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# THE EXECUTION "UNDER OATH" OF U.S. LITIGATION DOCUMENTS: MUST SIGNATURES BE AUTHENTICATED?

THOMAS W. TOBIN\*

## INTRODUCTION

United States federal and state rules of civil procedure require many litigation documents to be executed "under oath," often leading attorneys to the conclusion that signatures must be authenticated by a notary public or, if a client is outside the country, a foreign notary or U.S. consular official. Attorneys often forward these documents to foreign clients passing along the requirement for an authenticated signature without considering the time and expense of obtaining a notarization in a foreign country and/or the inconvenience of a visit to a U.S. consulate. While the need for such authenticated signatures in cases pending in state court must be analyzed on a state-by-state basis, it appears that there is *never* such a need in federal cases providing the signature block is drafted appropriately.

Part I of this Article examines the federal and state rules of procedure regarding the execution under oath and who has the authority to administer this task. Part II discusses the obstacles of document notarization in foreign countries. Parts III analyzes the issue of whether a notarized signature is required in federal court if

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the document is executed under penalty of perjury. Part IV examines state statutes pertaining to 28 U.S.C. § 1746. Finally, Part V of this Article proposes that a U.S. Consular be given authority to authenticate signatures and discusses some practical considerations to use when determining whether a notarized signature is needed for litigation documents.

#### I. THE FEDERAL AND STATE PROCEDURAL RULES WITH REGARD TO EXECUTION UNDER OATH

U.S. Federal Rule of Civil Procedure 33(b) provides that interrogatories “[s]hall be answered separately and fully in writing under oath . . . .”<sup>1</sup> The United States Code, section 2903 provides, “The oath of office required by § 3331 of this title be administered by . . . the laws of the United States or local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered,”<sup>2</sup> including notaries public. If a case is pending in state court, one must look to the laws of the forum state for guidance as to the requirements for oaths and affirmations. Every state requires that interrogatories and other responses to discovery demands be either verified or answered under oath.<sup>3</sup> Some states also require the verification of pleadings.<sup>4</sup>

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1. FED. R. CIV. P. 33(b).

2. 5 U.S.C. § 2903 (1997). Additionally, the Federal Rules of Evidence allows the admission of notarized documents without the need for any “extrinsic evidence of authenticity.” FED. R. EVID. 902.

3. ALA. R. CIV. P. 33(a); ARK. R. CIV. P. 33(a); ARIZ. R. CIV. P. 33(a); CAL. CIV. PROC. § 2025(f)(g) (1998); COLO. R. CIV. P. 33(b); CONN. R. CIV. P. 244; DEL. SUPER. CT. C.P.R. 33(a); D.C.R.C.P. 33; FLA. R. CIV. P. 1.340; GA. CODE ANN. § 9-11-33 (1997); HAW. R. CIV. P. 33; IDAHO R. CIV. P. 33(a); ILL. S. CT. R. 217; IND. R. TRIAL P. 33(b); IOWA R. CIV. P. 126; KAN. STAT. ANN. § 60-233 (1983); KY. R. CIV. P. 33.01; LA. CODE CIV. P. ANN. Art. 1458 (West 1997); ME. R. CIV. P. 33(a); MD. R. CIV. P. 2-421; MASS R. CIV. P. 33; MICH. CT. R. 2.309; MINN R. CIV. P. 33.01; MISS. R. CIV. P. 33(a); MO. REV. STAT. § 510.020 (1997); MONT. R. CIV. P. 33(a); NEV. R. CIV. P. 33(a); N.H. ST. DIST. & MUN. CT. R. 1.10; NEB. REV. STAT. § 25-1010; N.J. R. CIV. P. 4:17-4; N.M. R. CIV. P. 1-033; N.Y. C.P.L.R. 3133(b) (McKinney 1997); N.C. GEN. STAT. § 1A-1, Rule 33(a)(1997); OHIO R. CIV. P. 33(A); OKLA. STAT. tit. 12 § 3233 (1997); OR. REV. STAT. § 23.720(1)(a) (1996); PA. R. CIV. P. 4006; R.I. SUPER. CT. R. CIV. P. 33; S.C. R. CIV. P. 33(a); S.D. CODIFIED LAWS § 15-6-33(a)(Michie 1984); TENN. R. CIV. P. 33.01; TEX. R. CIV. P. 168; UTAH R. CIV. P. 33(a); VT. R. CIV. P. 33(a); VA. R. CIV. CT. 4:8; WASH. SUPER. CT. CIV. R. 33(a); W.VA. R. CIV. P. 33(a); WIS. STAT. ANN. § 804.08 (West 1994); WYO. R. CIV. P. 33(b).

