

DRAFT
FOR DISCUSSION ONLY

UNIFORM UNSWORN FOREIGN DECLARATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

May 2008 Interim Draft with Style Committee Revisions

With Prefatory Notes and Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM UNSWORN FOREIGN DECLARATIONS ACT

PREFATORY NOTE

Declarations of persons abroad are routinely received in state and federal courts and agencies. Many of the declarations are affidavits and other documents sworn to by declarants before authorized officials in United States embassies and consulate offices. Federal and some state courts and agencies may receive unsworn foreign declarations. The United States Code (28 U.S.C. § 1746) authorizes the use of unsworn foreign declarations if they meet the requirements of the statute. Some 19 states have statutes of like nature, but these statutes are not uniform and some apply only in specific types of litigation, proceedings, or situations. Moreover, state courts that have addressed the issue generally hold that the federal statute is inapplicable to state actions.

In recent years, particularly after September 11, 2001, access to United States embassies and consulates has been more difficult because of closings or added security. Thus, obtaining appropriately sworn foreign declarations for court or agency use is much more difficult in the post-9/11 environment.

In its Report 110, the American Bar Association identified the pressing need for an alternative to sworn declarations in the form of a uniform act for state courts and agencies. This need was communicated to the National Conference of Commissioners on Uniform State Laws, which decided to convene a drafting committee to address the issue. Commissioner Karen Roberts Washington was designated chair of the Drafting Committee. Professor Joseph A. Colquitt, University of Alabama School of Law, was named reporter for the project.

The Reporter, relying on both the ABA memorandum and a preliminary review of existing statutory and rules-based schemes, prepared an initial report for the Committee's first meeting in Salt Lake City, UT, on April 20-22, 2007. This report outlined and discussed the existing unsworn declarations provisions (focusing primarily on the federal, California, Florida, Kansas, and Alaska statutes), identified issues to be considered by the Committee, and suggested several statutes as initial models.

At the first meeting of the Drafting Committee in April, 2007, the Chair outlined the project. Although the Committee had reviewed the reporter's initial memorandum, the Reporter reviewed for the Committee selected examples of unsworn declarations acts. Thereafter, the Committee discussed at length the need for such provisions, their content, and alternatives available for Committee consideration. Through these discussions and a series of votes, the Chair and the Committee informed the Reporter of the provisions which should be included in the proposed Act. During a recess of the Committee meeting, the Reporter prepared an initial draft of the proposed Act, which was then circulated to the Committee and other interested parties. The Committee reconvened and discussed the draft of the proposed Act and how to proceed. It was decided that due to the pressing need for such a uniform law, the narrow scope of the proposal, and the Committee consensus in support of the proposal, the draft should be edited for style and submitted for a first reading at the 2007 Annual Conference.

Following the first meeting, a draft of the proposal was submitted to the Style Committee, and added to the calendar for the Annual Meeting in Pasadena, CA, in July 2007. The Style Committee finished its first review of the Act in June 2007. The Style Committee's suggestions were incorporated into the draft for consideration at the Annual Meeting.

The revised draft was presented in a first reading at the Annual Meeting in Pasadena, California, on July 29, 2007, with Commissioner Norman L. Greene, of New York, presiding. A number of comments and suggestions were received by the Committee at the Conference.

The Drafting Committee next met at Boise, Idaho, on October 5-6, 2007. A revised draft of the Act was circulated to the Committee members in advance of the Boise meeting. At the meeting in Boise, the Committee reviewed and considered the comments and suggestions received at the Annual Meeting, several written reports from interested organizations, and the comments of members of the Drafting Committee and other persons in attendance, such as several representatives of organizations representing notaries. Once again, the draft was revised to incorporate some of the proposed revisions and to address some of the comments about particular provisions of the uniform Act.

After the Boise meeting, the Drafting Committee submitted the revised draft to the Style Committee. The Style Committee finished its second review of the Act in January 2008. Once again, the Style Committee's suggestions were incorporated into the draft in preparation for the 2008 Annual Meeting in Big Sky, Montana.

1 **UNIFORM UNSWORN FOREIGN DECLARATIONS ACT**
2

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Unsworn
4 Foreign Declarations Act.

5 **Comment**
6

7 The word “Uniform” was added to the title of the Act by replacing “Certification of” with
8 “Uniform.”
9

10 **SECTION 2. DEFINITIONS.** In this [act]:

11 (1) “Boundaries of the United States” means the geographic boundaries of the United
12 States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or
13 insular possession subject to the jurisdiction of the United States.

14 (2) “Law” includes the federal or a state constitution, a federal or state statute, a judicial
15 decision, a rule of court, an executive order, or an administrative rule or order.

