

# South Carolina Divorce Forms

by Thomas F. McDow

Table of Contents

Introduction ..... [6](#)

HotDocs Market ..... [8](#)

Checklists ..... [9](#)

..... Complaint Checklist [9](#)

..... Domestic Relations Litigation Checklist [9](#)

..... Final Ruling Checklist [9](#)

..... Post Trial Checklist [9](#)

..... Temporary Ruling Checklist [9](#)

Information Collection and Retention ..... [10](#)

Captions and Closings ..... [11](#)

Affidavits ..... [14](#)

..... Affidavit of Absent Party [15](#)

..... Attorney’s Fees Affidavit [15](#)

..... Affidavit of Default [17](#)

..... Affidavit for Publication [18](#)

..... Affidavit of Party for Temporary Hearing [19](#)

..... Affidavit of Service by Certified Mail [21](#)

..... Affidavit of Service by Process Server [22](#)

..... Affidavit of Service by Regular Mail [22](#)

..... Affidavit of Witness for Temporary Hearing [23](#)

..... UCCJEA Affidavit [24](#)

Agreements ..... [25](#)

..... Mediated Settlement Agreement [25](#)

..... Prenuptial Agreement [26](#)

..... Retainer Fee Agreement [26](#)

..... Separation and Property Settlement Agreement [26](#)

Briefs ..... [28](#)

..... Mediation Briefs [28](#)

..... Pretrial Briefs [29](#)

Court Administration Forms ..... [31](#)

..... Certificate of Exemption [31](#)

..... Confidential Reference List of Redacted Identifiers	<a href="#">31</a>
..... Family Court Coversheet	<a href="#">31</a>
..... Motion and Order Information Form Coversheet	<a href="#">32</a>
..... Proposed Parenting Plan	<a href="#">32</a>
..... Request for Hearing	<a href="#">32</a>
..... Support Information Sheet	<a href="#">32</a>
..... Temporary Hearing Background Information	<a href="#">33</a>
 Discovery .....	<a href="#">34</a>
..... Discovery Requests	<a href="#">35</a>
.....	Interro
.....	Reques
.....	Reques
..... Discovery Responses	<a href="#">35</a>
.....	Answere
.....	Respon
.....	Respon
 Financial Declarations .....	<a href="#">37</a>
..... Financial Declaration	<a href="#">37</a>
 Letters (Limited).....	<a href="#">40</a>
..... Clerk of Court	<a href="#">40</a>
..... Client	<a href="#">40</a>
.....	Retain
.....	Your L
..... Generic	<a href="#">41</a>
..... Judge	<a href="#">41</a>
..... Opposing Counsel	<a href="#">41</a>
..... Opposing Party	<a href="#">41</a>
..... Process Server	<a href="#">41</a>
 Miscellaneous Documents .....	<a href="#">42</a>
..... Cancellation of Lis Pendens	<a href="#">42</a>
..... Generic Caption and Closing	<a href="#">42</a>
..... Request for Hearing	<a href="#">42</a>
..... Satisfaction of Judgment for Attorney's Fees	<a href="#">42</a>
 Motions.....	<a href="#">43</a>
..... Application to Be Relieved as Attorney	<a href="#">43</a>
..... Motion for Temporary Hearing	<a href="#">43</a>

.....Motion to Amend or Dismiss Pleading	<a href="#">43</a>
.....Motion to Compel Discovery	<a href="#">43</a>
.....Motion to Compel Settlement	<a href="#">43</a>
..... Motion to Reconsider	<a href="#">43</a>
Notices.....	<a href="#">44</a>
..... Notice of Appearance	<a href="#">44</a>
..... Notice of Deposition	<a href="#">44</a>
..... Notice of Hearing	<a href="#">44</a>
.....Notice of Lis Pendens	<a href="#">45</a>
Outlines.....	<a href="#">46</a>
.....Outline for Approval of Separation and Property Settlement Agreement	<a href="#">46</a>
..... Outline for Basic Divorce Without Collateral Relief	<a href="#">46</a>
Orders.....	<a href="#">47</a>
..... Arrest Order	<a href="#">47</a>
..... Bench Warrant	<a href="#">47</a>
..... Consent Order for Simple Modification	<a href="#">47</a>
..... Contempt Order	<a href="#">47</a>
..... Decree of Divorce	<a href="#">47</a>
..... Decree of Separate Maintenance and Support	<a href="#">47</a>
..... Judgment in a Family Court Case	<a href="#">47</a>
..... Order Appointing Guardian ad Litem	<a href="#">47</a>
..... Order Approving Agreement	<a href="#">47</a>
..... Order for Blood Test	<a href="#">47</a>
..... Order for Change of Venue	<a href="#">47</a>
..... Order for Continuance	<a href="#">47</a>
..... Order for Discovery	<a href="#">48</a>
..... Order for Name Change	<a href="#">48</a>
..... Order for Publication	<a href="#">48</a>
..... Order for Transport	<a href="#">48</a>
.....Order Generic	<a href="#">48</a>
..... Order of Dismissal	<a href="#">48</a>
..... Order Relieving Attorney	<a href="#">48</a>
..... Order Setting Emergency Hearing	<a href="#">48</a>
..... Order Substituting Attorney	<a href="#">48</a>
..... Order Terminating Child Support	<a href="#">48</a>
..... Order to Restore	<a href="#">48</a>
..... Pretrial Order	<a href="#">48</a>
..... Temporary Order	<a href="#">48</a>