4. In New York, if a complaint is verified then the answer must be verified. N.Y. CT. RULES 7000.1, 7000.6. Pennsylvania generally requires a pleading to be verified if it “. . . contain[s] an averment of fact not appearing on the record . . . .” PA. R. CIV. P. 1024. In California and Pennsylvania, however, a verification may be a declaration under the penalty of perjury and need not be notarized or even witnessed. CAL. BUS. & PROF. CODE § 2081 (West 1998); PA. R. CIV. P. 76. There is generally no verification of pleadings required in Florida, Illinois, Maryland, New Jersey, Texas, Virginia and Washington, D.C. D.C. SUP. CT. R. 10; FLA. R. CIV. P. 1.100; 735 ILCS 5/2-

Every state provides for a variety of officials, civil servants and others with special status to give oaths. The most common of these "oath givers" are notaries public. Examples of others include judges, court clerks, surrogates, sheriffs, members of state legislatures, commissioners in chancery, court reporters, lawyers, examiners of title, and mayors and aldermen of cities, towns and boroughs.<sup>5</sup> Some

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603 (West 1998); MD. R. CIV. P. 1-311; N.J. R. SUPER. TAX. SURR. CT. 4:5-1; TEX. R. U.S. BANK. CT. W.D. 9004; VA. R. S. CT. 1:4.

5. In California, "[e]very court, every judge or clerk of any court, every justice, every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths or affirmations." CAL. CIV. PROC. § 2093(a) (1998). This statute goes on to accord shorthand reporters and former judges or justices of a court of record from within California authority to take oaths. *Id.*

In Florida, oaths, affidavits, and acknowledgments authorized under the laws of Florida may be taken or administered within the State of Florida by or before any judge, clerk, or deputy clerk of any court of record within Florida, including federal courts, or before any United States commissioner or any notary public within the state. FLA. STAT. ANN. § 92.50 (West 1997).

In Illinois, all courts, court clerks, judges, the county clerk, deputy county clerk and notaries public have the power to administer oaths and affirmations. 5 ILCS 255/1 (West 1998).

In New Jersey:

All oaths, affirmations and affidavits . . . may be made and taken before any one of the following officers: The Chief Justice of the Supreme Court or any of the justices or judges of courts of record of this state; masters of the superior court; municipal judges; mayors or aldermen of cities, towns or boroughs or commissioners of commission governed municipalities; surrogates, registers of deeds and mortgages, county clerks and their deputies; municipal clerks and clerks of boards of chosen freeholders; sheriffs of any county; members of boards of chosen freeholders; clerks of all courts; notaries public; commissioners of deeds; members of the state legislature; attorneys-at-law and counselors-at-law of this state.

N.J. STAT. ANN. § 41:2-1 (West 1997).

In New York, an oath or affirmation taken within New York State may be executed before a justice of the Supreme Court; an official examiner of title; an official referee; or a notary public. N.Y. C.P.L.R. 2309 (McKinney 1997); N.Y. REAL PROP. § 298 (McKinney 1997).

In Pennsylvania, court personnel may administer oaths and 57 P.S. §164 authorizes notaries to administer oaths and affirmations. PA. CONS. STAT. § 327. An attorney may take an acknowledgment provided the procedure outlined in 42 PA.S.C.A. §327 is followed. *Id.*

In Texas, the administration of oaths is given by:

[a] judge, clerk, or commissioner of a court of records; a justice of the peace or a clerk of a justice court; a notary public; a member of a board or commission created by a law of the [State of Texas], in a matter pertaining to a duty of the board or commission; a person employed by the Texas Ethics Commission who has a duty related to a report required by Title 15, Election Code in a matter pertaining to that duty; the secretary of state; the lieutenant governor; the speaker of the house of representatives; or the governor.

TEX. GOV'T CODE ANN. § 602.002 (West 1997).

In Virginia, oaths and affidavits to be administered by "[a] magistrate, a notary, a commissioner in chancery, a commissioner appointed by the Gov-

states specify other oath-givers for oaths taken outside the state<sup>6</sup> and outside the country.<sup>7</sup> Examples of oath-givers outside the country include U.S. embassy officials (such as the ambassador, chargé d'affaires, secretary of legation, consul-general, consul, envoys, etc.), a judge or other presiding officer of any court having a seal, a mayor or other chief civil officer of any city or other political subdivision, a local notary public, and people generally authorized by the laws of the foreign country to administer oaths. When an oath is taken

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ernor, a judge or clerk or deputy clerk of a court, a commissioner or clerk or deputy clerk of the State Corporation Commission, or clerks of governing bodies of local governments." VA. CODE ANN. § 49-4 (Michie 1997).

6. In New York, an oath or affirmation taken outside New York State but within the United States may be executed before:

1. A Judge or other presiding officer of any court having a seal, or a clerk or other certifying officer thereof.
2. A mayor or other chief civil officer of any city or other political subdivision.
3. A notary public.
4. A commissioner of deeds appointed pursuant to the laws of this state to take acknowledgments or proofs without this state.
5. Any person authorized, by the laws of this state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof is made, to take the acknowledgment or proof of deeds to be recorded therein.

N.Y. C.P.L.R. 2309; N.Y. REAL PROP. § 299. In Texas, an oath made outside the state of Texas, but within the United States or its territories, may be administered by "a clerk of a court of record having a seal; a commissioner of deeds appointed under a law of the states; or a notary public." TEX. GOVT CODE ANN.

