 69.041(2), Fla. Stat. (2010).

(h) Complaint must include statement of default. Default based on unpaid taxes or insurance must be allege default with particularity. *Siahpoosh v. Nor Props.*, 666 So. 2d 988, 989 (Fla. 4th DCA 1996).

(i) Complaint should allege compliance with condition precedent, particularly notices.

(j) Legal description of the subject real property.

(k) Attorney fees - must be pled or it is waived. *Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991). Allegation as to obligation to pay a reasonable attorney fee is sufficient to claim entitlement. *Wallace v. Gage*, 150 So. 799, 800 (Fla. 1933). The claim of attorney fees is based on contractual language in the note and mortgage.

(l) Additional counts include: reestablishment of the note and reformation. Reestablishment of the note is necessary if the note is lost; reformation of the note is needed if material terms are missing. Reformation of the mortgage applies if there is a legal description discrepancy; reformation of deed is there is a deed problem.

(m) Deficiency judgment – if plaintiff seeks a deficiency, the guarantors must be sued.

Original Document Filing and Reestablishment of the Note

1. Note - Lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced. *Nat'l. Loan Investors, L.P. v. Joymar Associates*, 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

(a) A limited exception applies to lost, destroyed or stolen instruments. *Id.*

2. A lost promissory note is a negotiable instrument. § 673.1041(1), Fla. Stat. (2008); *Thompson v. First Union Bank*, 643 So. 2d 1179 (Fla. 5th DCA 1994).

(a) Loss or unintentional destruction of a note does not affect its validity or enforcement.

3. Reestablishment of the lost note - An owner of a lost, stolen or destroyed instrument may maintain an action by showing proof of his ownership, facts that prevent the owner from producing the instrument and proof of the terms of the lost instrument. § 673.3091(2), Fla. Stat. (2004); *Lawyer's Title Ins. Co., Inc. v. Novastar Mortgage, Inc.*, 862 So. 2d 793, 798 (Fla. 4th DCA 2004); *Gutierrez v. Bermudez*, 540 So. 2d 888, 890 (Fla. 5th DCA 1989).

(a) Owner of note is not required to have held possession of the note when the loss occurred to maintain an action against the mortgagor. *Deaktor v. Menendez*, 830 So. 2d 124, 126 (Fla. 3d DCA 2002). Further, plaintiff is not required to prove the circumstances of the loss or destruction of the note to seek enforcement. *Id.*, at 127. Plaintiff must show only that it was entitled to enforce the note at the time of loss or that it has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

§ 673.3091(1)(a), Fla. Stat. (2010); *MERS v. Badra*, 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008).

(b) If plaintiff is not in possession of the original note and did not reestablish it, plaintiff cannot foreclose on the note and mortgage. § 673.3091(1), Fla. Stat. (2004); *Dasma Invest., LLC v. Realty Associates Fund III, L.P.* 459 F. Supp. 2d 1294, 1302 (S.D. Fla. 2006).

(c) The filing of a duplicate copy of the note is sufficient to satisfy statutory requirements in a foreclosure action. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725 (Fla. 5th DCA 2004). If there is no copy, Plaintiff should file a lost note affidavit, ledger or a summary of loan terms.

(1) **Checklist for lost note affidavit:**

- (a) original principal balance;
- (b) signators and date note executed;
- (c) rate of interest;
- (d) unpaid balance and default date;
- (e) affiant status must be banking representative with knowledge of the particular loan;
- (f) indemnity language, precluding subsequent foreclosure judgment on the same note.

(d) Where the original note is lost, the court may require indemnification of the borrower for subsequent prosecution on the note and may require a bond to secure same. *Lovingood v. Butler Construction Co.*, 131 So. 126, 135 (Fla. 1930). Consider bonds particularly where there is a securitized trust.

1. Mortgage – Copy of mortgage is sufficient. *Perry*, 888 So. 2d at 726.

(a) Mortgage must contain correct legal description. *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115, 116 (Fla. 2d DCA 1998). If not, final judgment must be set aside. However, this can be corrected prior to final judgment.

Fair Debt Collection Practices Act (FDCPA)

1. Purpose - eliminate abusive debt collection practices by debt collectors and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

2. Some Florida courts held - attorneys engaged in regular foreclosure work met the general definition of debt collector and are subject to the FDCPA. *Sandlin v. Shapiro*, 919 F. Supp. 1564, 1567 (M.D. Fla. 1996), (law firm engaged in collection foreclosure work was considered a debt collector where the firm sent correspondence advising of payoff and reinstatement figures and directed mortgagors to pay the law firm).

3. Under FDCPA, a debt collector's obligation to send a Notice of Debt is triggered by an initial communication with the consumer. *McKnight v. Benitez*, 176 F. Supp. 1301, 1304 (M.D. Fla. 2001).

(a) Filing of suit is not "an initial communication which otherwise would have given rise to notice and verification rights." *Acosta v. Campbell*, 2006 WL 3804729 (M.D. Fla. 2006).

(b) Foreclosure law firms have adopted the practice of attaching to their complaint: "Notice Required under the Fair Debt Collection Practice Act." This notice held ineffective in *Martinez v. Law Offices of David J. Stern*, 266 B.R. 523 (Bank. S.D. Fla. 2001).

Mandatory Mediation of Homestead Foreclosures

1. Based on the exponential increase in filings of mortgage foreclosure cases in the Eleventh Judicial Circuit Court, the Chief Judge implemented four Administrative Orders in the following sequence:

(a) Administrative Order 09-08 applies to all residential foreclosure actions involving homestead properties filed on or after May 1, 2009. AO 09-08 established the 11th Circuit Homestead Access to Mediation Program (CHAMP) mandating mandatory mediation of homestead foreclosures prior to the matter being set for final hearing. At the time of filing the complaint, Plaintiff is required to transmit to the

Program Manager, the Collins Center, a notice form (Form A) with borrower's contact information. Within five days of filing the complaint, Plaintiff must tender a cost check in the amount of \$750.00 to cover the administrative costs of the mediation. The Collins Center responsibilities include: contacting the borrower, referring the borrower to financial counseling and making financial documentation available electronically to the Plaintiff. Plaintiff's counsel and the borrower are required to be physically present at mediation; the lender's representative must attend, but is allowed to participate by telephone. Within ten days of the completion of the mediation, the mediator must report the mediation results to the court.

(b) Administrative Order 09-09 revised the following forms: the civil cover sheet, Plaintiff's certification of settlement authority, Plaintiff's certification of residential mortgage foreclosure case status and the final judgment of foreclosure.

This Administrative Order specifically exempts condominium and homeowners' association fee foreclosures, private investor mortgage foreclosures, foreclosures of non-homestead properties and construction lien foreclosures.

(c) Administrative Order 09-09 A1 acknowledged the statutory authority of the Clerk of the Courts to conduct the sale of real or personal property by electronic means. This Administrative Order further proscribed adherence to certain procedures concerning tenant occupied residential properties under the "Protecting Tenants at Foreclosure Act of 2009." Amending the specific format of the final judgment of foreclosure, this Administrative Order prohibited the issuance of immediate writs of possession.

(d) Administrative Order 09-18 responded to the Clerk of the Court's request for formal approval to conduct on-line auctions, in lieu of on-site auctions for the sale of real property.

2. On December 28, 2009, the Florida Supreme Court issued Administrative Order 09-54, adopting the recommendations of the Task Force on Residential Mortgage Foreclosure Cases and establishing a uniform, statewide managed mediation program. The Florida Supreme Court approved the Task Force's Model Administrative Order, with minor changes to be implemented by each circuit chief judge.

3. On February 26, 2010, the Eleventh Judicial Circuit Court issued Administrative Order 10-03 A1 requiring mandatory mediation of all homestead mortgage foreclosure actions subject to the federal Truth in Lending Act, Regulation Z. Administrative Order 10-03 A 1 applies to actions filed after March 29, 2010. Specifically exempted from this Administrative Order are condominium and homeowners' association fee foreclosures and mechanics and construction lien foreclosures. This Administrative Order constitutes a formal referral to mediation through the Residential Mortgage Foreclosure Mediation (RMFM) Program; parties are ineligible for default judgment, a summary judgment or final hearing until they have fully complied with mediation requirements.

Basic Procedural Requirements of Administrative Order 10-03 A1 include:

(a) When suit is filed, plaintiff must file a completed Form A with the Clerk listing the last known mailing address and phone number for each party. One business day after filing the complaint, plaintiff must transmit Form A to the Program Manager of the RMFM along with the case number of the action. The Collins Center for Public Policy, Inc. is the contract Program Manager in the Eleventh Judicial Circuit. At the time of the filing of the complaint, the Plaintiff must tender RMFM fees in the amount of \$400.00; the balance of fees in the amount of \$350.00 must be paid by Plaintiff within 10 days after notice of the mediation conference.

(b) Upon receipt of Form A, the Program Manager must contact the borrower and refer the borrower an approved mortgage foreclosure counselor. Foreclosure counseling must be completed no later than 30 days from the Program Manager's initial contact with the borrower. If the Program Manager is unable to contact the borrower within this time frame, the borrower will have been deemed to elect nonparticipation in the RMFM Program.

(c) The Program Manager must transmit the borrower's financial disclosure for mediation no later than 60 days after the Program Manager receives Form A from Plaintiff.

(d) The Program Manager shall schedule a mediation session no earlier than 60 days and no later than 120 days after suit is filed.

(e) Plaintiff's representative may appear by telephone upon 5 days notice prior to the mediation; plaintiff's attorney, the borrower and the borrower's attorney, if any, must attend in person. The court may dismiss the action without prejudice or impose other sanctions for failure to attend. Within 10 days after completion of mediation, the mediator must issue a report advising the court as to the parties' attendance and result.

Service of Process

1. Due service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a foreclosure action. Rule 1.070, Fla. R. of Civ. P. (2010) and Chapters 48 and 49 of the Florida Statutes.

2. Service of process must be made upon the defendant within 120 days after the filing of the initial pleading. Rule 1.070(j), Fla. R. Civ. P. (2010). Absent a showing of excusable neglect or good cause, the failure to comply with the time limitations may result in the court's dismissal of the action without prejudice or the dropping of the defendant.

Personal Service

1. Section 48.031 (1), Fla. Stat. (2010) requires that service of process be effectuated by a certified process server on the person to be served by delivery of the complaint or other pleadings at the usual place of abode or by leaving the copies at the individual's place of abode with any person residing there, who is 15 years of age or older and informing them of the contents. § 48.27, Fla. Stat. (2010).

(a) Ineffective service - Leaving service of process with a doorman or with a tenant, when the defendant does not reside in the apartment is defective service. *Grosheim v. Greenpoint Mortgage Funding, Inc.*, 819 So. 2d 906, 907 (Fla. 4th DCA 2002). Evidence that person resides at a different address from service address is ineffective service. *Alvarez v. State Farm Mut. Ins. Co.*, 635 So. 2d 131 (Fla. 3d DCA 1994).

(b) Judgment subject to collateral attack where plaintiff did not substantially comply with the statutory requirements of service.

2. Substitute service authorized by Section 48.031 (2), Fla. Stat. (2010). Substitute service may be made upon the spouse of a person to be served, if the cause of action is not an adversary proceeding between the spouse and the person to be served, and if the spouse resides with the person to be served.

(a) Statutes governing service of process are strictly construed. *General de Seguros, S.A. v. Consol. Prop. & Cas. Ins. Co.*, 776 So. 2d 990, 991 (Fla. 3d DCA 2001). (reversed with directions to vacate default judgment and quash service of process since substituted service was not perfected).

(b) Use of private couriers or Federal Express held invalid. *Id.*; *FNMA v. Fandino*, 751 So. 2d 752, 753 (Fla. 3d DCA 2000), (trial courts voiding of judgment affirmed based on plaintiff's failure to strictly comply with substitute service of process which employed Fedex).

(c) Evading service of process – defined by statute as concealment of whereabouts. § 48.161(1), Fla. Stat. (2010); *Bodden v. Young*, 422 So. 2d 1055 (Fla. 4th DCA 1982).

(1) The Florida case which clearly illustrates concealment is *Luckey v. Smathers & Thompson*, 343 So. 2d 53 (Fla. 3d DCA 1977). In *Luckey*, the defendant had "for the purpose of avoiding all legal matters, secreted himself from the world and lived in isolation in a high security apartment refusing to answer the telephone or even to open his mail." *Id.* at 54. The Third District Court of Appeal affirmed the trial court's decision denying defendant's motion to vacate the writ of execution and levy of sale based on a record of genuine attempts to serve the defendant. The Third District Court further opined that "there is no rule of law which requires that the officers of the court be able to breach the self-imposed isolation in order to inform the defendant that a suit has been filed against him." *Id.*

(2) Effective proof of evading service must demonstrate plaintiff's attempts in light of the facts of the case (despite process server's 13 unsuccessful attempts at service, evasion was not proved based on evidence that the property was occupied and defendant's vehicle parked there.) *Wise v. Warner*, 932 So. 2d

591, 592 (Fla. 5th DCA 2006). Working whose place of employment was known to the sheriff was not concealing herself or avoiding process, sheriff only attempted service at the residence during work hours. *Styles v. United Fid. & Guaranty Co.*, 423 So. 2d 604 (Fla. 3d DCA 1982).

(3) Statutory requirements satisfied if papers left at a place from which the person to be served can easily retrieve them and if the process server takes reasonable steps to call the delivery to the attention of the person to be served. *Olin Corp. v. Haney*, 245 So. 2d 669 (Fla 4th DCA 1971).

3. Service on a corporation - may be served on the registered agent, officer or director. Section 48.081(2)(b), Fla. Stat. (2010) - if the address provided for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer or director in accordance with § 48.031, Fla. Stat. (2010).

Constructive Service by Publication

1. Section 49.011(1), Fla. Stat. (2010) identifies the enforcement of a claim of lien to any title or interest in real property such as foreclosure actions.

2. Sections 49.021-40.041, of the Florida Statutes govern constructive service or service by publication. Constructive service statutes are strictly construed against the party seeking to obtain service. *Levenson v. McCarty*, 877 So. 2d 818, 819 (Fla. 4th DCA 2004).

3. Service by publication - only available when personal service cannot be made. *Godsell v. United Guaranty Residential Insurance*, 923 So. 2d 1209, 1212 (Fla. 5th DCA 2006), (service by publication is void when plaintiff knew of the defendant's Canadian residency, but merely performed a skip trace in Florida and made no diligent search and inquiry to locate Canadian address); *Gross v. Fidelity Fed. Sav. Bank of Fla.*, 579 So. 2d 846, 847 (Fla. 4th DCA 1991), (appellate court reversed and remanded to quash service of process and default based on plaintiff's knowledge of defendant's out of state residence address and subsequent failure to attempt personal service).

(a) Plaintiff must demonstrate that an honest and conscientious effort, reasonably appropriate to the circumstances, was made to acquire the necessary information and comply with the applicable statute. *Dor Cha, Inc. v. Hollingsworth*, 8786 So. 2d 678, 679 (Fla. 4th DCA 2004), (default judgment reversed based on plaintiff's crucial misspelling of defendant's name and subsequent search on wrong individual).

