

National Conference of Commissioners on Uniform State Laws

Project Proposal Guidelines & Form

Twice each year the NCCUSL Committee on Scope and Program solicits proposals for new study and drafting projects. While many of our project proposals come from state uniform law commissioners, we also encourage outside groups and individuals to submit proposals. The following guidelines are derived from NCCUSL's "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts", and are intended to assist those submitting proposals to better anticipate the kinds of questions that typically arise when the Committee on Scope and Program is considering a suggested new project. Please feel free to use the attached optional form, or to submit in another format (memo, model text, etc.) but to the extent possible, in addition to submitting a description of the proposed project or law also provide analysis of the following issues:

1. (a) Is uniformity of state law for the proposed subject matter desirable and realistic? While not every NCCUSL act is uniformly adopted verbatim by all U.S. States and Territories, we do focus on acts that (directly or indirectly) will promote uniformity among the states in their respective subject matter areas. NCCUSL generally avoids subjects that are of purely local concern or which are unlikely to be widely enacted because of political differences among the states.

(b) Please address whether widespread enactment of the proposal would produce significant benefits to the public. Acts which reduce uncertainty or compliance costs because the law is made uniform among the states or which respond to a need common to a number of jurisdictions produce generally produce such results. Legislation that is drafted by NCCUSL avoids each jurisdiction having to develop its own solution to that need. Consider whether the proposed project will:

- I. Facilitate the flow of commercial and other transactions across state lines?
- II. Avoid conflicts of law in situations where the law of more than one state might apply?
- III. Fill an emergent need, modernize an antiquated concept, or codify the common law?

2. What have the states already done with regard to this subject? Information about existing state statutes and ongoing trends is very helpful; conversely, NCCUSL tends to avoid subjects that are entirely novel in character.

3. Does the proposed project require changes in federal laws or regulations? This is an important question as NCCUSL works exclusively in subject matter areas that are appropriate for state legislation.

4. What organizations or interest groups are likely to have an interest in the subject matter of the act, and are they likely to support or oppose a uniform or model act in this area? NCCUSL strives to produce balanced, enactable legislation, and it is important to identify the appropriate stakeholders and assess whether they are willing to participate in the development of a proposed project.

5. Are there resources available to support the development of the proposed project? The development of a uniform or model act generally requires a minimum of one year of study and two years of drafting meetings. The identification of an existing source of expertise with regard to a particular subject and/or the availability of outcome-neutral financial support (from a government or foundation source) is helpful information.

NCCUSL Committee on Scope and Program

Project Proposal Form

Submitted by:

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Description of Project

According to NCCUSL, ten states and the District of Columbia adopted the Uniform Law on Notarial Acts since it was completed by the Law Commissioners in 1982.

In the quarter century since the Uniform Law was completed, a number of states (most recently Pennsylvania, Massachusetts, California and New Jersey) have passed or are considering legislation that addresses administrative and procedural issues that are outside the scope of the Uniform Law. These issues include: qualifications of applicants; duration of commission; description of duties and powers; stamp or seal requirements; journal requirements; satisfactory evidence of identity requirements; evaluation of document signer comprehension and willingness to sign; prohibitions against the unauthorized practice of law, including immigration law; notary education and testing requirements; and provisions for electronic notarization.

The result is a widespread lack of uniformity in state notary laws.

We ask the Uniform Law Commissioners to consider a revision of the Uniform Law on Notarial Acts, which only defines the content and form of common notarial acts, to include additional provisions that states might consider to be useful.

It may be helpful to consider a model act, rather than a uniform act, that uses a “core” set of provisions that may be adopted *en bloc* by states that want to modernize and unify their notary laws, supplemented by “optional” provisions that cover the administrative and procedural issues noted above. The Committee drafting the Model State Administrative Procedure Act described such an approach as follows:

The Committee will draft the revision by using a “core” form supplemented by “optional” provisions. Core provisions will consist of only essential general principles. The Committee’s objectives are to produce a template consisting of core principles: 1) that a state can adopt with minimal adjustments; 2) that represents the most widely-adopted and accepted principles from the states and the best of current thinking ...; and 3) that is an ... Act entire in itself and ready for use. Principles that are not so widely adopted, essential or acceptable, or that are more clearly supplemental in nature or more detailed, but that might nevertheless be considered by some states to be useful, will be presented separately as optional sections of the revised code.