7. In New York, an oath or affirmation taken in a foreign country may be executed before:

1. An ambassador, envoy, minister, chargé d'affaires, secretary of legation, consul-general, consul, vice-consul, consular agent, vice-consular agent, or any other diplomatic or consular agent or representative of the United States, appointed or accredited to, and residing within, the country where the acknowledgment or proof is taken;
  2. A judge or other presiding officer of any court having a seal, or the clerk or other certifying officer thereof;
  3. A mayor or other chief civil officer of any city or other political subdivision;
  4. A notary public;
  5. A commissioner of deeds appointed pursuant to the laws of this state to take acknowledgments or proofs without this state;
  6. A person residing in, or going to, the country where the acknowledgment or proof is to be taken, and specially authorized for that purpose by a commission issued to him under the seal of the supreme court of the state of New York;
- Any person authorized, by the laws of the country where the acknowledgments or proof is made, to take acknowledgment of conveyances of real estate or to administer oaths in proof of the execution thereof.

N.Y. C.P.L.R. 2309; N.Y. REAL PROP. § 301. In Virginia, if an affidavit is executed outside the country, it may be executed before either a notary or an officer of that country authorized by that county's laws to administer an oaths. VA. CODE ANN. § 49-5.

outside the country, a "certificate of the oath giver's authority to take oaths" is often required in addition to the oath-giver's authentication of the signator's signature. This requirement along with other obstacles in foreign countries present a significant challenge in obtaining a notarized signature for the purpose of authenticating a litigation document.

## II. DOCUMENT NOTARIZATION IN FOREIGN COUNTRIES

In the United States, document notarization presents only modest inconvenience and expense. In many foreign countries, however, the notarization process, if it exists all, is often burdensome and expensive. For example, in Japan, although notaries exist, their primary function is to authenticate family or corporate "seals" on deeds in real estate transactions. The process requires appointments, several visits, typically costs in excess of \$500 and is more akin to a title search which guarantees proper seal registration than to the U.S. process of signature authentication based upon one or more forms of identification.

In England, notaries are primarily used to hold funds in trust for various reasons. They also perform "signature authentications," charging approximately \$250 per authentication. English solicitors are also able to "take oaths" and typically charge a similar fee. In France, notaries exist but their function is to handle estates. They will not authenticate signatures. If a document associated with some U.S. transaction or litigation absolutely must have an authenticated signature, the usual option for the authentication is a U.S. consulate. In Germany, notaries hold a status similar to lawyers, but do not appear in court. Like English notaries, they are often called upon to hold funds in trust and perform signature authentications. A German notary's fee, however, is dependent upon the amount in controversy. In a multi-million-dollar product liability action it would not be unusual for a notarization fee to be significantly in excess of \$500.

With these scenarios in mind,<sup>8</sup> it is particularly important for an attorney to know whether his or her foreign client must execute an oath in front of one of the specified oath-givers for the involved jurisdiction, or if perhaps this procedural hurdle can be minimized or avoided completely. As noted at the outset, this Article addresses this question for the U.S. federal system as well as each of the fifty states and Washington, D.C. The following section addresses whether a notarized signature is required in federal court if an oath

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8. Although notarization in foreign countries is often burdensome and expensive, this is not necessarily the situation. Examples of the converse include Canada and Korea. In these countries notaries are so readily available that for U.S. documents which require authenticated signatures the use of a notary is much preferred over signature authentication at a U.S. consulate. Notary fees in both countries are modest.

is given under penalty of perjury.

### III. FEDERAL CASES ADDRESSING NOTARIZED SIGNATURES

If a case is pending in federal court, there appears to be no need whatsoever for a notarized signature, or even an authenticated signature, if the document is executed "under penalty of perjury" pursuant to Title 28, U.S. Code, Judiciary and Judicial Procedure § 1746 "Unsworn Declarations Under Penalty of Perjury."<sup>9</sup> Although the focus of this article is documents executed outside the United States, Title 28 U.S.C. § 1746 also applies domestically.<sup>10</sup> In order for a signature to comply with this statute, it is recommended that the following language be used:

I hereby declare under penalty and perjury under the laws of the United States of America, and pursuant to Title 28, U.S. Code, Judiciary and Judicial Procedure §1746 "Unsworn Declarations Under Penalty and Perjury," that the foregoing is true and correct.

Executed on \_\_\_\_\_, 199\_\_

\_\_\_\_\_

[NAME]

[TITLE]

[COMPANY]

Every United States Court of Appeals has addressed the issue

9. Unsworn Declarations Under Penalty of Perjury, enacted in 1976, reads, in part:

Whenever, under any law of the United States or under any rule . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certification, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (1) If executed without the United States:

I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on (date)

\_\_\_\_\_  
Signature

28 U.S.C. § 1746 (1997).

10. Title 28, U.S.C. § 1746 goes on to specify the language ". . . in substantially the following form . . ." for documents ". . . executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). \_\_\_\_\_ Signature." *Id.*

of the sufficiency of 28 U.S.C. § 1746 signatures and each has found them to be sufficient for all purposes. Following are brief summaries of exemplary cases from each of the Circuits:

A. *First Circuit (Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico)*

*Goldman, Antonetti, et al. v. Medfit International*, was a lawsuit to recover fees allegedly owed to a law firm.<sup>11</sup> The defendant filed a motion to dismiss, which was treated as a motion for summary judgment under the Federal Rules of Civil Procedure rule 56(e).<sup>12</sup> In support of plaintiff's opposition to this motion, the plaintiff provided an unsworn statement signed under penalty of perjury.<sup>13</sup> The court held that under 28 U.S.C. § 1746 such an unsworn statement could be used in lieu of a sworn statement or affidavit for purposes of a 56(e) summary judgment motion.<sup>14</sup>