.....	Temporary Restraining Order	<a href="#">49</a>
Pleadings .....		<a href="#">50</a>
.....	Complaint	<a href="#">50</a>
.....	Answer	<a href="#">51</a>
.....	Answer and Counterclaim	<a href="#">52</a>
.....	Complaint Divorce	<a href="#">52</a>
.....	Complaint Rule to Show Cause	<a href="#">52</a>
.....	Complaint Generic	<a href="#">52</a>
.....	Reply	<a href="#">52</a>
Practice Aids .....		<a href="#">54</a>
.....	Alimony Factors	<a href="#">54</a>
.....		Basic I
.....	Basic information sheets Alimony	<a href="#">54</a>
.....		Basic I
.....		Basic I
.....	Client Information Basic	<a href="#">54</a>
.....	Child Support Worksheet	<a href="#">54</a>
.....	Client Evaluation of Lawyer Form	<a href="#">55</a>
.....	Equitable Apportionment Factors	<a href="#">55</a>
.....	Equitable Apportionment Worksheet	<a href="#">55</a>
.....	Income Relative Earnings	<a href="#">56</a>
Process .....		<a href="#">57</a>
.....	Rule to Show Cause	<a href="#">57</a>
.....	Subpoena	<a href="#">58</a>
.....	Summons	<a href="#">58</a>
Appendix .....		<a href="#">60</a>
.....	Administrative Order, Temporary Hearing in Family Court	<a href="#">60</a>
.....	BASIC INFORMATION SHEETS	<a href="#">62</a>
.....		BASIC
.....		CHIL
.....		EQUIT
.....		ALIMC

## Introduction

This book is not complete. It is a work in progress. It was first used for the April 21, 2017, seminar *Family Court Practice Management*. It provides background and directions for the family law templates found under *South Carolina Divorce Forms* at [hotdocsmarket.com](http://hotdocsmarket.com). I will send updated copies to every attendee at the seminar and every subscriber to *South Carolina Divorce Forms* on HotDocs Market.

This book reflects not only my education and experience but also my tastes and my prejudices. Your education, experience, tastes and prejudices may differ. In addition, I write for a larger and more general audience while you write for one client and either one judge or a limited number of judges. When it comes to your judgment versus mine, yours must control. Your client hired you rather than me for a reason.

View this book as your personal paralegal, not your client's lawyer. If you use it as a starting point, a first draft, and a checklist, you will save your time, save your client money, and most probably get a better result in settlement, mediation, trial, or appeal. If you blindly use these forms and processes without adjustment for your particular case and your particular client, you diminish your role to a paralegal—and not a very good one.

Effective lawyers listen, explain, and teach. The listening starts with the initial inquiry and continues throughout the case. You must listen to your client, opposing counsel, witnesses, and the judge to understand the facts and issues so you can teach and explain critical facts and applicable law to clients, opposing counsel, and judges. These forms and checklists should help you gather, record, and present information.

I am proud of my writing. I believe grammatical rules serve a purpose, including rules against splitting infinitives and ending sentences with prepositions. I oppose legalese, passive voice, redundancy, and verbiage by anyone but particularly by lawyers and judges. I still have much to learn, which explains why I checked every word of this book with a grammar checker, a spell checker, and WordRake before having it reviewed and proof read by several friends and colleagues. If any errors remain, blame me. Better still; tell me so I may correct them.

Barron Henley of Affinity Consulting and a frequent speaker on technology at South Carolina Bar continuing legal education seminars explained the principle of the “Golden Document.” Lawyers should be wary and cautious of using an old

document from an old case as a form or template and then cutting and pasting to create a new document in a new case. He used a commercial lease as an example. The first draft of the lease by the landlord will not resemble the final lease after considerable negotiation with concessions by both parties. If he used the final lease from the old case as his first draft in the new case, it would include concessions he is not prepared to make initially. In addition, while situations may be similar, few are identical. Barron teaches a document should not be used as a template for another, unless it is a Golden Document addressing all practical variables and situations. While I cannot prepare the Golden Document, I have done my best, but my final product requires your scrutiny, modification, and editing. If using one's own old documents as templates is dangerous and reckless, consider how much more reckless and dangerous it is to use an old document from another lawyer or the internet.

These documents, forms, and checklists reflect my understanding of South Carolina statutes, common law, and rules of court but I cannot guarantee I am correct or any judge or court will agree with me. With more than one hundred completed appeals to the Supreme Court of South Carolina and the South Carolina Court of Appeals, I have sometimes proved the trial judge did not understand the law but more often the appellate court ruled I misunderstood the law. I do not concede error; I only concede the appellate courts have the last word. We refer to "the practice of law" for a reason. Do not rely upon my, or anyone else's, legal research or interpretation of any procedural or substantive rule. Do your own research and check everyone else's legal research.

## HotDocs Market

“The marketplace is designed for legal professionals who are frustrated with the amount of time they have to dedicate to creating forms and contracts. HotDocs Market is a source to purchase expertly crafted templates from leading publishers and bar associations.”<sup>1</sup>

The forms explained in *South Carolina Divorce Forms* are available at HotDocs Market for \$200 per year. Additional licenses for lawyers or employees of the same firm are \$50 each. I do not care if you share within the firm with only one license; however, if you let someone outside your firm produce a form using your license and I learn of it, I will hire in intellectual property lawyer and sue you both.

HotDocs Market’s Help explains creating an account, choosing templates, answering interviews, saving answers, and creating documents at <https://www.hotdocsmarket.com/Home/Help>. Take particular care in learning to save your interviews to your server so they are available for others in your office and to you when you prepare your next document.

Malissa P. Church, [malissa@malissachurchlaw.com](mailto:malissa@malissachurchlaw.com) (803-327-4600) is good at answering HotDocs questions related to *South Carolina Divorce Forms*.

