# AFFIDAVITS - AMERICAN JURISPRUDENCE

**SECTIONS 1 - 20**

## 3 Am. Jur. 2d Affidavits § 1

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

**I. In General**

Topic Summary Correlation Table References

§ 1. Generally; definition

West's Key Number Digest
West's Key Number Digest, Affidavits 1

An "affidavit" is a voluntary[FN1] written statement[FN2] of fact[FN3] under oath[FN4] sworn to or affirmed by the person making it[FN5] before some person who has authority under the law to administer oaths[FN6] and officially certified to by the officer under his seal of office.[FN7]

The proper function of an affidavit is to state facts, not conclusions.[FN8] It is made without notice to the adverse party and without opportunity to cross-examine.[FN9] There is a distinction between types of affidavits: some serve as evidence and advise court as it decides preliminary issues or determines substantial rights where evidence is not in conflict, while others merely serve to invoke judicial power and are pledges of good faith in commencement of suits.[FN10]

No particular terminology is required to render a document an affidavit.[FN11]

Definition: A "verification" is a type of statement given under oath where the declarant must not only refrain from making a knowingly false statement, but must also have affirmative knowledge of the statement's truthfulness.[FN12]

Practice Guide: The question of whether a document constitutes an affidavit is normally a question of law.[FN13]

Observation: In some jurisdictions, matters that are supportable by affidavit are generally also supportable by a declaration under penalty of perjury, which is an unsworn statement subscribed to by the person making it and certified or declared to be true under penalty of perjury.[FN14] Furthermore, in particular jurisdictions, attorneys and certain specified medical professional persons are authorized by statute to serve an affirmation bearing the person's signature alone in lieu of and with the same force and effect as an affidavit.[FN15] In addition, some states provides for a "professional statement" which is statement of fact presented to the court by an attorney in connection with a matter then before such court, verified in effect by the oath of such attorney, and designed or calculated to aid or influence the court in the determination of a given cause or issue.[FN16] The attorney's professional statement has the effect of an affidavit.[FN17]

CUMULATIVE SUPPLEMENT

Cases:
A valid declaration has the same force and effect as an affidavit administered under oath. Garcia v. Superior Court, 42 Cal. 4th 63, 63 Cal. Rptr. 3d 948, 163 P.3d 939 (2007).

[END OF SUPPLEMENT]
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[FN1] Otani v. District Court in and for Twenty-First Judicial Dist., 662 P.2d 1088 (Colo. 1983); Pappas v. State, 179 Ind. App. 547, 386 N.E.2d 718 (2d Dist. 1979); In re Murphy, 321 Mass. 206, 72 N.E.2d 413 (1947); Holmes v. Michigan Capital Medical Center, 242 Mich. App. 703, 620 N.W.2d 319 (2000), appeal denied, 636 N.W.2d 144 (Mich. 2001); State v. Haase, 247 Neb. 817, 530 N.W.2d 617 (1995); Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 708 A.2d 401 (1998); Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134, 113 A.L.R. 1213 (1937); Ackler v. Raymark Industries, Inc., 380 Pa. Super. 183, 551 A.2d 291 (1988); Collins v. Doe, 343 S.C. 119, 539 S.E.2d 62 (Ct. App. 2000), cert. granted, (May 23, 2001); Clay v. Portik, 84 Wash. App. 553, 929 P.2d 1132 (Div. 2 1997); Fugate v. Mayor and City Council of Town of Buffalo, 348 P.2d 76, 97 A.L.R.2d 243 (Wyo. 1959).

- An affidavit requires that the affiant make a conscious and unequivocal act. State v. Bishop, 921 S.W.2d 765 (Tex. App. San Antonio 1996).
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[FN2] Donnellan v. City of Novato, 86 Cal. App. 4th 1097, 103 Cal. Rptr. 2d 882 (1st Dist. 2001).
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[FN3] Bigler v. State, 602 N.E.2d 509 (Ind. Ct. App. 1st Dist. 1992).
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[FN4] Meigs v. Black, 25 Kan. App. 2d 241, 960 P.2d 770 (1998).
- The purpose of permitting a declaration under penalty of perjury, in lieu of a sworn statement, is to help insure that declarations contain a truthful factual representation and are made in good faith. In re Marriage of Reese & Guy, 73 Cal. App. 4th 1214, 87 Cal. Rptr. 2d 339 (4th Dist. 1999).
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[FN5] Manchenton v. Auto Leasing Corp., 135 N.H. 298, 605 A.2d 208 (1992).
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[FN6] Mugavero v. Kenzler, 317 Ill. App. 3d 162, 251 Ill. Dec. 46, 739 N.E.2d 979 (2d Dist. 2000).
- If one was not sworn to before official or person in authority, it is not valid. State v. Bishop, 921 S.W.2d 765 (Tex. App. San Antonio 1996).
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[FN7] Goggin v. Grimes, 969 S.W.2d 135 (Tex. App. Houston 14th Dist. 1998).
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[FN8] Lindley v. Midwest Pulmonary Consultants, P.C., 55 S.W.3d 906 (Mo. Ct. App. W.D. 2001).
- An affidavit that contains only legal conclusions is substantively deficient and, although formal deficiencies in an affidavit can be waived if not raised in trial court, substantive deficiencies cannot be waived. Elam v. Quest Chemical Corp., 884 S.W.2d 907 (Tex. App. Beaumont 1994), reh'g overruled, (Nov. 22, 1994) and judgment rev'd on other grounds, 898 S.W.2d 819 (Tex. 1995) and writ granted, (May 25, 1995).
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[FN9] Thatcher v. Darr, 27 Wyo. 452, 199 P. 938, 16 A.L.R. 1442 (1921).
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[FN10] Lincoln Nat. Bank v. Mundinger, 528 N.E.2d 829 (Ind. Ct. App. 3d Dist. 1988).
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[FN11] Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. App. Texarkana 1994), writ granted, (Feb. 16, 1995) and judgment aff'd, 916 S.W.2d 949 (Tex. 1996).

[FN12] Double S, Inc. v. Northwest Kansas Production Credit Ass'n, 17 Kan. App. 2d 740, 843 P.2d 741 (1992).

- A "verification" is an affidavit attached to the statement as to truth of the matters set forth in the statement. Eveleigh v. Conness, 261 Kan. 970, 933 P.2d 675 (1997).
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[FN13] Meigs v. Black, 25 Kan. App. 2d 241, 960 P.2d 770 (1998).
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[FN14] In re Morelli, 11 Cal. App. 3d 819, 91 Cal. Rptr. 72 (2d Dist. 1970).
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[FN15] Slavenburg Corp. v. Opus Apparel, Inc., 53 N.Y.2d 799, 439 N.Y.S.2d 910, 422 N.E.2d 570 (1981), ruling, however that even those persons who are statutorily allowed to use affirmations in lieu of affidavits cannot do so when they are a party to an action.
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[FN16] Gilbride v. Trunnelle, 620 N.W.2d 244 (Iowa 2000).
- A "professional statement" is a technique, used as a matter of convenience and practical necessity to establish a record of matters peculiarly within the knowledge of an attorney. Blum v. State, 510 N.W.2d 175 (Iowa Ct. App. 1993).

- In offering a professional statement an attorney pledges the honor of his profession and his personal integrity. Gilbride v. Trunnelle, 620 N.W.2d 244 (Iowa 2000).
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[FN17] Gilbride v. Trunnelle, 620 N.W.2d 244 (Iowa 2000).

## 3 Am. Jur. 2d Affidavits § 2

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

I. In General

Topic Summary Correlation Table References

§ 2. Distinctions from other instruments

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself, 1 A.L.R. 5th 965.

West's Key Number Digest
West's Key Number Digest, Affidavits 1

A deposition, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in advance of the trial or hearing upon oral examination or in response to written interrogatories and where an opportunity is given for cross-examination.[FN1] The giving of a deposition may be compelled.[FN2] An acknowledgment is a means of authenticating an instrument by showing that it was the act of the person executing it.[FN3] An acknowledgment consists of an oral declaration of the party executing the instrument and a written certificate

attesting to the oral declaration.[FN4] An acknowledgment does not constitute an "affidavit" because it does not purport to be a certification that the person acknowledging it swears to the truth of the matter set out.[FN5] A requirement that a paper be "sworn to" contemplates the execution of an affidavit that the facts contained in it are true, and not an acknowledgment.[FN6]
The difference between an affidavit and an oath is that an affidavit consists of a statement of fact, which is sworn to as the truth, while an oath is a pledge.[FN7] Broadly speaking, pleadings and affidavits are distinguishable in that affidavits must state facts under oath, whereas pleadings may contain allegations of ultimate facts, and verification of a pleading may not be necessary in all cases.[FN8] An affidavit is not a pleading and cannot ordinarily be made to take place of a pleading.[FN9]
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[FN1] 23 Am. Jur. 2d, Depositions and Discovery § 108.
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[FN2] 23 Am. Jur. 2d, Depositions and Discovery § 148.
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[FN3] 1 Am. Jur. 2d, Acknowledgments § 1.
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[FN4] 1 Am. Jur. 2d, Acknowledgments § 1.
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[FN5] Cutler v. Ament, 726 S.W.2d 605 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Sept. 16, 1987).
- An "acknowledgment" shows, merely prima facie, that the instrument was duly executed, whereas a "verification" is an affidavit attached to the statement as to truth of the matters therein set forth. Eveleigh v. Conness, 261 Kan. 970, 933 P.2d 675 (1997).

- As to the definition of a "verification," see § 1.
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[FN6] State v. Wolfe, 156 Conn. 199, 239 A.2d 509 (1968); Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906, 29 A.L.R.2d 286 (1951).
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[FN7] 58 Am. Jur. 2d, Oath and Affirmation § 3.
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[FN8] State v. Londe, 345 Mo. 185, 132 S.W.2d 501 (1939).
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[FN9] In re Petition to Annex Certain Property to City of Wood Dale, 244 Ill. App. 3d 820, 183 Ill. Dec. 343, 611 N.E.2d 606 (2d Dist. 1993).

## 3 Am. Jur. 2d Affidavits II Refs.

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

II. Persons Who May Make Affidavit
Topic Summary Correlation Table
Research References
West's Key Number Digest
West's Key Number Digest, Affidavits 2

A.L.R. Library
A.L.R. Digest: Affidavits § 2
A.L.R. Index: Affidavits

Forms

1A Am. Jur. Legal Forms 2d, Affidavits and Declarations §§ 13:13 et seq., 13:47, 13:53, 13:56 to 13:59, 13:72

1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 115, 141, 142, 144 to 147, 149.1

## 3 Am. Jur. 2d Affidavits § 3

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

II. Persons Who May Make Affidavit

Topic Summary Correlation Table References

§ 3. Generally
West's Key Number Digest
West's Key Number Digest, Affidavits 2

Forms

Identification and oath. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations §§ 13:13 et seq.

Affidavit—Before notary public. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 141.

Where a statute specifies who can make an affidavit, only an affidavit by that specified person will suffice.[FN1] In the absence of statutory regulation, generally, anyone who has knowledge of the facts and is competent to testify may make an affidavit.[FN2]

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[FN1] Standard of Beaverdale, Inc. v. Hemphill, 746 S.W.2d 662 (Mo. Ct. App. E.D. 1988).
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[FN2] Moore v. Besse, 35 Cal. 184, 1868 WL 778 (1868).
- As to necessity of personal knowledge, see § 13.

## 3 Am. Jur. 2d Affidavits § 4

American Jurisprudence, Second Edition
Database updated February 2012
Affidavits
Rosemary Gregor, J.D.
II. Persons Who May Make Affidavit

§ 4. Agent or attorney

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication, 47 A.L.R. 2d 423 § 3.

West's Key Number Digest
West's Key Number Digest, Affidavits 2

Forms

Capacity of affiant—Attorney of record. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:53.

Capacity of affiant—Attorney in fact. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:58.

Affidavit—By attorney of plaintiff—In support of motion for summary judgment. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 144.

Affidavit—By attorney of plaintiff—In support of motion for entry of default. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 145.

Affidavit—Before notary public—By attorney for defendant—In support of motion for order directing plaintiff to submit to physical examination. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 146.

Affidavit—Before notary public—By attorney for defendant—Motion for order requiring attorney for plaintiff to produce evidence of attorney's authority. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 147.

Affidavit—Before notary public—Of attorney—In support of continuance. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 149.1.

While the appropriate party to attest to the facts is the plaintiff himself, not the plaintiff's attorney,[FN1] statutes have sometimes expressly authorized affidavits for certain purposes to be made by agents or attorneys.[FN2] Thus, where the principal is absent or ill, or for some other reason is unable to make an affidavit, an affidavit by his agent or attorney, who has knowledge of the facts, may be received,[FN3] and it must rest upon his personal knowledge in an area in which he is competent to testify.[FN4] However, an attorney's affidavit that is not based upon personal knowledge is without value.[FN5] An affidavit verified by counsel as "true and correct to the best of his knowledge" is insufficient as an affidavit unless authorized by statute.[FN6] It is, however, within the judgment or discretion of the court to receive the affidavit of an agent or attorney in situations where a different construction of the statute might defeat the ends of justice.[FN7] Thus, the personal knowledge of the terms of a settlement may be attributed to a lawyer for one of the parties and the absence of a recitation of personal knowledge by an attorney affiant concerning settlement terms may not render an affidavit inadequate.[FN8]

The professional statements of a litigant's attorney are treated as affidavits, and the attorney making a statement may be cross-examined regarding substance of the statement.[FN9] An attorney may respond to the defendant's legal arguments regarding the case, and the court may consider an affidavit on that basis.[FN10]

Caution: The practice of an attorney filing an affidavit on behalf of his client asserting the status of that client is not approved, inasmuch as not only does the affidavit become hearsay, but it places the attorney in a position of a witness, thus compromising his role as an advocate.[FN11]

Reminder: It is good practice for the agent to show he has special knowledge, indicating the sources thereof, except when the affidavit may be, and is, made on information and belief.[FN12]

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[FN1] Leather Facts, Inc. v. Foy, 157 Misc. 2d 35, 595 N.Y.S.2d 874 (City Civ. Ct. 1993).
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[FN2] Schwarz v. Smith, 325 S.W.2d 407 (Tex. Civ. App. Waco 1959), writ refused n.r.e., 160 Tex. 280, 329 S.W.2d 83 (1959).
- As to the verification of pleading by attorney or agent, see 61B Am. Jur. 2d, Pleading § 892.