In *United States v. Joost*, the defendant was convicted by a jury of conspiracy to obstruct, delay and affect air commerce by robbery of gold from an armored car, in violation of 18 U.S.C. § 1951.<sup>15</sup> Defendant, appealing pro se, charged the district court erred in denying him an evidentiary hearing on his motion to dismiss his indictments.<sup>16</sup> The district court, in denying an evidentiary hearing, referred at one point to the lack of an oath before a notary public.<sup>17</sup> While the First Circuit stated that a signed statement "under penalty of perjury" was sufficient to satisfy the affidavit requirement associated with submitting documents to a court as in *United States v. Joost*, it found defendant's affidavit was still defective since it was "nothing more than a generalized recitation of self-serving conclusions, speculation, and conjecture."<sup>18</sup>

B. *Second Circuit (New York, Vermont and Connecticut)*

*Franco v. Kelly*, involved a motion for summary judgment made by prison officials sued by a prisoner for civil rights violations.<sup>19</sup> The court addressed the issue of the sufficiency of plaintiff's evidence and held that, in light of 28 U.S.C. § 1746, plaintiff's factual submissions, along with his sworn complaint, sufficed to withstand summary judgment purposes even though they did not meet the formal requirements of a notarized affidavit.<sup>20</sup>

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11. 982 F.2d 686, 687-88 (1st Cir. 1993).

12. *Id.* at 688.

13. *Id.* at 689.

14. *Id.* at 689-90.

15. 1996 WL 480215, at \*1 (1st Cir. 1993).

16. *Id.* at \*1, \*6.

17. *Id.*

18. *Id.*

19. 854 F.2d 584, 585 (2d Cir. 1988).

20. *Id.* at 587.



In *Colon v. Coughlin*, a prisoner brought a § 1983 action against defendants (prison officials), alleging they conspired to concoct false charges, to deprive him of a fair hearing, and to subject him disciplinary action in retaliation for his two prior lawsuits.<sup>21</sup> The defendants moved for summary judgment, one of the grounds being that plaintiff's "affidavit" in response to their motion was devoid of facts.<sup>22</sup> Defendants asserted the "more detailed factual allegations of [plaintiff's] complaint [were] irrelevant, . . . because a party may not rest upon the mere allegations of a pleading to defeat a properly submitted motion for summary judgment."<sup>23</sup> The court first stated that defendants' argument was faulted in the fact that plaintiff verified his complaint by attesting under the penalty of perjury that the statements in the complaint were true to the best of his knowledge.<sup>24</sup> The court elaborated, stating "a verified complaint is to be treated as an affidavit for summary judgment purposes, and therefore will be considered in determining whether material issues of fact exist, provided that it meets the other requirements for an affidavit under Rule 56(e)."<sup>25</sup> The court went on to find that plaintiff had introduced sufficient evidence in his verified complaint to withstand defendants' motion for summary judgment.<sup>26</sup>

*C. Third Circuit (Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands)*

In *United States v. 225 Cartons, More or Less, of an Article or Drug*, the court stated that a declaration made under penalty of perjury, in accordance with 28 U.S.C. § 1746, satisfies the affidavit requirement of Federal Rule of Civil Procedure 56.<sup>27</sup>

*D. Fourth Circuit (Virginia, West Virginia, North Carolina and South Carolina)*

In *Willard v. Internal Revenue Service*, the court stated that unsworn declarations made under penalty of perjury, in accordance with 28 U.S.C. § 1746, are acceptable in lieu of affidavits for purposes of summary judgment motions.<sup>28</sup>

*E. Fifth Circuit (Texas, Louisiana and Mississippi)*

In *Duncan v. Foti*, prisoner Calvin F. Duncan bought a civil rights lawsuit against the criminal sheriff of the parish in which he

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21. 58 F.3d 865, 865 (2d Cir. 1995).

22. *Id.* at 872.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 871 F.2d 409, 414 n.4 (3d Cir. 1989).

28. 776 F.2d 100, 102 n.3 (4th Cir. 1985).

was imprisoned.<sup>29</sup> Mr. Duncan's contention was that his civil rights were violated by the unavailability of notary services in the prison.<sup>30</sup> He said that this unavailability prevented him from obtaining documents under the Federal Freedom of Information and Privacy Acts (FOIA).<sup>31</sup> The lower court dismissed Mr. Duncan's suit with prejudice, ruling that he had no constitutional right to seek information under the Freedom of Information Act or the Privacy Act.<sup>32</sup> The court of appeals ruled that it was not necessary to reach the issue of whether such constitutional rights exist as 28 U.S.C. § 1746 provides "[a]n alternative to notarization which should permit Duncan to file his FOIA and Privacy Act requests."<sup>33</sup>

