

D R A F T

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CERTIFICATION OF UNSWORN FOREIGN DECLARATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA
JULY 27 - AUGUST 3, 2007

CERTIFICATION OF UNSWORN FOREIGN DECLARATIONS ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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CERTIFICATION OF 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 committee's suggestions have been incorporated into the current draft.

CERTIFICATION OF UNSWORN FOREIGN DECLARATIONS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Certification of Unsworn Foreign Declarations Act.

SECTION 2. DEFINITIONS. In this [act]:

(a) “Law” includes statutes, rules, regulations, ordinances, orders, and decisions of courts of record.

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

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

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

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

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

(e) “Unsworn declaration” means a signed record, not given under oath, that complies with Section 5.

Comment

1. The definition of “law” is drafted in an open-ended manner to give it the widest possible application. The term is not ordinarily defined in uniform acts but in this context it is important that judges applying the act be in no doubt about its breadth.

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

3. The definition of “sign” is broad enough to cover any writing containing a traditional

signature and any record containing an electronic signature. It is consistent with the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 *et seq.*).

SECTION 3. USE OF UNSWORN DECLARATION GENERALLY. Except as provided in Section 5 and subject to Section 6, if the law of this state requires or permits use of a sworn declaration, an unsworn declaration may be used if the person making the declaration is physically located outside the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, and the unsworn statement is made under penalty of perjury as provided by the law of this state.

Comment

The committee discussed two options: Limiting the Act to declarants in foreign jurisdictions (i.e. outside the United States and its territories), and extending it to declarants outside the state in which the unsworn declaration is to be used but within the United States (e.g., a declarant in Michigan making an unsworn declaration for use in a Florida court or agency). The committee decided that the Act should be limited to declarants in foreign jurisdictions, subject to expansion at some later time should the need arise. The reasons for this decision are that the committee believes that limiting the Act to truly foreign-based declarants will enhance the likelihood that states will adopt the provision in a timely manner, and that the Act, so limited, meets the immediate needs expressed to the committee by the ABA committee that recommended the project.

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

SECTION 4. REQUIRED MEDIUM. If the law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in that medium.

Comment

Courts and agencies often restrict the medium in which pleadings, motions, and other documents may be filed. This section recognizes that such a restriction is binding on a person

1 seeking to introduce a foreign unsworn declaration.
2

3 **SECTION 5. WHEN UNSWORN DECLARATION MAY NOT BE USED.** An
4 unsworn declaration may not be used in place of a required sworn declaration that is:

- 5 (1) a deposition;
6 (2) an oath of office;
7 (3) an oath required to be given before a specified official other than a notary public;
8 (4) to be recorded pursuant to [insert appropriate section of state’s real estate law]; or
9 (5) an oath required by [insert appropriate section of state’s law relating to self-proved
10 wills].

11 **Comment**
12

13 The use of unsworn declarations is not limited to litigation. Unsworn declarations would
14 be usable in civil, criminal, and regulatory proceedings and settings. However, there are certain
15 contexts in which the committee concluded they should not be used, and these contexts are listed
16 in this section.
17

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

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

24 [Signature]”

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

1 **Comment**

2
3 This section recites the importance of uniformity among the adopting states when
4 applying and construing the act.
5

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

12 **Comment**

13 This section responds to the specific language of the Electronic Signatures in Global and
14 National Commerce Act and is designed to avoid preemption of state law under that federal
15 legislation.
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17 **SECTION 9. EFFECTIVE DATE.** This [act] takes effect [date].

18 **Comment**

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20 This act will become effective in the enacting jurisdiction on the designated date.

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1 "I certify (or declare) under penalty of perjury that the foregoing is true and correct"

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3 (Date and Place) (Signature)

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5 (b) If executed at any place, within or without this state:

6
7 "I certify (or declare) under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct":

9 -----
10 (Date and Place) (Signature)

11
12 **28 U.S. CODE § 1746.**

13
14 Wherever, under any law of the United States or under any rule, regulation, order, or
15 requirement made pursuant to law, any matter is required or permitted to be supported,
16 evidenced, established, or proved by the sworn declaration, verification, certificate, statement,
17 oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of
18 office, or an oath required to be taken before a specified official other than a notary public), such
19 matter may, with like force and effect, be supported, evidenced, established, or proved by the
20 unsworn declaration, certificate, verification, or statement, in writing of such person which is
21 subscribed by him, as true under penalty of perjury, and dated, in substantially the following
22 form:

23
24 (1) If executed without the United States: "I declare (or certify, verify, or state)
25 under penalty of perjury under the laws of the United States of America that the foregoing is true
26 and correct. Executed on (date).

27 (Signature)".

28
29 (2) If executed within the United States, its territories, possessions, or
30 commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the
31 foregoing is true and correct. Executed on (date).

32 (Signature)".

33
34 Any state enacting the Certification of Unsworn Foreign Declarations Act likely will
35 need to amend the state's perjury laws to impose the penalties of perjury on false unsworn
36 statements.