[FN3] Wilson v. Steinbach, 98 Wash. 2d 434, 656 P.2d 1030 (1982).
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[FN4] Bowman v. Henard, 547 S.W.2d 527 (Tenn. 1977).
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[FN5] Romel v. Reale, 155 A.D.2d 747, 547 N.Y.S.2d 691 (3d Dep't 1989).
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[FN6] International Turbine Service, Inc. v. Lovitt, 881 S.W.2d 805 (Tex. App. Fort Worth 1994), reh'g overruled, (Aug. 9, 1994) and writ denied, (Nov. 17, 1994).
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[FN7] Southern Attractions, Inc. v. Grau, 93 So. 2d 120 (Fla. 1956).
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[FN8] Possehl v. Ossino, 28 Mass. App. Ct. 918, 547 N.E.2d 59 (1989).
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[FN9] Frunzar v. Allied Property and Cas. Ins. Co., 548 N.W.2d 880 (Iowa 1996).
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[FN10] Leather Facts, Inc. v. Foy, 157 Misc. 2d 35, 595 N.Y.S.2d 874 (City Civ. Ct. 1993).
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[FN11] Porter v. Porter, 274 N.W.2d 235 (N.D. 1979).
- As to affidavits made by agents or attorneys of corporations, see § 5.

[FN12] Wakely v. Sun Ins. Office of London, Eng., 246 Pa. 268, 92 A. 136, 3 A.L.R. 128 (1914).
- As to affidavits on information and belief, see § 8.

## 3 Am. Jur. 2d Affidavits § 5

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

II. Persons Who May Make Affidavit

Topic Summary  Correlation Table  References

§ 5. Persons acting on behalf of corporation

West's Key Number Digest
West's Key Number Digest, Affidavits 2
A.L.R. Library

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication, 47 A.L.R. 2d 423 § 7.

Forms

Before notary public—By corporate officer. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:47.

Capacity of affiant—Officer of corporation as agent. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:56.

Capacity of affiant—Employee and agent of municipal corporation. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:57.

Capacity of affiant—Attorney in fact for corporation. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:59.

Disposition of real property interest—Nonforeign transferor—Corporation. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:72.

Capacity of affiant—Agent—Of corporation. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 115.

Affidavit—Before notary public—By officer of corporation. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 142.

Affidavits on behalf of corporations may be made by any duly authorized officer or agent having knowledge of facts verified.[FN1] The theory is that the corporation, when acting in this regard through its officers, is acting per se, and not per alium.[FN2] An officer must possess the requisite knowledge.[FN3]

An important consideration in determining the sufficiency of an affidavit made by an agent or attorney who is not an officer is whether or not the facts alleged are within the personal knowledge of the affiant.[FN4] Generally, the agent's personal knowledge of the facts sworn to will not be presumed, and, therefore, the means and sources of his information should be shown.[FN5]

CUMULATIVE SUPPLEMENT

Cases:

Affidavit of engineering manager employed by dairy's customer, submitted by dairy's insurer in support of motion for summary judgment in dairy's action against insurer alleging breaches of commercial general liability policy, commercial excess insurance policy, and deluxe income business policy by failing to defend or agree to indemnify dairy against claims by customer resulting from explosion and fire in dairy's ice cream plant, was not self-serving, and thus not subject to strike; affidavit acknowledged limits on types of damages that customer was seeking in its action against dairy, and, while such averments may have been beneficial to insurer, they did not benefit customer. Wells Dairy, Inc. v. Travelers Indemnity Co. of Illinois, 241 F. Supp. 2d 945 (N.D. Iowa 2003).

[END OF SUPPLEMENT]
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[FN1] Federal Land Bank of Saint Paul v. Anderson, 401 N.W.2d 709 (N.D. 1987).
- As to the verification of pleadings by corporations, see 19 Am. Jur. 2d, Corporations §§ 2222, 2223.

[FN2] American Soda Fountain Co. v. Stolzenbach, 75 N.J.L. 721, 68 A. 1078 (N.J. Ct. Err. & App. 1908).
- As to necessity of statement as to authority to make affidavit, see § 6.

[FN3] United Bonding Ins. Co. v. Dura-Stress, Inc., 243 So. 2d 244 (Fla. Dist. Ct. App. 2d Dist. 1971); American Soda Fountain Co. v. Stolzenbach, 75 N.J.L. 721, 68 A. 1078 (N.J. Ct. Err. & App. 1908).
- As to the necessity that the affiant state facts within his or her knowledge generally, see § 14.

[FN4] Wakely v. Sun Ins. Office of London, Eng., 246 Pa. 268, 92 A. 136, 3 A.L.R. 128 (1914).
- As to affidavits made by agents or attorneys generally, see § 4.
- As to necessity of statement as to authority to make affidavit, see § 3.

[FN5] Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 P. 498 (1903); Mintz v. Tri-County Natural Gas Co., 259 Pa. 477, 103 A. 285 (1918).

## 3 Am. Jur. 2d Affidavits III Refs.

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

III. Taking of Affidavit
Topic Summary  Correlation Table
Research References
West's Key Number Digest
West's Key Number Digest, Affidavits 5, 6, 14
A.L.R. Library
A.L.R. Digest: Affidavits § 1
A.L.R. Index: Affidavits

Forms

1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 141

1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 13:13 et seq.

## 3 Am. Jur. 2d Affidavits § 6

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

III. Taking of Affidavit

Topic Summary  Correlation Table  References

§ 6. Generally

West's Key Number Digest
West's Key Number Digest, Affidavits 5, 6, 14
A.L.R. Library

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R. 3d 483.

Forms

Affidavit—Before notary public. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 141.

In order to make an affidavit, the officer, the affiant, and the paper must be present, and there must be something done which amounts to the administration of an oath.[FN1] The fact of the affiant's swearing must be certified by a proper officer.[FN2] In some states, the question of an attorney's qualifications to administer an oath to his or her client is controlled by statute, and these statutes vary widely.[FN3]
Caution: In the absence of statute, a notary public ordinarily has no power to take an affidavit to be used the basis of a warrant or arrest, although in some jurisdictions, the rule is otherwise.[FN4]

As a general rule an affidavit is not invalid merely because it was taken on Sunday.[FN5]

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[FN1] Kropp v. Roberts, 246 Ga. App. 497, 540 S.E.2d 680 (2000).
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[FN2] Lee v. CSX Transp., Inc., 233 Ga. App. 30, 503 S.E.2d 309 (1998).
- Documents ascribed and sworn to before a person not authorized by law to administer oaths is not an "affidavit" and is void as such. State v. Haase, 247 Neb. 817, 530 N.W.2d 617 (1995).
- As to the authority to administer oaths, generally, see 58 Am. Jur. 2d, Oath and Affirmation §§ 11 et seq.
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[FN3] 58 Am. Jur. 2d, Oath and Affirmation § 13.
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[FN4] 58 Am. Jur. 2d, Notaries Public § 37.
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[FN5] State v. Conwell, 96 Me. 172, 51 A. 873 (1902).
- As to Sundays and holidays, generally, see 73 Am. Jur. 2d, Sundays and Holidays.

## 3 Am. Jur. 2d Affidavits § 7

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

III. Taking of Affidavit

Topic Summary Correlation Table References
§ 7. Administering of oath or affirmation
West's Key Number Digest
West's Key Number Digest, Affidavits 6, 14

Forms

1A Am. Jur. Legal Forms 2d, Identification and Oath—Affidavits §§ 13:13 et seq.

The affiant must swear to the affidavit, and fact of his swearing must be certified by a proper officer.[FN1] The notary and affiant must be present together for giving of oath.[FN2] An affidavit is not a "lawful affidavit" where signed outside the presence of the officer and no oath was administered.[FN3] Thus, a notary's administration of the oath over a telephone, rather than in the affiant's presence, does not create a valid affidavit.[FN4]

It is not necessary that the oath administered be formal, nor is it necessary that any exact words or specific ceremony be used to constitute a valid administration of an oath.[FN5] There must be something which amounts to the administration of an oath or affirmation, and this requires concurrent action on the part of the affiant and an authorized officer.[FN6] For an affidavit to be valid, there must be, in the presence of the officer, something done by which the person to be bound consciously takes upon himself the obligation of an oath. It is not essential that the affiant should hold up his hand and swear in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing.[FN7]

Observation: An expert affidavit filed with a medical malpractice complaint was valid, even though the expert admitted in a deposition that the notary public whose jurat appeared on the affidavit did not administer an oath to the physician before he signed it, where the expert signed the affidavit in front of a notary public, and they both understood that what the expert had done was sufficient to complete the act of swearing.[FN8] Similarly, where an affiant signed his name to a statement wherein he stated on oath that he had read the attached document, that he knew its contents, and that they were true, it was held that the statement constituted proof that he was conscious of the fact that he was swearing to the correctness of the attached document, and the document was verified according to law, even though the notary, instead of executing a jurat, executed a certificate of acknowledgment.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

The oath requirement for a valid affidavit is met, whatever the form of the oath adopted, if the oath is taken in the presence of an officer authorized to administer it, and it must be an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. People v. Penaflorida, 932 N.Y.S.2d 682 (N.Y. City Civ. Ct. 2011).

[END OF SUPPLEMENT]
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[FN1] Lee v. CSX Transp., Inc., 233 Ga. App. 30, 503 S.E.2d 309 (1998).
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[FN2] Sambor v. Kelley, 271 Ga. 133, 518 S.E.2d 120 (1999).

[FN3] Phoebe Putney Memorial Hosp. v. Skipper, 235 Ga. App. 534, 510 S.E.2d 101 (1998).
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[FN4] Sambor v. Kelley, 271 Ga. 133, 518 S.E.2d 120 (1999).
- As to acknowledgments taken over the telephone, see 1 Am. Jur. 2d, Acknowledgments § 25.
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[FN5] Harris v. Murray, 233 Ga. App. 661, 504 S.E.2d 736 (1998).
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[FN6] Thompson v. Self, 197 Ark. 70, 122 S.W.2d 182 (1938); Kirk v. Hartlieb, 193 Ark. 37, 97 S.W.2d 434 (1936).
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[FN7] Harris v. Murray, 233 Ga. App. 661, 504 S.E.2d 736 (1998).
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[FN8] Harris v. Murray, 233 Ga. App. 661, 504 S.E.2d 736 (1998).
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[FN9] Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943).

## 3 Am. Jur. 2d Affidavits IV A Refs.

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
A. In General
Topic Summary Correlation Table
Research References

West's Key Number Digest
West's Key Number Digest, Affidavits 9 to 12
A.L.R. Library
A.L.R. Digest: Affidavits § 1
A.L.R. Index: Affidavits

Forms

1A Am. Jur. Legal Forms 2d, Affidavits and Declarations §§ 13:20, 13:22 et seq., 13:44, 13:50, 13:51, 13:75
1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 21 to 23, 31 to 34, 41 to 55, 61 to 75, 81 to 90, 101, 102, 155

## 3 Am. Jur. 2d Affidavits § 8

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit

A. In General

Topic Summary Correlation Table References

§ 8. Generally

West's Key Number Digest
West's Key Number Digest, Affidavits 9 to 12

A.L.R. Library

Admissibility of affidavit to impeach witness, 14 A.L.R. 4th 828.

Forms

Caption. 1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 21 to 23.

Venue. 1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 31 to 34.

Introduction of affidavit. 1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 41 to 55.

Affidavit—Of handwriting expert—Forged signature. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 155.