(b) Condition precedent to service by publication - Section 49.041, Fla. Stat., (2010), requires that the plaintiff file a sworn statement that shows (1) a diligent search and inquiry has been made to discover the name and residence of such person, (2) whether the defendant is over the age of 18, or if unknown, the statement should set forth that it is unknown, and (3) the status of the defendant's residence, whether unknown or in another state or country. Section 49.051, Fla. Stat. (2010) applies to service by publication on a corporation.

(c) Plaintiff is entitled to have the clerk issue a notice of action subsequent to the filing of its sworn statement. Pursuant to § 49.09, Fla. Stat., (2010), the notice requires defendant to file defenses with the clerk and serve same upon the plaintiff's attorney within 30 days after the first publication of the notice.

(1) Notice - published once each week for two consecutive weeks, with proof of publication filed upon final publication.

§49.10(1)(c)(2), Fla. Stat. (2010).

(d) Affidavit of diligent search - need only allege that diligent search and inquiry have been made; it is not necessary to include specific facts. *Floyd v. FNMA*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998), (final judgment and sale vacated based on plaintiff's failure to conduct diligent search to discover deceased mortgagor's heirs residence and possession of the subject property). However:

(1) Better practice is to file an affidavit of diligent search that contains all details of the search. *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n.*, 625 So. 2d 1219, 1222 (Fla. 4th DCA 1993), (plaintiff's attorney failed to conduct diligent search and

inquiry by neglecting to follow up on leads which he knew were likely to yield defendant's residence).

(a) **Diligent search and inquiry checklist**

Form 1.924, Fla. R. Civ. P. (2010) contains a basic checklist of a diligent search and inquiry to establish constructive service. This Form adds consideration of inquiry of tenants as to the location of the owner/landlord of tenant occupied property. Further, the Form utilizes the following sources:

- (1) Inquiry as to occupants in possession of the subject property;
- (2) Inquiry of neighbors;
- (3) Public records search of criminal/civil actions;
- (4) Telephone listings;
- (5) Tax collector records;
- (6) Utility Co. records;
- (7) Last known employer;
- (8) U. S. Post Office;
- (9) Local police department, correctional department;
- (10) Local hospitals;
- (11) Armed Forces of the U.S.;
- (12) Department of Highway Safety & Motor Vehicles;
- (13) School board enrollment verification, if defendant has children;
- (14) An inquiry of the Division of Corporations, State of Florida, to determine if the defendant is an officer, director or registered agent;
- (15) Voter registration records.

(f) The plaintiff bears the burden of proof to establish the legal sufficiency of the affidavit when challenged. *Id.* If constructive service of process is disputed, the trial court has the duty of determining: (1) if the affidavit of diligent search is legally sufficient; and (2) whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009).

(g) **Diligent search test** - whether plaintiff reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances. *Shepherd v. Deutsche Bank Trust Co. Am.s*, 922 So. 2d 340, 343 (Fla. 5th DCA 2006), (reversed and voided judgment as to defendant wife based on plaintiff's failure to strictly comply with statute, when they had been informed of defendant's correct address in England). Plaintiff's reliance on constructive service, when a doorman in New York repeatedly informed the process server of the Defendant's location in Florida, reflects an insufficient amount of reasonable efforts to personally serve the defendant to justify the use of constructive service. *De Vico v. Chase Manhattan Bank*, 823 So. 2d 175, 176 (Fla. 3d DCA 2002). Similarly, failure to inquire of the most likely source of information concerning whereabouts of a corporation, or an officer or agent, does not constitute reasonable diligence. *Redfield Investments, A. V. V. v. Village of Pinecrest*, 990 So. 2d 1135, 1139 (Fla. 3d DCA 2008).

(h) Defective service of process - judgment based on lack of diligent search and inquiry constitutes improper service and lacks authority of law. *Batchin v. Barnett Bank of Southwest Fla.*, 647 So. 2d 211,213 (Fla. 2d DCA 1994).

(1) Judgment rendered void - when defective service of process amounts to no notice of the proceedings. *Shepherd*, 922 So. 2d at 345. Void judgment is a nullity that cannot be validated by the passage of time and may be attacked at any time. *Id.*

(2) Judgment rendered voidable - i rregular or defective service actually gives notice of the proceedings. *Id.*

(i) Limitations of constructive service – only confers in rem or quasi in jurisdiction; restricted to the recovery of mortgaged real property.

(1) No basis for deficiency judgment - constructive service of process cannot support a judgment that determines an issue of personal liability. *Carter v. Kingsley Bank*, 587 So. 2d 567, 569 (Fla. 1st DCA 1991), (deficiency judgment cannot be obtained absent personal service of process).

Service of Process outside the State of Florida and in Foreign Countries

1. Section 48.194(1), Fla. Stat., (2010) - authorizes service of process in the same manner as service within the state, by an officer in the state where the person is being served. Section states that service of process outside the United States may be required to conform to the provisions of Hague Convention of 1969 concerning service abroad of judicial and extrajudicial documents in civil or commercial matters.

2. The Hague Convention creates - appropriate means to ensure that judicial and extra-judicial documents to be served abroad shall be brought to the addressee in sufficient time. *Koechli v. BIP Int'l.*, 861 So. 2d 501, 502 (Fla. 5th DCA 2003).

(a) Procedure - process sent to a designated central authority, checked for compliance, served under foreign nation's law, and certificate prepared which documents the place and date of service or an explanation as to lack of service. *Id.* (return by the central authority of a foreign nation of completed certificate of service was prima facie evidence that the authority's service on a defendant in that country was made in compliance with the Hague Convention and with the law of that foreign nation).

(b) Compliance issues - see *Diz v. Hellman Int'l. Nat'l. Forwarders*, 611 So. 2d 18 (Fla. 3d DCA 1992), (plaintiff provided a faulty address to the Spanish authorities and the trial judge entered a default judgment, which appellate court reversed).

3. Service by registered mail - authorized by Section 48.194(2), Fla. Stat. (2010). Permits service by registered mail to nonresidents where the address of the person to be served is known.

(a) Section 48.192(2)(b), Fla. Stat. (2010), provides that plaintiff must file an affidavit which sets forth the nature of the process, the date on which the process was mailed by registered mail, the name and address on the envelope containing the process that was mailed, the fact that the process was mailed by registered mail and was accepted or refused by endorsement or stamp. The return envelope from the attempt to mail process should be attached to the affidavit.

Service of process and timeshare real property:

1. Foreclosure proceedings involving timeshare estates may join multiple defendants in the same action. § 721.83, Fla. Stat. (2010).

2. There are additional options to effectuating service of process for a timeshare foreclosure.

(a) Substitute service may be made upon the obligor's appointed registered agent. § 721.85(1), Fla. Stat. (2010).

(b) When quasi in rem or in rem relief only is sought, service may be made on any person whether the person is located inside or outside the state by certified or registered mail, addressed to the person to be served at the notice address. § 721.85(a), Fla. Stat. (2010).

Substitution of Parties

1. Substitution is not mandatory; the action may proceed in the name of the original party. However, to substitute a new party based on a transfer of interest requires a court order. *Tinsley v. Mangonia Residence 1, Ltd.*, 937 So. 2d 178, 179 (Fla. 4th DCA 2006), Rule 1.260, Fla. R. Civ. P.

2. Order of substitution must precede an adjudication of rights of parties, including default. *Floyd v. Wallace*, 339 So. 2d 653 (Fla. 1976); *Campbell v. Napoli*, 786 So. 2d 1232 (Fla. 2d DCA 2001), (error to enter judgment without a real party against whom judgment could be entered).

3. When substitution is permitted, plaintiff must show the identity of the new party's interest and the circumstances.

Entry of Default

1. Without proof of service demonstrating adherence to due process requirements, the Plaintiff is not entitled to entry of default or a default final judgment.

(a) Failure to effectuate service - places the jurisdiction in a state of dormancy during which the trial court or clerk is without authority to enter a default. *Armet*

S.N.C. di Ferronato Giovanni & Co. v. Hornsby, 744 So. 2d 1119, 1121 (Fla. 1st DCA 1999); *Tetley v. Lett*, 462 So. 2d 1126 (Fla. 4th DCA 1984).

2. Legal effect of default - admission of every cause of action that is sufficiently well-pled to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought. *Fiera.Com, Inc. v. Digicast New Media Group, Inc.*, 837 So. 2d 451, 452 (Fla. 3d DCA 2003). Default terminates the defending party's right to further defend, except to contest the amount of unliquidated damages. *Donohue v. Brightman*, 939 So. 2d 1162, 1164 (Fla. 4th DCA 2006).

3. Plaintiff is entitled to entry of default if the defendant fails to file or serve any paper 20 days after service of process. Rule 1.040(a)(1), Fla. R. Civ. P. (2010).

(a) State of Florida has 40 days in which to file or serve any paper in accordance with Section 48.121, Fla. Stat. (2008).

(b) United States of America has 60 days to file under the provisions of 28 U.S.C.A. § 2410(b); Rule 12(a)(3), Fed. R. Civ. P.

4. **Service Members Civil Relief Act of 2003 (formerly, Soldier's & Sailors Act)**

(a) Codified in 50 App. U. S. C. A. § 521 - tolls proceedings during the period of time that the defendant is in the military service.

(b) Act precludes entry of default; there is no need for the service member to demonstrate hardship or prejudice based on military service. *Conroy v. Aniskoff*, 507 U.S. 511, 512 (1993). Service member with notice of the foreclosure action, may obtain a stay of the proceedings for a period of 9 months. 50 App. U. S. C. A. § 521 (d) was superseded by the Housing and Economic Recovery Act of 2008, § 2203, which expires on 12/31/10. Upon expiration, the original 90 day period will re-take effect.

(c) Determination of military status – to obtain default, plaintiff must file an affidavit stating:

(1) defendant is not in military service; or

(2) plaintiff is unable to determine if the defendant is in the military service. 50 App. U. S. C. A. § 521(b)(1).

(d) Unknown military status -the court may require the plaintiff to file a bond prior to entry of judgment. 50 App. U. S. C. A. § 521(b)(3).

5. Plaintiff is required to serve the defendant with notice of the application for default. Failure to notice defendant's attorney entry of subsequent default is invalid; rendering resulting judgment void. *U.S. Bank Nat'l. Ass'n. v. Lloyd*, 981 So. 2d 633, 634 (Fla. 2d DCA 2008).

6. Non-Military Affidavit required -must be based on: personal knowledge, attest to the fact that inquiry was made of the Armed Forces, and affiant must state that the defendant is not in the armed forces. *The Fla. Bar Re: Approval of Forms*, 621 So. 2d 1025, 1034 (Fla. 1993). Affidavits based on information and belief are not in compliance.

(a) Non-military affidavit is valid for one year.

Appointment of a Guardian ad Litem

1. The best practice is appointment when unknown parties are joined and service effected through publication. For example, a guardian ad litem should be appointed to represent the estate of a deceased defendant or when it is unknown if the defendant is deceased. § 733.308, Fla. Stat. (2010).

(a) Section 65.061(2), Fla. Stat. (2010) states that a "guardian ad litem shall not be appointed unless it affirmatively appears that the interest of minors, persons of unsound mind, or convicts are involved."

(b) Rule 1.210(b), Fla. R. Civ. P. (2010) provides that the court "shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented...for the protection of the minor or incompetent person." Similarly, Rule 1.511(e), Fla. R. Civ. P. (2010) maintains that "final judgment after default may be entered by the court at any time, but no judgment may be entered against an infant or incompetent person unless represented by a guardian."

Appointment of a Receiver

1. During a foreclosure, appointment of a receiver for condominium and homeowners' associations is governed by statute, although it may also be authorized by association by-laws.

(a) Section 718.116(6)(c), Fla. Stat. (2010), provides that the court in its discretion may require the resident condominium unit owner to pay a reasonable rental for the unit. During the "pendency of the foreclosure action, the condominium association is entitled to the appointment of a receiver to collect the rent." *Id.*

(b) Similarly, Section 720.3085(1)(d), Fla. Stat. (2010) governs homeowners' associations. Post judgment, this Section provides that the court may require the parcel owner to pay a reasonable rent for the parcel. If the parcel is rented or leased during the pendency of the foreclosure, the homeowners' association is entitled to the appointment of a receiver. *Id.*

(c) Blanket motions for appointment of a receiver for units prior to the filing of a foreclosure action do not meet the requirements of either statutory provision.

2. The movant for appointment of a receiver for real property which does not qualify under the condominium or homeowners' association statutes must satisfy basic prerequisites. These basic prerequisites are the same legal standards applicable to non-foreclosure proceedings, as injunctive relief.

(a) This equitable prejudgment remedy must be exercised with caution as it is in derogation of the legal owner's fundamental right of possession of his property and only warranted if there is a showing that the secured property is being wasted or otherwise subject to serious risk of loss. *Alafaya Square Association, Ltd. v. Great Western Bank*, 700 So. 2d 38, 41 (Fla. 5th DCA 1997); *Twinjay Chambers Partnership v. Suarez*, 556 So. 2d 781, 782 (Fla. 2d DCA 1990); *Electro Mechanical Products, Inc. v. Borona*, 324 So. 2d 638 (Fla. 3d DCA 1976).

(b) In the absence of a showing that the property is being wasted or otherwise subject to serious risk of loss, appointment of a receiver is unjustified. *Seasons P'ship 1 v. Kraus-Anderson, Inc.*, 700 So. 2d 6061, 6062 (Fla. 2d DCA 1997).

(c) The party seeking appointment must show that there is a substantial likelihood that it will prevail on the merits at the conclusion of the case and must present sufficient proof that appointment of a receiver is warranted. *Keybank National Association v. Knuth, Ltd.*, 2009 WL 2448160, 2448161 (Fla. 3d DCA, Aug. 12, 2009).

(d) A final prerequisite to appointment of a receiver is that the movant must post a bond, for either the plaintiff or the receiver. Rule 1.620(c), Fla. Rules of Civ. P. (2010); *Boyd v. Banc One Mortgage Corp.*, 509 So. 2d 966,967 (Fla. 3d DCA 1987).

Summary Final Judgment of Foreclosure

1. Legal standard – No genuine issue of material fact and movant is entitled to a judgment as a matter of law. Also, outstanding discovery can preclude summary judgment.

2. Burden of Proof - The plaintiff bears the burden of proof to establish the nonexistence of disputed issues of material fact. *Delandro v. Am.'s. Mortgage Servicing, Inc.*, 674 So. 2d 184, 186 (Fla. 3d DCA 1996); *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966).

3. Content of motion for summary judgment – plaintiff should allege:

1) execution of note and mortgage; 2) plaintiff's status as owner and holder (or representative); 3) date of default; 4) notice of default and acceleration; 5) amount due and owing; 6) relief sought; and 7) address affirmative defenses, if any.

