

## CALENDAR V AFFIDAVITS FOR PROVE UP OF DAMAGES – DEFAULT JUDGMENT

In order to obtain a default judgment, the plaintiff must prove damages.<sup>1</sup> A plaintiff cannot rely on a Verified Complaint to prove damages.<sup>2</sup> Affidavits or live testimony must be presented.

### **Affidavits proving damages must comply with the following:**

**1. Basis of Statement.** The affidavit must state whether the affiant is basing his or her testimony on personal knowledge, on documents, or both.

- If the affidavit is based on personal knowledge, the affiant must explain how he or she acquired that personal knowledge. *Note:* Personal knowledge is acquired from personal involvement in a specific transaction or event; it is *not* acquired from business records or from what one is told.
- If the affidavit is based on documents, the documents must be attached to the affidavit or the Complaint and referenced accordingly.

**2. Foundation for Records.** The proper evidentiary foundation must be laid for any documents upon which the affiant relies and those records must be attached to the affidavit. For all such records, the affiant must state that the document is a true and correct copy of what it purports to be. If a document is being used for the truth of what is contained therein, such as an accounting record used to show what defendant paid and still owes, the affiant must establish that the document falls under the hearsay exception for records of regularly conducted activity.

- *Note: **Effective January 1, 2011***, Illinois Rules of Evidence 803(6) and 902(11) set forth the requirements for admissibility of business records. Pursuant to those rules, a record of regularly conducted activity is admissible when accompanied by a written certification that the record (1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters (2) the document was kept in the regular course of business activity and (3) was made by the regularly conducted activity as a regular practice.
- If a running record is kept of multiple transactions so that multiple transactions appear on one document, the affiant must explain how the record is created (*e.g.*, payments are entered at or around the time they are received).
- If it is not possible to submit supporting documents to the court because they are voluminous or electronic, the affiant must attach a summary or printed total of damages. In this situation the affiant must also describe the documents relied upon for the summary or printed total and explain how those documents are admissible under Illinois Rules of Evidence 803(6) and 902(11).

**3. Calculation of Damages.** The affidavit must explain how the damages, including interest and late charges, were calculated. Mathematical calculations must be shown. Supporting provisions of the contract must be clearly cited (*i.e.*, the affiant must state the contract page and section number providing the interest rate, allowing assessment of late charges/other fees, and/or allowing for recovery of attorney's fees; and must state which exhibits support the calculation of the amount due). If a computer program calculated the damages, the computer generated records must be submitted and evidence that describes the process or system used and shows that the process or system used produces an accurate record must be provided. ILL. R. EVID. 901. If the note is subject to a variable interest rate, the affiant must state how the program knows that rate (*e.g.*, the prime rate is automatically downloaded from the WALL STREET JOURNAL website).

**4. Affidavit for Attorney's Fees and Costs.** Attorney's Fees are recoverable only by statute or when provided for in an agreement between the parties. If attorney's fees are recoverable, an affidavit and timekeeping records are necessary to establish that the amount sought is reasonable. The affidavit shall state: the nature of the services performed, the number of hours spend performing these services, the attorney's hourly rate, the year the attorney graduated from law school and a short synopsis of the attorney's experience, statement that the number of hours spend and the rate charged per hour are fair and reasonable, and within the normal standards of the community for the type of services performed, and a description of the method used to create timekeeping records.

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<sup>1</sup> Section 2-610 of the Code of Civil Procedure provides that failure to deny an allegation of the Complaint constitutes an admission of the allegation "**except allegations of damages**."

<sup>2</sup> Section 2-605 of the Code of Civil Procedure provides "Verified allegations [of pleadings] do not constitute evidence except by way of admission."