Such a model act may promote uniformity and minimize diversity, even though states may not adopt it in its entirety.

1. Need for and benefits of uniformity in this subject matter area:

Legislators have attempted to respond to serious problems such as real estate fraud, identity theft, homeland security, and immigration fraud with legislation to change their states' notary laws. Two recent examples:

- New Jersey's Assembly Bill 2974 proposes to make U.S. citizenship a prerequisite to commissioning as a notary, despite the U.S. Supreme Court's ruling in *Bernal v. Fainter* that such a requirement violates the Fourteenth Amendment of the Constitution.
- A number of states have prohibited or would prohibit the advertising of notary services to non-English speaking populations without a disclaimer that the notary is not an attorney. Maine's Immigration and Nationality Law Assistance Act, signed into law April 5, 2006, specifically prohibits the making of any statement that the provider of immigration and nationality law assistance can or will obtain special favors from or has special influence with the federal or any state government.

Rather than patching together legislative solutions like these, states should have the guidance of a comprehensive model law that has been studied, drafted and fully supported by an authoritative body.

2. Summary/analysis of existing state law and trends concerning this subject

Briefly, here are five areas not addressed in the current ULONA where states have adopted or are considering legislation:

- Citizenship requirement – Twenty-two years after *Bernal v. Fainter* [467 U.S. 216, 216-17 (1984)], legislators are attempting to make U.S. citizenship a prerequisite for appointment as a notary.
- Education requirement – Legislators attempting to curb fraud and identity theft are introducing new requirements for education and testing prior to commission as a notary.
- Identification requirement – States define different standards for satisfactory evidence of identity. The federal REAL ID Act will affect identification requirements in the future.
- Journal requirement – States that have not had journal requirements are proposing amendments to require notaries to keep records of their official notarial acts. However, real estate, banking and legal professionals tend to oppose journal requirements.
- Stamp/seal requirement – When a stamp or seal is required, a variety of ink and/or embossing stamps or seals are used, leading to confusion over whether a document has been notarized properly when that document crosses state lines.

3. Impact of federal laws and regulations on this proposed subject:

Notary laws generally have been left to the states. However, states have had to respond to federal laws such as E-SIGN and the REAL ID Act with changes in their notary laws.

4. Identity of organizations or persons interested in this subject area, and assessment of support/opposition

Organizations likely to support a revision include:

- American Bar Association and state bar associations (with some objections)
- national and state notary associations
- governors, secretaries of state and other appointing authorities
- state notary administrators
- state legislatures
- federal immigration and naturalization agencies

- immigration and naturalization advocacy groups
- departments and bureaus of motor vehicles
- consumer protection agencies and advocacy groups

Organizations that may have specific objections to a revision include:

- banking, real estate and title companies

5. Availability of existing research and/or financial support?

There is an extensive body of knowledge and expertise that can be brought to bear on the study and drafting of a revised notary law.

If NCCUSL undertakes a revision of the ULONA, interest and support will come from a large number of organizations and the states themselves, including but not limited to those currently invested in electronic notarization initiatives.

STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF ACTS (January 13, 2001)

The Conference and its committees shall conform to the following criteria and procedures in proposing or considering Acts:

1. CRITERIA.

(a) The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress. If it properly falls within the exclusive jurisdiction of the Congress, it is obviously not appropriate for legislation by the several States. However, if the subject matter is within the concurrent jurisdiction of the federal and state governments and the Congress has not pre-empted the field, it may be appropriate for action by the States and hence by the Conference.

(b) The subject matter must be such that approval of the Act by the Conference would be consistent with the objectives of the Conference, as stated in Article 1.2 of its Constitution: "to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable."