4. Filing of the Motion - at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. Rule 1.510(a), Fla. R. Civ. P. (2010). The motion for summary judgment, supporting affidavits and notice of hearing must be served on a defendant at least (20) twenty days before the summary judgment hearing. Rule 1.510(c), Fla. R. Civ. P. (2010); *Verizzo v. Bank of New York*, 2010 WL 711862 (Fla. 2 DCA Mar. 3, 2010); *Mack v. Commercial Industrial Park, Inc.*, 541 So. 2d 800, 801 (Fla. 4th DCA 1989).

(a) Opposition materials and evidence supportive of a denial of a motion for summary judgment must be identified. Rule 1.510(c), Fla. R. Civ. P. (2010). Notice of opposition must be mailed to the movant's attorney at least five days prior to the day of hearing or delivered no later than 5:00 P. M., (2) two business days prior to the day of the hearing on the summary judgment.

(b) The movant for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Leal v. Deutsche Bank Nat'l. Trust Co.*, 21 So. 3d 907, 908 (Fla. 3d DCA 2009).

(c) Filing of cross motions is subject to the 20-day notice period. *Wizikowsji v. Hillsborough County*, 651 So. 2d 1223 (Fla. 2d DCA 1995).

5. Requirement for motion for summary judgment - due notice and a hearing. Proof of mailing of notice of the final summary judgment hearing created presumption that notice of hearing was received. *Blanco v. Kinas*, 936 So. 2d 31, 32 (Fla. 3d DCA 2006).

6. **Affidavits in support of Summary Judgment**

Affidavits in support of the motion must be made based on personal knowledge and set forth facts that would be admissible in evidence, and demonstrate that the affiant is competent to testify on the matters presented.

(a) Affidavit of Indebtedness – Must be signed by a custodian of business record with knowledge. In general, the plaintiff's affidavit itemizes:

- (1) property address,
- (2) principal balance,
- (3) interest (calculated from default up until the entry of judgment, when the mortgage provides for automatic acceleration upon default, *THFN Realty Co. v. Kirkman/Conroy, Ltd.*, 546 So. 2d 1158 (Fla. 5th DCA 1989). (best practice is to include per diem interest),
- (4) late charges (pre-acceleration only), *Fowler v. First Fed. Sav. & Loan Ass'n.*, 643 So. 2d 30, 33(Fla. 1st DCA 1994).),
- (5) prepayment penalties – unavailable in foreclosure actions, *Fla. Nat'l*

Bank v. Bankatlantic, 589 So. 2d 255, 259 (Fla. 1991), unless specifically authorized in note in the event of acceleration and foreclosure. *Feinstein v. Ashplant*, 961 So. 2d 1074 (Fla. 4th DCA 2007).

- (6) property inspections & appraisals,
- (7) hazard insurance premiums and taxes.

(b) Affidavit of Costs - This affidavit details:

- (1) the filing fee,
- (2) service of process,
- (3) and abstracting costs.

(c) Affidavit of attorney's time - references the actual time the attorney expended on the foreclosure file and references the actual hourly billable rate or the flat fee rate which the client has agreed to pay. The Fla. Supreme Court endorsed the lodestar method. *Bell v. U. S. B. Acquisition Co.*, 734 So. 2d 403, 406 (Fla. 1999). The hours may be reduced or enhanced in the discretion of the court, depending on the novelty and difficulty of questions involved. *Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). With regard to uncontested time, plaintiff is not required to keep contemporaneous time records since the lender is contractually obligated to pay a flat fee for that time. *Id.*

(d) Affidavit as to reasonableness of attorneys' fee - Affidavit of attorney's fee must be signed by a practicing attorney not affiliated with the plaintiff's firm, attesting to the rate as reasonable and customary in the circuit. Affiant should reference and evaluate the attorney fee claim based on the eight factors set forth in Rule 4-1.5(b)(1) Rules Regulating the Fla. Bar. Of these, relevant factors, such as the time and labor required, the customary fee in the locality for legal services of a similar nature, and the experience and skill of the lawyer performing the service must be examined. An award of attorney fees must be supported by expert evidence. *Palmetto Federal Savings and Loan Association v. Day*, 512 So. 2d 332 (Fla. 3d DCA 1987).

- (1) Where there is a default judgment and the promissory note or mortgage contains a provision for an award of attorney fees,

Section 702.065(2), Fla. Stat. (2010) provides that "it is not necessary for the court to hold a hearing or adjudge the requested attorney's fees to be reasonable if the fees do not exceed 3 per cent of the principal amount owed at the time of the filing of the complaint." *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *Id.* This statutory provision confirms that "such fees constitute liquidated damages in any proceeding to enforce the note or mortgage." *Id.*

(2) The judgment must contain findings as to the number of hours and the reasonable hourly rate. *Id.* at 1152. The requirements of *Rowe* are mandatory and failure to make the requisite findings is reversible error. *Home Insurance Co. v. Gonzalez*, 648 So. 2d 291, 292 (Fla. 3d DCA 1995). "An award of attorneys' fees must be supported by competent substantial evidence in the record and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved." *Stack v. Homeside Lending, Inc.* 976 So. 2d 618, 620 (Fla. 2d DCA 2008).

Affirmative Defenses

1. Genuine existence of material fact - precludes entry of summary judgment. *Manassas Investments Inc. v. O'Hanrahan*, 817 So. 2d 1080 (Fla. 2d DCA 2002).
2. Legal sufficiency of defenses - Certainty is required when pleading affirmative defenses; conclusions of law unsupported by allegations of ultimate fact are legally insufficient. *Bliss v. Carmona*, 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982) "Affirmative defenses do not simply deny the facts of the opposing party's claim; they raise some new matter which defeats an otherwise apparently valid claim." *Wiggins v. Protmay*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983). Plaintiff must either factually refute affirmative defenses or establish that they are legally insufficient. *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009).

3. Affirmative defenses commonly raised:

(a) Payment – Where defendants alleged advance payments and plaintiff failed to refute this defense, plaintiff not entitled to summary judgment. *Morrone v. Household Fin. Corp. III*, 903 So. 2d 311, 312 (Fla. 2d DCA 2005). Equally, if the affidavit of indebtedness is inconclusive (for example, includes a credit for unapplied funds without explanation), and the borrower alleges a the defense of inaccurate accounting, then summary judgment should be denied. *Kanu v. Pointe Bank*, 861 So. 2d 498 (Fla. 4th DCA 2003). However, summary judgment will be defeated if payment was attempted, but due to misunderstanding or excusable neglect coupled with lender’s conduct, contributed to the failure to pay. *Campbell v. Werner*, 232 So. 2d 252, 256 (Fla. 3d DCA 1970); *Lieberbaum v. Surfcomber Hotel Corp.*, 122 So. 2d 28, 29 (Fla. 3d DCA 1960), (Court dismissed foreclosure complaint where plaintiffs knew that some excusable oversight was the cause for non-payment, said payment having been refused and subsequently deposited by defendants into the court registry).

(b) Failure to comply with conditions precedent – such as Plaintiff’s failure to send the Notice of Default letter. Failure to receive payoff information does not preclude summary judgment. *Walker v. Midland Mortgage Co.*, 935 So. 2d 519, 520 (Fla. 3d DCA 2006).

(c) Estoppel is usually based on: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Harris v. Nat’l. Recovery Agency*, 819 So. 2d 850, 854 (Fla. 4th DCA 2002); *Jones v. City of Winter Haven*, 870 So. 2d 52, 55 (Fla. 2d DCA 2003), (defendant defeated city’s foreclosure based on evidence presented which indicated that the city had agreed to stop fines for noncompliance with property code if homeowner hired a licensed contractor to make repairs).

(d) Waiver – the knowing and intentional relinquishment of an existing right. *Taylor v. Kenco Chem. & Mfg. Co.*, 465 So. 2d 581, 588 (Fla. 1st DCA 1985). When properly pled, affirmative defenses that sound in waiver (and estoppel) present

genuine issues of material fact which are inappropriate for summary judgment. *Schiebe v. Bank of Am.*, 822 So. 2d 575 (Fla. 5th DCA 2002).

(1) Acceptance of late payments - common defense asserting waiver is the lenders acceptance of late payments. However, the lender has the right to elect to accelerate or not to accelerate after default. *Scarfo v. Peever*, 405 So. 2d 1064, 1065 (Fla. 5th DCA 1981). Default predicated on defendant's failure to pay real estate taxes, could not be overcome by defendant's claim of estoppel due to misapplication of non-escrow payments. *Lunn Woods v. Lowery*, 577 So. 2d 705, 707 (Fla. 2d DCA 1991).

(e) Fraud in the inducement - defined as situation where parties to a contract appear to negotiate freely, but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. *HTP, Ltd. v. Lineas Aereas Costarricenses, S. A.*, 685 So. 2d 1238, 1239 (Fla. 1996).

Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks*, 820 So. 2d 325 (Fla. 5th DCA 2001). (Note that purchasers had first filed fraud in the inducement case and seller retaliated with foreclosure suit). Further, the appellate court opined in the *Hinton* case that fraud in the inducement was not barred by the economic loss rule. *Id.*

(f) Usury – defined by § 687.03, Fla. Stat. (2010), as a contract for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest. If the loan exceeds \$500,000 in amount or value, then the applicable statutory section is § 687.071, Fla. Stat. (2010). A usurious contract is unenforceable according to the provisions of Section 687.071(7), Fla. Stat. (2010).

(g) Forbearance agreement - Appellate court upheld summary judgment based on Defendant's failure to present any evidence as to the alleged forbearance

agreement of prior servicer to delay foreclosure until the settlement of his personal injury case. *Walker v. Midland Mortgage Co.*, 935 So. 2d at 520. If evidence of forbearance is submitted, it may defeat summary judgment.

(h) Statute of limitations - Property owner successfully asserted that foreclosure filed five years after mortgage maturity date was barred by statute of limitations; mortgage lien was no longer valid and enforceable under Section 95.281(1)(a), Fla. Stat. (2010); *American Bankers Life Assurance Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 191 (Fla. 3d DCA 2005).

(i) Failure to pay documentary stamps – Section 201.08, Fla. Stat. (2010) precludes enforcement of notes and mortgages absent the payment of documentary stamps. *WRJ Dev., Inc. v. North Ring Limited*, 979 So. 2d 1046, 1047 (Fla. 3d DCA 2008); *Bonifiglio v. Banker's Trust Co. of Calif.*, 944 So. 2d 1087, 1088 (Fla. 4th DCA 2007).

(1) This is a limitation on judicial authority; not a genuine affirmative defense.

(j) Truth in Lending (TILA) violations – Technical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Corp.*, 759 So. 2d 726 (Fla. 4th DCA 2000); 15 U. S. C. A. § 1600. Exception to TILA one year statute of limitations applies to defenses raised in foreclosure. *Dailey v. Leshin*, 792 So. 2d 527, 532 (Fla. 4th DCA 2001); 15 U. S. C. A. § 1640(e).

TILA issues include:

(1) Improper adjustments to interest rates (ARMS);

(2) Borrower must be given 2 copies of notice of rescission rights. Written acknowledgement of receipt is only a rebuttable presumption. *Cintron v. Bankers Trust Co.*, 682 So. 2d 616 (Fla. 2d DCA 1996).

(3) TILA rescission for up to 3 years after the transaction for failure to make material disclosures to borrower. Such as, APR of loan, amount financed, total payment and payment schedule. Rescission relieves borrower only for payment of interest. Must be within three years of closing. 15 U. S. C. § 1601-166 (1994); *Beach v. Great Western Bank*, 692 So. 2d 146, 153 (Fla. 1997).

(a) Wife's homestead interest in mortgaged property gives her right to

TILA disclosure. *Gancedo v. DelCarpio*, 17 So. 3d 843, 844 (Fla. 4th DCA 2009).

(k) Res judicata – Foreclosure and acceleration based on the same default bars a subsequent action unless predicated upon separate, different defaults. *Singleton v. Greymar Assoc.*, 882 So. 2d 1004, 1007 (Fla. 2004).

Additional cases: *Limehouse v. Smith*, 797 So. 2d 15 (Fla. 4th DCA 2001), (mistake); *O'Brien v. Fed. Trust Bank, F. S. B.*, 727 So. 2d 296 (Fla. 5th DCA 1999), (fraud, RICO and duress); *Biondo v. Powers*, 743 So. 2d 161 (Fla. 4th DCA 1999), (usury); *Heimmermann v. First Union Mortgage Corp.*, 305 F. 23d 1257 (11th Circ. 2002), (Real Estate Settlement Procedures Act (RESPA) violations).

Summary Judgment Hearing

1. Plaintiff must file the original note and mortgage at or before the summary judgment hearing. Since the promissory note is negotiable, it must be surrendered in the foreclosure proceeding so that it does not remain in the stream of commerce. *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 726 (Fla. 5th DCA 2001). Copies are sufficient with the exception that the note must be reestablished. *Id.* Best practice is for judge to cancel the signed note upon entry of summary judgment.

(a) Failure to produce note - can preclude entry of summary judgment. *Natl. Loan Investors, L. P. v. Joymar Assoc.*, 767 So. 2d 549, 550 (Fla. 3d DCA 2000).

Final Judgment

1. Section 45.031, Fla. Stat. (2010) governs the contents of the final judgment. Final Judgment Form 1.996, Fla. R. Civ. P. (2010).

2. Amounts due - Plaintiff's recovery limited to items pled in complaint or affidavit or based on a mortgage provision.

3. Court may award costs agreed at inception of contractual relationship; costs must be reasonable. *Nemours Found. v. Gauldin*, 601 So. 2d 574, 576 (Fla. 5th DCA 1992), (assessed costs consistent with mortgage provision rather than prevailing party statute); *Maw v. Abinales*, 463 So. 2d 1245, 1247 (Fla. 2d DCA 1985), (award of costs governed by mortgage provision).

4. Checklist for Final Summary Judgment

(a) Final Judgment:

- (1) Check service, defaults, dropped parties.
- (2) Check for evidence of ownership of note.
- (3) Check affidavits – signed and correct case number/parties.
- (4) Amounts due and costs should match affidavits filed. If interest has increased due to resets a daily interest rate should be indicated so you can verify it.
- (5) Check principal, rate & calculation of interest through date of judgment.
- (6) Late fees – pre-acceleration is recoverable; post acceleration is not. *Fowler v. First Fed. Sav. & Loan Assoc. of Defuniak Springs*, 643 So. 2d 30, 33 (Fla. 1st DCA 1994).
- (7) All expenses and costs, such as service of process should be reasonable, market rates. Items related to protection of security interest, such as fencing and boarding up property are recoverable if reasonable.
- (8) Beware - hidden charges & fees for default letters, correspondence related to workout efforts. Court's discretion to deny recovery.
- (9) Attorney fees must not exceed contract rate with client and be supported by an affidavit as to reasonableness. Attorney fee cannot exceed 3% of principal owed. § 702.065(2), Fla. Stat. (2010). Beware – add-ons for litigation fees – make sure that they are not double-billing flat fee.
- (10) Bankruptcy fees not recoverable - Correct forum is bankruptcy court. *Martinez v. Giacobbe*, 951 So. 2d 902, 904 (Fla. 3d DCA 2007); *Dvorak v. First Family Bank*, 639 So. 2d 1076, 1077 (Fla. 5th DCA 1994). Bankruptcy costs incurred to obtain stay relief - recoverable. *Nemours*, 601 So. 2d at 575.