A complete affidavit must satisfy three essential elements: (1) a written oath embodying the facts as sworn to by the affiant; (2) the signature of the affiant; and (3) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer.[FN1] While an affidavit typically includes a caption or title, the venue, the signature of affiant, the jurat, and the body of the instrument,[FN2] no particular terminology is required to render the document an affidavit,[FN3] as it is the substance and not form of affidavit that is important.[FN4] Technical deficiencies do not render affidavits improper[FN5] and will not be stricken.[FN6] Accordingly, if it affirmatively appears from whole of document that affiant could competently testify to contents of affidavit at trial, then technical insufficiencies in affidavit should be disregarded.[FN7]

An affidavit must set forth facts and show affirmatively how the affiant obtained personal knowledge of those facts.[FN8] Thus, an affidavit that does not positively and unequivocally represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient.[FN9] An objection that an affidavit contains statements of opinion[FN10] or hearsay in an affidavit are defects in form, and whether an affiant has personal knowledge and is competent are objections to form.[FN11] Similarly, an affidavit is not a "lawful affidavit" where signed outside the presence of the officer and no oath is administered.[FN12]

Practice Guide: A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signatory is in substance an affidavit, and is accorded the same probative force as affidavit.[FN13] A "verification" is a type of statement given under oath where the declarant must not only refrain from making a knowingly false statement, but must also have affirmative knowledge of the statement's truthfulness.[FN14] To function as an opposing affidavit, the verified complaint must be based on personal knowledge and set forth specific facts admissible in evidence.[FN15]

Observation: An attorney's affidavits filed in support of her motion for summary judgment in a legal malpractice action were not defective, where the attorney stated that she was fully competent and qualified to

make the affidavit on her own personal knowledge, that she was the attorney for the client in the underlying divorce until she withdrew, that she intervened for her fees, and that the attached exhibits were true and correct copies of the originals, and she signed the affidavit which was sworn to and subscribed before a notary public.[FN16]

CUMULATIVE SUPPLEMENT

Cases:

An affidavit that does not state that the facts recited are true, but is based on personal knowledge and is subscribed to and sworn before a notary public, is not defective. Churchill v. Mayo, 224 S.W.3d 340 (Tex. App. Houston 1st Dist. 2006), review denied, (Nov. 17, 2006).

[END OF SUPPLEMENT]

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[FN1] Roberson v. Ocwen Federal Bank FSB, 250 Ga. App. 350, 553 S.E.2d 162 (2001).
- As to the administration of the oath, see § 7.

- As to the signature of the affiant, see § 9.

- As to the certificate of the officer, see § 11.

[FN2] Acme Brick, a Div. of Justin Industries, Inc. v. Temple Associates, Inc., 816 S.W.2d 440 (Tex. App. Waco 1991), writ denied, (Dec. 11, 1991).

- If an affidavit is prepared for use in a pending action, the courts generally require that it bear a caption, or heading, which states the title of the cause in which it is to be used, specifying the court and the names of the parties. Dollar v. Thompson, 212 Ga. 831, 96 S.E.2d 493 (1957).
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[FN3] Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. App. Texarkana 1994), writ granted, (Feb. 16, 1995) and judgment aff'd, 916 S.W.2d 949 (Tex. 1996).
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[FN4] Centro Jurici de Instituto Tecnologico y Estudios Superiores de Monterrey v. Intertravel, Inc., 2 S.W.3d 446 (Tex. App. San Antonio 1999).
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[FN5] Hoover v. Crippen, 151 Ill. App. 3d 864, 105 Ill. Dec. 8, 503 N.E.2d 848 (3d Dist. 1987).
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[FN6] Allerion, Inc. v. Nueva Icacos, S.A. de C.V., 283 Ill. App. 3d 40, 218 Ill. Dec. 632, 669 N.E.2d 1158 (1st Dist. 1996), as modified on denial of reh'g, (Sept. 17, 1996).
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[FN7] Kirby v. Jarrett, 190 Ill. App. 3d 8, 137 Ill. Dec. 204, 545 N.E.2d 965 (1st Dist. 1989).
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[FN8] M.G.M. Grand Hotel, Inc. v. Castro, 8 S.W.3d 403 (Tex. App. Corpus Christi 1999).
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[FN9] David McDavid Nissan, Inc. v. Subaru of America, Inc., 10 S.W.3d 56 (Tex. App. Dallas 1999), review granted, (Dec. 7, 2000) and rev'd on other grounds, 44 Tex. Sup. Ct. J. 779, 2001 WL 578337 (Tex. 2001), reh'g granted, (Dec. 6, 2001).
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[FN10] Drew v. Harrison County Hosp. Ass'n, 20 S.W.3d 244 (Tex. App. Texarkana 2000).
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[FN11] Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 43 U.C.C. Rep. Serv. 2d 306 (Tex. App. Houston 14th Dist. 2000).
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[FN12] Phoebe Putney Memorial Hosp. v. Skipper, 235 Ga. App. 534, 510 S.E.2d 101 (1998).
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[FN13] Mata v. State, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).
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[FN14] Double S, Inc. v. Northwest Kansas Production Credit Ass'n, 17 Kan. App. 2d 740, 843 P.2d 741 (1992).
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[FN15] Schroeder v. McDonald, 55 F.3d 454, 32 Fed. R. Serv. 3d 196 (9th Cir. 1995).
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[FN16] Goggin v. Grimes, 969 S.W.2d 135 (Tex. App. Houston 14th Dist. 1998).

## 3 Am. Jur. 2d Affidavits § 9

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.
IV. Elements of Affidavit
A. In General

Topic Summary  Correlation Table  References

§ 9. Signature of affiant

West's Key Number Digest
West's Key Number Digest, Affidavits 11

Forms

Signature by mark—With witnesses. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:20.
Forged signature. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:75.

Affidavit—Of handwriting expert—Forged signature. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 155.

Generally, an affidavit must be sworn to in person before a notary public or other officer empowered to administer oaths for the affidavit to be valid and have the affiant's signature attached.[FN1] An affidavit is not a "lawful affidavit" where signed outside the presence of the officer and no oath was administered.[FN2] Thus, an affidavit must be signed by the deponent, or his name must appear therein as the person who took the oath, in order to constitute a formal affidavit.[FN3]

A plaintiff's statement was an affidavit, despite the lack of his signature, where the plaintiff's name appeared as the person who took the oath.[FN4] A statement which does not show that the person who made it was under oath is not an affidavit.[FN5] The signature need not be at the end, if it appears in any part and is applicable to the whole circumstance of the affidavit.[FN6]

Caution: Except where positive law mandates addition of signature to record of oath administration, signature of deponent is not essential element of affidavit.[FN7] Thus, although in the absence of a statute or rule of court to the contrary, it is not necessary to the validity of an affidavit that it have the signature of the affiant subscribed thereto,[FN8] all the authorities and general custom recommend, as the better practice, that it be signed by the affiant.[FN9]

Practice Guide: For purposes of a summary judgment motion, a plaintiff, by declaring under penalty of perjury that complaint is true (i.e. verifying complaint pursuant to 28 U.S.C.A. § 1746), and by signing it, converts the complaint, or rather those factual assertions in the complaint that comply with the requirements for affidavits specified in Fed. R. Civ. P. 56(e), into an affidavit.[FN10]

CUMULATIVE SUPPLEMENT

Statutes:

Fed. R. Civ. P. 56 was substantially amended April 28, 2010, effective December 1, 2010. Under the amended Rule, the requirements for affidavits are in Fed. R. Civ. P. 56(c)(4), which provides that an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Cases:

The truth of the facts contained in an affidavit must be sworn to in order for the affidavit to be proper. State ex rel. Nixon v. McIntyre, 2007 WL 1974953 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Aug. 28, 2007).

Oaths to affidavits ordinarily are not required to be administered with any particular ceremony, but the affiant must perform some corporal act before the officer whereby the affiant consciously takes upon himself or herself the obligation of an oath. Moyer v. Nebraska Dept. of Motor Vehicles, 275 Neb. 688, 747 N.W.2d 924 (2008).

[END OF SUPPLEMENT]

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[FN1] Roberson v. Ocwen Federal Bank FSB, 250 Ga. App. 350, 553 S.E.2d 162 (2001).

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[FN2] Phoebe Putney Memorial Hosp. v. Skipper, 235 Ga. App. 534, 510 S.E.2d 101 (1998).

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[FN3] Northrop v. Lopatka, 242 Ill. App. 3d 1, 182 Ill. Dec. 937, 610 N.E.2d 806 (4th Dist. 1993).

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[FN4] Chmielewski v. Kahlfeldt, 237 Ill. App. 3d 129, 179 Ill. Dec. 809, 606 N.E.2d 641 (2d Dist. 1992).

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[FN5] Northrop v. Lopatka, 242 Ill. App. 3d 1, 182 Ill. Dec. 937, 610 N.E.2d 806 (4th Dist. 1993).

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[FN6] General Motors Acceptance Corp. v. Sutherland, 122 Neb. 720, 241 N.W. 281 (1932).

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[FN7] In re McAndrew, 105 Pa. Commw. 503, 524 A.2d 1072 (1987).

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[FN8] Huff v. Com., 213 Va. 710, 194 S.E.2d 690 (1973).

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[FN9] International Harvester Co. of America v. Embody, 89 Mont. 402, 298 P. 348 (1931); People ex rel. New York City Omnibus Corporation v. Miller, 282 N.Y. 5, 24 N.E.2d 722 (1939); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).
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[FN10] Ford v. Wilson, 90 F.3d 245, 35 Fed. R. Serv. 3d 539 (7th Cir. 1996).

# 3 Am. Jur. 2d Affidavits § 10

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
A. In General

Topic Summary  Correlation Table  References

§ 10. Jurat

Legal Encyclopedias

Definition: A "jurat" is generally defined as a certificate added to an affidavit stating when, before whom, and where it was made.[FN1]

West's Key Number Digest
West's Key Number Digest, Affidavits 12

Forms

Jurat; Affirmation. 1A Am. Jur. Legal Forms 2d, Affidavits & Declarations §§ 13:22 et seq.
Jurat; Declaration. 1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 61 to 75.

1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 81 to 90.

If a declaration has in fact been made under oath, it is an "affidavit" although no jurat may be attached.[FN2] A jurat, which is a symbol certifying the administration of an oath, is not part of an affidavit.[FN3] but simply evidence that oath was taken.[FN4] The jurat provides one effective means of attesting that an affidavit was sworn under oath, but is not the only effective or permissible means.[FN5]
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[FN1] Allstate Savings & Loan Assn. v. Lotito, 116 Cal. App. 3d 998, 172 Cal. Rptr. 535 (2d Dist. 1981).
- A "notary jurat" is a certificate of the due administration of an oath, the purpose of which is to evidence the fact that the affidavit has been duly sworn to by an officer authorized to administer an oath. State v. Colon, 230 Conn. 24, 644 A.2d 877 (1994).

- Jurats are generally not competent to prove the identity of the affiant. Jordan v. Deery, 609 N.E.2d 1104 (Ind. 1993).

- As to the power of notaries to administer oaths and affirmations, see 58 Am. Jur. 2d, Oath and Affirmation § 37.
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[FN2] Eveleigh v. Conness, 261 Kan. 970, 933 P.2d 675 (1997).
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[FN3] Yang v. Stafford, 515 N.E.2d 1157, 1 A.L.R.5th 1023 (Ind. Ct. App. 4th Dist. 1987).
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[FN4] Bigler v. State, 602 N.E.2d 509 (Ind. Ct. App. 1st Dist. 1992).
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[FN5] State v. Colon, 230 Conn. 24, 644 A.2d 877 (1994).

# 3 Am. Jur. 2d Affidavits § 11

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
A. In General

Topic Summary  Correlation Table  References

§ 11. Jurat—Effect of omission

West's Key Number Digest
West's Key Number Digest, Affidavits 12

According to one line of authority, the omission of a jurat is not fatal to the validity of an affidavit so long as it appears either from the instrument itself or from evidence aliunde that the affidavit was, in fact, duly sworn to before authorized officer.[FN1] Similarly, a document which has no jurat, or certificate that it was sworn to by the person who signed it, may be shown to be an affidavit by other evidence.[FN2] Thus, where the affiant is otherwise identified, courts overlook mere clerical errors such as naming the wrong person in a jurat or omitting the affiant's name from a jurat entirely.[FN3] To attack an affidavit on improper execution grounds, there must be either evidence from the witness or notary or from the face of the affidavit showing that the execution was not made in the notary's physical presence.[FN4]

In some jurisdictions, however, in the absence of a valid jurat, a writing in the form of an affidavit has no force, no validity, and amounts to nothing, when standing alone or when construed in connection with other evidence.[FN5] Another view is that an affidavit with an invalid jurat is admissible as an unsworn statement if there is no requirement that the statement be sworn for the purpose that it is offered.[FN6]

Similarly, in some jurisdictions, without the official certification by an officer authorized to administer oaths, a statement is not an "affidavit," and is not competent summary judgment proof.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

An affidavit that is neither signed nor notarized is not competent evidence. State ex rel. Nixon v. McIntyre, 2007 WL 1974953 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Aug. 28, 2007).

[END OF SUPPLEMENT]

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[FN1] Bigler v. State, 602 N.E.2d 509 (Ind. Ct. App. 1st Dist. 1992).

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[FN2] Meigs v. Black, 25 Kan. App. 2d 241, 960 P.2d 770 (1998).

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[FN3] Cintuc, Inc. v. Kozubowski, 230 Ill. App. 3d 969, 172 Ill. Dec. 822, 596 N.E.2d 101 (1st Dist. 1992).

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[FN4] Roberson v. Ocwen Federal Bank FSB, 250 Ga. App. 350, 553 S.E.2d 162 (2001).

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[FN5] Phoebe Putney Memorial Hosp. v. Skipper, 226 Ga. App. 585, 487 S.E.2d 1 (1997), cert. granted, cause remanded, (Jan. 8, 1998).

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[FN6] Pappas v. State, 179 Ind. App. 547, 386 N.E.2d 718 (2d Dist. 1979).

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[FN7] Hall v. Rutherford, 911 S.W.2d 422 (Tex. App. San Antonio 1995), reh'g overruled, (Oct. 30, 1995) and writ denied, (Feb. 29, 1996).

- A certification which contains neither the signature nor seal of any party purporting to be authorized to take sworn statement is insufficient to constitute "affidavit" under Florida law. Orbe v. Orbe, 651 So. 2d 1295 (Fla. Dist. Ct. App. 5th Dist. 1995).