16 (3) “Record” means information that is inscribed on a tangible medium or that is stored in
17 an electronic or other medium and is retrievable in perceivable form.

18 (4) “Sign” means, with present intent to authenticate or adopt a record:

19 (A) to execute or adopt a tangible symbol; or

20 (B) to attach to or logically associate with the record an electronic symbol, sound,
21 or process.

22 (5) “Sworn declaration” means a declaration in a signed record given under oath. The
23 term includes a sworn statement, verification, certificate, and affidavit.

24 (6) “Unsworn declaration” means a declaration in a signed record that is not given under
25 oath.

26 **Comment**

1
2 1. The District of Columbia was added to the definition of “boundaries of the United
3 States” at the suggestion of the Style Committee to eliminate any potential ambiguity.
4

5 2. The definition of “law” is drafted in an open-ended manner to give it the widest
6 possible application. The term is not ordinarily defined in uniform acts but in this context it is
7 important that judges applying the act be in no doubt about its breadth. The wording, as
8 suggested by the Style Committee, is taken from the definition contained in the Revised Model
9 State Administrative Procedure Act.
10

11 3. A “record” includes information that is in intangible form (e.g., electronically stored)
12 as well as tangible form (e.g., written on paper). It is consistent with the Uniform Electronic
13 Transactions Act and the federal Electronic Signatures in Global and National Commerce Act
14 (15 U.S.C. § 7001 *et seq.*).
15

16 4. The definition of “sign” is broad enough to cover any writing containing a traditional
17 signature and any record containing an electronic signature. It is consistent with the Uniform
18 Electronic Transactions Act and the federal Electronic Signatures in Global and National
19 Commerce Act (15 U.S.C. § 7001 *et seq.*).
20

21 5. Section 2(6) was amended to address suggestions made at the National Conference.
22

23 6. A Commissioner at National Conference suggested that the Act define the term
24 “electronic.” The Reporter searched a number of uniform acts and none of them defined the term
25 although those acts also included similar references to records and federal acts.
26

27 **SECTION 3. APPLICABILITY.** This [act] applies to a declarant who at the time of
28 making an unsworn declaration is physically located outside the boundaries of the United States
29 whether or not that location is subject to the jurisdiction of the United States. This [act] does not
30 apply to a declarant who is physically located on property within the boundaries of the United
31 States and subject to the jurisdiction of another country.

32 *Legislative Note: Enacting states will need to ensure that the perjury laws of the enacting state*
33 *include unsworn declarations.*
34

35 **Comment**

36

37 The Committee discussed a number of options, but focused on two: Limiting the Act to
38 declarants in foreign jurisdictions (i.e. outside the United States and its territories), and
39 extending it to declarants outside the state in which the unsworn declaration is to be used but
40 within the United States (e.g., a declarant in Michigan making an unsworn declaration for use in

1 a Florida court or agency). The Committee decided that the Act should be limited to declarants
2 in foreign jurisdictions, subject to expansion at some later time should the need arise.

3
4 At the 2007 National Conference in Pasadena, California, several Commissioners
5 questioned the Committee’s decision to limit the Act to declarations made outside the United
6 States. The Committee discussed its decision at length at its meeting in Boise, Idaho, in October
7 2007, and decided to restrict the Act as originally drafted, although the definition in Section 3
8 was amended to clarify the provision. Thus, in keeping with the limited scope of the Act, the
9 Drafting Committee decided that an unsworn declaration made within the geographical
10 boundaries of the United States, even if the location is under the control of another sovereign,
11 such as foreign embassies or consulates or Indian reservations, should not be deemed “outside
12 the boundaries of the United States” for the purposes of this Act.

13
14 The reasons for this decision are that the Committee believes that the Act, so limited,
15 meets the immediate needs expressed to the Committee by the ABA committee that
16 recommended the project, and that limiting the Act to truly foreign-based declarants will
17 enhance the likelihood that states will adopt the provision in a timely manner. Moreover, notaries
18 and officials authorized to administer oaths are more readily available in the United States.

19
20 States that already have statutes that permit out-of-state declarants in the U.S. to make
21 unsworn declarations may be unlikely to modify their statutes to restrict the reach of those
22 statutes. Their experiences with the broader statutes serve as a laboratory for future review of the
23 reach this Act.

24
25 **SECTION 4. VALIDITY OF UNSWORN DECLARATION.**

26 (a) Except as otherwise provided in subsection (b), if the law of this state requires or
27 permits the use of a sworn declaration, an unsworn declaration meeting the requirements of this
28 [act] has the same effect as a sworn declaration.

