

Affidavits which are offered to prove the truth of the statements contained in them are hearsay. Therefore, as a general rule, affidavits are only admissible as substantive evidence when they fall within one of the standard hearsay exceptions.¹ For example, a party's admission, made in an affidavit, may be admissible.

Moreover, affidavits intended to be used as evidence should be based upon personal knowledge.² Those based upon "information and belief" are generally insufficient unless authorized by statute.³ Affidavits should also state specific facts as opposed to opinions or conclusions.⁴

And further, affidavits which are not specifically authorized by statute will be excludable at the request of the opposition.⁵ And even if an affidavit is

¹ *Everett v. State*, 835 So.2d 118 (Miss.App. 2003); *Colonial Mortgage & Loan Corporation v. Sino*, 812 So.2d 817 (La.App. 2002). In an action by creditors to recover a deficiency balance on a promissory note following the release of a mortgage, summary judgment affidavits were not admissible evidence at trial, and the court could not consider them in reaching a judgment.

Converse v. Ameritech Corp., 179 F.R.D. 533 (Mich. 1997); *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989).

² *Reuther v. Smith*, 926 So.2d 9 (La.App., 2006). Generally, a sworn affidavit is hearsay and is not competent evidence unless its use is specifically authorized by statute. An affidavit is generally inadmissible as hearsay, but in the rare instances where it is acceptable as a substitute for testimony, it must be based on personal knowledge, must set forth only facts admissible in evidence, and must show that the affiant is competent to testify as to the matters contained therein. *Ackler v. Raymark Industries, Inc.*, 551 A.2d 291 (Pa. 1988).

³ *State ex rel. Simmons v. Moore*, 774 S.W.2d 711 (Tex. 1989); *State Dept. of Human Service for Martin v. Neilson*, 771 S.W.2d 128 (Tenn. 1989).

⁴ *North Broward Hosp. Dist. v. Royster*, 544 So.2d 1131 (Fla. 1989).

⁵ *Amari Co., Inc. v. Burgess*, 546 F.Supp.2d 571 (N.D.Ill., 2008). In a civil action against consulting company owners for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), statements contained in affidavits filed by former employees of the consulting company (expressing that it was common knowledge that the company's owners would take revenge against anyone whom they perceived to be acting against them) were

authorized by statute, the court may still limit its use.⁶ Generally, affidavits taken without authority, in the absence of the other party and without notice, have no weight as direct evidence and ought not to be considered as testimony in a case (unless the parties consent to their use, or no timely objection is made, or the affidavit, as used in the case, falls within one of the statutory exceptions to the hearsay rule).⁷

inadmissible hearsay for the purpose of a motion for a protective order related to the intimidation of witnesses against the company and its owners.

Kulshrestha v. First Union Commercial Corp, 131 Cal.Rptr.2d 881, 107 Cal.App.4th 415 (2003). A declaration is inadmissible hearsay in the absence of a statute permitting it. *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.3d 521 (7th Cir. Ill., 2004); *Home Bank of Guntersville v. Perpetual Federal Savings and Loan Ass'n.*, 547 So.2d 840 (Ala. 1989); *Lee v. Schroeder*, 529 N.E.2d 349 (Ind. 1988). Affidavits that contained the testimony of affiants who were not available for cross-examination constituted inadmissible hearsay.

⁶ *Walter R. Thomas Associates, Inc. v. Media Dynamite, Inc.*, 643 S.E.2d 883, 284 Ga.App. 413 (2007). Affidavits purporting to establish the amount of a debt without accompanying business records are insufficient to sustain a summary judgment.

Agha v. Rational Software Corporation, 252 F.Supp.2d 1074 (D.Or., 2003). A third party's declaration in an employment discrimination action consisted of a statement of what a terminated Arabian account representative said to the declarant regarding the speaking of Arabic. The declaration was stricken as hearsay.

Reid v. Pyle, 51 P.3d 1064 (Colo.App., 2002). In a lawsuit against a debtor to recover money used to purchase a motor home, a police officer's "affidavit of probable cause" for the arrest of the lender was not admissible under the public records exception to the hearsay rule. The probable cause affidavit arose from an alleged assault on the lender's wife. The affidavit contained statements of the wife to the effect that she told the lender that she had an affair with the purchaser of the motor home.

Schraer v. Berkeley Property Owners' Ass'n., 255 Cal. Rptr. 453 (1989).

⁷ *Ohlen v. Shively*, 430 S.E.2d 559 (Va.App. 1993).