## 3 Am. Jur. 2d Affidavits § 12

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
A. In General

Topic Summary  Correlation Table  References

§ 12. Affidavit taken in another state

Forms
Certificate of authority—Of officer of court taking affidavit in another state—By clerk of court. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:44.

Before notary public in another jurisdiction—With county clerk's certificate of authority. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:50.

Before judge in foreign jurisdiction—With court clerk's certificate. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:51.

Certificate of authority—Of officer of court taking affidavit in another state—By clerk of court. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 101.

Certificate of authority—Of notary public taking affidavit in another state. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 102.

In some jurisdictions, an affidavit in support of motion for default judgment, signed and sworn to before a notary in another state, does not require an accompanying certificate authenticating the notary's authority to administer oaths.[FN1] In others, oaths, affidavits, and acknowledgments taken in other states that are required must be administered by authorized person and authenticated by the signature and seal of that person.[FN2]

In the absence of any statutory provisions as to what constitutes a sufficient authentication of the official character of a foreign notary, his seal of office is generally considered sufficient.[FN3] Some authorities decline to take judicial notice of the authority of a notary in another state to take affidavits, but require that the authority of the officer before whom the affidavit was taken be shown,[FN4] including that the power of the notary to administer an oath is customary and inherent in his office, and that statutes conferring the power are merely declaratory in their nature.[FN5]

Observation: An Israeli advocate was not a person who could authenticate the defendant's affidavit, which was filed in support of his motion to dismiss for lack of personal jurisdiction, since being an advocate in Israel did not automatically confer the status of a notary public.[FN6]

Practice Guide: Although both pages of an out-of-state affidavit in opposition to the defendants' motion for summary judgment in a medical malpractice action should have been accompanied by a certificate authenticating the authority of an oath administrator, the court properly refused to reject an affidavit for the technical failure to comply with CLS CPLR § 2309(c), where the only result would have been in further delay because the affidavit could have been given nunc pro tunc effect once properly acknowledged.[FN7]
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[FN1] Firstcom Broadcast Services v. New York Sound Inc., 184 Misc. 2d 524, 709 N.Y.S.2d 329 (City Civ. Ct. 2000).
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[FN2] Orbe v. Orbe, 651 So. 2d 1295 (Fla. Dist. Ct. App. 5th Dist. 1995).
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[FN3] Simpson v. Wicker, 120 Ga. 418, 47 S.E. 965 (1904).
- As to the authority of notaries to administer oaths and take affidavits, generally, see 58 Am. Jur. 2d, Notaries Public § 37.
- As to the authentication of extradition papers, see 31A Am. Jur. 2d, Extradition §§ 74, 75, 78, 79.
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[FN4] Teutonia Loan & Building Co. v. Turrell, 19 Ind. App. 469, 49 N.E. 852 (1898); Holbrook v. Libby, 113 Me. 389, 94 A. 482 (1915).
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[FN5] Simpson v. Wicker, 120 Ga. 418, 47 S.E. 965 (1904).
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[FN6] Ben-Aziz v. Polani, 710 So. 2d 125 (Fla. Dist. Ct. App. 4th Dist. 1998).
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[FN7] Nandy v. Albany Medical Center Hosp., 155 A.D.2d 833, 548 N.Y.S.2d 98 (3d Dep't 1989).
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## 3 Am. Jur. 2d Affidavits IV B Refs.

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts

Topic Summary  Correlation Table

Research References

West's Key Number Digest
West's Key Number Digest, Affidavits 3, 16, 17

A.L.R. Library
A.L.R. Digest: Affidavits § 1
A.L.R. Index: Affidavits

Forms

1A Am. Jur. Legal Forms 2d, Affidavits and Declarations §§ 13:66, 13:67
1B Am. Jur. Pleading and Practice Forms, Affidavits §§ 46, 128, 129

## 3 Am. Jur. 2d Affidavits § 13

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts

Topic Summary  Correlation Table  References

§ 13. Generally

West's Key Number Digest
West's Key Number Digest, Affidavits 3

An affidavit must be based on personal knowledge,[FN1] and its allegations should be of the pertinent facts and circumstances, rather than conclusions.[FN2] Although an affidavit must be verified by a person with personal knowledge of the facts, the court may rely on reasonable inferences drawn from the facts stated.[FN3] An affidavit may be considered, even if conclusions are intermingled with facts.[FN4] When an affiant makes a conclusion of fact, it must appear that the affiant had an opportunity to observe and did

observe matters about which he or she testifies.[FN5] Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.[FN6] The affiant must swear or affirm under oath that facts stated are true.[FN7]
An affidavit need not follow the precise language of the statute requiring such affidavit, a substantial compliance being sufficient.[FN8]

Observation: Statements in an affidavit to the effect that the affiant had read a memorandum and believed statements in it to be true did not adequately show personal knowledge of the disclosures within the document, and an assertion that the writing was based on best of the affiant's knowledge and belief would not make the affidavit admissible.[FN9]

CUMULATIVE SUPPLEMENT

Cases:

Summary judgment affidavit of motorist's expert failed to identify a defect in motorist's pick-up truck at time it left the manufacturer, and thus, affidavit was insufficient to show that manufacturer was liable for product defect for fire that the expert "suspected" was caused by truck's electrical system. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(i). Ford Motor Co. v. Ridgway, 135 S.W.3d 598 (Tex. 2004).

[END OF SUPPLEMENT]
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[FN1] § 14.
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[FN2] Atiya v. Di Bartolo, 63 Cal. App. 3d 121, 133 Cal. Rptr. 611 (1st Dist. 1976); PPX Enterprises, Inc. v. Musicali, 42 N.Y.2d 897, 397 N.Y.S.2d 987, 366 N.E.2d 1341 (1977).
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[FN3] In re Contempt of Steingold, 244 Mich. App. 153, 624 N.W.2d 504 (2000).
- A verified pleading may also be used as an affidavit if the facts stated therein are true to the party's own knowledge. Bruce E. M. v. Dorothea A. M., 455 A.2d 866 (Del. 1983).
- As to verification of pleadings, generally, see 61B Am. Jur. 2d, Pleading §§ 894 et seq.
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[FN4] Hepner v. Southern Ry. Co., 182 Ga. App. 346, 356 S.E.2d 30 (1987).
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[FN5] Scott v. City of Seymour, 659 N.E.2d 585 (Ind. Ct. App. 1995).
-
[FN6] Young v. First United Bank of Bellevue, 246 Neb. 43, 516 N.W.2d 256 (1994).
- When ultimate facts or conclusions of law appear in an affidavit which also contains the proper subject of affidavit testimony, facts within the personal knowledge of the affiant, the extraneous material should be disregarded, and only the facts considered. A. L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co., 650 F.2d 118 (6th Cir. 1981).
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[FN7] Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc., 956 S.W.2d 562 (Tex. App. Houston 14th Dist. 1997), reh'g overruled, (Dec. 23, 1997).
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[FN8] Simonton v. Simonton, 40 Idaho 751, 236 P. 863, 42 A.L.R. 1363 (1925); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); Clayton v. Clark, 76 Kan. 832, 92 P. 1117 (1907).
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[FN9] Arkla, Inc. v. Maddox and May Bros. Casing Service, Inc., 624 So. 2d 34 (La. Ct. App. 2d Cir. 1993).

# 3 Am. Jur. 2d Affidavits § 14

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts

Topic Summary  Correlation Table  References

§ 14. Personal knowledge

West's Key Number Digest
West's Key Number Digest, Affidavits 3, 17

Forms

Status of affiant—Personal knowledge of affiant. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 129.

Generally, affidavits must be made on the affiant's personal knowledge[FN1] of the facts alleged in the petition.[FN2] The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness.[FN3] The personal knowledge of facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist.[FN4] However, where it appears that an affidavit is based on the personal knowledge of the affiant and a reasonable inference is that the affiant could competently testify to the contents of the affidavit at trial, there is no requirement that the affiant specifically attest to those facts.[FN5]

If from the document as a whole it appears that affidavit is based upon the personal knowledge of the affiant, and there is a reasonable inference that the affiant could competently testify to its contents at trial, rule establishing requirements for affidavits is satisfied.[FN6]

Observation: The "personal knowledge" required by a statute governing affidavits for a summary judgment motion is that information which is obtained by the affiant through the use of his or her senses.[FN7] Practice Guide: Opinions or beliefs of an expert based on his or her special training and experience do not meet the requirement of personal knowledge for a statute governing affidavits for summary judgment.[FN8]
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[FN1] State v. Pearson, 551 S.E.2d 471 (N.C. Ct. App. 2001), appeal dismissed, 2001 WL 1548735 (N.C. 2001); State ex rel. Sekermestrovich v. Akron, 90 Ohio St. 3d 536, 740 N.E.2d 252 (2001).
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[FN2] Ackler v. Raymark Industries, Inc., 380 Pa. Super. 183, 551 A.2d 291 (1988).
-
[FN3] Requipco, Inc. v. Am-Tex Tank & Equipment, Inc., 738 S.W.2d 299 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Oct. 7, 1987).

- Where an affidavit does not specifically recite that the facts set forth there are true, but does set out that it is based on personal knowledge and is subscribed to and sworn before a notary public, it is not defective if, when considered in its entirety, its obvious effect is that the affiant is representing that the facts stated therein are true and correct. Federal Financial Co. v. Delgado, 1 S.W.3d 181, 40 U.C.C. Rep. Serv. 2d 759 (Tex. App. Corpus Christi 1999), reh'g overruled, (Sept. 16, 1999).
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[FN4] Bova v. Vinciguerra, 139 A.D.2d 797, 526 N.Y.S.2d 671 (3d Dep't 1988).
- Where a number of witnesses are making affidavits as to the same state of facts, the close similarity of language of such affidavits, even with respect to minute details, will render them open to suspicion and, therefore, objectionable. State v. District Court of Jefferson County, 213 Iowa 822, 238 N.W. 290, 80 A.L.R. 339 (1931).
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[FN5] Allerion, Inc. v. Nueva Icacos, S.A. de C.V., 283 Ill. App. 3d 40, 218 Ill. Dec. 632, 669 N.E.2d 1158 (1st Dist. 1996), as modified on denial of reh'g, (Sept. 17, 1996).
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[FN6] Kugler v. Southmark Realty Partners III, 309 Ill. App. 3d 790, 243 Ill. Dec. 407, 723 N.E.2d 710 (1st Dist. 1999).
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[FN7] Read v. State Farm Fire & Cas. Ins. Co., 725 So. 2d 85 (La. Ct. App. 3d Cir. 1998).
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[FN8] Read v. State Farm Fire & Cas. Ins. Co., 725 So. 2d 85 (La. Ct. App. 3d Cir. 1998).

## 3 Am. Jur. 2d Affidavits § 15

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts

Topic Summary  Correlation Table  References

§ 15. Allegations on information and belief

West's Key Number Digest
West's Key Number Digest, Affidavits 3

Forms

Statement of facts—On information and belief. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:66.

Status of affiant—Based on information and belief. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 128.
An "affidavit on information and belief" is an affidavit which is not based on the personal knowledge of the affiant, but rather on a good-faith belief by the affiant that the information is true.[FN1] The source of the information and the grounds for the belief must be provided.[FN2] An affidavit made on knowledge and

belief is insufficient as an affidavit unless authorized by a special statute[FN3] or where those matters sworn to are of necessity opinions or conclusions of law.[FN4]

Observation: In affidavit based on an affiant's best knowledge and belief, every item set forth as fact in the affidavit may be false, and yet each one may be true to the best of the affiant's knowledge and belief.[FN5]

Caution: The legislature may expressly authorize the use of affidavits on information and belief to support a particular pleading or motion.[FN6] Conversely, the legislature may preclude use of affidavits on information and belief to support particular pleading or motion by expressly requiring allegations based on personal knowledge.[FN7]

CUMULATIVE SUPPLEMENT

Cases:

Affidavits made pursuant to an affiant's information and belief are limited as to the oath they make because the affiant is not swearing that the facts as averred are true to the best of his personal knowledge; rather, he is swearing that he makes the averments in good faith upon his best information and his bona fide belief. Estate of Neterer v. Indiana Dept. of State Revenue, 956 N.E.2d 1214 (Ind. Tax Ct. 2011).

[END OF SUPPLEMENT]

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[FN1] State, Dept. of Human Services for Martin v. Neilson, 771 S.W.2d 128 (Tenn. Ct. App. 1989).
- As to affidavit for attachment on information and belief, see 6 Am. Jur. 2d, Attachment and Garnishment § 278.
- As to the verification of an affidavit in an application to vacate, modify, or set aside a judgment based upon information and belief, see 47 Am. Jur. 2d, Judgments § 857.

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[FN2] In re Sullivan, 185 Misc. 2d 39, 710 N.Y.S.2d 853 (Sup 2000).
- Affidavits on information and belief without giving the source of the information or the grounds of belief are mere hearsay and incompetent as evidence. In re Kuser's Estate, 132 N.J. Eq. 260, 26 A.2d 688 (Prerog. Ct. 1942).

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[FN3] Slater v. Metro Nissan of Montclair, 801 S.W.2d 253 (Tex. App. Fort Worth 1990), writ denied, (Apr. 3, 1991) and reh'g of writ of error overruled, (June 5, 1991).

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[FN4] State, Dept. of Human Services for Martin v. Neilson, 771 S.W.2d 128 (Tenn. Ct. App. 1989).