29 (b) An unsworn declaration may not be used for:

30 (1) a deposition;

31 (2) an oath of office;

32 (3) an oath required to be given before a specified official other than a notary
33 public;

34 (4) a declaration to be recorded pursuant to [insert appropriate section of state’s
35 real estate law]; or

1 (5) an oath required by [insert appropriate section of state’s law relating to self-
2 proved wills].

3 **Comment**

4
5 The use of unsworn declarations is not limited to litigation. Unsworn declarations would
6 be usable in civil, criminal, and regulatory proceedings and settings. However, there are certain
7 contexts in which the Committee concluded they should not be used, and these contexts are
8 listed in this section.
9

10 **SECTION 5. REQUIRED MEDIUM.** If the law of this state requires that a sworn
11 declaration be presented in a particular medium, an unsworn declaration must be presented in
12 that medium.

13 **Comment**

14
15 Courts and agencies often restrict the medium in which pleadings, motions, and other
16 documents may be filed. This section recognizes that such a restriction is binding on a person
17 seeking to introduce a foreign unsworn declaration.
18

19 **SECTION 6. FORM OF UNSWORN DECLARATION.** An unsworn declaration
20 under this [act] must be substantially in the following form:

21 I declare under penalty of perjury under the law of [insert name of enacting state] that the
22 foregoing is true and correct, and that I am physically located outside the United States,
23 the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or
24 insular possession subject to the jurisdiction of the United States.

25 Executed on the ___ day of _____, _____, at _____.
26 (month) (year) (city or other location, and state) (country)

27 _____
28 (printed name)

29 _____
30 (signature)

31 **Comment**

1
2 “Insert name of enacting state” was added to the original version based on suggestions
3 made at the National Conference.
4

5 **SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
6 applying and construing this uniform act, consideration must be given to the need to promote
7 uniformity of the law with respect to its subject matter among states that enact it.

8 **Comment**
9

10 This section recites the importance of uniformity among the adopting states when
11 applying and construing the act.
12

13 **SECTION 8. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
15 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
16 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
17 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
18 U.S.C. Section 7003(b).

19 **Comment**
20

21 This section responds to the specific language of the Electronic Signatures in Global and
22 National Commerce Act and is designed to avoid preemption of state law under that federal
23 legislation.
24

25 **SECTION 9. REPEALS.** The following acts and parts of acts are repealed:
26 _____.

27 **Comment**
28

29 Any state enacting the Uniform Unsworn Foreign Declarations Act likely will need to
30 amend the state’s laws by repealing any conflicting statutory provisions. This Section was added
31 based on comments at the National Conference.
32

1 statement, declaration, verification, or certificate, in writing of such person which recites that it
2 is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or
3 her, and (1), if executed within this state, states the date and place of execution, or (2), if
4 executed at any place, within or without this state, states the date of execution and that it is so
5 certified or declared under the laws of the State of California. The certification or declaration
6 may be in substantially the following form:

7
8 (a) If executed within this state:
9 "I certify (or declare) under penalty of perjury that the foregoing is true and correct"

10 -----
11 (Date and Place) (Signature)

12
13 (b) If executed at any place, within or without this state:
14 "I certify (or declare) under penalty of perjury under the laws of the State of California that the
15 foregoing is true and correct": -----
16 -----

17 (Date and Place) (Signature)

18
19 **28 U.S. CODE § 1746.**

20
21 Wherever, under any law of the United States or under any rule, regulation, order, or
22 requirement made pursuant to law, any matter is required or permitted to be supported,
23 evidenced, established, or proved by the sworn declaration, verification, certificate, statement,
24 oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of
25 office, or an oath required to be taken before a specified official other than a notary public), such
26 matter may, with like force and effect, be supported, evidenced, established, or proved by the
27 unsworn declaration, certificate, verification, or statement, in writing of such person which is
28 subscribed by him, as true under penalty of perjury, and dated, in substantially the following
29 form:

30 (1) If executed without the United States: "I declare (or certify, verify, or state) under
31 penalty of perjury under the laws of the United States of America that the foregoing is true and
32 correct. Executed on (date).

33 (Signature)".

34
35 (2) If executed within the United States, its territories, possessions, or commonwealths:
36 "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and
37 correct. Executed on (date).

38 (Signature)".

39
40 As noted in the Legislative Note to Section 3, any state enacting the Uniform Unsworn Foreign
41 Declarations Act likely will need to amend the state's perjury laws to impose the penalties of
42 perjury on false unsworn statements. At the 2007 National Conference, a Commissioner
43 suggested that a citation to the enacting state's perjury statute be incorporated into the text of the
44 uniform Act (i.e., instead of "as provided by the law of this state," the provision should be "as
45 provided by [insert citation of perjury statute]"). After some discussion, the Committee left the
46 provision as originally drafted.