In *King v. Dogan*, the plaintiff brought an action against, *inter alia*, the investigator for the Department of Public Safety, alleging that the investigator violated plaintiff's constitutional rights in connection with the investigation and prosecution of the criminal charges against her.<sup>34</sup> The court held "[a] plaintiff's verified complaint can be considered as summary judgment evidence to the extent that it comports the requirements of Fed. R. Civ. P. 56 (e)."<sup>35</sup> In this case, plaintiff filed an unverified, amended complaint that superseded the original verified complaint, and as such, plaintiff failed to meet his evidentiary burden.<sup>36</sup>

#### F. Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee)

In *McPherson v. U.S.*, the defendant appealed from a district court judgment that denied a motion to vacate his sentence under 28 U.S.C. § 2255.<sup>37</sup> The defendant "[p]leaded guilty to participating in a conspiracy to distribute and possess cocaine base for intended distribution."<sup>38</sup> After being sentenced to 120 months in prison, he did not directly appeal.<sup>39</sup> In his motion, he claimed, *inter alia*, that his attorney promised to file a direct appeal but did not.<sup>40</sup> In support of his claim, "[defendant] submitted his own declarations, as well as declarations by his mother and brother, which indicated he had asked his retained counsel to file an appeal immediately after sentencing and that counsel had promised to do so on that same day."<sup>41</sup> The district court denied his motion, finding his evidence supporting

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29. 828 F.2 297, 297 (5th Cir. 1987).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. 31 F. 3d 344, 345 (5th Cir. 1994).

35. *Id.* at 346.

36. *Id.*

37. 1997 WL 63342, at \*1 (6th Cir. 1997).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at \*2.

did not warrant an evidentiary hearing since the "affidavit" did not put the question of defendant's request into appeal.<sup>42</sup> The Sixth Circuit vacated and remanded, finding the declarations submitted by defendant, his mother and brother all complied with the requirements of 28 U.S.C. § 1746.<sup>43</sup>

G. *Seventh Circuit (Wisconsin, Illinois and Indiana)*

In *DeBruyne v. Equitable Life Assurance Society of the United States*, the court addressed the sufficiency of the affidavit plaintiff submitted in support of a summary judgment motion.<sup>44</sup> The court held the plaintiff's affidavit insufficient because it was not notarized at the time of filing, and noted that since the affidavit was not signed subject to penalties for perjury, and otherwise did not comply with the requirements of 28 U.S.C. § 1746, plaintiff was not able to invoke that statute, which would have allowed the court to consider the un-notarized declaration as an affidavit for summary judgment purposes.<sup>45</sup>

In *Ford v. Wilson*, plaintiff-arrestee brought a civil rights action under section 1983 against a police officer who arrested after a traffic stop.<sup>46</sup> "The district court granted summary judgment for the defendant, noting that plaintiff had not submitted an affidavit or equivalent evidence in opposition to defendant's affidavit."<sup>47</sup> On appeal, the Seventh Circuit found plaintiff had verified his complaint, and the complaint contained factual allegations that "[i]f included in an affidavit or deposition would be considered evidence, and not merely an assertion."<sup>48</sup> The court elaborated, stating that "[b]y declaring under the penalty of perjury that the complaint was true, and by signing it, . . . he converted it into an affidavit."<sup>49</sup>

H. *Eight circuit (Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota and Nebraska)*

In *Burgess v. Moore*, the appellate court reversed the lower court's granting of summary judgment in favor of defendant, because the lower court had failed to recognize the evidentiary value of plaintiff's signed complaint and affidavit.<sup>50</sup> The complaint and affidavit were signed under penalty of perjury and, for summary judgment purposes under 28 U.S.C. § 1746, should have been recognized in the same way that a sworn affidavit is recognized as raising tri-

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42. *McPherson*, 1997 WL 63342 at \*2.

43. *Id.*

44. 920 F.2d 457, 463 (7th Cir. 1990).

45. *Id.* at 471.

46. 90 F.3d 245, 246 (7th Cir. 1996).

47. *Id.* at 246.

48. *Id.*

49. *Id.*

50. 39 F.3d 216, 217-18 (8th Cir. 1994).

able issues of fact.<sup>51</sup>

*I. Ninth Circuit (Nevada, Arizona, California, Oregon, Washington, Idaho, Montana, Alaska and Hawaii)*

In *Schroeder v. McDonald*, the plaintiff was a state prisoner serving a twenty-year sentence for first degree robbery and kidnapping.<sup>52</sup> Schroeder sued the state prisons claiming a number of his constitutional rights were violated.<sup>53</sup> The [d]efendants each played some role in transferring Schroeder from a minimum security facility to a medium security facility where he was originally assigned and had begun serving his sentence.<sup>54</sup> Schroeder filed a verified complaint which defendants (appellants) asserted was not in conformity with 28 U.S.C. § 1746 because Schroeder stated “[t]he facts stated in the . . . complaint [are] true and correct as known to me.”<sup>55</sup> The court first noted that a verified complaint may be used as an opposing affidavit under Rule 56 as long as it is “[b]ased on personal knowledge and set forth specific facts admissible in evidence.”<sup>56</sup> The court then stated that “[a]lthough Schroeder did not follow § 1746’s form with precision, [he] did verify his complaint because he stated under penalty of perjury that the contents were true and correct.”<sup>57</sup>