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[FN5] Ingram v. JIK Realty Co., Inc., 199 Ga. App. 335, 404 S.E.2d 802 (1991).

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[FN6] City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (1989).

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[FN7] City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (1989).

## 3 Am. Jur. 2d Affidavits § 16

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts

Topic Summary  Correlation Table  References

§ 16. Allegations in the alternative

West's Key Number Digest
West's Key Number Digest, Affidavits 17

Forms

Statement of facts—Alternative allegations. 1A Am. Jur. Legal Forms 2d, Affidavits and Declarations § 13:67.

If a remedy exists upon proof of any one of various distinct and separate grounds, an affidavit which alleges alternatively that one or another ground exists does not definitely allege the existence of either ground and, by reason of the uncertainty of its allegations, is generally held insufficient.[FN1] A distinction however, is to be made between alleging in the alternative two or more distinct grounds, and alleging in the alternative two or more phases of a single ground; in the latter case, the alternative form is of no consequence.[FN2]
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[FN1] Helton v. McLeod & Dantzler, 93 Miss. 516, 46 So. 534 (1908); In re Kuser's Estate, 132 N.J. Eq. 260, 26 A.2d 688 (Prerog. Ct. 1942); Piedmont Grocery Co. v. Hawkins, 83 W. Va. 180, 98 S.E. 152, 4 A.L.R. 828 (1919).
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[FN2] McCarthy Bros. Co. v. McLean County Farmers' Elevator Co., 18 N.D. 176, 118 N.W. 1049 (1908); Johnson v. Emery, 31 Utah 126, 86 P. 869 (1906); Piedmont Grocery Co. v. Hawkins, 83 W. Va. 180, 98 S.E. 152, 4 A.L.R. 828 (1919).

## 3 Am. Jur. 2d Affidavits § 17

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

IV. Elements of Affidavit
B. Personal Knowledge of Affiant; Statement of Facts
Topic Summary  Correlation Table  References

§ 17. Amendment

West's Key Number Digest
West's Key Number Digest, Affidavits 16

Forms

By affiant—Amendment to prior affidavit. 1B Am. Jur. Pleading and Practice Forms, Affidavits § 46.

Affidavits are as amendable as other pleadings,[FN1] and an amendment by substitution is as permissible as an amendment by striking from or adding to the contents of the paper which it is sought to amend.[FN2] Where the date of the affiant's signature and the date of the notary's attestation differ, such error is an amendable defect and does not render the affidavit void ab initio.[FN3] Similarly, a failure to sign an affidavit in the presence of a notary public is an amendable defect and does not render the affidavit void ab initio.[FN4]

However, if the defect in an affidavit is one of substance, the trial court does not have to allow an opportunity to amend.[FN5] Thus, affidavits containing hearsay, legal conclusions, and irrelevant information are properly stricken without an opportunity to amend, as defects in the affidavits are of substance and not form.[FN6]

Practice Guide: The trial court in its discretion may extend the time for filing amendments to defective affidavits.[FN7]

Observation: A defendant's motion to strike the government's declaration was dismissed as moot, because the government filed a corrected declaration that complied with the requirements of 28 U.S.C.A. § 1746.[FN8]

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[FN1] Joyce's Submarine Sandwiches, Inc. v. California Public Employees' Retirement System, 195 Ga. App. 748, 395 S.E.2d 257 (1990).
- As to the amendment of affidavits in attachment and garnishment proceedings, see 6 Am. Jur. 2d, Attachment and Garnishment §§ 297 to 300.
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[FN2] Phoebe Putney Memorial Hosp. v. Skipper, 235 Ga. App. 534, 510 S.E.2d 101 (1998).
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[FN3] Kropp v. Roberts, 246 Ga. App. 497, 540 S.E.2d 680 (2000).
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[FN4] Weekes v. Nationwide General Ins. Co., 232 Ga. App. 144, 500 S.E.2d 620 (1998).
- Absent a showing that the tenant was prejudiced by permitting a dispossessory affidavit to be expanded by unverified amendments, the court could properly allow the affidavit to be amended after trial to add a verification. Joyce's Submarine Sandwiches, Inc. v. California Public Employees' Retirement System, 195 Ga. App. 748, 395 S.E.2d 257 (1990).
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[FN5] Bell v. Moores, 832 S.W.2d 749 (Tex. App. Houston 14th Dist. 1992), writ denied, (Oct. 21, 1992).
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[FN6] Bell v. Moores, 832 S.W.2d 749 (Tex. App. Houston 14th Dist. 1992), writ denied, (Oct. 21, 1992).
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[FN7] Kropp v. Roberts, 246 Ga. App. 497, 540 S.E.2d 680 (2000).
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[FN8] U.S. v. Gritz Bros. Partnership, 155 F.R.D. 639 (E.D. Wis. 1994).

# 3 Am. Jur. 2d Affidavits V Refs.

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

V. Use and Admissibility; Sufficiency

Topic Summary  Correlation Table

Research References

West's Key Number Digest
West's Key Number Digest, Affidavits 17, 18
A.L.R. Library
A.L.R. Digest: Affidavits § 1
A.L.R. Index: Affidavits

Forms

1A Am. Jur. Legal Forms 2d, Affidavits and Declarations

1B Am. Jur. Pleading and Practice Forms, Affidavits

# 3 Am. Jur. 2d Affidavits § 18

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

V. Use and Admissibility; Sufficiency

Topic Summary  Correlation Table  References

§ 18. Generally

West's Key Number Digest
West's Key Number Digest, Affidavits 18

In general practice, affidavits may be used to start in motion the process of the court and are generally received as evidence upon the hearing of motions, irrespective of the vital influence the latter may have upon the final outcome of the suit.[FN1]

A plaintiff cannot, under the guise of fortifying the complaint, present an entirely new cause of action or expand the scope of his cause of action by means of an affidavit.[FN2]

Caution: An affidavit need not reflect the direct personal observations of the affiant and may be based on hearsay.[FN3] However, affidavit testimony as to which the affiant has no personal knowledge and which includes information that must have been secured from others may be inadmissible hearsay.[FN4]
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[FN1] Walker v. First Indus. Bank, 95 Colo. 411, 36 P.2d 467 (1934); State v. District Court of Ninth Judicial Dist. in and for Gallatin County, 72 Mont. 245, 233 P. 126 (1925); Dunn v. Silk, 155 Va. 504, 155 S.E. 694, 71 A.L.R. 667 (1930).
- A statutory provision to the effect that an affidavit may be used upon a motion relates to preliminary, collateral, and interlocutory matters, and an affidavit by insurer's attorney is not admissible to establish that under the law of another state attorney's fees are not recoverable by the plaintiff in an action on an insurance policy. Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N.W.2d 185 (1943).

- As to the use of affidavits in supporting or opposing motions, see 56 Am. Jur. 2d, Motions, Rules, and Orders §§ 22, 27.

- As to affidavits in verifying pleadings, see 61B Am. Jur. 2d, Pleading § 894.

- As to affidavits to prove service of process, see 62B Am. Jur. 2d, Process § 317.

- As to affidavits in support of a motion to suppress, see 29 Am. Jur. 2d, Evidence § 652.
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[FN2] Appleton v. Board of Educ. of Town of Stonington, 53 Conn. App. 252, 730 A.2d 88, 135 Ed. Law Rep. 170 (1999), certification granted in part, 249 Conn. 927, 733 A.2d 847, 136 Ed. Law Rep. 948 (1999) and judgment aff'd in part, rev'd in part, 254 Conn. 205, 757 A.2d 1059, 146 Ed. Law Rep. 1097 (2000).
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[FN3] Doggett v. State, 791 So. 2d 1043 (Ala. Crim. App. 2000), cert. denied, (Dec. 8, 2000).
-
[FN4] Home Bank of Guntersville v. Perpetual Federal Sav. and Loan Ass'n, 547 So. 2d 840, 10 U.C.C. Rep. Serv. 2d 879 (Ala. 1989).

## 3 Am. Jur. 2d Affidavits § 19

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

V. Use and Admissibility; Sufficiency

Topic Summary  Correlation Table  References

§ 19. Admissibility as evidence

West's Key Number Digest
West's Key Number Digest, Affidavits 18

Generally, affidavits are not competent evidence and should not be considered by the court as a trier of fact.[FN1] An affidavit is normally presumed to state matters personally known to the affiant and lacks

evidentiary value, in a variety of civil contexts, when based on information and belief, or hearsay.[FN2] Affidavits generally can be used for impeachment purposes,[FN3] but cannot be offered as substantive evidence.[FN4]

An affidavit is ordinarily not admissible to prove facts in issue at an evidentiary hearing, because it is not subject to cross examination and would improperly shift the burden of proof to the adverse party.[FN5] However, an affidavit may be admissible as evidence on a material fact at issue if evidence is admissible generally on that fact as an exception to the hearsay rule.[FN6]

> [EVIDENTIARY HEARING: An evidentiary hearing is a formal examination of charges by the receiving of testimony from interested persons, irrespective of whether oaths are administered, and receiving evidence in support or in defense of specific charges which may have been made. Where an evidentiary hearing is held, the parties are entitled to know the charges and claims involved, have a right to meet such charges or claims by competent evidence, and the right to be heard by counsel upon the force of evidence put forth and upon the applicable law. http://definitions.uslegal.com/e/evidentiary-hearing/]

Affidavits are generally not competent evidence unless provided by statute.[FN7] Accordingly, an affidavit must state the facts positively and not merely on information and belief in order for the affidavit to be used as evidence.[FN8]

Unsigned affidavits of a witness are not admissible evidence.[FN9]

As a general rule, a party is not permitted to create an issue of fact by submitting a affidavit whose conclusions contradict a prior deposition or other sworn testimony.[FN10] While, supplemental affidavits can be employed to clarify ambiguous or confusing deposition testimony,[FN11] the court should disregard any inadmissible information contained in affidavit.[FN12] Thus, only such portion of an affidavit that sets forth facts that are admissible in evidence can be considered.[FN13] On the other hand, every discrepancy contained in an affidavit does not justify a trial court's refusal to give credence to such evidence, and in light of the jury's role in resolving questions of credibility, a trial court should not reject the contents of an affidavit even if it is at odds with statements made in an earlier deposition.[FN14]

While an affidavit is generally inadmissible as a piece of independent testimony, the opposite party may waive objection to its admissibility,[FN15] and incompetent statements in an affidavit become competent evidence when admitted without objection.[FN16] It cannot, however, be used to corroborate a witness whose testimony is unimpeached.[FN17]

Observation: The general rule is that affidavits are commonly regarded as weak evidence, to be received with caution, and that they are not conclusive of the facts stated therein, even though not contradicted by counter affidavits.[FN18]
Caution: Even in rare instances in which an affidavit 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 to the matters contained therein.[FN19]

CUMULATIVE SUPPLEMENT

Statutes:

Fed. R. Civ. P. 56 was substantially amended April 28, 2010, effective December 1, 2010. Under the amended Rule, the requirements for affidavits are in Fed. R. Civ. P. 56(c)(4), which provides that an affidavit

or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Cases:

Affidavits were not admissible on summary judgment motion under the residual exception, to hearsay rule; affidavits which were pre-typed forms that required the declarants merely to "fill-in-the-blank" with facts and which appeared to be facially inconsistent with the factual account provided by another affidavit, lacked indicia of both trustworthiness and probative force, and proponent, by failing to depose either affiant during the year after obtaining their affidavits despite knowledge of the affiants' elderly age, failed to engage in reasonable efforts to preserve their testimony for trial in products liability action. Bortell v. Eli Lilly and Co., 406 F. Supp. 2d 1 (D.D.C. 2005).

Affidavit of country club president, offered in support of club's motion for summary judgment on claim for overtime compensation under Maryland Wage and Hour Law, would not be stricken on the ground that statements therein were at odds with earlier judicial decision finding that club was not a bona fide private membership club for other purposes; affidavit was proper as long as statements therein were made on basis of personal knowledge. Paukstis v. Kenwood Golf & Country Club, Inc., 241 F. Supp. 2d 551 (D. Md. 2003).

Prisoner's summary judgment affidavit attesting to the source and amount of income in her inmate account was neither signed nor verified by prisoner, and as such, could not be considered as summary judgment evidence in state's action for reimbursement of incarceration costs. State ex rel. Nixon v. McIntyre, 2007 WL 1974953 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Aug. 28, 2007).

Failure of prisoner to present competent summary judgment evidence, as a result of unverified summary judgment affidavit, precluded prisoner from succeeding on motion for summary judgment in state's action for reimbursement of incarceration expenses, even if state's response to prisoner's motion failed to create a genuine issue of material fact; by presenting no competent evidence, prisoner failed to establish a prima facie case establishing her right to judgment as a matter of law, rendering state's response to her motion irrelevant. State ex rel. Nixon v. McIntyre, 2007 WL 1974953 (Mo. Ct. App. W.D. 2007), reh'g and/or transfer denied, (Aug. 28, 2007).

Affidavit executed after appellant's negligence case had reached Supreme Court could not be considered by Supreme Court when deciding restricted appeal stemming from trial court's dismissal of action for want of prosecution after appellant failed to appear for pretrial scheduling hearing; appellant was required to show that error was apparent on face of the record, and affidavit constituted extrinsic evidence. Vernon's Ann.Texas Rules Civ.Proc., Rule 165a, subd. 1; Rules App.Proc., Rule 26.1(c). Alexander v. Lynda's Boutique, 134 S.W.3d 845 (Tex. 2004).
Affidavit for medical billing records of provider was not admissible in insured's underinsured motorist claim against automobile insurer since affidavit was not filed at least 30 days before presentation of evidence, and the error was not harmless in the absence of other evidence by traditional means of proof to support the expenses provided by medical provider. Bituminous Cas. Corp. v. Cleveland, 223 S.W.3d 485 (Tex. App. Amarillo 2006).