(c) Every Act drafted by the Conference shall conform to the following requirements:

(i) there shall be an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;

(ii) there must be a reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity indirectly;

(iii) the subject of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law (for example, facilitating interstate economic, social or political relations, or responding to a need common to many States as to which uniform legislation may be more effective, more efficient, and more widely and easily understood) or will avoid significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the States in their activities or dealings in other States or with citizens of other States or in moving from State to State).

(d) Experience demonstrates that Acts to accomplish the following purposes have met with the widest acceptance by state legislatures;

(i) *Acts to facilitate the flow of commercial transactions across state lines*, such as the Uniform Commercial Code;

(ii) *Acts to avoid conflict of laws when the laws of more than one State may apply to a transaction or series of transactions*, such as the Uniform Act on Transfers to Minors, the Uniform Certification of Questions of Law Act, the Uniform Child Custody Jurisdiction and Enforcement Act, the Uniform Interstate Family Support Act, and the Uniform Attendance of Out of State Witnesses Act;

(iii) *Acts without substantial interstate implications but conceived and drafted to fill emergent needs, to modernize antiquated concepts, or to codify the common law*, such as the Uniform Acts on Simultaneous Death, Limited Partnership, Partnership, Limited Liability Company, Rules of Evidence, Common Trust Fund, Principal and Income, and Fraudulent Transfers.

(e) Acts may promote uniformity indirectly as well as by substantially verbatim adoptions, as, for example, by:

(i) extensive adoptions in principle, such as the Uniform Alcoholism and Intoxication Treatment Act;

(ii) impact on case law and teaching practices, such as the Uniform Rules of Evidence;

(iii) gradually increasing adoptions, either in statutes or in case law, of particular sections or parts of a Uniform or Model Act addressing specific problems within the larger area to which the Act is directed, as for example, the Uniform Acts on Intestacy, Wills and Donative Transfers, Testamentary Additions to Trusts, Disclaimer of Property Interests, Statutory Rule Against Perpetuities, International Wills, Succession without Administration, Trustee Powers, Estate Tax Apportionment, Guardianship and Protective Proceedings, Durable Power of Attorney, and

Nonprobate Transfers on Death, which address specific and discrete problems within the larger area to which the Uniform Probate Code is directed.

(f) As a general rule, the Conference should consider past experience in determining future projects and should avoid consideration of subjects that are:

(i) entirely novel and with regard to which neither legislative nor administrative experience is available;

(ii) controversial because of disparities in social, economic or political policies or philosophies among the various States; and

(iii) of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.

2. DESIGNATION OF ACTS AS UNIFORM OR MODEL

The above criteria are equally applicable to Uniform and Model Acts. In determining whether an Act should be designated as a "Uniform" Act or a "Model" Act, the following procedures and criteria should be applied:

(a) The Executive Committee, in appointing a special committee for the consideration of an Act, may do so without indicating whether the product will be a "Uniform" or "Uniform Law Commissioners' Model" Act. The committee may be designated initially as the "Special Committee on [subject matter] Act" and any drafts circulated as "Uniform Law Commissioners' [subject matter] Act."

(b) Before the first reading, the Special Committee, after considering the criteria for designation, shall make a recommendation to the Executive Committee as to whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act.

(c) The Executive Committee shall review the recommendation of the Special Committee and decide whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act.

(d) After the Act's first reading, the Executive Committee shall reconsider whether the Act should be circulated as a "Uniform" or "Uniform Law Commissioners' Model" Act. A subsequent draft must be presented and circulated in the form approved by the Executive Committee.

(e) The Conference may change the designation assigned by the Executive Committee.

(f) Criteria for designation:

(i) An act shall be designated as "Uniform" if

(A) there is a substantial reason to anticipate enactment in a large number of jurisdictions; and

(B) "uniformity" of the provisions of the proposed enactment among the various jurisdictions is a principal objective.

(ii) An act shall be designated as a "Uniform Law Commissioners' Model" Act if

(A) "uniformity" may be a desirable objective, although not a principal objective;

(B) the Act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the Act in its entirety; or

(C) the purposes of the Act can be substantially achieved, even though it is not adopted in its entirety by every State.