---

<sup>1</sup><https://www.hotdocsmarket.com/> March 5, 2017.

## Checklists

I recommend Atul Gawande's best selling *The Checklist Manifesto, How to Get Things Right*, to every lawyer and law firm. At McDow & Urquhart, LLC it was required reading for lawyers and staff. We then had several one-hour meetings to discuss it and its application to our office. The tasks for which we have check lists flow smoothly. The tasks for which we do not have checklists continue to be problems.

### Complaint Checklist

#### DOMESTIC RELATIONS LITIGATION CHECKLIST

#### FINAL RULING CHECKLIST

#### POST TRIAL CHECKLIST

#### Temporary Ruling Checklist

## Information Collection and Retention

Understanding the facts is the first step toward successful resolution of a legal issue. Understanding the facts is a prerequisite to researching, understanding, and applying the law to those facts. Proper application of the law is necessary for a correct—and hopefully favorable—resolution. It begins with the collection of information.

Four Basic Information Sheets are included in the Appendix, page 62: Basic Domestic Relations Information Sheets, Child Custody Information Sheets, Equitable Apportionment Information Sheets, and Alimony Information Sheets. These questionnaires should prod the client's thinking about the areas in which I need information and provide a starting point for my questions to the client at the initial consultation.

For my use with the HotDocs templates, I use a Client Information Basics Form to start the information collection process. The client answers preliminary questions allowing HotDocs to structure the Questionnaire so it asks only relevant questions. Many questions mesh with the HotDocs forms so the information must be entered only once into the Client's HotDocs Answer Sheet.

The Client Information Basics Form omits many irrelevant questions. If the first answer confirms the parties have no child, then it omits questions about children and child care. If an answer shows the opposing party is unemployed, then it omits questions about his employer. The HotDocs interviews track this form, making it easier for the lawyer or the paralegal to complete the HotDocs Interview.

## Captions and Closings

With automated forms, the lawyer will prepare no caption but she must understand the requirements and the reasons for the captions.

**Name of Court.** The proper name of the court is "The Family Court of the \_\_\_\_ Judicial Circuit."<sup>2</sup> There is no "\_\_\_\_ County Family Court." The legislature abolished all single county and multi-county family courts effective July 1, 1977.<sup>3</sup> This distinction may never affect a case in the history of jurisprudence but better lawyers strive for perfection. Anyone not knowing the name of the court should not practice in it. **If you know obscure rules of law such as this, other lawyers and judges are more likely to believe you know the important law.**

**Names of Parties.** What's in a name? An opportunity to save work for yourself, others, and an opportunity to protect your client's rights and your own. Determine the correct name of each party. This is relatively simple with males but may be more difficult with women. For example, **when a woman marries she drops her maiden name and assumes the husband's surname.** 65 *C.J.S. Names*, § 3(c). For example, when Tamara Faye LaValley married Jim Bakker she became Tamara Faye Bakker, not Tamara LaValley Bakker. When she married Roe Messner she became Tamara Faye Messner, not Tamara Faye Bakker Messner or Tamara LaValley Messner.

**Neither middle names nor middle initials are required but the better practice is to use them.** This avoids confusion for title checkers and others who use the public records. If you represent or sue John Quincy Adams, using only John Adams invites a telephone call every time a title checker encounters anyone from John Aaron Adams to John Zachariah Adams.

Do not use nicknames. Every trial lawyer in South Carolina knows to whom you refer when you mention Judge Bubba Ness; however, title checkers and other pedantics only know him as Julius B. Ness.

Less skilled lawyers may not understand the law of names. These lawyers may have used incorrect names on other legal documents such as deeds and mortgages. This example demonstrates how long ago I originally wrote this. If you are suing Tamara Faye Messner and find deeds on record to Tammy Faye Bakker and

---

<sup>2</sup>S. C. Code Ann. § 20-7-1460.

<sup>3</sup>S. C. Code Ann. § 14-2-10.

Tammy L. Bakker, use the following in the caption: Tamara Faye Messner f/k/a Tamara Faye Bakker a/k/a Tammy Faye Bakker and Tammy L. Bakker. **Do not let correctness prevent you from having validly indexed judgments and liens favoring your client.** This also affects your attorney's fees award.

**Signatures.** The signature line must comply with Rule 11, SCRCP, which requires "Every pleading, motion, or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated." Legible signatures are not a requirement; however, illegible signature are one of my many pet peeves. I contend people with illegible signatures are ashamed of their parents and their name.

Before signing, consider the requirements of good faith imposed upon you by Rule 11, SCRCP, and the sanctions for failure to comply with the rule:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

....

If a pleading, motion, or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Although decided based on the South Carolina Frivolous Civil Proceedings Sanctions Act<sup>4</sup> rather than Rule 11, SCRCP, *Kilcawley v. Kilcawley*<sup>5</sup> puts lawyers on notice that neither the Family Court nor the appellate courts tolerate frivolous pleadings.

---

<sup>4</sup>S. C. Code Ann. §§ 15-36-10 (1976), et seq.

<sup>5</sup>312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994)

**Date and Place.** No statute or rule of court requires either the date or the place of signing of a pleading.<sup>6</sup> I date my pleadings solely for my own information. I use the date of printing rather than the date of signing. I do not show where I signed the pleading because I do not care if I signed it while in Rock Hill or Timbuktu.

**Closing.** Rule 11(a), SCRCP, requires the lawyers address and telephone number. Our closing has options for your South Carolina Bar number and your email address. I am reluctant to add options for fax number because the fax machine is obsolete technology with no place in a modern law office.

---

<sup>6</sup>Rules 7-11 SCRCP.