[END OF SUPPLEMENT]

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[FN1] Brandel Realty Co. v. Olson, 159 Ill. App. 3d 230, 111 Ill. Dec. 181, 512 N.E.2d 85 (2d Dist. 1987).
- As to the admissibility of perjury evidence, see 60A Am. Jur. 2d, Perjury §§ 93 to 95.

[FN2] City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (1989).
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[FN3] Moseley v. Lewis & Brackin, 583 So. 2d 1297 (Ala. 1991).
- As to the impeachment of witnesses by means of prior inconsistent statements, see 81 Am. Jur. 2d, Witnesses §§ 938, 963, 996.
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A.L.R. Library

Admissibility of affidavit to impeach witness, 14 A.L.R. 4th 828.

[FN4] Robinson v. Robinson, 795 So. 2d 729 (Ala. Civ. App. 2001).
- Ex parte affidavits may be received as evidence in interlocutory or preliminary matters, although they would be but hearsay at trial. Scott v. Crussen, 741 N.E.2d 743 (Ind. Ct. App. 2000).
- As to hearsay evidence, in general, see 29 Am. Jur. 2d, Evidence §§ 658 to 707.
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[FN5] Doug Sears Consulting, Inc. v. ATS Services, Inc., 752 So. 2d 668 (Fla. Dist. Ct. App. 1st Dist. 2000).
- Ex parte affidavits are not admissible against a defendant in criminal case. Miller v. State, 266 Ga. 850, 472 S.E.2d 74 (1996).
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A.L.R. Library

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases, 24 A.L.R. 4th 1266.

[FN6] Lupyan v. Lupyan, 263 Pa. Super. 303, 397 A.2d 1220 (1979).
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[FN7] McDonald v. Superior Court, 22 Cal. App. 4th 364, 27 Cal. Rptr. 2d 310 (4th Dist. 1994).
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[FN8] Hobbs v. Prudential Property and Cas. Co., 1993 OK CIV APP 76, 853 P.2d 252 (Okla. Ct. App. Div. 1 1993).
- An affidavit that states that it is based on "personal knowledge and/or knowledge acquired upon inquiry" does not unequivocally show that it is based on personal knowledge, and therefore can not serve as evidence. Federal Financial Co. v. Delgado, 1 S.W.3d 181, 40 U.C.C. Rep. Serv. 2d 759 (Tex. App. Corpus Christi 1999), reh'g overruled, (Sept. 16, 1999).

- An affidavit complies with Fed R Civ P Rule 56(e) if it presents evidence which would be admissible at trial; as general rule, this requires that the affiant have personal knowledge of the information contained in the affidavit. Reed v. Aetna Cas. and Sur. Co., Inc., 160 F.R.D. 572 (N.D. Ind. 1995).
[FN9] Brewster v. State, 697 N.E.2d 95 (Ind. Ct. App. 1998).
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[FN10] Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996).
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[FN11] Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996).
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[FN12] Bankmark of Florida, Inc. v. Star Financial Card Services, Inc., 679 N.E.2d 973 (Ind. Ct. App. 1997).
- While the trial court is vested with discretion to consider affidavits not timely filed, refusal to exercise that discretion is not error. Wade v. Howard, 232 Ga. App. 55, 499 S.E.2d 652 (1998), reconsideration dismissed, (Apr. 3, 1998).
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[FN13] Roberson v. Ocwen Federal Bank FSB, 250 Ga. App. 350, 553 S.E.2d 162 (2001).
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[FN14] Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980).
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[FN15] Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U.S. 208, 23 S. Ct. 294, 47 L. Ed. 446 (1903).
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[FN16] Vartanian v. Croll, 117 Cal. App. 2d 639, 256 P.2d 1022 (1st Dist. 1953); Naficy v. Braker, 642 S.W.2d 282 (Tex. App. Houston 14th Dist. 1982), writ refused n.r.e., (Jan. 26, 1983).
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[FN17] Judd v. Letts, 158 Cal. 359, 111 P. 12 (1910).
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[FN18] Audit Services v. Kraus Const., Inc., 189 Mont. 94, 615 P.2d 183 (1980).
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[FN19] Arkla, Inc. v. Maddox and May Bros. Casing Service, Inc., 624 So. 2d 34 (La. Ct. App. 2d Cir. 1993).
- As to personal knowledge, see § 14.

## 3 Am. Jur. 2d Affidavits § 20

American Jurisprudence, Second Edition
Database updated February 2012

Affidavits
Rosemary Gregor, J.D.

V. Use and Admissibility; Sufficiency

Topic Summary Correlation Table References

§ 20. Sufficiency

West's Key Number Digest
West's Key Number Digest, Affidavits 17, 18
A.L.R. Library

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication, 47 A.L.R. 2d 423 § 3.

To be legally sufficient, the affidavit should show affirmatively the affiant's competence to testify to the facts stated,[FN1] and the allegation must directly and unequivocally represent that the facts are true and within the personal knowledge of the affiant.[FN2] Affidavits that merely state conclusions rather than facts are insufficient.[FN3] Thus, an affidavit that contains only legal conclusions is substantively deficient and although formal deficiencies in an affidavit can be waived if not raised in trial court, substantive deficiencies cannot be waived.[FN4] Affidavits are insufficient unless they contain allegations that are direct and unequivocal and perjury can be assigned upon them.[FN5]

The chief test of the sufficiency of an affidavit is its ability to serve as a predicate for perjury prosecution.[FN6] Thus, the general test applied to determine the sufficiency of an affidavit is whether if the facts to which the affiant swears are false, the affiant may be prosecuted and convicted of perjury.[FN7]
Practice Guide: It is not necessary that the facts presented by an affidavit be sufficient to support a verdict.[FN8] Rather, they need only be admissible as evidence.[FN9]

The sufficiency of an affidavit is an issue ordinarily left to the discretion of the court.[FN10] The courts must accept an affidavit as true if it is uncontradicted by a counteraffidavit or other evidentiary materials.[FN11] If an affidavit is uncontradicted, the reviewing court must accept its contents as true.[FN12] Accordingly, where an opposing party does not deny or controvert facts stated in a movant's affidavit, the facts may be deemed to be admitted for purposes of court's ruling on such matter.[FN13] However, it is not a function of an affidavit to bring a legal argument before the trial court.[FN14]

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[FN1] State ex rel. Simmons v. Moore, 774 S.W.2d 711 (Tex. App. El Paso 1989).
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[FN2] In Interest of Simpson, 932 S.W.2d 674 (Tex. App. Amarillo 1996).
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[FN3] Jaime v. St. Joseph Hosp. Foundation, 853 S.W.2d 604 (Tex. App. Houston 1st Dist. 1993).
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[FN4] Elam v. Quest Chemical Corp., 884 S.W.2d 907 (Tex. App. Beaumont 1994), reh'g overruled, (Nov. 22, 1994) and judgment rev'd on other grounds, 898 S.W.2d 819 (Tex. 1995) and writ granted, (May 25, 1995).
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[FN5] Natural Gas Clearinghouse v. Midgard Energy Co., 23 S.W.3d 372 (Tex. App. Amarillo 1999), reh'g overruled, (Feb. 14, 2000).
-
[FN6] Hoskins v. Sharp, 629 N.E.2d 1271 (Ind. Ct. App. 1st Dist. 1994).
- As to perjury in affidavits, see 60A Am. Jur. 2d, Perjury §§ 44 to 48.

[FN7] Reyna v. National Union Fire Ins. Co. of Pittsburgh, Pa., 883 S.W.2d 368 (Tex. App. El Paso 1994), judgment rev'd, 897 S.W.2d 777 (Tex. 1995), reh'g overruled, (June 8, 1995) and writ granted, (May 11, 1995).
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[FN8] Yang v. Stafford, 515 N.E.2d 1157, 1 A.L.R.5th 1023 (Ind. Ct. App. 4th Dist. 1987).
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[FN9] Yang v. Stafford, 515 N.E.2d 1157, 1 A.L.R.5th 1023 (Ind. Ct. App. 4th Dist. 1987).
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[FN10] Caggiano v. Ross, 130 A.D.2d 538, 515 N.Y.S.2d 274 (2d Dep't 1987).
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[FN11] Kugler v. Southmark Realty Partners III, 309 Ill. App. 3d 790, 243 Ill. Dec. 407, 723 N.E.2d 710 (1st Dist. 1999).
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[FN12] Frink v. State, 568 N.E.2d 535 (Ind. 1991).
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[FN13] Rios v. Danuser Mach. Co., Inc., 110 N.M. 87, 792 P.2d 419 (Ct. App. 1990), cert. quashed, 110 N.M. 72, 792 P.2d 49 (1990).
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[FN14] State v. Phathammavong, 860 P.2d 1001 (Utah Ct. App. 1993).

CASE REFFERENCES

Court of Appeals of Indiana,

First District.

Pamela HOSKINS, Appellant-Plaintiff, v. Gary SHARP, M.D., Appellee-Defendant.

No. 30A01-9308-CV-259.

March 3, 1994.

Rehearing Denied April 28, 1994.
In medical malpractice action, summary judgment for defendant was granted by the Hancock Circuit Court, Judith Proffitt, Special Judge, and plaintiff appealed. The Court of Appeals, Najam, J., held that: (1) right to medical review panel was not waived by physician by asking trial court to intervene in panel selection process to compel compliance with the Medical Malpractice Act; (2) trial court did not exceed its jurisdiction in ordering compliance with specific statutory requirements; (3) Act is not unconstitutional on theory that it is unworkable; (4) affidavit submitted in opposition to summary judgment met requirements of rule and was substantively sufficient to preclude summary judgment; and (5) where physician supported his motion for summary judgment with opinion of medical review panel that evidence did not support conclusion that physician failed to meet applicable standard of care, but panel's opinion was silent on issue of proximate causation, plaintiff was not obliged to present expert medical opinion establishing the proximate cause element of her claim.
Reversed and remanded.

**West Headnotes**

**[1] Health 198H 806**
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk806 k. Malpractice Panels in General.
Most Cited Cases
(Formerly 299k17.5 Physicians and Surgeons)
Refusal of defendant physician in medical malpractice case to accept the striking panels selected by panel chairman and insisting the medical review panel be composed of at least two members from his medical specialty as contemplated by the Medical Malpractice Act did not mean that the informal procedure contemplated by the Act had failed and that the statutory right to a medical review panel should be deemed waived. West's A.I.C. 16-9.5-9-2(a, b), 16-9.5-9-2.1(a), 16-9.5-9-3(b)(1)
(Repealed).

**[2] Health 198H 806**
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk806 k. Malpractice Panels in General.
Most Cited Cases
(Formerly 299k17.5 Physicians and Surgeons)
The only way in which claimant can waive requirement that proposed complaint be submitted to medical review panel before action may be commenced against health care provider is by written agreement signed by each party or authorized agent, with copy attached to the complaint. West's A.I.C. 16-9.5-9-2(b)
(Repealed).

**[3] Health 198H 806**
198H Health
198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings
198Hk806 k. Malpractice Panels in General.
Most Cited Cases
(Formerly 299k17.5 Physicians and Surgeons)
Court did not exceed its jurisdiction under the Medical Malpractice Act by ordering compliance with specific statutory requirements for formation of medical review panel, and if trial court in any way intruded on informality of the panel formation process, it was harmless error, where composition of panel as finally established was not disputed and no defect in its operation was alleged.
West's A.I.C.
16-9.5-10-1 (Repealed).

**[4] Health 198H 806**
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk806 k. Malpractice Panels in General.
Most Cited Cases
(Formerly 299k17.5 Physicians and Surgeons)
Medical Malpractice Act invests courts with limited jurisdiction over medical malpractice claims before medical review panel has rendered its opinion; court having jurisdiction over the subject matter and the parties may, upon filing of copy of proposed complaint and written motion, preliminarily determine any affirmative defense or issue of law or fact that may be so determined under Rules of Procedure, or compel discovery, or both.
West's A.I.C. 16-9.5-10-1, 16-9.5-10-2
(Repealed).

**[5] Health 198H 604**
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk604 k. Validity. Most Cited Cases
(Formerly 299k2 Physicians and Surgeons)
Medical Malpractice Act is not unconstitutional in its operation and effect on theory that the medical review panel selection process is unworkable “in a real life situation” because of the deadlines, paperwork and other dictates the Act. West's A.I.C. 27-12-1-1 et seq.; West's A.I.C. 16-9.5-1-1 et seq.
(Repealed).

**[6] Appeal and Error 30 863**
30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Appeal and Error 30 934(1)
30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

When reviewing motion for summary judgment, Court of Appeals applies same standard as the trial court and resolves any doubt as to a fact, or an inference to be drawn therefrom, in favor of party opposing summary judgment, and role of Court of Appeals includes careful scrutiny of trial court's determination to assure that nonprevailing party is not improperly prevented from having his day in court.

**[7] Judgment 228 185(2)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
Party moving for summary judgment bears burden of proving nonexistence of genuine issue of material fact, and if there is any doubt, motion should be denied, but once movant has sustained his burden, opponent may not rest on mere allegations or denials in his pleadings be must respond by setting forth specific facts showing that there is genuine issue for trial.
Trial Procedure Rule 56(C, E).