In *Knight v. U.S.*, the plaintiff appealed an order dismissing his complaint in part and granting summary judgment in part in his action brought under “28 U.S.C. § 2410 to quiet title to his retirement pay upon which the I.R.S. had placed a levy.”<sup>58</sup> The plaintiff argued that a declaration by one of the Government’s employees “[s]hould not have been considered because Federal Rule 56 (e) requires the use of an affidavit, not declarations.”<sup>59</sup> The court stated, however, that “[a] declaration signed under the penalty of perjury and dated has the same force and effect as a sworn statement or affidavit,” and since the particular declaration was properly executed pursuant to 28 U.S.C. § 1746, it met the requirement of Rule 56(e).<sup>60</sup>

*J. Tenth Circuit (New Mexico, Utah, Wyoming, Colorado, Kansas and Oklahoma)*

In *Henderson v. Inter-Chem Coal, Inc.*, the plaintiff filed suit to recover unpaid overtime compensation pursuant to the Fair Labor

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51. *Id.*

52. 55 F.3d 454, 456 (9th Cir. 1995).

53. *Id.*

54. *Id.*

55. *Id.* at 460 n.10.

56. *Id.* at 460.

57. *Id.* at 460 n.10.

58. 1996 WL 48380, at \*1 (9th Cir. 1996).

59. *Id.* at \*2.

60. *Id.*

Standards Act.<sup>61</sup> The district court “[g]ranted summary judgment for the defendants, holding that the plaintiff was an independent contractor.”<sup>62</sup> The plaintiff’s appeal raised the question of “[w]hether summary judgment should have been granted deciding that he was an independent contractor of the defendants and not an employee for purposes of the FLSA.”<sup>63</sup> In support of their motion for summary judgment, defendants submitted several affidavits.<sup>64</sup> The plaintiff, on the other hand, only submitted an “unsworn statement under the penalty of perjury.”<sup>65</sup> The defendant argued that plaintiff’s submitting of an unsworn statement under penalty of perjury did not meet the affidavit requirement regarding Rule 56(e) motions.<sup>66</sup> The court noted, however, that 28 U.S.C. § 1746, provided otherwise, and therefore plaintiff’s declarations satisfied this requirement.<sup>67</sup>

*K. Eleventh Circuit(Alabama, Georgia and Florida)*

In *United States v. Four Parcels of Real Property in Green and Tuscaloosa Counties in the State of Alabama*, the court, in a forfeiture action, addressed the sufficiency of an unsworn declaration as a means of presenting facts for purposes of a summary judgment motion.<sup>68</sup> The Court cited 28 U.S.C. § 1746 and stated that, on summary judgment, the court may treat declarations executed in accordance with this statute as affidavits.<sup>69</sup>

*L. District of Columbia Circuit*

In *Summers v. United States Department of Justice*, Anthony Summers submitted a request under the Freedom of Information Act to the Federal Bureau of Investigation seeking documents pertaining to a Mr. John F. Shaw.<sup>70</sup> Mr. Summers provided with his request a privacy waiver, signed by an individual who identified himself as Shaw, authorizing the release of the desired documents.<sup>71</sup> The waiver included the data that is required in such a document, but was not notarized.<sup>72</sup> The waiver was signed beneath a statement giving notice that the signer was subjecting himself to penalties for perjury.<sup>73</sup> The court held, based on 28 U.S.C. § 1746, that the unsworn privacy waiver could be used to establish identity, and did not

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61. 41 F.3d 567, 569 (10th Cir. 1994).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Henderson*, 41 F.3d at 569.

67. *Id.* at 569 n.1.

68. 941 F.2d 1428, 1444 n.36 (11th Cir. 1991).

69. *Id.*

70. 999 F.2d 570, 571 (D.C. Cir. 1993).

71. *Id.*

72. *Id.*

73. *Id.*

have to be notarized.<sup>74</sup>

### M. Federal Circuit

In *Ceja v. United States*, the plaintiff was a civilian employee of the federal government.<sup>75</sup> His employment was terminated because of "conspiracy in the theft of government property, and theft of government property."<sup>76</sup> When terminated, Mr. Ceja was notified that he had twenty days within which to appeal his termination.<sup>77</sup> Mr. Ceja did not appeal for approximately twenty months.<sup>78</sup> In response to an invitation to show cause for the delay in his appeal, Mr. Ceja submitted written statements declaring under penalty of perjury that they were true and correct.<sup>79</sup> The court held, in accordance with 28 U.S.C. § 1746, that such unsworn declarations are the equivalent of an affidavit.<sup>80</sup>

In summary, litigation documents executed "under oath" both outside and inside the United States do not require authenticated signatures. In state court situations, 28 U.S.C. § 1746 has been adopted by many state legislatures, thus not requiring authenticated signatures for discovery responses and affidavits, although there are some state exceptions for affidavits.

#### IV. STATE STATUTES ADDRESSING THE NOTARIZATION OF SIGNATURES

Fourteen states have either adopted 28 U.S.C. § 1746 or statutes that achieve the same result. These states are: Alaska, Arizona, California, Florida, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Nevada, New Jersey, Pennsylvania, Washington, and West Virginia. More specifically the state of Alaska has adopted 28 U.S.C. § 1746, allowing for the certification of documents in lieu of an affidavit.<sup>81</sup> This statute provides:

A matter required or authorized to be supported, evidenced, established or proven by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making it . . . may be supported, evidenced, established, or proven by the person certifying in writing "under penalty of perjury" that the matter is true.<sup>82</sup>

The legislatures of Arizona, Washington, Kansas and West

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74. *Id.* at 573.