## Affidavits

An affidavit is a sworn statement. It will support a finding of the facts averred but if those averments are false it will also impeach the witness and support a perjury conviction. Lawyers, litigants, and witnesses should always be truthful and aware of the pitfalls and penalties for mistakes in affidavits.

Prudent lawyers advise clients not to sign unnecessary affidavits. No lawyer should allow a client to verify a pleading unless verification is required or a strong reason supports verification. One commonly used verification form in South Carolina not only has the client needlessly swearing to the allegations of the pleading but has the client accept responsibility for any mistakes the lawyer may have made in preparing the pleading.

Martin Luther said, “The fewer the words, the better the prayer.” This applies equally to affidavits. The shorter the affidavit, the more likely the intended reader will read it and read it carefully. I strive to omit all extraneous and unnecessary words, including, “Personally appeared before me Jane Doe, who being first duly sworn, deposed and stated under oath the following.” No closing language is necessary, especially the trite and archaic phrase, “And further deponent sayeth naught.” I always want to ask the deponent why she used this phrase when telling her lawyer what happened.

Lawyers and their staffs must understand the sanctity of affidavits and the requirements of lawyers, notaries, and witnesses. **A license to practice law is a heavy price for expedience, laziness, illegal short cuts, or carelessness in signing of affidavits.** Consider these examples: Public reprimand, “signature purporting to be [client’s] that was witnessed by respondent and notarized by respondent's paralegal.”<sup>7</sup> Public reprimand, “Despite the affiants not signing the documents in his presence, respondent notarized the four statements and presented the affidavits to the court at the temporary hearing.”<sup>8</sup> Disbarment, “He also admittedly allowed others in his office to sign his name to various papers and documents filed with the courts and as notary.” Disbarment, “We find respondent's signing and notarizing Roberts's name was misconduct.”<sup>9</sup> Indefinite suspension, “The renunciation of dower was accomplished by using unsophisticated notaries

---

<sup>7</sup> *Matter of Schiller*, No. 2017-001645, 2017 WL 5618649, at 2 (S.C. Nov. 22, 2017).

<sup>8</sup> *In re Purvis*, 399 S.C. 378, 379, 731 S.E.2d 888 (2012).

<sup>9</sup> *Matter of Jennings*, 321 S.C. 440, 446, 468 S.E.2d 869, 873 (1996).

public who obviously had little understanding of real estate law.”<sup>10</sup> Disbarment, “Respondent is not a notary public. However, on three occasions respondent notarized legal documents for clients.”<sup>11</sup> Two-year suspension, Respondent-lawyer overstated his billing rate by \$25 per hour in his affidavit in support of attorney’s fees.<sup>12</sup> If you believe the improper execution of an affidavit is a joke, tell it to the Supreme Court of South Carolina and see how many laughs you get.

#### AFFIDAVIT OF ABSENT PARTY

This affidavit is used for the judicial approval of an agreement when the party cannot be present. It is the duty of the family court to rule upon the fairness of the agreement.<sup>13</sup> The court must determine whether the party understands the agreement, whether the party entered the agreement freely and voluntarily, and whether the agreement is fair under all of the circumstances. It is not necessary for the trial judge to require answers to dozens of questions.

Because most judges require answers to these extraneous and irrelevant questions, the Affidavit of Absent Party caters to the requirements of those judges, despite my belief the questions are excessive.

The template has 21 optional paragraphs. The paragraph regarding *pro se* representation is excluded unless you check it. The remaining paragraphs are included unless you check them. You may add any other quirky provisions on which you, opposing counsel, or the judge insist.

#### ATTORNEY’S FEES AFFIDAVIT

If you present your affidavit to the court stating that you are familiar with Rule 407, § 1.5, SCACR, *Anderson v. Tolbert*,<sup>14</sup> and *Glasscock v. Glasscock*,<sup>15</sup> then make

---

<sup>10</sup>*Matter of Allen*, 285 S.C. 489, 490, 331 S.E.2d 349, 350 (1985).

<sup>11</sup> *Matter of Brown*, 319 S.C. 342, 347, 461 S.E.2d 385, 387 (1995).

<sup>12</sup> *In re Massey*, 357 S.C. 439, 441, 594 S.E.2d 159, 160 (2004).

<sup>13</sup> Litigants are encouraged to agree on marital issues; however, it is the duty of the Family Court to rule upon the fairness of the agreement. *McKinney v. McKinney*, 274 S.C. 95, 261 S.E.2d 526; *Fishl v. Fishl*, 272 S.C. 297, 251 S.E.2d 743; and *Drawdy v. Drawdy*, 275 S.C. 76, 268 S.E.2d 30.

<sup>14</sup> *Anderson v. Tolbert*, 322 S.C. 543, 473 S.E.2d 456 (Ct. App. 1996).

sure that you are familiar with those authorities. If you are not familiar with them, you should not be seeking attorney's fees in the Family Court.

---

<sup>15</sup>*Glasscock v. Glasscock*, 304 S.C. 133, 403 S.E.2d 313 (1991).

Your affidavit should address each factor of *Anderson* and *Glasscock* and with enough detail for the judge to decide your entitlement to a fee and the amount of your fee. One critical factor is beneficial result. One way to achieve a beneficial result is not asking for relief to which you are not entitled or do not need. For example, do not ask for attorney's fees in a case in which your client has the superior financial position and the opposing party has no ability to pay attorney's fees. In *Brown v. Brown*,<sup>16</sup> the court reversed where the wife could not show a beneficial result. Since *Brown*, we keep a box score showing each issue and the extent to which each party prevailed on each issue. Your affidavit must establish your client incurred your attorney's fees. See *Williamson v. Middleton*<sup>17</sup> for a tragic example of a lawyer's \$35,000 attorney's fee award being reversed because the evidence did not establish the client incurred attorney's fees.