(11) Sale date – may not be set in less than 20 days or more than 35 days, unless parties agree. § 45.031(1)(a), Fla. Stat. (2010), *JRBL Dev., Inc. v. Maiello*, 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

5. If summary judgment denied, foreclosure action proceeds to trial on contested issues.

(a) Trial is before the court without a jury. § 702.01, Fla. Stat. (2010).

6. Motion for rehearing – abuse of discretion to deny rehearing where multiple legal issues, including prepayment penalties and usury, remain unresolved by the trial court. *Bonilla v. Yale Mortgage Corporation*, 15 So. 3d 943, 945 (Fla. 3d DCA 2009).

7. After entry of final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case. *Ross v. Damas*, 2010 WL 532812 (Fla. 3d DCA Feb. 17, 2010); 459 So. 2d 435 (Fla. 3d DCA 1984). Exception: when the trial court reserves in the final judgment the jurisdiction of post judgment matters, such as deficiency judgments. *Id.*

Right of Redemption

1. Mortgagor may exercise his right of redemption at any time prior to the issuance of the certificate of sale. § 45.0315, Fla. Stat. (2010).

(a) Court approval is not needed to redeem. *Indian River Farms v. YBF Partners*, 777 So. 2d 1096, 1100 (Fla. 4th DCA 2001); *Saidi v. Wasko*, 687 So. 2d 10, 13 (Fla. 5th DCA 1996).

(b) Court of equity may extend time to redeem. *Perez v. Kossow*, 602 So. 2d 1372 (Fla. 3d DCA 1992).

2. To redeem, mortgagor must pay the entire mortgage debt, including costs of foreclosure and attorney fees. *CSB Realty, Inc. v. Eurobuilding Corp.*, 625 So. 2d 1275, 1276 (Fla. 3d DCA 1993); §45.0315, Fla. Stat. (2008).

3. Right to redeem is incident to every mortgage and can be assigned by anyone claiming under him. *VOSR Indus., Inc. v. Martin Properties, Inc.*, 919 So. 2d 554, 556 (Fla. 4th DCA 2006). There is no statutory prohibition against the assignment, including the assignment of bid at sale.

(a) Right of redemption extends to holders of subordinate interests. Junior mortgage has an absolute right to redeem from senior mortgage. *Marina Funding Group, Inc. v. Peninsula Prop. Holdings, Inc.*, 950 So. 2d 428, 429 (Fla. 4th DCA 2007); *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690, 694 (Fla. 1930).

4. Fed. right of redemption – United States has 120 days following the foreclosure sale to redeem the property if its interest is based on an IRS tax lien. For any other interest, the Fed. government has one year to redeem the property. 11 U. S. C. § 541, 28 U. S. C. § 959.

Judicial Sale

Scheduling the judicial sale

1. The statutory proscribed time frame for scheduling a sale is “not less than 20 days or more than 35 days after the date” of the order or judgment. § 45.031(1) (a), Fla. Stat. (2010). The statute applies unless agreed otherwise.

2. Cancellations, continuances and postponements are within the discretion of the trial court. Movant must have reasons. Judicial action based on benevolence or compassion constitutes an abuse of discretion. *Republic Federal Bank v. Doyle*, 2009 WL 3102130 (Fla. 3d DCA 2009), (Appellate court reversed trial court’s continuance of sale based on compassion to homeowners claiming they needed additional time to sell the home). There should be no across the board policy. But see, *Wells Fargo v. Lupica*, 2010 WL 2218584 (Fla. 5th DCA 6/4/10) – denial of lender’s unopposed motion to cancel and subsequent motion to vacate sale reversed. Counsel alleged a loan modification agreement had been reached. Court rejected asking for evidence of agreement. The Fifth District Court ruled, “there was no basis for the trial court to reject Wells Fargo’s counsels representation, as an officer of the court, that an agreement had been reached.” *Id.* Look at language in motions, “HAMP Review” and “loss mitigation” do not constitute an agreement. Include language in the order indicating the court’s rationale, even if you have a form order. Ask counsel to make a personal representation as an “officer of the court.” See also, *Chemical Mortgage v. Dickson*, 651 So. 2d 1275, 1276 (Fla. 4th DCA 1995). Error not to cancel sale and

reschedule where plaintiff did not receive bidding instructions on a federally-guaranteed mortgage. However, this case found "no extraordinary circumstances" preventing rescheduling. Suggestion: we live in extraordinary times.

Notice of sale

1. Notice of sale must be published once a week, for 2 consecutive weeks in a publication of general circulation. § 45.031(1), Fla. Stat. (2010). The second publication shall be at least five days before the sale. § 45.031(2), Fla. Stat. (2010).

(a) Notice must include: property description; time and place of sale; case style; clerk's name and a statement that sale will be conducted in accordance with final judgment.

(b) Defective notice can constitute grounds to set aside sale. *Richardson v. Chase Manhattan Bank*, 941 So. 2d 435, 438 (Fla. 3d DCA 2006); *Ingorvaia v. Horton*, 816 So. 2d 1256 (Fla. 2d DCA 2002).

Judicial sale procedure

1. Judicial sale is public, anyone can bid. *Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088 (Fla. 4th DCA 1987). Property is sold to the highest bidder.

2. Plaintiff is entitled to a credit bid in the amount due under final judgment, plus interest and costs through the date of sale. *Robinson v. Phillips*, 171 So. 2d 197, 198 (Fla. 3d DCA 1965).

3. Amount bid is conclusively presumed sufficient consideration. § 45.031(8), Fla. Stat. (2010).

Certificate of sale

1. Upon sale completion - certificate of sale must be served on all parties not defaulted. The right of redemption for all parties is extinguished upon issuance of certificate of sale. §45.0315, Fla. Stat. (2008).

2. Documentary stamps must be paid on the sale. §201.02(9), Fla. Stat. (2010). The amount of tax is based on the highest and best bid at the foreclosure sale. *Id.*

(a) Assignment of successful bid at foreclosure sale - is a transfer of an interest in realty subject to the documentary stamp tax. Fla. Admin. Code Rule 12B-4.013(25). (Rule 12B-4.013(3) provides that the tax is also applicable to the certificate of title

issued by the clerk of court to the holder of the successful foreclosure bid, resulting in a double stamp tax if the bid is assigned and the assignee receives the certificate of title.)

(b) Assignment prior to foreclosure sale - holder of a mortgage foreclosure judgment that needs to transfer title to a different entity and anticipates that the new entity would be the highest bidder, should assign prior to the foreclosure sale to avoid double tax.

(c) Documentary stamps are due only if consideration or an exchange of value takes place. *Crescent Miami Center, LLC v. Fla. Dept. of Revenue*, 903 So. 2d 913, 918 (Fla. 2005), (Transfer of unencumbered realty between a grantor and wholly-owned grantee, absent consideration and a purchaser, not subject to documentary stamp tax); *Dept. of Revenue v. Mesmer*, 345 So. 2d 384, 386 (Fla. 1st DCA 1977), (based on assignment of interest and tender of payment, documentary stamps should have been paid).

(d) Exempt governmental agencies, which do not pay documentary stamps include: Fannie Mae, Freddie Mac, Fed. Home Administration and the Veteran's Administration. Fla. Admin. Code Rules 12B-4.014(9)-(11); 1961 Op. Atty. Gen. 061-137, Sept. 1, 1961.

Objection to sale

1. Any party may file a verified objection to the amount of bid within 10 days. § 45.031(8), Fla. Stat. (2010). The court may hold a hearing – within judicial discretion. Hearing must be noticed to everyone, including third party purchasers. *Shlishey the Best v. Citifinancial Equity Services, Inc.*, 14 So. 3d 1271 (Fla. 2d DCA 2009).

2. Court has broad discretion to set aside sale. *Long Beach Mortgage Corp. v. Bebble*, 985 So. 2d 611, 614 (Fla. 4th DCA 2008), (appellate court reversed sale - unilateral mistake resulted in outrageous windfall to buyer who made *de minimis* bid). The court may consider a settlement agreement in considering whether to vacate a sale. *JRBL Development, Inc. v. Maiello*, 872 So. 2d 362, 363 (Fla. 2d DCA 2004).

3. **Test:** sale may be set aside if:

(1) bid was grossly or startlingly inadequate; and (2) inadequacy of bid resulted from some mistake, fraud, or other irregularity of sale. *Blue Star Invs., Inc. v. Johnson*, 801 So. 2d 218 (Fla. 4th DCA 2001); *Mody v. Calif. Fed. Bank*, 747 So. 2d 1016, 1017 (Fla. 3d DCA 1999). Mere inadequacy of price is not enough. *Artt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1960). Burden on party seeking to vacate sale.

(a) Plaintiff's delay in providing payoff information cannot be sole basis for setting aside sale. *Action Realty & Invs., Inc. v. Grandison*, 930 So. 2d 674, 676 (Fla. 4th DCA 2006).

(b) Stranger to foreclosure action does not have standing to complain of defects in the absence of fraud. *REO Properties Corp. v. Binder*, 946 So. 2d 572, 574 (Fla. 2d DCA 2006).

(c) Sale may be set aside if plaintiff misses sale, based on appropriate showing. *Wells Fargo Fin. System Fla., Inc. v. GRP Fin. Services Corp.*, 890 So. 2d 383 (Fla. 2d DCA 2004).

(d) Court may refuse to set aside sale where objection is beyond statutory period. *Ryan v. Countrywide Home Loans, Inc.*, 7453 So. 2d 36, 38 (Fla. 2d DCA 1999), (untimely motion filed 60 days following the sale).

Sale vacated

1. If sale vacated – mortgage and lien “relieved with all effects” from foreclosure and returned to their original status. §702.08, Fla. Stat. (2010).

(a) Upon readvertisement and resale, a mortgagor's lost redemptive rights temporarily revert. *YEMC Const. & Development, Inc., v. Inter Ser, U. S. A., Inc.*, 884 So. 2d 446, 448 (Fla. 3d DCA 2004).

Post Sale Issues

Certificate of title

1. No objections to sale – Sale is confirmed by the Clerk's issuance of the certificate of title to purchaser. Title passes to the purchaser subject to parties whose interests were not extinguished by foreclosure, such as omitted parties.

(a) Plaintiff may reforeclose or sue to compel an omitted junior lienholder to redeem within a reasonable time. *Quinn*, 129 So. 2d at 694.

(b) Foreclosure is void if titleholder omitted. *England v. Bankers Trust Co. of Calif., N. A.*, 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005).

Right of possession

1. Purchaser has a right to possess the property - upon the issuance of the certificate of title, provided the interest holder was properly joined in the foreclosure.

2. Right of possession enforced through writ of possession. Rule 1.580, Fla. R. Civ. P. (2010)

3. **Summary writ of possession procedure:**

(a) Purchaser of property moves for writ of possession;

(b) The writ can be issued against any party who had actual or constructive knowledge of the foreclosure proceedings and adjudication; *Redding v. Stockton, Whatley, Davin & Co.*, 488 So. 2d 548, 549 (Fla. 5th DCA 1986);

(c) Best practice is to require notice and a hearing before issuance of a writ.

(1) Protecting Tenants at Foreclosure Act of 2009 provides for a 90 day pre-eviction notice applicable to bona fide tenants. (See following section)

(d) At hearing, judge orders immediate issuance of writ of possession unless a person in possession raises defenses which warrant the issuance of a writ of possession for a date certain;

(e) The order for writ of possession is executed by the sheriff and personal property removed to the property line.

Protecting Tenants at Foreclosure Act of 2009

1. Federal legislation, known as Senate Bill 896, P. L. 111-22, provides for a nationwide 90 day pre-eviction notice requirement for bona fide tenants in foreclosed properties. The provisions of the original bill were extended under HR 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which became law on 7/21/10.

2. The application of the new law is restricted to any dwelling or residential property that is being foreclosed under a federally-related mortgage loan as defined by Section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U. S. C. 2602). In short, the originating lender must be the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation or a financial institution insured by the Federal Government.

2. Three prerequisites must be satisfied to qualify as a bona fide tenant under the new Act:

- (1) The tenant cannot be the mortgagor or a member of his immediate family;
- (2) The tenancy must be an arms length transaction; and
- (3) The lease or tenancy requires the receipt of rent that is not substantially lower than the fair market rent for the property.

4. The buyer or successor in interest after foreclosure sale must provide bona fide tenants:

- (a) With leases – the right to occupy the property until the expiration of the lease term. The exception is if the buyer intends to occupy the property as a primary residence, in which case he must give 90 days notice.
- (b) Without leases – the new buyer must give the tenant 90 days notice prior to lease termination.

5. The single other exception to the foregoing is Section 8 Housing. In this case, the buyer assumes the interest of the prior owner and the lease contract. The buyer cannot terminate in the absence of "good cause."

6. This provisions of the new law went into effect on May 20, 2009. The bill sunsets on 12/31/2014.

Disbursement of Sale Proceeds

Surplus

1. Surplus - the remaining funds after payment of all disbursements required by the final judgment of foreclosure and shown on the certificate of disbursements. § 45.032(1)(c), Fla. Stat. (2010). Disbursement of surplus funds is governed by Section 45.031, Fla. Stat. (2010).

2. Entitlement to surplus is determined by priority; in order of time in which they became liens. *Household Fin. Services, Inc. v. Bank of Am., N. A.*, 883 So. 2d 346, 347 (Fla. 4th DCA 2004). It is the duty of the court to prioritize the interests of the competing junior lien holders and the amounts due each. *Citibank v. PNC Mortgage Corp. of America*, 718 So. 2d 300, 301 (Fla. 2d DCA 1998).

(a) Default does not waive lienholder's rights to surplus funds. *Golindano v. Wells Fargo Bank*, 913 So. 2d 614 (Fla. 3d DCA 2005). A junior lienholder has priority over the property holder for surplus funds. *Id.*, 615.

(b) A senior lienholder is not entitled to share in surplus funds. *Garcia v. Stewart*, 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005), (senior lienholder liens unaffected; improper party to junior lienholder foreclosure).

(c) Entitlement to balance of surplus after payment of priority interests - payable to the record owner as of the date of the filing of the lis pendens. *Suarez v. Edgehill*, 2009 WL 3271350 (Fla. App. 3d DCA Oct. 14, 2009).

Deficiency Judgment

1. Deficiency – is the difference between the fair market value of the security received and the amount of the debt. *Mandell v. Fortenberry*, 290 So. 2d 3, 6 (Fla. 1974); *Grace v. Hendricks*, 140 So. 790 (Fla. 1932).

2. A deficiency can be obtained only if a request for that relief is made in the pleadings and if personal jurisdiction has been obtained over the defendant or defendants against whom the deficiency is sought. *Bank of Florida in South Florida v. Keenan*, 519 So. 2d 51, 52 (Fla. 3d DCA 1988). The granting of a deficiency judgment is the rule rather than the exception. *Thomas v. Premier Capital, Inc.*, 906 So. 2d 1139, 1140 (Fla. 3d DCA 2005).