**[8] Judgment 228 185.3(21)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Medical malpractice case based on negligence is rarely appropriate case for disposal by summary judgment, especially when critical question for resolution is whether defendant exercised a degree of care due under the factual circumstances, but if defendant doctor can show that there are no genuine issue of material fact as to any one of the elements of the plaintiff's case, doctor is entitled to summary judgment unless plaintiff can establish, by expert testimony, genuine issue of material fact for trial.
Trial Procedure Rule 56(C, E).

**[9] Health 198H 611**
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(B) Duties and Liabilities in General
198Hk611 k. Elements of Malpractice or Negligence in General. Most Cited Cases
(Formerly 299k18.12 Physicians and Surgeons)
To prevail in medical malpractice action, plaintiff must prove three elements: duty on part of defendant in relation to plaintiff; failure of defendant to conform his conduct to requisite standard of care required by the relationship; and injury to plaintiff resulting from that failure.

**[10] Judgment 228 185(2)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
Judgment 228 185(4)
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General

228k185(4) k. Documentary Evidence or Official Record. Most Cited Cases Opinion of medical review panel that evidence did not support conclusion that defendant physician failed to meet applicable standard of care charged in malpractice complaint was admissible as evidentiary matter for purposes of summary judgment and sufficient to satisfy doctor's initial burden of showing no genuine issue of material fact on standard of care issue, so that burden shifted to plaintiff to respond by designating evidentiary matter which demonstrated genuine issue for trial.
Trial Procedure Rule 56(C, E); West's A.I.C. 16-9.5-9-9
(Repealed).

**[11] Judgment 228 185.3(21)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Despite opinion of medical review panel that family practitioner did not violate standard of care in failing to refer to a hematologist patient with low platelet count, affidavit of another family practitioner that referral to hematologist would be warranted and would be the standard of care of family practitioners established issue of fact on standard of care, precluding summary judgment for defendant physician in malpractice action.

**[12] Judgment 228 185.1(1)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of 228k185.1(1) k. In General. Most Cited Cases
In affidavit in opposition to summary judgment, affiant's words, “I affirm the truth of the above statements” met requirements for verification even though affidavit was not notarized.
Trial Procedure
Rule 11(B).

**[13] Affidavits 21 1**
21 Affidavits
21k1 k. Nature and Functions in General. Most Cited Cases
“Affidavit” is written statement of fact which is sworn to as the truth before authorized officer, and chief test of sufficiency of affidavit is its ability to serve as predicate for perjury prosecution.
Trial Procedure Rule 11(B).

**[14] Judgment 228 185.1(1)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(1) k. In General. Most Cited Cases
Affidavits in support of or opposition to motion for summary judgment must first be properly verified.
Trial Procedure Rule 11(B).

**[15] Judgment 228 185.3(21)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases
In medical malpractice case, affidavit submitted to establish issue of fact on standard of care, in opposition to motion for summary judgment, must demonstrate expert's familiarity with applicable standard of care, set out that standard of care and state that treatment in question fell below that standard, and it is not enough to state that expert would have treated patient differently.
[16] Judgment 228 185.1(3)
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(3) k. Personal Knowledge or Belief of Affiant. Most Cited Cases
Judgment 228 185.3(21)
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Affidavit of family practitioner in opposition to summary judgment in medical malpractice case met requirements of summary judgment rule where it demonstrated that it was based on physician's personal knowledge of hematology report, set forth facts admissible in evidence and showed that physician, as board certified family practitioner, was competent to testify what, in her opinion, the standard of care was under the circumstances, demonstrated familiarity with applicable standard of care, stated what that standard was, and affirmatively stated that conduct such as defendant's would fall below that standard of care.
Trial Procedure Rule 56(E).

**[17] Judgment 228 185.3(21)**
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Where medical review panel found no breach of standard of care but its opinion was silent on issue of proximate cause, medical malpractice plaintiff, in opposition to doctor's motion for summary judgment, was not obligated to present expert opinion on proximate cause when physician, in support of motion, submitted only the review panel's opinion.
[18] Health 198H 614
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(B) Duties and Liabilities in General
198Hk612 Duty
198Hk614 k. Necessity and Existence of Duty. Most Cited Cases
(Formerly 299k18.90 Physicians and Surgeons)
As a matter of law, physician owed patient duty of care as his family doctor.
*1273 Thomas E.Q. Williams, Greenfield, for appellant-plaintiff.
Robert J. Shula, Richard S. Pitts, Lowe Gray Steele & Hoffman, Indianapolis, for appellee-defendant.
NAJAM, Judge.

STATEMENT OF THE CASE
Pamela Hoskins brings this appeal from the entry of summary judgment for Gary Sharp, M.D., in a medical malpractice action arising from Sharp's treatment of her late husband, James Hoskins. Pamela filed a proposed complaint with the Indiana Department of Insurance pursuant to the Medical Malpractice Act (the

"Act") FN1 alleging that Dr. Sharp was negligent in his care of James. After the trial court had ruled on various discovery and other motions, Pamela's challenge to the constitutionality of the Act and a dispute over formation of the medical review panel, the panel rendered its unanimous opinion that the evidence did not support the conclusion that Dr. Sharp failed to meet the applicable standard of care charged in the complaint. Pamela then filed a complaint in the trial court, specifically alleging that Dr. *1274 Sharp was negligent because he failed to refer James to a hematologist "due to the possibility of the diagnosis of acute leukemia" which she alleged caused his death. Dr. Sharp moved for summary judgment and submitted only the panel's opinion in support of his motion. Pamela submitted affidavits and letters, James' medical records and his cause of death report in opposition to the motion. The trial court entered summary judgment for Sharp.
FN1. The Indiana Medical Malpractice
Act, Indiana Code § 16-9.5-1-1 et seq., has been repealed and recodified as Indiana
Code §§ 27-12-1-1 et seq., effective July 1, 1993. All citations in this opinion shall be to the former version of the Act in effect when the suit was filed.
We reverse.

ISSUES

1. Whether Dr. Sharp waived the statutory requirement of a medical review panel by asking the trial court to compel the formation of two properly constituted medical review striking panels.
2. Whether the trial court had jurisdiction to order the panel chairman to form striking panels constituted as provided in the Act.
3. Whether the Act is constitutional.
4. Whether Dr. Sharp is entitled to summary judgment as a a matter of law.

FACTS

Dr. Sharp, a specialist in family practice, treated James from approximately 1976 until James' death in June of 1989. In February of 1989, James submitted to a blood test that Dr. Sharp had ordered which revealed an abnormally low platelet count. That result was unchanged from a blood test which Sharp had ordered in 1985, which had also revealed a low platelet count. In May of 1989, James, then 45, was admitted to the emergency room of Hancock Memorial Hospital in serious condition. He was then treated by Dr. Sharp and other physicians, and was diagnosed with severe encephalopathy. FN2 One of the treating physicians noted in James' medical records that James also had a history of alcohol abuse. James was later transferred to Community Ritter Hospital in Indianapolis where he was diagnosed with acute promyelocytic leukemia. James remained hospitalized until his death on June 18, 1989. FN2. Encephalopathy is generally described as any disease of the brain. Stedman's Medical Dictionary 508 (25th ed. 1990).
DISCUSSION AND DECISION
Issue One: Waiver of Medical Review Panel

[1] Pamela first contends Dr. Sharp waived his right to have Pamela's claim presented to a medical review panel. She asserts that Dr. Sharp refused to accept the striking panels selected by the panel chairman and instead obtained a court order requiring a panel "under other conformity." She argues that where voluntary compliance with the formation of a panel becomes "impossible" and a trial court is asked to intervene in the panel selection process, the informal procedure contemplated by the Act has failed and the statutory right to a medical review panel should be deemed waived. We cannot agree.

[2] Generally, no action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to the Act and an opinion has been rendered by the panel.FN3 IND.CODE §16-9.5-9-2(a). A claimant can waive this requirement in only one prescribed manner. "A claimant may commence an action in court for malpractice without the presentation of the claim to a medical review panel if the claimant and all parties named as defendants in the action agree that the claim is not to be presented to a medical review panel."

IND.CODE § 16-9.5-9-2(b). That agreement must be in writing and must be signed by each party or the authorized agent of a party. Id. A copy of the agreement must be attached to the complaint filed with the court in which the action is commenced.
Id.
FN3. However, "a patient may commence an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient's pleadings include a declaration that the patient seeks damages from the
health care provider in an amount no greater
than fifteen thousand dollars ($15,000)."
IND.CODE § 16-9.5-9-2.1(a).

*1275 Here, there was no written agreement between the parties for waiver of a medical review panel. In fact, in his motion opposing plaintiff's motion for further instruction, Dr. Sharp stated, "the Defendant rejects Plaintiff's offer to waive the panel formation in this case." Record at 161. The evidence also shows that Dr. Sharp did not simply refuse to accept the striking panels selected by the panel chairman but only insisted that the panels be composed of qualified physicians as provided under the Act. See IND.CODE § 16-9.5-9-3(b)(1) (when one defendant is specialist in particular area of medicine, two member of review panel are required to be health care professionals specializing in same area as the defendant). Sharp merely insisted upon compliance with Indiana Code § 16-9.5-9-3(b)(1), and we can discern no waiver from his insistence that the medical review panel be composed of at least two members from his medical specialty.

Pamela asks that we fashion a common law waiver rule which would apply when the parties are unable voluntarily and informally to select a medical review panel. She suggests that this waiver rule should be applied in a case such as this one where the procedure "while followed by the parties in good faith, has broken down due to a requirement that reasonably necessitates a court opinion." Brief of Appellant at 11. We decline to fashion such a rule where the legislature has narrowly prescribed the circumstances under which an effective waiver occurs under Indiana Code § 16-9.5-9-2(b). Dr. Sharp did not waive his right to a medical review panel merely by insisting upon compliance with the Act.

Issue Two: Trial Court's Jurisdiction

[3] Pamela next disputes the trial court's order directing the panel chairman to form two striking panels of family practitioners. The court ordered the formation of new striking panels because the striking panels previously submitted by the panel chairman contained only one qualified physician in contravention of Indiana Code § 16-9.5-9-3(b)(1). FN4 Pamela contends that the court interfered with the informal panel formation process and exceeded its jurisdiction under Indiana Code § 16-9.5-10-1. FN4. Indiana Code § 16-9.5-9-3(b)(1) provides that if there is only one party defendant who is an individual, two of the panelists selected must be members of the profession of which the defendant is a member, and if the individual defendant is a health care professional who specializes in a limited area, two of the panelists selected must be health care professionals who specialize in the same area as the defendant.

Sharp filed a motion with the trial court asking the court to issue an order compelling the formation of two medical review striking panels composed of family practitioners. When confronted with such a motion, the medical review panel chairman is required to appoint a striking panel consisting of three qualified health care professionals for each party. IND.CODE §16-9.5-9-3(b)(3). Here, the medical review panel chairman had appointed two striking panels; however, only one of the six health care professionals named to these panels was a family practitioner like Sharp. The trial court granted Sharp's motion and ordered the panel chairman to compose two new striking panels with a sufficient number of family practitioners, pursuant to Indiana Code § 16-9.5-9-3(b)(1) and (3).

[4] The Act invests the courts with limited jurisdiction over medical malpractice claims until the medical review panel has rendered its opinion. Surgical Associates, Inc. v. Zabolotney (1992), Ind.App., 599 N.E.2d 614, 615, trans. denied. The Act provides that "any party to the proceeding may invoke the limited jurisdiction of the court by paying the statutory filing fee to the clerk and filing a copy of the proposed complaint and motion with the clerk." IND.CODE § 16-9.5-10-2. A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the Commissioner of Insurance may, upon the filing of a copy of the proposed complaint and a written motion,

> (1) preliminarily determine any affirmative defense or issue of law or fact that may be so determined under the Indiana Rules of Procedure; or
> (2) compel discovery in accordance with the Indiana Rules of Procedure; or (3) both. IND.CODE §16-9.5-10-1.

On December 3, 1990, Pamela invoked the jurisdiction of the Hancock Circuit Court by filing a motion for a discovery order.FN5 Pamela*1276 does not dispute the composition of the panel as it was finally established or allege any defect in the panel's operation. Pamela cannot show that the medical review panel deliberations did not comply with the statutory requirements or that she was prejudiced in any way by the trial court's order directing the panel chairman to form striking panels properly composed of a sufficient number of family practitioners. See Jordan v. Deery (1993), Ind., 609 N.E.2d 1104, 1108-09.

FN5. The docket sheet entry states only that, "Plaintiff files motion for discovery order." Record at 2. The record does not disclose that Pamela filed a copy of the proposed complaint with the court. Since the court considered the motion and other motions filed by the parties, and neither party addressed this issue, we shall assume without deciding that the proposed complaint was before the court and that the court's jurisdiction over the case was properly invoked. Pamela cites Griffith v. Jones (1992), Ind., 602 N.E.2d 107, for her position, although Griffith is inapposite.