The itemization of services must describe each task, the time spent on the task, and the amount charged. More detail is better. Avoid vague descriptions such as "work on file" or "trial preparation." What work did you do on the file? What did you do to prepare for trial? If there is a conference, state the purpose and the names of attendees. If it is a telephone call, name the parties to the call and the purpose. Your itemization must convince the judge you did the work and the opposing party must pay you.

Note of caution: The opposing party, and probably opposing counsel, will read your Attorney's Fees Affidavit carefully. Redact any confidential information from your itemization. Your client billing statement may appropriately include, "office conference with client regarding the possible effect of her promiscuous conduct on her custody claims." For your affidavit in support of attorney's fees you should redact this to read "office conference with client."

I seem to be the only person in South Carolina who believes that an attorney's fee affidavit is hearsay. The affidavit is admissible at a temporary hearing under Rule 21, SCRFC. At final hearings, one may object to attorney's fee affidavits, resulting in an opportunity to cross-examine the lawyer who prepared the affidavit. Examining a lawyer on her affidavit is usually a mistake unless cross-examination exposes serious misstatements of time or charges.

However, never forget how quickly the appellate courts affirm issues on appeal because trial counsel did not present the issue to the trial judge and thus did not

---

<sup>16</sup>*Brown v. Brown*, 408 S.C. 582, 758 S.E.2d 922 (Ct. App. 2013),

<sup>17</sup>*Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009).

preserve it for appeal. *Buist v. Buist*<sup>18</sup> is essential reading for challenging an affidavit in support of attorney's fees or appealing an award of attorney's fees.

#### Template Tips for Affidavit in Support of Attorney's Fees:

- : You must include your education, experience, and qualifications to support your hourly rate. "The question on the template is: What is your education and experience justifying your fee? I recommend composing this paragraph and then saving it for future use. Address your legal education and admission to the bar, the years you have practiced and firm with which you practiced, and the areas in which you practice. List bar association memberships, including section memberships, offices held, and committee assignments. List seminars at which you have spoken, classes you have taught, articles and books you published. List honors and accolades you have received. List significant cases in which you have been involved, particularly appellate cases; however, you must have your client's consent to publicize the case.<sup>19</sup> The more impressive your credentials, the shorter you can make this paragraph."
- : You will also be asked for your retainer fee, your hourly rate, the number of hours your worked, your paralegal's hourly rate, the number of hours your paralegal worked, and the costs advanced.
- : You must attach a summary of your fees and costs to your affidavit.
- : The affidavit has four sections: Fee Agreement, Fee Authority, Fee Requested, and Qualifications and Experience.
- : You may edit your affidavit to include averments regarding difficulties you encountered, requiring additional time and effort. Examples include novel questions of law, an uncooperative opposing party whose actions extended the litigation, or difficulty in locating and interviewing witnesses. You not only want the trial judge to know how much work you did, but why you had to do it.

#### AFFIDAVIT OF DEFAULT

---

<sup>18</sup>*Buist v. Buist*, 410 S.C. 569, 575, 766 S.E.2d 381, 384 (2014).

<sup>19</sup>NEEDS CITATION.

Many judges and lawyers believe there is no default in family court because of Rule 17(a), SCRFC, providing

(a) Appearance by Defendant. In domestic relations matters, even though the defendant does not file an answer, notice of the time and date of the merits hearing shall be given to the defendant. If the defendant is not represented by counsel, notice as required by this rule shall be sufficient if mailed to the defendant at his last known address, by certified mail, return receipt requested. The defendant may be heard at the merits hearing on issues of custody of children, visitation, alimony, support, equitable distribution, and counsel fees.

There is an argument that sometimes it is better not to answer and simply appear at the final hearing. I do not recommend that approach because a judge exercising her discretion may not allow the defaulting defendant to testify or call witnesses. Consider the difference between “The defendant may be heard” and “The defendant shall be heard.” A judge may hear an ignorant defaulting *pro se* litigant but refuse to hear a defaulting defendant represented by a sophisticated and expensive lawyer.

Filing an affidavit of default is an effective way to get the attention of an adverse attorney who has been dilatory in serving a responsive pleading. It is also an effective way to anger lackadaisical opposing counsel into a raging bull. The lawyer who consistently files affidavits of default will eventually be glad she did.

#### AFFIDAVIT FOR PUBLICATION

Service for publication is controlled by S. C. Code Ann. § 15-9-710, *et seq.* § 15-9-710 provides defines when service by publication is permissible. § 15-9-740 addresses the requirement for publication and mailing the summons.

*Caldwell v. Wiquest*<sup>20</sup> is must reading for lawyers preparing affidavits and orders for publication because it explains the due diligence required in attempting to locate and personally serve the defendant. Likewise, it is must reading by the defendant’s lawyer seeking to open a default after service by publication as it explores ways of showing an absence of due diligence.

---

<sup>20</sup>402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013).

In the day of the internet, service by publication is rarely necessary as anyone exercising due diligence can find any defendant. This may be an overstatement and exaggeration, but not by much. Service by publication scares me because of the risk of the opposing party reopening a judgment, perhaps years later, because the plaintiff's attorney did not exercise due diligence in trying to find and serve the defendant. This could cause a malpractice claims by one's client, a grievance by either party, or a possible criminal charge for perjury. Consider the accusations and finger-pointing that will follow the reversal of a decree of adoption or even a long delay in an adoption proceeding.