(a) Deficiency judgment not allowable if based on constructive service of process.

(b) New service of process on defendant was not required for deficiency judgment where personal jurisdiction had been originally conferred by service of foreclosure complaint. *L. A. D. Property Ventures, Inc. v. First Bank*, 2009 WL 3270846 (Fla. App. 2d DCA Oct. 14, 2009). "The law contemplates a continuance of the proceedings for entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor." *Id.*

3. Trial court has discretion to enter deficiency decree. § 702.06, Fla. Stat. (2008); *Thomas*, 906 So. 2d at 1140. The court needs to hold an evidentiary hearing. *Merrill v. Nuzum*, 471 So. 2d 128, 129 (Fla. 3d DCA 1985). The court can enter a default judgment provided the defendant was properly noticed. *Semlar v. Savings of Florida*, 541 So 2d 1369, 1370 (Fla. 4th DCA 1989).

(a) The exercise of discretion in denial of a deficiency decree must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. *Larsen v. Allocca*, 187 So. 2d 903, 904 (Fla. 3d DCA 1966).

4. A cause of action for deficiency cannot accrue until after entry of final judgment and a sale of the assets to be applied to the satisfaction of the judgment. *Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343, 345 (Fla. 4th DCA 2005). The amount of deficiency is determined at the time of the foreclosure sale. *Estepa v. Jordan*, 678 So. 2d 878 (Fla. 5th DCA 1996). The amount bid at foreclosure sale is not conclusive evidence of the property's market value. *Century Group, Inc. v. Premier Financial Services*, 724 So. 2d 661, (Fla. 2d DCA 1999).

(a) The appraisal determining the fair market value must be properly admitted into evidence and be based on the sale date. *Flagship State Bank of Jacksonville v. Drew Equipment Company*, 392 So. 2d 609, 610 (Fla. 5th DCA 1981).

(b) The formula to calculate a deficiency judgment is the final judgment of foreclosure total debt minus the fair market value of the property. *Morgan v. Kelly*, 642 So. 2d 1117 (Fla. 3d DCA 1994).

(c) The amount paid by a mortgage assignee for a debt is "legally irrelevant" to the issue of whether the assignee is entitled to a deficiency award after a foreclosure sale. *Thomas*, 906 So. 2d at 1141.

4. Burden: The secured party has the burden to prove that the fair market value of the collateral is less than the amount of the debt. *Chidnese v. McCollem*, 695 So. 2d 936, 938 (Fla. 4th DCA 1997), *Estepa* 678 So. 2d at 878. However, the Third District Court has held that the burden is on the mortgagor resisting a deficiency judgment to demonstrate that the mortgagee obtained property in foreclosure worth more than the bid price at the foreclosure sale. *Addison Mortgage Co. v. Weit*, 613 So.2d 104 (Fla. 3d DCA 1993). See also, *Thunderbird, Ltd. v. Great American Ins. Co.*, 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990), (court held that introduction of the certificate of sale from the foreclosure sale showing that the bid amount at the foreclosure sale was less than the amount of the debt shifted the burden to the mortgagee to go forward with other evidence concerning the fair market value of the property.)

5. Denial of deficiency decree in foreclosure suit for jurisdictional reasons, as distinguished from equitable grounds, is not res judicata so as to bar an action for deficiency. *Frumkes v. Mortgage Guarantee Corp.*, 173 So. 2d 738, 740 (Fla. 3d DCA 1965); *Klondike, Inc. v. Blair*, 211 So. 2d 41, 42 (Fla. 4th DCA 1968).

6. Reservation of jurisdiction in the final judgment of foreclosure – If jurisdiction is reserved, new or additional service of process on defendant is not required. *Estepa*, 678 So. 2d at 878. The motion and the notice of hearing must be sent to the attorney of record for the mortgagor. *Id.*, *NCNB Nat'l. Bank of Fla. v. Pyramid Corp.*, 497 So. 2d 1353, 1355 (Fla. 4th DCA 1986), (defaulted defendant entitled to notice of deficiency hearing). However, the motion for deficiency must be timely filed. If untimely, the deficiency claim could be barred upon appropriate motion by the defendant under Rule 1.420(e), Fla. R. Civ. P. (2010), *Frohman v. Bar-Or*, 660 So. 2d 633, 636 (Fla. 1995); *Steketee v. Ballance Homes, Inc.*, 376 So. 2d 873, 875 (Fla. 2d DCA 1979).

(a) No reservation of jurisdiction in the final judgment - motion for deficiency must be made within ten (10) days of issuance of title. *Frumkes*, 173 at 740.

(b) The lender can file a separate action for post-foreclosure deficiency. Section 702.06, Fla. Stat (2010). In a separate action, the defendant has the right to demand a trial by jury. *Hobbs v. Florida First Nat.'l Bank of Jacksonville*, 480 So. 2d 153, 156 (Fla. 1st DCA 1985); *Bradberry v. Atlantic Bank of St. Augustine*, 336 So. 2d 1248, 1250 (Fla. 1st DCA 1976), (no jury trial right within foreclosure action). Section 55.01(2), Fla. Stat. (2010) mandates that final judgments in a separate action for deficiency contain the address and social security number of the judgment debtor, if known. This requirement is not imposed in a mortgage foreclosure action, in which an *in rem* judgment is sought.

7. Statute of limitations –

(a) A deficiency judgment or decree is barred when an action on the debt secured by the mortgage is barred. *Barnes v. Escambia County Employees Credit Union*, 488 So. 2d 879, 880 (Fla. 1st DCA 1986), abrogated on other grounds.

(b) Section 95.11, Fla. Stat. (2010) imposes a five-year statute of limitations for a foreclosure deficiency judgment.

(c) "A cause of action for deficiency does not accrue, and thus the statute of limitations does not begin to run, until the final judgment of foreclosure and subsequent foreclosure sale." *Chrestensen*, 906 So. 2d at 345.

8. There are statutory limitations imposed on a deficiency judgment when a purchase money mortgage is being foreclosed. Section 702.06, Fla. Stat. (2010) includes language that impairs the entitlement to a deficiency judgment with respect to a purchase money mortgage, when the mortgagee becomes the purchaser at foreclosure sale. Specifically, this statutory limitation provides: "the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor." Essentially, if the

lender purchases the subject property he has not incurred the damages and in fact may recoup or profit at a later sale. See also, *United Postal Savings Ass'n v. Nagelbush*, 553 So. 2d 189(Fla. 3d DCA 1989), *Taylor v. Prine*, 132 So. 2d 464, 465 (Fla. 1931).

(a) One Florida court ruled in a case where the purchase money mortgagee was also the purchaser that the "all important distinction" in the case was that "the purchaser at the foreclosure sale was not the mortgagee but ... an utter stranger to the parties," a third party purchaser, warranting reversal of the trial court's denial of deficiency judgment. *Lloyd v. Cannon*, 399 So. 2d 1095, 1096 (Fla. 1st DCA 1981).

Bankruptcy

1. The automatic stay provisions of 11 U. S. C. §362 enjoins proceedings against the debtor and against property of the bankruptcy estate.

(a) To apply, the subject real property must be listed in the bankruptcy schedules as part of the estate. 11 U. S. C. § 541.

2. Foreclosure cannot proceed until the automatic stay is lifted or terminated. If property ceases to be property of the bankruptcy estate, the stay is terminated.

(a) The automatic stay in a second case filed within one year of dismissal of a prior Chapter 7, 11 or 13 automatically terminates 30 days after the second filing, unless good faith is demonstrated. 11 U. S. C. § 362(c)(3).

(b) The third filing within one year of dismissal of the second bankruptcy case, lacks entitlement to the automatic stay and any party in interest may request an order confirming the inapplicability of the automatic stay.

(c) Multiple bankruptcy filings where the bankruptcy court has determined that the debtor has attempted to delay, hinder or defraud a creditor may result in the imposition of an order for relief from stay in subsequent cases over a two year period. 11 U. S. C. §362(d)(4).

3. Debtor's discharge in bankruptcy only protects the subject property to the extent that it is part of the bankruptcy estate.

4. Foreclosure cannot proceed until relief from automatic stay is obtained or otherwise terminated, or upon dismissal of the bankruptcy case.

Florida's Expedited Foreclosure Statute

1. Enacted by § 702.10, Fla. Stat. (2010).

2. Upon filing of verified complaint, plaintiff moves for immediate review of foreclosure by an order to show cause. (These complaints are easily distinguishable from the usual foreclosure by the order to show cause).

(a) The failure to file defenses or to appear at the show cause hearing "presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard." *Id.*

3. Not the standard practice among foreclosure practitioners, due to limitations:

(a) Statute does not foreclose junior liens;

(b) Procedures differ as to residential and commercial properties; and

(c) Statute only provides for entry of an *in rem* judgment; a judgment on the note or a deficiency judgment cannot be entered under the show cause procedure.

Common Procedural Errors

1. Incorrect legal description contained in the:

(a) Original mortgage – requires a count for reformation. An error in the legal description of the deed requires the joinder of the original parties as necessary parties to the reformation proceedings. *Chanrai Inv., Inc., v. Clement*, 566 So. 2d 838, 840 (Fla. 5th DCA 1990).

(b) Complaint and lis pendens – requires amendment.

(c) Judgment – Rule 1.540 (a), Fla. R. Civ. P. (2010) governs. For example, an incorrect judgment amount which omitted the undisputed payment of real estate taxes could be amended. *LPP Mortgage Ltd. v. Bank of America*, 826 So. 2d 462, 463 (Fla. 3d DCA 2002).

(d) Notice of Sale – requires vacating the sale and subsequent resale of property. *Hyte Development Corp. v. General Electric Credit Corp.*, 356 So. 2d 1254 (Fla. 3d DCA 1978).

(e) Certificate of title – a “genuine” scrivener’s error in the certificate of title can be amended. However, there is no statutory basis for the court to direct the clerk to amend the certificate of title based on post judgment transfers of title, faulty assignments of bid or errors in vesting title instructions.

(1) An error in the certificate of title which originates in the mortgage and is repeated in the deed and notice of sale requires the cancellation of the certificate of title and setting aside of the final judgment. *Lucas v. Barnett Bank of Lee County*, 705 So. 2d 115 (Fla. 2d DCA 1998). (For example, plaintiff’s omission of a mobile home and its vehicle identification number (VIN) included in the mortgage legal description, but overlooked throughout the pleadings, judgment and notice of sale, cannot be amended in the certificate of title.) Due process issues concerning the mobile home require the vacating of the sale and judgment.

Mortgage Workout Options

1. Reinstatement: Repayment of the total amount in default or payments behind and restoration to current status on the note and mortgage.
2. Forbearance: The temporary reduction or suspension of mortgage payments.
3. Repayment Plan: Agreement between the parties whereby the homeowner repays the regularly scheduled monthly payments, plus an additional amount over time to reduce arrears.
4. Loan Modification: Agreement between the parties whereby one or more of the mortgage terms are permanently changed.
5. Short Sale: Sale of real property for less than the total amount owed on the note and mortgage.

(a) If the lender agrees to the short sale, the remaining portion of the mortgage debt, (the difference between the sale price of the property and mortgage balance, the deficiency), may be forgiven by the lender.

(1) Formerly, the amount of debt forgiven was considered income imputed to the seller and taxable as a capital gain by the IRS.

Parker Delaney, 186 F. 2d 455, 459 (1st Cir. 1950). However,

federal legislation has temporarily suspended imputation of income upon the cancellation of debt.

6. Deed-in-lieu of Foreclosure: The homeowner's voluntary transfer of the home's title in exchange for the lender's agreement not to file a foreclosure action.

Revised 7/14/10

**Residential Foreclosure Procedures for Indian River County, Martin
County, Saint Lucie County Beginning August 2010**

The 19th Judicial Circuit along with all other judicial circuits in the State of Florida has been allotted resources to address and reduce the backlog of residential mortgage foreclosure cases. This Circuit will be utilizing Senior Judges, case managers and support staff to reduce the backlog of cases as follows:

Indian River County: Beginning the week of August 2, 2010, a Senior Judge will hear a full day of only summary judgments on residential mortgage foreclosure cases on Fridays beginning at 9:00 am. Judge Kanarek will continue to hear all other matters regarding foreclosure cases, and will assist the Senior Judge by also conducting hearings on summary judgments. All summary judgments hearings in which counsel for the plaintiff wishes to appear by phone should be scheduled by contacting CourtCall at **888-882-6878**. CourtCall will set 12 cases every ½ hour starting at 9:00 am, and the last 12 cases of the morning will be set at 11:30 am. In the afternoon, hearings will start at 1:30 pm, and the last 12 will be set at 3:30 pm. Refer to Judge Kanarek's webpage at www.circuit19.org for information on scheduling all hearings except hearings for summary judgment. Judge Kanarek's Summary Judgment hearings will continue to be scheduled via CourtCall if Plaintiff's counsel wishes to appear at the hearing telephonically. Cases in which plaintiff's counsel wishes to schedule a plaintiff's motion for hearing and appear in person may be scheduled by contacting Judge Kanarek's office, and once scheduled through Judge Kanarek's office, plaintiff's counsel may not appear by phone at the hearing.

Martin County: Beginning the week of August 2, 2010, a Senior Judge will hear a full day of only summary judgments on residential mortgage foreclosure cases on Thursdays beginning at 9:00 am. Judge Metzger will continue to hear all other matters regarding foreclosure cases, and will assist the Senior Judge by also conducting hearings on summary judgments. All summary judgments hearings in which counsel for the plaintiff wishes to appear by phone should be scheduled by contacting CourtCall at **888-882-6878**. CourtCall will set 12 cases every ½ hour starting at 9:00 am, and the last 12 cases of the morning will be set at 11:30 am. In the afternoon, hearings will start at 1:30 pm, and the last 12 will be set at 3:30 pm. Refer to Judge Metzger's webpage at www.circuit19.org for information on scheduling all hearings except hearings for summary judgment. Judge Metzger's Summary Judgment hearings will continue to be scheduled via CourtCall if Plaintiff's counsel wishes to appear at the hearing telephonically. Cases in which plaintiff's counsel wishes to schedule a plaintiff's motion for hearing and appear in

person may be scheduled by contacting Judge Metzger's office, and once scheduled through Judge Metzger's office, plaintiff's counsel may not appear by phone at the hearing.

Saint Lucie County (Saint Lucie West Courthouse Annex): Beginning the week of August 2, 2010, a Senior Judge will hear all matters concerning residential mortgage foreclosure cases on Mondays, Tuesdays, and Wednesday at the Saint Lucie West Courthouse Annex (and not the main courthouse) as follows:

SUMMARY JUDGMENT HEARINGS (Plaintiff's Counsel Attends By Phone): Full day of hearings on Mondays and Tuesdays beginning at 9:30 am. All such hearings will be scheduled through CourtCall at **888-882-6878**. CourtCall will set 12 cases every ½ hour starting at 9:30 am, and the last 12 cases of the morning will be set at 11:30 am. In the afternoon, hearings will start at 1:30 pm, and the last 12 will be set at 3:30 pm.