3. ACTS RECOMMENDED BY OUTSIDE ORGANIZATIONS.

When an affiliated or responsible non-affiliated organization recommends a subject for an Act or requests the Conference to draft an Act, it should be informed of the criteria to which Acts proposed for action by the Conference must conform and be requested to demonstrate such conformity as well as to submit recommendations as to the substance of the Act.

4. PRODEDURE IN CONSIDERING PROPOSED SUBJECTS OF ACTS.

(a) *Committee on Scope and Program.* Whenever a subject for an Act is proposed to the Conference, the proposal shall first be submitted to the Committee on Scope and Program, which shall have the responsibility to determine whether the subject merits consideration by the Conference and:

- (i) if so, to report that determination to the Executive Committee, together with its reasons; or
- (ii) if not, to report its recommendation to the Executive Committee, together with its reasons.

(b) *Executive Committee.*

(i) The Executive Committee shall review the recommendations of the Committee on Scope and Program as to any subject for a proposed Act and either approve or disapprove its recommendations. If the Executive Committee determines that a subject for a proposed Act merits consideration by the Conference, the President of the Conference shall assign the subject to a Standing or Special Committee, as the Executive Committee directs, either for further study and recommendations or to proceed with the drafting of an Act on the subject.

(ii) Before proceeding with the drafting of an Act, the Executive Committee must find that a proposed Act:

- (A) comports with the criteria of the Conference;
- (B) has the potential, in comparison with other pending proposals, of substantially contributing to the objectives of the Conference; and
- (C) will have adequate agenda time for its consideration.

(c) *Standing or Special Study Committee.* Unless otherwise directed by the Executive Committee, the Standing or Special Study Committee to which the President assigns the subject will be charged with the responsibility not of drafting an Act, but of studying the subject and of conducting research to determine whether, in the opinion of that Committee, the subject is one on which an Act should be drafted and whether the Act should be designated as "Uniform" or "Uniform Law Commissioners' Model". The Standing or Special Study Committee shall address the criteria and report by a given date its recommendations, based on those criteria, to the Committee on Scope and Program.

If the Standing or Special Study Committee recommends to the Committee on Scope and Program that an Act on the subject be drafted by the Conference, the Committee on Scope and Program, after addressing the Criteria of the Conference for designating Acts, shall report its recommendations to the Executive Committee for further action.

(d) *Identifying Outside Resources.* If consideration of the proposal will require outside resources in addition to the work of members, Associate Members, and staff of the Conference, reasonably promising prospects for obtaining the required resources must be identifiable.

(e) *Reference of Adverse Report to Executive Committee.* If the Standing or Special Study Committee recommends to the President that no Act be drafted on the subject, the report of the Standing or Special Study Committee shall be referred to the Executive Committee, which shall review all reasons advanced for and against an Act on the subject and determine, subject to review by the Conference, whether or not an Act should be drafted on the subject.

(f) *Procedure for Reexamination of Pending Subjects.* Each Special Drafting Committee shall report semi-annually, in accordance with Section 28.3 of the Bylaws, and at any intervening time, if so requested by the Executive Committee, on the progress of its work and its current views about

(i) whether the subject of its work meets the criteria of the Conference for considering Acts and, if so

(ii) whether the Act should be recommended as a "Uniform" Act or, instead, as a "Uniform Law Commissioners' Model" Act.

5. OBLIGATION OF COMMISSIONERS.

Approval of an Act as a Uniform Act carries with it the obligation of the Commissioners from each State to endeavor to procure consideration by the legislature of the State, unless the Commissioners deem the Act inappropriate for enactment in their State. (See Section 6.1 of the Constitution.)

"Uniform" Acts should be proposed and supported for adoption as promulgated to achieve necessary and desirable uniformity. "Uniform Law Commissioners' Model" Acts must be proposed and supported to minimize diversity and improve the law, but without the same emphasis on adhering to the verbatim text.