#### Template Tips for the Affidavit in Support of Order for Publication:

- : A checklist provides eight choices for the basis for service by publication: foreign corporation, left state to defraud creditors, cannot be found, nonresident has property, interest in real or personal property, adoption proceeding, parental rights proceeding, annulment proceeding. Check all that apply.
- : Complete this sentence by checking all that apply: attempted service, certified mail, internet searches, neighbors, relatives, employer, WestLaw, Lexis Nexis, Other. Checking is the easy part. After running the template, edit your document to explain what you did regarding each answer you checked.
- : The court may excuse mailing the summons to the defendant's last known address if it would be futile. You have an option of checking mail summons or mailing summons not required.

#### AFFIDAVIT OF PARTY FOR TEMPORARY HEARING

Evidence at temporary hearings is controlled by Rule 21, SCRFC, which provides:

(b) Evidence at Hearing. Evidence received by the court at temporary hearings shall be confined to pleadings, affidavits, and financial declarations unless good cause is shown to the court why additional evidence or testimony may be necessary.

(c) Service of Affidavits. Notwithstanding the provisions of Rule 6(d), SCRCP, affidavits filed at a temporary hearing need not be served on the opposing party prior to the temporary hearing.

Many aspects of temporary hearings are controlled by an administrative Order of the Supreme Court of South Carolina dated November 21, 2012. See the Appendix, page 60, for a copy. This Order requires the Temporary Hearing Background Information form, limits each party to eight pages of affidavits, and permits either party to request a designation of complex litigation. Read this Order and be familiar with it.

Your client's affidavit must entitle your client to the relief sought or to defeat the other party's claim. You may need the affidavits of other persons, but you probably need fewer than you think.

The amount of detail is one of strategy. My strategy is usually less detail. The less I write, the more carefully most judges will read it. I want my client's affidavit read carefully. Rule 21(b) affidavit is reverse discovery. Everything you include in an affidavit for temporary relief is a disclosure helping your adversary prepare for the final hearing.

Most judges are not swayed by the number of affidavits, at least not swayed in a positive manner. Many judges resent excessive affidavits. Consider filing a single affidavit for your client that makes only a *prima facie* case on each point. While numerous affidavits may impress your client, they will most probably have the exact opposite effect on the trial judge.

From my perspective, a rule restricting a party's affidavits to eight pages is akin to a rule restricting one's intake to eight Big Macs at one sitting. I cannot remember filing an affidavit exceeding four pages for my client. When I use an attachment, I try to restrict the attachment to one page. I avoid affidavits of family, friends, and co-workers. I try to keep my client's affidavit positive. The more negative my client's affidavit, the more negative my client appears.

#### Template Tips for Affidavit of Party for Temporary Hearing:

- : Telling the trial judge what relief you seek is important; however, many lawyers omit this vital information from their client's affidavit. A checklist includes 16 items of relief. Check all that apply.
- : Child Custody. "What are the children's circumstances? (See help text for examples)" This is the example for the help text: "Johnny is 14-years-old in the ninth grade at Rock Hill High School and suffers mild autism. Susie is 12 years old and in the seventh grade at Sullivan Middle School. Joe is 10-years-old, in the fifth grade, and is home schooled."

- : Common Consideration in Custody Decisions. Check all that apply. Client was the primary caretaker for the children during the marriage. Client has the better work schedule to exercise custody. Client is a stay-at-home parent? Client works from home. Client works from home. Client has a good attitude and willingness to co-parent. These are necessarily generalizations. You may edit your document to add details and arguments to these reasons.
- : Use of Property. Of what property does client seek temporary use and why does client seek it or need it?
- : Payment of Debts. Describe the debts client is willing to pay and those client wants the adverse party to pay.
- : Injunctive Relief Based on Conduct. Check the reason: history of violence, threats, other conduct or reasons. Expand on this by added the opposing party's history with specific acts causing the client to fear for his or her health or safety.
- : Injunctive Relief Regarding Property: Check the reasons: history of financial irresponsibility, recent actions with property, recent actions incurring debt, threats, other conduct or reasons. Add the specific acts or threats.
- : Guardian ad Litem. Many lawyers and judges believe appointment of a Guardian ad Litem is mandatory is all custody or visitation cases. Not so. Lawyers can save their clients thousands of dollars by understanding the arguments against appointing a guardian ad litem. Read *Getting Rid of the GAL: How to save your client from those expensive, unnecessary officious intermeddlers*.<sup>21</sup> You must establish a statutory reason for the trial judge to appoint a guardian if the diligent adverse attorney opposes the appointment of a guardian. Answer these questions: What are the reasons the court will not be fully informed of the facts without a guardian. What is it about the dispute which necessitates the appointment of a guardian ad litem?
- : Alimony. Check each of the 14 listed alimony factors you wish to address in the affidavit. There are also questions for rehabilitative alimony, employment history, standard of living, and marital property and nonmarital property.

---

<sup>21</sup>*South Carolina Lawyer* by Robert Rosen, January 2003.

! Statements. Remember that statements made in affidavits at a temporary hearing may have consequences at the final hearing.<sup>22</sup>

#### AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

The affidavits of service cover personal or substituted service, service by certified mail, and service by regular mail. See Rule 4, SCRCF, about the service of original process, and Rule 5, SCRCF, about the service of pleadings and other papers.

The rules require personal or substituted service or service by certified mail with restricted delivery for original process<sup>23</sup> or notice of hearing for a defaulting defendant.<sup>24</sup> Service by regular mail is acceptable for other pleadings, motions, and orders after the initial summons.<sup>25</sup>

I receive many certificates of service from other lawyers and the non-lawyer staff of other lawyers; however, I find only one reference to certificates of service in the South Carolina Rules of Civil Procedure. Rule 4, SCRCF, states, "If served by the sheriff or his deputy, he shall make proof of service by his certificate. If served by any other person, he shall make affidavit thereof." I recommend affidavits of service as the title for your proof of service.