SUMMARY JUDGEMENT HEARINGS (Plaintiff's Counsel Appears In Person): Hearings in which Plaintiff's counsel will attend in person will be heard Monday through Wednesday from 9:00 am to 9:30 am. You must submit a packet at least 10 days in advance of the hearing as indicated below. Contact the Senior Judge's secretary to schedule such a hearing: **772-871-7206** or **foreclosure@circuit19.org**.

SHORT HEARING/UNIFORM MOTION CALENDARS (Hearings Needing No More Than 5 Minutes Per Side): Short Hearing/Uniform Motion Calendars will be conducted on Monday, Tuesdays, and Wednesdays from 8:30 am to 9:00 am. **The hearing date must be coordinated with opposing counsel and set with the Senior Judge's Office by calling the secretary at 772-871-7206 or foreclosure@circuit19.org. A copy of the motion must be sent to Senior Judge, 250 NW Country Club Dr., Ste. 217, Port St. Lucie, FL 34986 no later than 5 days prior to the scheduled hearing, and the notice of hearing must be served on opposing counsel 5 days prior to the scheduled hearing. No evidentiary hearings or summary judgment hearings shall be set on Short Hearing/Uniform Motion Calendars.** Attorneys may attend by CourtCall if arrangements are made through CourtCall at least 2 days prior to the scheduled hearing.

EMERGENCY MOTIONS TO CANCEL FORECLOSURE SALE OR POSTPONE WRIT OF POSSESSION: Emergency Motions to Cancel Foreclosure Sales or Postpone Writs of Possession will be conducted on Monday, Tuesdays, and Wednesdays from 8:30 am to 9:00 am. The motion

must be filed with the Clerk of Court no later than 2 days prior to the scheduled sale date or date the Sheriff is to deliver the property under a writ of possession, and the notice of hearing must be served on opposing counsel by facsimile no later than 2 days prior to the scheduled hearing. The emergency hearing must be set by contacting the Senior Judge's secretary at **772-871-7206** or **foreclosure@circuit19.org**. Attorneys may attend by CourtCall if arrangements are made through CourtCall at least 2 days prior to the scheduled hearing.

HEARINGS REQUIRING MORE THAN 10 MINUTES: Motions requiring a hearing of more than 10 minutes will be set on Wednesdays from 9:30 am to Noon (additional days and times may be added as needed). Contact the Senior Judge's secretary to schedule a hearing on your motion requiring 10 minutes or more at: **772-871-7206** or **foreclosure@circuit19.org**.

NOTICES FOR TRIAL: All notices that the case is at issue and ready to be set for trial shall be sent to Senior Judge, 250 NW Country Club Dr., Ste. 217, Port St. Lucie, FL 34986.

ENVELOPES FOR SENDING ORDERS: Please provide a sufficient number of envelopes for sending orders to all parties. The return address on the envelopes must be: Senior Judge, 250 NW Country Club Dr., Ste. 217, Port St. Lucie, FL 34986

19TH JUDICIAL CIRCUIT
REQUIRED SUMMARY JUDGMENT PACKET CONTENTS FOR
RESIDENTIAL FORECLOSURE CASES

Summary judgment packets submitted to the court **must** contain the following as a minimum for the case to proceed to a hearing:

COPIES ONLY (Originals should be sent to Clerk of Court for filing):

- Motion for Summary Judgment and Notice of Hearing/Re-Notice of Hearing
- First page of complaint showing the style of the case and Clerk's date of filing stamp
- All returns of service indicating service of summons on defendants (returns showing no service should not be submitted)
- Notice of dismissal/dropping party for any defendant not served
- Any documents filed in the court file regarding status of any bankruptcy proceeding for any defendant
- Promissory note sued upon (showing any endorsements)

- Allonge or recorded assignments
- Affidavit stating plaintiff is the owner and holder of the note or the servicer has full authority to foreclose
- Form A
- Plaintiff Attorney's Certificate of Compliance with AO 2010-03 or 2009-15 as applicable
- Mediation Report (if applicable)
- Notice of Borrower Non-Participation (if applicable)
- Affidavit of indebtedness
- Affidavit regarding attorney's fees by plaintiff's counsel
- Affidavit regarding attorney's fees by supporting expert
- Affidavit of costs
- Notice of Filing regarding original note, mortgage, assignments or allonges

ORIGINALS:

- Proposed Final Judgment
- Proposed Notice of Foreclosure Sale
- Proposed Certificate of Sale
- Proposed Certificate of Disbursements
- Proposed Certificate of Title
- Final Disposition Form (properly filled out)

All originals must be accompanied by a sufficient number of copies for conforming and stamped addressed envelopes with sufficient postage for distribution to all parties. **Envelopes must have this address as a return address: Senior Judge, 250 NW Country Club Dr., Ste. 217, Port St. Lucie, FL 34986.**

Please do not send separate copies of your motion for summary judgment, affidavits or notice of hearing to the Senior Judge. This must all be included in the packet.

All residential mortgage foreclosure summary judgment packets for Indian River County, Martin County and Saint Lucie County cases must be sent to: Senior Judge, 250 NW Country Club Dr., Ste. 217, Port St. Lucie, FL 34986, no later than 10 calendar days prior to the scheduled hearing. If complete packets are not received at least 10 calendar days in advance of the hearing, the summary judgment hearing may be reset.

**NINETEENTH JUDICIAL CIRCUIT
JOB OPPORTUNITY (OPS)**

Date: June 10, 2010

Closing Date: June 21, 2010

Title: Senior Secretary – Mortgage Foreclosures (OPS)

Pay: \$11.89 per hour (no benefits available)

General Description

The essential function of the position within the organization is to provide complex clerical/secretarial support. This position is responsible for a variety of office tasks. The position works under general supervision according to some procedures; and may decide how and when to complete tasks.

Examples of Work Performed

(Note: The examples of work as listed in this class specification are not necessarily descriptive of any one position in the class. The omission of specific statements does not preclude management from assigning specific duties not listed herein if such duties are a logical assignment to the position.)

Schedules and coordinates meetings and prepares orders for judges' signatures; coordinates schedules for staff and contract mediators; prepares memoranda of agreements reached in mediation and submits to judges.

Transcribes legal memoranda from dictation, court orders and Supreme Court responses; proofreads for grammar, spelling, accuracy of quotations, proper case citation and format, and distributes memoranda as appropriate.

Answers departmental telephones; provides information, directs callers to appropriate personnel or department, or takes and relays messages.

Serves as receptionist; greets visitors and checks in appointments; provides information, and directs visitors to appropriate personnel or department.

Performs complex clerical/secretarial tasks, such as typing and processing documents such as letters, agreements, work orders or memoranda; performing research; processing and distributing mail; preparing paperwork for meetings; preparing reports; or maintaining calendars or record systems.

Transfers legal memoranda to research directory; prepares labels and filings; scans office files onto disks; assists in keeping a log of all case files and assigns new cases; maintains index of cases assigned and monitors current status; prepares periodic reports.

Performs special tasks, such as signing materials in and out, screening cases and reviewing files, gathering data for special reports, or assisting with special projects.

Performs duties of other Courts System personnel in their absence as directed.

Performs routine office tasks, such as scanning documents, performing data entry, faxing, filing or photocopying.

Receives requests for interpreter services; dispatches assignments to interpreters; tracks assignments and maintains records and documentation of work provided.

Performs purchasing duties via p-card and purchase orders. Processes travel authorization requests and travel reimbursement forms.

Competencies

Data Responsibility:

Refers to information, knowledge, and conceptions obtained by observation, investigation, interpretation, visualization, and mental creation. Data are intangible and include numbers, words, symbols, ideas, concepts, and oral verbalizations.

Gathers, organizes, analyzes, examines, or evaluates data or information and may prescribe action based on these data or information.

People Responsibility:

Refers to individuals who have contact with or are influenced by the position.

Provides assistance to people to achieve task completion; may instruct or assign duties to coworkers.

Assets Responsibility:

Refers to the responsibility for achieving economies or preventing loss within the organization.

Has responsibility and opportunity for achieving moderate economies and/or preventing moderate losses through the management of a small division; handling supplies of high value or moderate amounts of money consistent with the operation of a small division.

Mathematical Requirements:

Deals with quantities, magnitudes, and forms and their relationships and attributes by the use of numbers and symbols.

Uses addition, subtraction, multiplication, and division; may compute ratios, rates, and percents.

Communications Requirements:

Involves the ability to read, write, and speak.

Reads technical instructions, charts, and/or procedures manuals; composes routine reports and

completes job forms; speaks compound sentences using standard grammar.

Complexity of Work:

Addresses the analysis, initiative, ingenuity, creativity, and concentration required by the position and the presence of any unusual pressures.

Performs semi-routine work involving set procedures and rules, but with frequent problems; requires normal attention with short periods of concentration for accurate results or occasional exposure to unusual pressure.

Impact of Decisions:

Refers to consequences such as damage to property, loss of data or property, exposure of the organization to legal liability, or injury or death to individuals.

The impact of decisions is moderately serious – affects work unit and may affect others.

Equipment Usage:

Refers to inanimate objects such as substances, materials, machines, tools, equipment, work aids, or products. A thing is tangible and has shape, form, and other physical characteristics.

Handles machines, tools, equipment, or work aids involving some latitude for judgment regarding attainment of standard or in selecting appropriate items, such as computers, peripherals, or software programs such as word processing or spreadsheets.

Education and Experience Guidelines

Education:

Refers to job specific training and education that is recommended for entry into the position. Additional relevant experience may substitute for the recommended educational level on a year-for-year basis.

High school diploma or GED.

Experience:

Refers to the amount of related work experience that is recommended for entry into the position that would result in reasonable expectation that the person can perform the required tasks. Additional relevant education may substitute for the recommended experience on a year-for-year basis, excluding supervisory experience.

Two years of experience in office skills, computer operation or a closely related field.

Licenses, Certifications, and Registrations Required:

Refers to professional, state, or federal licenses, certifications, or registrations required to enter the position.

None

**NINETEENTH JUDICIAL CIRCUIT
JOB OPPORTUNITY (OPS)**

Date: June 10, 2010

Closing Date: June 21, 2010

Title: Court Program Specialist II – Mortgage Foreclosures (OPS)

Pay: \$17.36 per hour (no benefits available)

General Description

The essential function of the position within the organization is to assist judges with the timely disposition of cases through case management, case monitoring and program implementation. The position is responsible for providing information to litigants and system staff, reviewing filings of litigants and making referrals to community-based services, managing and preparing cases for court hearings and briefing judges, attending hearings, maintaining record/filing system, training and assisting new departmental personnel, scheduling hearings, and performing related clerical functions. The position is responsible for collecting and reporting on case/program data, maintaining databases as needed. The position works under general supervision of Trial Court Administrator or Administrative Services Manager developing work methods and sequences.

Examples of Work Performed

(Note: The examples of work as listed in this class specification are not necessarily descriptive of any one position in the class. The omission of specific statements does not preclude management from assigning specific duties not listed herein if such duties are a logical assignment to the position.)

Assists litigants in person, by telephone and via correspondence, providing case status information, rules of civil procedures and statutes, and referrals to appropriate community agencies; reviews filings for judges.

Organizes and maintains filing systems for the area of responsibility; updates library of brochures and pamphlets/information for litigants.

Schedules hearings by determining case status; determines whether to set a case management conference or appropriate hearing, or proceed without a hearing and prepare appropriate court order or correspondence.

Manages and prepares cases for court hearings by tabbing and naming pleadings, composing and preparing historical summations, and researching and providing corresponding cases and other documentation pertinent to the case and/or litigants.

Prepares and maintains court dockets; attends court hearings, taking notes, composing and preparing appropriate orders based on rulings, and providing information to the court as needed; researches statutes and rules and applies basic accounting methods.

Monitors and reviews new legislation, rules and other mandates requiring procedural and/or administrative changes, and implements required changes.

Trains and provides continuing information and assistance to co-workers as needed; and reviews work as needed; provides information to other agencies as requested.

Performs administrative tasks, such as composing and preparing orders, documents, forms and correspondence; or creating and maintaining record systems for efficient case management.

Participates on local communities, councils, and workgroups to exchange information, solve problems, and coordinate services.

Maintains daily, monthly and yearly statistics regarding volume and types of cases handled by program.

Competencies

Data Responsibility:

Refers to information, knowledge, and conceptions obtained by observation, investigation, interpretation, visualization, and mental creation. Data are intangible and include numbers, words, symbols, ideas, concepts, and oral verbalizations.

Coordinates or determines time, place, or sequence of operations or activities based on analysis of data and possibly executes determinations or reports on events.

People Responsibility:

Refers to individuals who have contact with or are influenced by the position.

Persuades or influences others in favor of a service, course of action, or point of view.

Assets Responsibility:

Refers to the responsibility for achieving economies or preventing loss within the organization.

Requires minimum responsibility for only small quantities of low cost items or supplies where opportunities for achieving economies or preventing loss are negligible.

Mathematical Requirements:

Deals with quantities, magnitudes, and forms and their relationships and attributes by the use of numbers and symbols.

Uses addition, subtraction, multiplication, and division; may compute ratios, rates, and percents.

Communications Requirements:

Involves the ability to read, write, and speak.

Reads professional publications; composes complex reports and manuals; speaks formally to groups outside the organization.

Complexity of Work:

Addresses the analysis, initiative, ingenuity, creativity, and concentration required by the position and the presence of any unusual pressures.

Performs coordinating work involving guidelines and rules, with constant problem solving; requires continuous close attention for accurate results or frequent exposure to unusual pressures.

Impact of Decisions:

Refers to consequences such as damage to property, loss of data or property, exposure of the organization to legal liability, or injury or death to individuals.

The impact of errors is moderately serious – affects work unit and affects other units or citizens.

Equipment Usage:

Refers to inanimate objects such as substances, materials, machines, tools, equipment, work aids, or products. A thing is tangible and has shape, form, and other physical characteristics.

Handles machines, tools, equipment, or work aids involving some latitude for judgment regarding attainment of standard or in selecting appropriate items, such as computers, peripherals, or software programs, such as word processing or spreadsheets.

Safety of Others:

Refers to the responsibility for other people's safety, either inherent in the job or to assure the safety of the general public.

Requires some responsibility for safety and health of others and/or for occasional enforcement of the standards of public safety or health.

Education and Experience Guidelines

Education:

Refers to job specific training and education that is recommended for entry into the position. Additional relevant experience may substitute for the recommended educational level on a year-for-year basis.

Bachelor's degree in public or business administration, criminal justice, psychology, sociology or a closely social science related field.

Experience:

Refers to the amount of related work experience that is recommended for entry into the position that would result in reasonable expectation that the person can perform the required tasks. Additional relevant education may substitute for the recommended experience on a year-for-year

basis, excluding supervisory experience.

Three years of related experience. Juris doctorate degree may substitute for required experience.

Licenses, Certifications, and Registrations Required:

Refers to professional, state, or federal licenses, certifications, or registrations required to enter the position.