75. 710 F.2d 812, 813 (Fed. Cir. 1983).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Ceja*, 710 F.2d at 813 n\*.

81. ALASKA STAT. § 09.63.020 (Michie 1997).

82. *Id.* See also *Harrison v. State of Alaska*, 923 P.2d 107 (1996) (discussing this statute).

Virginia have also adopted 28 U.S.C. § 1746 providing that any matter to be supported by sworn written documents and affidavits may be certified under an oath of penalty and perjury.<sup>83</sup> In California, an "Unsworn Certification or Declaration" permits the use of unwitnessed declarations under the penalty of perjury of the laws of California in substantially the same form as is allowed under Title 28 U.S.C. § 1746.<sup>84</sup> In Florida, Statute § 92.525 "Verification of Documents; Perjury by False Written Declaration, Penalty" permits the use of an unwitnessed declaration "... under the penalties of perjury . . . ."<sup>85</sup>

The state of Hawaii has not adopted 28 U.S.C. § 1746, but its code contains a statute that permits verification of documents via unsworn declarations.<sup>86</sup> The legislature of Iowa has adopted a statute similar to 28 U.S.C. § 1746:

When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting the matter, the person may attest the matter by an unsworn statement if that statement recites that the person certifies to be true under penalty of perjury under the laws of this state . . . .<sup>87</sup>

The legislature of Massachusetts has expressly permitted the submitting of unsworn documents made under the penalties of perjury.<sup>88</sup> The applicable statute states written statements presented to a court do not have to be verified by a magistrate if the document is made under the penalties of perjury.<sup>89</sup> The legislature of Minnesota has drafted a statute similar to 28 U.S.C. § 1746 and the state of Nevada also permits verification of documents via unsworn declarations made under penalty of perjury.<sup>90</sup>

In New Jersey, Rule of General Application 1:4.4 provides that in lieu of an affidavit, oath or verification required by New Jersey Rules of Court, an affiant may submit a certification that the statements at issue are true and that if any of the statements are willfully false the affiant will be subject to punishment.<sup>91</sup> In Pennsylvania, a party may verify a document without the need for either a witness or notary if the document provides that the statement is made subject to the Pennsylvania statute relating to unsworn falsifi-

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83. ARIZ. R. CIV. P. 80(I); WASH. REV. CODE ANN. § 9A.72.085 (West 1997); KAN. STAT. ANN. § 53-601 (1996); W. VA. CODE § 39-1-10a (1997).

84. CAL. CIV. PROC. § 2105.5 (West 1997).

85. FLA. STAT. ANN. § 92.525.

86. H.R.C.C., Rule 2 (Michie 1996).

87. IOWA CODE ANN. § 53-601 (1996).

88. MASS. GEN. LAWS ANN. ch. 268 § 1A (West 1997).

89. *Id.*

90. MINN. STAT. ANN. § 524.1-310 (West 1997).

91. N.J. R. GEN. APPLICATION 1:4-4.

cations to authorities.<sup>92</sup>

Although 28 U.S.C. § 1746 and state statutes provide that a document submitted to a court does not need to be authenticated if the written declaration is made under penalty and perjury, there are possible alternatives to notarization and considerations when deciding to have a document notarized.

#### V. SIGNATURE AUTHENTICATION BY A U.S. CONSULAR OFFICIAL AS AN ALTERNATIVE TO NOTARIZATION AND PRACTICAL CONSIDERATIONS FOR STATE CASES

Within most states the leading "oath-giver" pursuant to state and federal civil litigation procedural rules is the notary public. Outside the U.S., however, (and as noted above) notarization may not exist or, if it does, it may bear little resemblance to the process employed within the United States. An alternate procedure to notarization outside the United States is for a signature to be "authenticated" by an "official" at a U.S. consulate.<sup>93</sup> While this procedure is typically less cumbersome and expensive than a notarization, it may not be.

Consider Japan as an example. The United States maintains multiple consulates in Japan. They are located in cities including Tokyo, Osaka, Nagoya, Sapporo, Fukuoka and Naha. The largest of these consulates is within the U.S. Embassy in Tokyo. If a company is in the Tokyo area this may seem convenient. Consider, however, that even in the best of circumstances the person burdened with the assembly of and responsibility for the information in the document must then further dedicate at least a morning and perhaps the better part of an entire day merely to executing the documents. There is such demand for this "signature authentication" in Tokyo, however, that the Tokyo consulate supplies the service only on Wednesdays from 8:30 a.m. to 12:30 p.m. There is actually an exception for litigation documents (as opposed to other documents) but the unescorted Japanese salaryman is often either not aware of this exception or not successful in communicating the applicability of the exception to the U.S. Marines guarding the gate to the embassy. The result is that many signatories end up rearranging their schedules

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92. 18 PA. CONS. STAT. ANN. § 4904 (West 1997).