In Griffith, the trial court had instructed the medical review panel concerning the definition of terms and phrases used in the Act, the evidence that the panel could consider in reaching its opinion and the form and substance of its opinion. Id. at 109. Our supreme court held that the trial court exceeded its jurisdiction and interfered with the informal operation of the medical review panel as contemplated by the legislature. Id. However, in the present case, the panel had not yet been formed, and the trial court did not instruct the panel or interfere in any manner with its operation. The court did not dictate to the panel concerning the content of the panel's opinion, the manner in which the panel should arrive at its opinion, or the matters that the panel could consider in arriving at its opinion. See Griffith, 602 N.E.2d at 110. Instead, the court merely acted to facilitate selection of a panel by ordering compliance with the specific statutory requirements for panel formation.

We conclude that it was permissible for the trial court to invoke its jurisdiction for this limited purpose under Indiana Code § 16-9.5-10-1. If the trial court in any way intruded upon the informality of the panel formation process, it was harmless error.

Issue Three: Constitutionality of Medical Malpractice Act

[5] Pamela's third claim is that the Medical Malpractice Act is unconstitutional because the panel selection process is unworkable "in a real life situation," although she concedes that "the idea of the statute seems to have been upheld as ... constitutional." Brief of Appellant at 14; see Johnson v. St. Vincent's Hospital, Inc. (1980), 273 Ind. 374, 404 N.E.2d 585. Nevertheless, Pamela asserts that the deadlines, paperwork and other dictates of the Act render it an "impossible law" and that the scheme of the Act should be held unconstitutional, if not per se, then in its actual operation and effect.

Brief of Appellant at 14. The trial court rejected Pamela's argument, and we are bound by our supreme

court's decision in Johnson. Pamela's position on this issue is without merit.

Issue Four: Summary Judgment
Finally, Pamela asserts that evidentiary materials she submitted to the trial court create a genuine issue of material fact precluding summary judgment in favor of Dr. Sharp.
[6] When reviewing a motion for summary judgment, we apply the same standard as the trial court, and we resolve any doubt as to a fact, or an inference to be drawn therefrom, in favor of the party opposing summary judgment. City of Evansville v. Moore (1990), Ind., 563 N.E.2d 113, 114.

Our role on appeal includes a careful scrutiny of the trial court's determination to assure that the nonprevailing party is not improperly prevented from having his day in court. Id.

[7] Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ind.Trial Rule 56(C); Lucas v. Stavos (1993), Ind.App., 609 N.E.2d 1114, 1116, trans denied. The moving party bears the burden of proving the nonexistence of a genuine issue of material fact, and if there is any doubt, the motion should be resolved in favor of the party opposing the motion. Oelling v. Rao (1992), Ind., 593 N.E.2d 189, 190. “Once the movant has sustained this burden, however, the opponent may not rest upon the mere allegations or denials in his pleadings, but must *1277 respond by setting forth specific facts showing that there is a genuine issue for trial.” Id.; Ind.Trial Rule 56(E).

[8] A medical malpractice case based upon negligence is rarely an appropriate case for disposal by summary judgment. Chambers By Hamm v. Ludlow (1992), Ind.App., 598 N.E.2d 1111, 1116; Bassett v. Glock (1977), 174 Ind.App. 439, 442, 368 N.E.2d 18, 20. This is especially true when the critical question for resolution is whether the defendant exercised the degree of care due under the factual circumstances. Bassett, 174 Ind.App. at 442, 368 N.E.2d at 20.

[9] To prevail in a medical malpractice action, the plaintiff must prove three elements:
(1) a duty on the part of the defendant in relation to the plaintiff;
(2) failure to conform his conduct to the requisite standard of care required by the relationship; and
(3) an injury to the plaintiff resulting from that failure.” Oelling, 593 N.E.2d at 190; Ludlow, 598 N.E.2d at 1116. When the defendant doctor moves for summary judgment and can show the there is no genuine issue of material fact as to any one of these elements, the defendant is entitled to summary judgment as a matter of law unless the plaintiff can establish, by expert testimony, a genuine issue of material fact for trial. See Ludlow, 598 N.E.2d at 1116.

[10] Here, in support of his motion for summary judgment, Dr. Sharp submitted only the medical review panel opinion. The panel determined that the evidence did not support the conclusion that the defendant failed to meet the applicable standard of care charged in the complaint. The opinion of the medical review panel is admissible as evidentiary matter for the purposes of summary judgment. IND.CODE § 16-9.5-9-9. Thus, the panel opinion was sufficient to satisfy Dr. Sharp's initial burden of showing no genuine issue of material fact on the standard of care issue. See Oelling, 593 N.E.2d at 190. The burden of proof then shifted to Pamela to respond by designating evidentiary matter which demonstrated a genuine issue for trial. See id.

[11] On appeal, Pamela relies solely upon an affidavit of Dr. Brenda Woods, a family practitioner, and a letter from Dr. Ronald Hoffman, a hematologist and oncologist, in opposition to Dr. Sharp's motion for summary judgment. Sharp contends that these documents could not be considered by the trial court as evidentiary material because they “were not in compliance with the Trial Rules and case authority.”

Appellee's Brief at 28. However, we need not address whether Dr. Hoffman's letter is proper evidentiary material under Trial Rule 56(C) because we conclude that Dr. Woods' affidavit is, standing alone, sufficient evidence to withstand Dr. Sharp's motion for summary judgment.

[12] Dr. Woods' affidavit contains the following statement before her signature: "I affirm the truth of the above statements." According to Dr. Sharp, Dr. Woods' affidavit was not properly verified because it was not notarized. We must disagree.
[13][14] An affidavit has been defined as a written statement of fact which is sworn to as the truth before an authorized officer. Jordan v. Deery (1993), Ind., 609 N.E.2d 1104, 1110. The chief test of the sufficiency of an affidavit is its ability to serve as a predicate for a perjury prosecution. Id.
Affidavits in support of or in opposition to a motion for summary judgment must first be properly verified. Trial Rule 11(B) provides:
"When in connection with any civil or statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified, or that an oath be taken, it shall be sufficient is the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:
'I (we) affirm, under penalties for perjury, that the foregoing representation(s) is (are) true. (Signed) __'...." (emphasis added).

In Jordan, our supreme court held that a doctor's affidavit was sufficient to subject the doctor to prosecution for making a false affidavit when it stated, "Affiant ... being duly sworn upon her oath alleges and says: ...," although the affiant did not swear that the statements she made were true. Jordan, 609 N.E.2d at 1109-10. The court distinguished* 1278 Jordan from other cases involving statutory verification requirements. Id. at 1109-10.

It explained that there is no singular statutory rule regarding proper verification of an affidavit filed in connection with summary judgment proceedings, and "although Trial Rule 11 provides one method for binding an affiant to his oath, compliance with its provisions is not required." Id. at 1110. We conclude that Dr. Woods' words, "I affirm the truth of the above statements," meets the "chief test" from Jordan that the affidavit will subject her to a perjury prosecution if any of her statements are false.

FN6 Therefore, Dr. Woods' affidavit is properly verified.
FN6. Indiana's perjury statute provides that a person who makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true, commits perjury, a Class D felony. IND.CODE § 35-44-2-1.
[15] We must next consider whether Dr. Woods' affidavit is substantively sufficient to create a genuine issue of material fact on the issue of breach of the standard of care. Trial Rule 56(E) requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ind. Trial Rule 56(E). In addition, "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Id. In a medical malpractice case, an opposing affidavit submitted to establish an issue of fact on the standard of care issue must demonstrate the expert's familiarity with the applicable standard of care, set out that standard of care and state that the treatment in question fell below that standard. Oelling, 593 N.E.2d at 190; Ellis v. Smith (1988), Ind.App., 528 N.E.2d 826, 829. It is not enough to state the expert would have treated the patient differently. Oelling, 593 N.E.2d at 191.

Dr. Woods' affidavit stated that she was a board certified family practice physician and that she had reviewed the hematology report on James prepared by Hancock Memorial Hospital. Her opinion was
(1) that she found the white blood cell count, red blood cell count and platelet count were low;
(2) that she concluded a referral to a hematologist would be warranted and a consultation to determine

the cause should be undertaken;
(3) that such a referral would be the standard of care of family practitioners and that a failure to do so would fall below the requisite standard of care of a family practitioner at the time of the hematological report in that locale of medical practice; and
(4) that she would not conclude the blood test depicted an alcoholic, although that possibility would need to be considered.

[16] Dr. Woods' affidavit established an issue of material fact concerning whether Dr. Sharp's conduct fell below the applicable standard of care. The affidavit met the requirements of 56(E) because it demonstrated that it was made based upon Dr. Woods' personal knowledge of James' hematology report, it set forth facts admissible in evidence and it showed that Dr. Woods, as a board certified family practitioner, was competent to testify to what in her opinion the standard of care was under these circumstances. See Winbush v. Memorial Health System, Inc. (1991), Ind., 581 N.E.2d 1239, 1243-44. Dr. Woods' affidavit was also sufficient because it demonstrated a familiarity with the applicable standard of care, stated what that standard was and affirmatively stated that conduct such as Dr. Sharp's would fall below that standard of care.

Dr. Woods' opinion went beyond a mere assertion that she would have treated James in a different manner. Cf. Oelling, 593 N.E.2d at 191 (affidavit stating doctor himself would have treated patient differently held insufficient to demonstrate issue of fact on breach of standard of care). While Dr. Woods' affidavit could have been more complete, it was nevertheless sufficient to carry Pamela's burden of showing the existence of an issue of material fact on breach of the standard of care.FN7

FN7. Dr. Sharp contends that Dr. Woods' affidavit was equivocal on whether the standard of care was met because she states that James' alleged alcohol abuse was a "possibility" which would need to be considered. Brief of Appellee at 29-30. However, that statement does not affect the sufficiency of Dr. Woods' opinion on breach of the standard of care but instead goes to the issue of proximate cause. *1279 [17][18] We cannot agree with Dr. Sharp's contention that because the medical review panel found no breach of the standard of care, Pamela was obligated to present an expert opinion establishing each element of her claim. Brief of Appellee at 26. We first note that whether Dr. Sharp owed James a duty of care is not disputed in this case, and we conclude as a matter of law that Dr. Sharp owed James such a duty as his family doctor. See Webb v. Jarvis (1991), Ind., 575 N.E.2d 992, 995 (whether duty exists in negligence action is question of law). Also, while Dr. Sharp's submission of the medical review panel opinion shifted the burden of going forward with evidentiary matter to Pamela, she "was under no obligation to present evidence sufficient to prevail upon [her claim] in the context of a full blown trial." Malooley v. McIntyre (1992), Ind. App., 597 N.E.2d 314, 317.

Rather, when the medical review panel opines that the plaintiff has failed to satisfy any one element of her prima facie case, the plaintiff is only required to "come forward with expert medical testimony to refute the panel's opinion in order to survive summary judgment." Ludlow, 598 N.E.2d at 1116 (emphasis added); see Malooley, 597 N.E.2d at 317.

As we noted in Watson v. Medical Emergency Services (1989), Ind.App., 532 N.E.2d 1191, trans. denied, our inquiry is whether Dr. Sharp showed the "undisputed nonexistence of at least one of these elements." Id. at 1193. Dr. Sharp met his initial burden by designating the medical review panel opinion that there was no breach of the applicable standard of care. However, Pamela countered with Dr. Woods' expert opinion that Dr. Sharp had breached the standard of care. Pamela successfully refuted the panel's opinion and survives summary judgment because Dr. Sharp failed to establish the undisputed nonexistence of the element of breach of the standard of care. See Ludlow, 598 N.E.2d at 1116; Watson, 532 N.E.2d at 1193.

Contrary to Dr. Sharp's contention, Pamela was not required to present expert medical evidence on the issue of proximate cause. See Brief of Appellee at 26. The medical review panel opinion consisted of a form,

prescribed by statute, with four possible opinions from which the panel could have selected. Pursuant to the instructions on the form, three of the opinions were crossed out and one was selected, which read: "The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care charged in the complaint." The panel's opinion is silent on the issue of proximate cause. The medical review panel opinion was the only expert opinion tendered by Dr. Sharp, and it is insufficient to establish that no genuine issue of fact exists on the issue of proximate cause because it concerns only the applicable standard of care. Accordingly, while Pamela, through Dr. Woods' affidavit, failed to present an expert opinion that Dr. Sharp's negligence was the proximate cause of James' death, she was not required to do so. Dr. Sharp, not Pamela, had the initial burden of negating the proximate cause element of Pamela's claim.

Thus, the burden never shifted to Pamela. Pamela alleged in her complaint that Dr. Sharp's negligence was the proximate cause of James' injuries, and she was entitled to rest on her pleadings on that issue. See Whitten v. Kentucky Fried Chicken Corp. (1991), Ind.App., 570 N.E.2d 1353, 1359, trans. denied ("unless and until movant makes showing that there is a lack of a material factual issue, nonmoving party may rest upon allegations of pleadings").

Therefore, we conclude that a genuine issue of material fact remains on the standard of care issue. The existence of a genuine issue of material fact on at least one element of Pamela's claim precludes the entry of summary judgment in Dr. Sharp's favor. See Oelling, 593 N.E.2d at 1193.

CONCLUSION
We hold that the trial court had jurisdiction to order compliance with the statutory procedures for formation of a medical review panel, that Dr. Sharp did not waive his right *1280 to a medical review panel, and that the Act is constitutional. However, we hold that summary judgment in favor of Dr. Sharp was error. A genuine issue of material fact remains regarding whether Dr. Sharp breached the requisite standard of care when he failed to refer James to a hematologist.

We reverse and remand for proceedings consistent with this opinion.
BAKER and RUCKER, JJ., concur. Ind.App. 1 Dist., 1994.
Hoskins v. Sharp 629 N.E.2d 1271

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