None



ADMINISTRATIVE OFFICE OF THE COURTS
INTER-OFFICE

MEMO 2009-32

TO: Honorable Jeffrey K. Barton
Honorable Marsha Ewing
Honorable Sharon Robertson
Honorable Joe E. Smith

FROM: Thomas A. Genung, Trial Court Administrator 

DATE: August 17, 2009

RE: Administrative Order 2009-10, Judicial Assignments for 2010

Attached please find original **Administrative Order 2009-10** for filing with the Court.

If you have any questions regarding the above, please do not hesitate to contact me.

TAG/mt
Attachment

cc w/attach: All Judges in the Nineteenth Judicial Circuit
All Magistrates and Hearing Officers in the Nineteenth Judicial Circuit
All Staff Attorneys in the Nineteenth Judicial Circuit
Myra Zilahy, General Counsel, IRC Clerk of Court
Honorable Bruce Colton, State Attorney's Office
Honorable Diamond Litty, Public Defender's Office
All County Attorneys in the Nineteenth Judicial Circuit
All Local Law Libraries
All Local Bar Presidents
IT

**IN THE CIRCUIT COURT OF THE NINETEENTH CIRCUIT IN AND FOR
INDIAN RIVER, MARTIN, OKEECHOBEE, AND ST. LUCIE COUNTIES, FLORIDA**

ADMINISTRATIVE ORDER 2009-10

RE: Judicial Assignments for 2010

WHEREAS the Chief Judge is required to develop an administrative plan for the efficient and proper administration of all courts within the circuit;

Now, therefore, as Chief Judge, pursuant to Rule 2.215(b)(4), Florida Rules of Judicial Administration, the following judicial assignments are hereby made effective January 4, 2010 through December 31, 2010.

INDIAN RIVER COUNTY

Honorable Cynthia L. Cox:

All Family; All Domestic Violence and Repeat Violence cases; DOR Cases

Honorable Robert A. Hawley:

75% Felony Cases

Honorable Paul B. Kanarek:

All Civil Cases

Honorable Robert L. Pegg:

All Juvenile Dependency and Delinquency Cases; Detention and Shelter Hearings daily; 25% Felony Cases; Probate and Guardianship Cases; Adult Drug Court Cases; Juvenile Drug Court Cases; Substance Abuse and Mental Health Cases

Honorable David C. Morgan:

50% of Indian River County Court Cases

Honorable Joe A. Wild:

50% of Indian River County Court Cases

MARTIN COUNTY

Honorable Sherwood Bauer, Jr.:

All Felony Cases, excluding Arraignments

Honorable Chief Judge Steven J. Levin:

Felony Arraignments; Felony Drug Court; Mental Health Court; Assist with Felony

Honorable Robert R. Makemson:

All Family Cases; All Domestic Violence and Repeat Violence Cases; DOR Cases

Honorable Elizabeth A. Metzger:

All Civil Jury Cases and all Foreclosure Cases

Honorable Gary L. Sweet:

All Juvenile Dependency and Delinquency Cases; Detention and Shelter Hearings daily; Delinquency and Dependency Drug Court Cases; All Non-Jury Civil Cases; All Jimmy Ryce Cases; Assist with Jury Civil Trials; Probate and Guardianship Cases; Substance Abuse and Mental Health Cases

Honorable Stewart R. Hershey:

One third of Martin County Court Cases

Honorable Kathleen H. Roberts:

One third of Martin County Court Cases

Honorable Darren Steele:

One third of Martin County Court Cases

OKEECHOBEE COUNTY

Honorable Robert E. Belanger:

All Felony Cases; Substance Abuse and Mental Health Cases; All Domestic Violence and Repeat Violence Cases

Honorable Larry Schack:

All Civil Cases; All Family Cases; Probate and Guardianship Cases; Juvenile Dependency, including Shelter Hearings; DOR Cases

Honorable Jerald D. Bryant:

All Okeechobee County Court Cases; Truancy Court; All Juvenile Delinquency Cases, including Detention Hearings; Adult Felony and Misdemeanor Drug Court

ST. LUCIE COUNTY

Honorable Barbara W. Bronis:

50% Family Cases, including 50% DOR Cases; 50% Domestic Violence and Repeat Violence Cases

Honorable Burton C. Conner:

All Civil Jury Cases; Probate and Guardianship Cases; Substance Abuse and Mental Health Cases

Honorable Cynthia L. Cox:

Mental Health Court

Honorable Dwight L. Geiger:

All Juvenile Delinquency and Dependency Cases; Detention and Shelter Hearings daily

Honorable Chief Judge Steven J. Levin:

Juvenile Drug Court

Honorable James W. McCann:

One third of Felony Cases, including review of Arrest and Violation of Probation warrants; Bond hearings; Pre-trial motions; Change of pleas; Trials; Sentencings; 3.800 motions and non-3.850 post-conviction motions (Alphabet GP-PE)

Honorable F. Shields McManus:

50% Family Cases, including 50% DOR Cases; 50% Domestic Violence and Repeat Violence Cases

Honorable Lawrence M. Mirman:

One third of Felony Cases, including review of Arrest and Violation of Probation warrants; Bond hearings; Pre-trial motions; Change of pleas; Trials; Sentencings; 3.800 motions and non-3.850 post-conviction motions (Alphabet PF-Z)

Honorable William L. Roby:

All Felony Violation of Probation Cases; All Felony Arraignments; All Felony 3.850 motions; All Fast-Track Change of Pleas; Weekday First Appearance Hearings (in rotation with County Court Judges); Domestic Violence and Repeat Violence Hearings one time per month for each family judge; Non-Jury Civil Cases excluding Residential Mortgage Foreclosures but including trials of Residential Mortgage Foreclosures Cases; Assist with Civil Jury motions three (3) days each month

Honorable Larry Schack:

Adult Drug Court; Residential Mortgage Foreclosures, excluding Trials of Residential Mortgage Foreclosure Cases

Honorable Dan L. Vaughn:

One-third of Felony Cases, including review of Arrest and Violation of Probation warrants; Bond hearings; Pre-trial motions; Change of pleas; Trials; Sentencings; 3.800 motions and non-3.850 post-conviction motions (Alphabet A-GO)

Honorable Clifford H. Barnes:

20% of All St. Lucie County Court Criminal Cases; Small Claims Cases excluding Replevin Cases; One third County Ordinance Cases

Honorable Kathryn Nelson:

40% of All St. Lucie County Court Criminal Cases; One third County Ordinance Cases; Misdemeanor Drug Court

Honorable Thomas J. Walsh, Jr.:

Collections Court; All St. Lucie County Court Civil Cases (other than Civil Ordinance Cases, Misdemeanors, or County Ordinance Cases); 100% Landlord/Tenant Cases, including Count II Damages Cases filed in County Civil Court and all actions arising out of any eviction filings; All Replevin Cases; Traffic Infractions involving serious injury or death; Supervision of Traffic Magistrates for all civil traffic matters; All Traffic Magistrate recusal and/or disqualification Cases; Assist with Circuit Mortgage Foreclosure matters as needed

Honorable Philip J. Yacucci:

40% of All St. Lucie County Court Criminal Cases; One third County Ordinance Cases; Domestic Violence Diversion Program (Criminal/DVDP)

WEEKEND FIRST APPEARANCE DUTY

All Circuit Court Judges assigned to St. Lucie County and Okeechobee County will be responsible, in rotation with the St. Lucie County Court Judges and the Chief Judge, for Weekend First Appearances, Shelter Hearings and Detention Hearings in St. Lucie County.

All Circuit Court Judges assigned to Indian River County will be responsible, in rotation with Indian River County Judges, for Weekend First Appearances and Shelter Hearings in Indian River County.

All Circuit Court Judges assigned to Martin County will be responsible, in rotation with Martin County Judges, for Weekend First Appearances and Shelter Hearings in Martin County.

All Circuit Court Judges assigned to Martin County and Indian River County will be responsible, in rotation with the Okeechobee County Judge, for Weekend First Appearances and Shelter Hearings in Okeechobee County. Any County Court Judge in Martin or Indian River County may choose to assist with the Weekend First Appearances and Shelter Hearings in Okeechobee County.

ADMINISTRATIVE JUDGES

Honorable Elizabeth A. Metzger, Appellate Division
Honorable Barbara W. Bronis, Family Division
Honorable Sherwood Bauer, Jr., Criminal Division
Honorable Burton C. Conner, Civil Division
Honorable Gary L. Sweet, Drug Court
Honorable Cynthia L. Cox, Mental Health Court
Honorable Stewart R. Hershey, County Division

APPELLATE DIVISION

All Circuit and County Judges

PROGRAM ASSIGNMENTS - JUDICIAL CHAIRPERSON

FAMILY LAW ADVISORY GROUP.....Judge Bronis-St. Lucie
Judge Makemson-Martin
Judge Cox-Indian River
Judge Schack-Okeechobee

SUPERVISED VISITATION COMMITTEE.....Judge Bronis

PRO BONO COMMITTEEJudge Yacucci
Judge Geiger

ARTICLE V COMMITTEEJudge Conner

BENCH/BAR PROFESSIONALISMJudge Sweet

JURY MANAGEMENTJudge Wild

SMALL CLAIMS MEDIATIONJudge Walsh

TECHNOLOGY COMMITTEE

Judge Morgan, Chair

Members: Judge Roby, Judge Kanarek, Judge Levin,
Judge Bauer, Judge Belanger, Judge Hawley

FUTURE GROWTH AND SPACE NEEDS COMMITTEE

Judge Conner, Chair

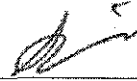
Members: Judge Bronis, Judge Morgan, Judge Yacueci,
Judge Levin, Judge Belanger, Judge Roby

LONG RANGE PLANNING COMMITTEE

Judge Levin, Chair

Members: Judge Belanger, Judge Conner,
Judge Nelson, Judge Pegg, Judge Roby

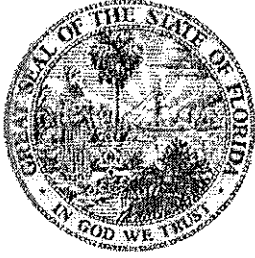
DONE and ORDERED in quadruplicate in Stuart, Martin County, Florida on this 14th day of August, 2009.



STEVEN J. LEVIN
Chief Judge

copies furnished to:

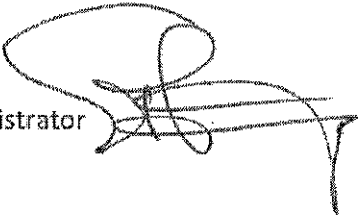
All Judges in the 19th Judicial Circuit
All Clerk of Courts in the 19th Judicial Circuit
State Attorney's Office
Public Defender's Office
Sheriff's Departments
Police Departments
All Law Libraries in the 19th Judicial Circuit
Media



ADMINISTRATIVE OFFICE OF THE COURTS
INTER-OFFICE
MEMORANDUM

2009-35

TO: Honorable Jeffrey K. Barton
Honorable Marsha Ewing
Honorable Sharon Robertson
Honorable Joe E. Smith

FROM: Thomas A. Genung, Trial Court Administrator 

DATE: August 31, 2009

RE: **Amended Administrative Order 2009-11**
Clarification of Judicial Assignments for July, 2009 as to Civil Assignment in St. Lucie County

Attached please find an original **Amended Administrative Order 2009-11** for filing with the Court.

If you have any questions regarding the above, please do not hesitate to contact me.

TAG/mt
Attachment

cc w/attach: All Judges in the Nineteenth Judicial Circuit
All Magistrates and Hearing Officers in the Nineteenth Judicial Circuit
All Staff Attorneys in the Nineteenth Judicial Circuit
Myra Zilahy, General Counsel, IRC Clerk of Court
Honorable Bruce Colton, State Attorney's Office
Honorable Diamond Litty, Public Defender's Office
All County Attorneys in the Nineteenth Judicial Circuit
All Local Law Libraries
All Local Bar Presidents
IT

IN THE CIRCUIT COURT OF THE NINETEENTH CIRCUIT IN AND FOR
INDIAN RIVER, MARTIN, OKEECHOBEE, AND ST. LUCIE COUNTIES,
STATE OF FLORIDA

AMENDED ADMINISTRATIVE ORDER 2009-11

RE: Clarification of Judicial Assignments for July, 2009 as to Civil Assignment in St. Lucie County

WHEREAS the Chief Judge is required to develop an administrative plan for the efficient and proper administration of all courts within the circuit

Now therefore as Chief Judge and pursuant to Rule 2.215(b) (4), Florida Rules of Judicial Administration, the following clarification of the St. Lucie County Civil assignment effective July 1, 2009 through December 31, 2009. All other aspects of previously entered Administrative Order 2009- 08 remain unchanged as set forth in that previously entered Administrative Order.

ST. LUCIE COUNTY

Honorable William L. Roby:

All Felony Violation of Probation cases (VOPs); All Felony Arraignments; All Felony 3.850 Motions; All Fast-Track Change of Pleas; Weekday First Appearance Hearings (in rotation with County Court Judges); Assist in any felony proceeding; **All Non-Jury Civil Cases (all trials and motions) excluding Residential Mortgage Foreclosures but including trials of Residential Mortgage Foreclosure Cases; Domestic Violence and Repeat Violence hearings one time per month for each family judge (clarification of previous assignment outlined in Administrative Order 2009-08 in bold)**

Honorable Burton C. Conner:

All Civil Jury Cases; Probate and Guardianship; Substance Abuse and Mental Health Matters

Honorable F. Shields McManus:

Residential Mortgage Foreclosures, excluding Trials of Residential Mortgage Foreclosure Cases

DONE and ORDERED in quadruplicate in Stuart, Martin County, Florida on this 28th day of August, 2009, nunc pro tunc July 1, 2009.



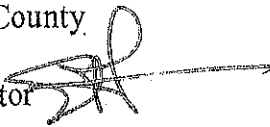
STEVEN J. LEVIN
Chief Judge

Copies furnished to:
All Judges in the 19th Judicial Circuit
All Clerk of Courts in the 19th Judicial Circuit
State Attorney's Office
Public Defender's Office
Sheriff's Department
All Law Libraries in the 19th Judicial Circuit
Media



ADMINISTRATIVE OFFICE OF THE COURTS
INTER-OFFICE
MEMORANDUM

MEMO 2010-19

TO: Iris Schwartz, Civil Division, Indian River County
FROM: Thomas A. Genung, Trial Court Administrator 
DATE: August 6, 2010
RE: Senior Judge Assignment Orders from July 1, 2010 – June 30, 2011

Attached please find the original Assignment Orders for the following Senior Judges assigned to Indian River County:

- Honorable John Fennelly
- Honorable George Shahood
- Honorable James Midelis

Please have these orders signed, recorded and filed accordingly. Also, please sign and date below once the orders have been recorded and return a signed copy of this memo to me so that we may have verification of the same.

Thank you.

TAG/ms
Attachments

By: _____ Date: _____

cc: Honorable John Fennelly
Honorable George Shahood
Honorable James Midelis

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR INDIAN RIVER COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

WHEREAS the Honorable John Fennelly has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable John Fennelly is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in Indian River County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 5th day of August, 2010, nunc pro tunc to July 1, 2010.


STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

JEFFREY K. BARTON, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF INDIAN RIVER, FLORIDA

BY: _____ D.C.

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR INDIAN RIVER COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

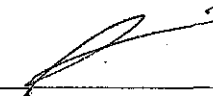
WHEREAS the Honorable George Shahood has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable George Shahood is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in Indian River County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 5th day of May, 2010, nunc pro tunc to July 1, 2010.



STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

JEFFREY K. BARTON, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF INDIAN RIVER, FLORIDA

BY: _____ D.C.

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR INDIAN RIVER COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

WHEREAS the Honorable James Midelis has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable James Midelis is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in Indian River County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 5th day of April, 2010, nunc pro tunc to July 1, 2010.


STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

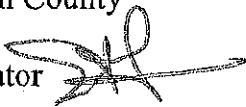
JEFFREY K. BARTON, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF INDIAN RIVER, FLORIDA

BY: _____ D.C.



ADMINISTRATIVE OFFICE OF THE COURTS
INTER-OFFICE
MEMORANDUM

MEMO 2010-20

TO: Tammy Copus, Manager, Recording, Martin County
FROM: Thomas A. Genung, Trial Court Administrator 
DATE: August 6, 2010
RE: Senior Judge Assignment Orders from July 1, 2010 – June 30, 2011

Attached please find the original Assignment Orders for the following Senior Judges assigned to Martin County:

- Honorable John Fennelly
- Honorable George Shahood

Please have these orders signed, recorded and filed accordingly. Also, please sign and date below once the orders have been recorded and return a signed copy of this memo to me so that we may have verification of the same.

Thank you.

TAG/ms
Attachments

By: _____ Date: _____

cc: Honorable John Fennelly
Honorable George Shahood

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR MARTIN COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

WHEREAS the Honorable John Fennely has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable John Fennely is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in Martin County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this day of , 2010, nunc pro tunc to July 1, 2010.



STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

MARSHA EWING, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF MARTIN, FLORIDA

BY: _____ D.C.

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR MARTIN COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER


WHEREAS the Honorable George Shahood has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable George Shahood is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in Martin County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 5th day of August, 2010, nunc pro tunc to July 1, 2010.


STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

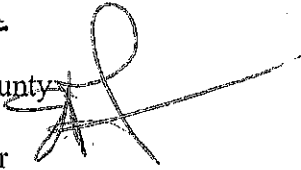
MARSHA EWING, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF MARTIN, FLORIDA

BY: _____ D.C.



ADMINISTRATIVE OFFICE OF THE COURTS
INTER-OFFICE
MEMORANDUM

MEMO 2010-21

TO: Joseph E. Smith, Clerk of Court, St. Lucie County 
FROM: Thomas A. Genung, Trial Court Administrator
DATE: August 9, 2010
RE: Senior Judge Assignment Orders from July 1, 2010 – June 30, 2011

Attached please find the original Assignment Orders for the following Senior Judges assigned to St. Lucie County:

- Honorable John Fennelly
- Honorable James Midelis
- Honorable George Shahood

Please have these orders signed, recorded and filed accordingly. Also, please sign and date below once the orders have been recorded and return a signed copy of this memo to me so that we may have verification of the same.

Thank you.

TAG/ms
Attachments

By: _____ Date: _____

cc: Honorable John Fennelly
Honorable James Midelis
Honorable George Shahood

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR ST. LUCIE COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER


WHEREAS the Honorable John Fennelly has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable John Fennelly is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in St. Lucie County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 6th day of August, 2010, nunc pro tunc to July 1, 2010.



STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

JOSEPH E. SMITH, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF ST. LUCIE, FLORIDA

BY: _____ D.C.

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR ST. LUCIE COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

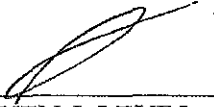
WHEREAS the Honorable James Midelis has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable James Midelis is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in St. Lucie County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 6th day of August, 2010, nunc pro tunc to July 1, 2010.



STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

JOSEPH E. SMITH, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF ST. LUCIE, FLORIDA

BY: _____ D.C.

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
FOR ST. LUCIE COUNTY, FLORIDA

SENIOR JUDGE ASSIGNMENT ORDER

WHEREAS the Honorable George Shahood has been approved by the Supreme Court of Florida to serve as a Senior Judge; and,

WHEREAS in accordance with the powers vested in the chief judge pursuant to rule 2.215, Florida Rules of Judicial Administration and in order to effectuate the efficient and proper administration of the courts in the 19th Judicial Circuit, it is at times necessary to appoint a senior judge to hear a specific case, and/or any and all matters within a particular division;

IT IS THEREFORE ORDERED:

The Honorable George Shahood is hereby appointed to hear any and all matters involving residential mortgage foreclosure cases coming before him in St. Lucie County from July 1, 2010 through June 30, 2011.

DONE AND ORDERED in Stuart, Martin County, Florida this 6th day of August, 2010, nunc pro tunc to July 1, 2010.



STEVEN J. LEVIN
CHIEF JUDGE

ATTEST:

JOSEPH E. SMITH, CLERK
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF ST. LUCIE, FLORIDA

BY: _____ D.C.



NINETEENTH JUDICIAL CIRCUIT COURT OF FLORIDA
SERVING MARTIN, ST. LUCIE, INDIAN RIVER AND OKEECHOBEE COUNTIES

Honorable Judge Elizabeth Metzger

Assignment

Administrative Judge – Appellate Division

Martin: All Civil Jury Cases and all Foreclosure Cases.

FAX #: To be used only upon approval by Judicial Assistant and to fax notices of settlement/dismissal from trial dockets.

UMC NOTICE:

BEGINNING FRIDAY, OCTOBER 2, 2009, FRIDAY UMC TIME
WILL BE FOR FORECLOSURE SJ/FJ'S ONLY. ALL OTHER UMC
MOTIONS WILL NEED TO BE SET TUESDAY – THURSDAY @ 8:30 AM

PARTIES MAY APPEAR AT UMC BY PHONE VIA COURTCALL.
ONCE YOU CHOOSE YOUR UMC DATE,
PLEASE CALL COURTCALL 5 DAYS IN ADVANCE OF YOUR HEARING
TO SCHEDULE WITH COURTCALL @888-882-6878-EXT. 870

NEW SCHEDULE IS AS FOLLOWS:

MONDAY AND FRIDAY – UMC FORECLOSURE SJ/FJ ONLY - 8:30-9:30 AM
TUESDAY, WEDNESDAY AND THURSDAY – ALL OTHER UMC MOTIONS – 8:30 AM

** Please click below to read PROCEDURES before contacting Judge Metzger's office.**

Monthly Calendars:

November — December — January — February — March

Trial List:

***Please note that the Jury Trial list is now divided into one week/ two week/ and three week trials**

Jury Trial List

UMC Notice:

BEGINNING FRIDAY, OCTOBER 2, 2009, FRIDAY UMC TIME WILL BE FOR FORECLOSURE
ALL OTHER UMC MOTIONS WILL NEED TO BE SET TUESDAY – THURSDAY @ 8:30 AM

Effective February 2 , 2009

Procedures:

Professionalism Guidelines Order — Courtroom Guidelines, Procedures and Expectation

Documents:

Uniform Final Judgment of Foreclosure - ([doc](#)) ([pdf](#))

Administrative Order:

94-10 — 2007-06 — 2010-08

Biography:

Not Available

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

IN RE: **STANDING ORDER ON GUIDELINES
FOR PROFESSIONAL CONDUCT**

WHEREAS, the Guidelines for Professional Conduct, a copy of which are attached hereto, were approved in 1994 by the Executive Council of the Trial Lawyers' Section of The Florida Bar and in 1995 by the Florida Conference of Circuit Court Judges, and

WHEREAS, the purpose of the Guidelines for Professional Conduct is to discourage unprofessional conduct by attorneys and to enhance the practice of law and the administration of justice, it is hereby

ORDERED that the Guidelines for Professional Conduct are specifically adopted by this Court and the attorneys and parties are placed on notice of the Court's intention to enforce the Guidelines as rules of practice in this division. Failure to abide by these Guidelines may result in the imposition of sanctions.

DONE AND ORDERED in chambers on this 1st day of June, 2007.


ELIZABETH A. METZGER
Circuit Judge

Guidelines for Professional Conduct

Foreword

In 1993 the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines for professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from both Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines which had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines For Professional Conduct. The Trial Lawyers Section sought the endorsement of the Guidelines from the Florida Conference of Circuit Judges, and at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference wishes to make clear that the Guidelines do not have the force of law and that trial judges will still have the right and obligation to consider issues raised by the Guidelines on a case by case basis. Nevertheless, both the Trial Lawyers Section and the Florida Conference of Circuit Judges hope that publication and widespread dissemination of these Guidelines will give direction to both lawyers and judges as to how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section is also intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines will simply reflect their current practice. However, it is hoped that the widespread dissemination and implementation of these Guidelines will result in an overall increase in the level of professionalism in trial practice in Florida.

Preamble

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however, is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, in recognition that they must be applied in a manner consistent with the interests of one's client and the Rules of Professional Conduct, and in keeping with the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar, the following Guidelines for Professional Conduct are hereby

adopted. Although we do not expect every lawyer will agree with every guideline, these standards reflect our best effort at encouraging decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME.

Scheduling and Continuances

1. Attorneys are encouraged to communicate with opposing counsel prior to scheduling depositions, hearings and other proceedings, in order to schedule them at times that are mutually convenient for all interested persons. Alternatively, if an attorney does not communicate with opposing counsel prior to scheduling a deposition or hearing, the attorney should be willing to reschedule that deposition or hearing if the time selected is inconvenient for opposing counsel.
2. Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.
3. A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.
4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.
5. Counsel should never request a calendar change or misrepresent a conflict in order to obtain an advantage or delay. However, in the practice of law, emergencies affecting our families or our professional commitments will arise which create conflicts and make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make such request of other counsel only when absolutely necessary.
6. Attorneys should endeavor to provide opposing counsel, parties, witnesses, and other affected persons, sufficient notice of depositions, hearings and other proceedings, except upon agreement of counsel, in an emergency, or in other circumstances compelling more expedited scheduling.
7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

Extensions

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.
9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should

ordinarily be granted between counsel as a matter of courtesy unless time is of the essence.

10. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.
11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."
12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.
13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving the right to seek reciprocal scheduling concessions. However, a lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.
14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

B. SERVICE OF PAPERS.

15. The timing and manner of service should not be used to the disadvantage of the party receiving the papers.
16. Papers and memoranda of law should not be served at court appearances without advance notice to opposing counsel and should not be served so close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.
17. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.
18. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

C. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS.

19. Written briefs or memoranda of points of authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic or sociological data if such data appear in or are derived from generally available sources but only if these would

be subject to judicial notice and if sufficient backup data and its sources are presented contemporaneously.

20. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

D. COMMUNICATION WITH ADVERSARIES.

21. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.
22. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.
23. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.
24. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.
25. A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.
26. During the course of representing a client, a lawyer should not communicate on the subject of the representation with a party known to be represented by a lawyer in that matter without the prior consent of the lawyer representing such other party unless authorized by law to do so.

E. DEPOSITIONS.

27. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.
28. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.
29. In scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.
30. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.
31. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.
32. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.
33. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such

- as by repeating questions after they have been answered, by raising the questioner's voice or by appearing angry at the witness.
34. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Rules of Civil Procedure or applicable case law. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question, counsel should simply state "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly and only what is necessary to state the grounds should be stated.
 35. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others.
 36. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information.
 37. Counsel for all parties should refrain from self-serving speeches during depositions.
 38. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

F. DOCUMENT DEMANDS.

39. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
40. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case. If a document request is objectionable only in part, the documents responsive to the unobjectionable portion should be produced in a timely manner.
41. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.
42. Documents should be withheld on the grounds of privilege only where appropriate. Where documents are withheld, the withholding party should immediately provide a list of the privileged documents showing the date, author and general description and a statement of the basis for withholding the document.
43. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.
44. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

G. INTERROGATORIES.

45. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.
46. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.
47. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.
48. A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or causing the adversary to incur unnecessary expense.

H. MOTION PRACTICE.

49. Before setting a motion for hearing, counsel should make a reasonable effort to resolve the issue.
50. A lawyer should not force his or her adversary to make a motion and then not oppose it.
51. Following a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should immediately be submitted to the court. Attorneys should promptly provide, either orally or in writing, proposed orders to opposing counsel for approval prior to submitting them to the court. Opposing counsel should then promptly communicate any objections and at that time, the drafting attorney should immediately submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel. The order must fairly and adequately represent the ruling of the court.

I. DEALING WITH NON-PARTY WITNESSES.

52. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition or to obtain necessary documents in the possession of a non-party witness.
53. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.
54. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available as soon as possible to the adversary at his or her expense even if the deposition is canceled or adjourned.

J. EX PARTE COMMUNICATIONS WITH THE COURT AND OTHERS.

55. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom such case is pending.
56. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application. A lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced if the application or communication is made on regular notice.
57. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Counsel should always notify opposing counsel of dates and times obtained from the court for future hearings on the same day that the hearing date is obtained from the court. Copies of any submissions to the court (such as correspondence, memoranda of law, case law, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at the same time a copy should be hand-delivered or faxed to opposing counsel. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel at the time the material is submitted to the court.
58. A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual informality to a judge, uncalled for by their personal relations. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or having the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

59. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.
60. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
61. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

L. PRE-TRIAL CONFERENCE.

62. A lawyer should carefully read the order setting trial and complete the pre-trial conference statement in full to the extent it can be agreed to by the parties.
63. A lawyer should be familiar with the evidence in the case.
64. A lawyer should be sure discovery is completed or address the need for additional discovery with opposing counsel well in advance of the pre-trial conference. All counsel should use due diligence in preparing the case for trial and should file a motion for continuance of the pre-trial conference or of the trial only if counsel has been unable to complete preparations in spite of diligent efforts.
65. A lawyer should evaluate the case and have a figure in mind at which the case could reasonably settle with authorization from the client to do so.
66. A lawyer should determine if the court needs to, and agrees to, hear any motions at the pre-trial.
67. The attorney who will try the case must appear at the pre-trial conference, unless excused by the court.
68. A lawyer should not ask for a continuance unless the client agrees and signs the motion.

M. TRIAL CONDUCT AND COURTROOM DECORUM.

69. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court.
70. Be punctual and prepared for any court appearance.
71. Stand as court is opened, recessed or adjourned; when the jury enters or retires from the courtroom; and when addressing, or being addressed by, the court.
72. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and during interrogation should avoid blocking opposing counsel's view of the witness.
73. Counsel should address all public remarks to the court, not to opposing counsel.
74. A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.
75. Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.
76. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.
77. Counsel should request permission before approaching the bench. Any documents counsel wish to have the court examine should be handed to the clerk.
78. Have the clerk pre-mark the potential exhibits.
79. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a