I have never understood how one can honestly sign an affidavit or certificate of service by mail stating that he mailed something, when the signed affidavit or certificate is included with the document supposedly served by mail prior to the signing. The statement is patently false. The better practice is to send an unsigned certificate of service when you serve by mail.

#### AFFIDAVIT OF SERVICE BY PROCESS SERVER

Private investigator and process servers may be excellent in their primary jobs but they tend to be poor writers and use poor forms and templates. I prefer to

---

<sup>22</sup>*Schultze v. Schultze*, 403 S.C. 1, 4, 741 S.E.2d 593, 595 (Ct. App. 2013)

<sup>23</sup>Rule 4(d)(1), SCRCF.

<sup>24</sup>Rule 17(a), SCRCF.

<sup>25</sup>Rule 5(b)(1), SCRCF.

prepare the Affidavit of Service for the process server so I have more control over the content.

Sometimes I add an additional paragraph describing any difficulties in serving the document or unusual circumstances such as statements by the person served or a paramour's presence.

#### AFFIDAVIT OF SERVICE BY REGULAR MAIL

Rule 5(a), SCRCP, describes what documents must be served, including some documents of which I never heard. Note Rule 5(a) is not applicable to family court to the extent it does not require notice to a defendant of every hearing. See Rule 17(a), SCRFC, for the requirement for serving a defaulting defendant. Only the summons and complaint must be filed before service. All other documents may be filed within five days after service.<sup>26</sup> Many lawyers believe the documents must be filed stamped by the clerk of court before they may be served on opposing counsel or an opposing party; however, this is true only for the summons and complaint.

#### AFFIDAVIT OF WITNESS FOR TEMPORARY HEARING

Trying to write a universal affidavit for a witness is nearly impossible. I normally include three sections: The identity of the witness, the relationship of the witness, and the conclusion of the witness. The identity of the witness should portray the witness as a likeable and trustworthy human. The relationship should show the witness knows the client and the facts, The conclusion should be the facts the witness knows.

Many lawyers abuse the use of affidavits at temporary hearings to their clients' detriment. The right to produce affidavits of third party witnesses does not make it good strategy. In almost all cases, I limit my affidavit to my client's affidavit and my affidavit in support of attorney's fees. If I use an affidavit of a third person, I try to limit it do a single point I must make and limit it to a single page.

#### Template Tips for Affidavit of Witness for Temporary Hearing

The Affidavit of Witness for Temporary Hearing has three sections.

1. Identity. Who is the witness? What are her credentials?

---

<sup>26</sup>Rule5(d), SCRCP.

- : Relationship. What is the witness' relationship to the client.
- : Conclusion. What are the facts the witness can present to help the judge reach the correct conclusion. It might be better to name this section facts.

Affidavits saying the client loves the child or the client's whole life revolves around the child are not helpful. If the client's fitness is an issue, an affidavit from a responsible witness saying she allows the client to care for the witness' child is strong. An affidavit from a teacher stating client's participation in the child's education and the beneficial result to the child is helpful.

If you produce affidavits of witnesses at the temporary hearing, consider the possible effect of not calling those witnesses at the final hearing.<sup>27</sup>

To avoid a public reprimand or worse, do not have a client sign a verification before the pleading is prepared and do not allow staff members to take affidavits by telephone and then sign them.<sup>28</sup>

I try to keep all witness affidavits to less than one full page with only one or two facts.

#### Template Tips for Affidavit of Witness for Temporary Hearing:

- : Who is the witness? This paragraph should identify the witness with facts supporting credibility. Example: I live at 568 Liberty Street, Rock Hill, South Carolina, with my husband and three young children. I own Kiddie Kapers Day Care. I am a volunteer guardian ad litem and an active member of Northside Baptist Church where I teach sixth grade Sunday School. I am one of Kerry's strong and supportive network of family and friends.
- : What is the witness' relationship to the client? This should include the length of the relationship and the nature of the relationship. It should establish the witness knows the facts asserted. Example: I have known Kerry J. Smith for seven years when she began working for me caring for children at Kiddie Kapers Day Care. I see her regularly during the work day, but we are also close

---

<sup>27</sup>*Hatfield v. Van Epps*, 358 S.C. 358, 594 S.E.2d 526 (Ct. App. 2004).

<sup>28</sup>*Matter of Woods*, 390 S.C. 446, 703 S.E.2d 562 (2010); *Matter of Cerato*, 393 S.C. 625, 714 S.E.2d 282 (2011); *Matter of Purvis*, 399 S.C. 378, 731 S.E.2d 888 (2012).

friends and visit in each other's homes. She has cared for my children and I have cared for her children.

- : What is the witness' conclusion? Example: Kerry loves children, which she demonstrates with her own children and the children of others. Kerry is regularly drug tested at work and has never had a negative drug test. I have never known Kerry to have an alcohol or substance abuse problem. I trust Kerry to care for my children.

#### UCCJEA AFFIDAVIT

There are two primary reasons to prepare the Uniform Child Custody Jurisdiction affidavit. First, it is mandated by S. C. Code Ann. § 63-15-346. It must be done by "every party in a custody proceeding." Some courts in other states have held this affidavit is a prerequisite to subject matter jurisdiction.<sup>29</sup> If you or opposing counsel fail to file this affidavit, "the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished."<sup>30</sup> This is an easy route to a continuance if someone fails to file the affidavit.

Second, completing the affidavit will frequently provide information you need and indicate issues you may not have anticipated. For example, you may learn that a child has lived with a grandparent or other relative or there have been other custody actions.