93. Foreign Service, Consular Officers, Notarial Acts, Oaths, Affirmations, Affidavits and Deposition Fees states:

Every consular officer of the United States is required, whenever application is made to him therefore, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States; and for every such notarial act performed he shall charge in each instance the appropriate fee prescribed by the President under §4219 of this title.

22 U.S.C. § 4215 (1997).



to take time out on a Wednesday morning only to stand in line for hours with the rest of the masses. Often a member of the claims staff of any involved insurer is right there with them . . . .<sup>94</sup>

With the foregoing in mind, requests for notarized or otherwise authenticated signatures should be made only when they are actually necessary: *probably never in a federal case* (assuming your signature block is appropriately drafted) and *only sometimes in a state case*, depending upon the type of document and applicable state law.

Although the strict letter of the law in a particular state may require a notarized or otherwise authenticated signature for litigation documents, there are certain practical issues that might also be considered.

The first is the type of document being executed. A party propounding discovery may demand that responses be executed exactly as required by the applicable state rules (under oath -with an authenticated signature) because that party is concerned that otherwise admissible responses might not be admissible into evidence at the time of trial unless they are so executed. At the same time, an experienced litigator should have no hesitancy as to the admissibility of discovery responses executed under penalty of perjury, similar to the Title 28 U.S.C. § 1746 signature block recommended in this article. In this regard, hearsay objection should not be sustained as the responses are clearly "admissions by a party opponent" under most states' evidentiary rules (particularly if the state has a rule paralleling Federal Rule of Evidence 801(d)(2)). Indeed, unless the responding party denies that they provided the responses at all, there would seem to be virtually no chance of a party successfully objecting to the admissibility of discovery responses based only upon their own unauthenticated execution of the responses.<sup>95</sup>

Should the party propounding discovery take the position that a response without a formal verification in front of a notary or other oath-giver is a nullity, it is almost certain that "notice with an opportunity to cure" would have to be extended before sanctions could be imposed for failing to properly respond to discovery.<sup>96</sup> For the sake

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94. A similar situation exists in France, where the consulate at the U.S. embassy in Paris is open for signature authentication purposes only a few hours on one day a week.

95. Support for this proposition is found in the plethora of case law under 28 U.S.C. § 1746 concerning the validity of unauthenticated signatures on affidavits in support of dispositive motions and the complete absence of any similar case law dealing with the validity of unauthenticated signatures on discovery responses.

96. In several states the procedural rules allow an adverse party to treat an unverified pleading as a nullity in a situation where that party is entitled to a verified pleading. These rules, however, typically also require that the adverse party "gives notice with due diligence" if he or she intends to treat the pleading as a nullity, effectively providing the offending party an opportunity to cure the defect in the execution of the discovery response. See, e.g., N.Y.

of completeness it must be noted, however, that it is conceivable (although very unlikely) that some judge in an extreme case would rule the responses a nullity from the outset and impose sanctions for failing to comply (or timely comply) with discovery.

In view of the above, when a party located outside the U.S. is preparing responses to discovery in a state case pending in a state with no "self authentication" procedure, the question arises as to whether a signature block paralleling that which is recommended under Title 28 U.S.C. § 1746 should be prepared or whether a more cautious approach should be adopted and the signator be sent in search of a notary or other oath-giver (perhaps a U.S. consular official). The best decision probably depends upon how the foreign party balances the time and trouble of the "formal" execution of the document as against the small chance of problems down the road. If the foreign party is nervous about the potential problems, a middle ground in this regard might be to simply bite the bullet, advise the opposing counsel of the practical difficulties and see if he or she will accommodate the foreign party by accepting a Title 28 U.S.C. § 1746-style signature block.

The other type of document in a state case deserving special consideration is an affidavit in support of a dispositive or other serious substantive motion with strict filing deadlines. For such affidavits the potential consequences (however remote) of an objection for lack of an authenticated, formal execution are typically too great to allow the recommendation of anything other than an authenticated, formal execution.

## VI. CONCLUSION

Federal courts and most state courts that do not require litigation documents to be executed "under oath" require "authenticated signatures." In some states it is recommended that affidavits be notarized.<sup>97</sup> In those cases in which an affidavit is recommended, con-

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C.P.L.R. 3022 (McKinney 1997) (illustrating this rule).

97. There are two caveats regarding this statement: 1) Title 28, U.S.C. § 1746 applies to matters which "[u]nder any law of the United States or under any rule . . . is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath or affidavit . . ." 28 U.S.C. § 1746. Although this statute has been broadly interpreted in each federal circuit, the purpose and/or legislation controlling the document being executed should be carefully examined prior to relying upon a Title 28, U.S.C. § 1746 signature, and 2) Provided that the signature block is drafted as recommended in this article, pursuant to 28 U.S.C. § 1746. Additionally, this statement assumes that: 1) the "self-authenticating statute" of the forum state governs the document being executed; and 2) the signature block is drafted as indicated by the statute. See *supra* text sec. V for a discussion regarding "practical consideration" which specifically recommends that the signator balance the inconvenience factor against the possibility of the court imposing sanctions without first allowing and opportunity to cure the "defect."

sider what type of document is being executed and the situation that surrounds the case.