Including this information in a verified complaint or verified answer is permitted by S. C. Code Ann. § 63-15-346. I choose not to do this because of my aversion to verified pleadings when the verification is optional. I always do a separate UCCJEA Affidavit and I recommend this to you.

#### Template Tips for the UCCJEA Affidavit:

- : Most of the template questions are simple and intuitive, such as the present address of the children. A table asks for the former addresses of the children for the past five years including the starting dates (from) and the ending dates (to). Another table asks for the names of the persons the children have lived with for the past five years, including the starting and ending dates. I prefer to

---

<sup>29</sup>*Saved by Another Lawyer's Negligence, South Carolina Lawyer*, Jan./Feb. 1993, at page 39.

<sup>30</sup>S. C. Code Ann. § 63-15-346(B).

complete this for the lives of the children rather than only five years, unless there is a compelling reason to go back only five years.

- : If there has been any other case regarding custody or visitation, state the names and descriptions of those cases. Not getting this information not only makes the affidavit inaccurate, it may cause you and your client to be blindsided in court
- : If another person may claim custody or visitation rights, you must name those parties and state the basis of their claims. This can be beneficial to your case. If your client's parents have been close to the children and often cared for them, this may help your client.

## Agreements

### MEDIATED SETTLEMENT AGREEMENT

After five or six hours of mediation, the parties, the lawyers, and the mediators agree on a full and final settlement of all issues. It is late and everyone is tired. They agree to prepare the written agreement the next day. Every one goes home relieved. Then the parties talk with their friends, neighbors, co-workers, family, and paramours. Each person tells the party they should have done better. The party repudiates the agreement or insists upon changes to which the other party will not agree. Months later, the parties try the case at great emotional and financial cost. Regardless of the court's ruling, everyone is a loser, with the possible exception of the lawyers.

Do not allow this to happen. Never leave a mediation without a written and signed memorandum of each settled issue. The memorandum should also state which issues are unsettled and remain.

My partner, Erin K. Urquhart, several years ago added a clause to a mediated settlement agreement. This clause is now widely used in York County where is it known as the Erin Urquhart clause:

1. ***Binding Agreement.*** The parties and their attorneys intend this to be a full and final settlement binding on the parties and enforceable under Rule 43(k), SCRCF. If either party seeks to repudiate this agreement and is unsuccessful, then the repudiating party will pay the other party's attorney's fees for this entire case.

I am unaware of anyone ever repudiating an agreement containing the Erin K. Urquhart Clause.

## Template tips for Mediated Settlement Agreement:

- : I am not capable of preparing the golden Mediated Settlement Agreement because creative lawyers require provisions beyond my imagination. This template is a start toward your agreement. You may need to add additional clauses. Even when selected a clause, read it carefully as it may require editing for your situation.

### PRENUPTIAL AGREEMENT Not ready yet. Coming soon.

Years ago, responding to a question from a young lawyer regarding a prenuptial or antenuptial agreement, I said, “Lawyers make a serious mistake getting involved in prenuptial agreements. Only two things can happen: First, you get a reasonable fee and there is never an issue about the prenuptial agreement. Second, you get a reasonable fee, the marriage falls apart, the prenuptial agreement is contested and whether it is sustained or overturned you get sued, reported to the South Carolina Commission on Lawyer Conduct, and the Resolution of Fee Disputes Board with the result that even if you were blameless you end up with a net fee of \$1.83 per hour and several years off your life expectancy.”

For those daredevils who prepare prenuptial agreement, there are strict requirements.

- : Both parties must be separately represented by counsel. This requires actual representation, not just the opportunity to have counsel.
- : There must be full financial disclosure by both parties. At a minimum, this should include a very good financial declaration compliant with Rule 20, SCRFC. Even better would be a thorough balance sheet from a certified public accountant.
- : The agreement must be fair and equitable.<sup>31</sup>

---

<sup>31</sup>S. C. Code Ann. § 20-3-630(A)(4): “property excluded by written contract of the parties. “Written contract” includes any antenuptial agreement of the parties which must be considered presumptively fair and equitable so long as it was voluntarily executed with both parties

: A prenuptial agreement may remove issues from the jurisdiction of the family court.<sup>32</sup>

#### RETAINER FEE AGREEMENT

The Rules of Professional Conduct, Rule 1.5, dealing with fees, provides, “(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, **preferably in writing**, before or within a reasonable time after commencing the representation ....” When the Supreme Court of South Carolina says, “preferably in writing,” it means you are in a lot of trouble if you have an issue before the Court involving your fee and have no written fee agreement. This issue can come before the Court in many ways. The trial court awards you a huge attorney’s fee and the opposing party appeals. You sue the client, or former client, for your hard-earned and well-deserved fee, the court of common pleas rules in your favor, and the former client appeals. Your former client reports you the South Carolina Commission on Lawyer Conduct for charging an unreasonable fee.

Do not have a problem with fee agreements. Have a written fee agreement before your new client leaves your office.

The form for the Retainer Fee Agreement is the form Erin K. Urquhart and I use at McDow & Urquhart, LLC. It works for us but I am concerned it needs modification to work for you. You may delete paragraphs by not checking them in the Retainer Fee Agreement Interview. We would like to add additional optional paragraphs. To do this, we solicit your comments on additional paragraph options you want.

Separation and Property Settlement Agreement  
Not ready yet. Coming soon.

---

separately represented by counsel and pursuant to the full financial disclosure to each other that is mandated by the rules of the family court as to income, debts, and assets”

<sup>32</sup>Meehan v. Meehan, 407 S.C. 471, 756 S.E.2d 398 (Ct. App. 2014).

