

UNIFORM UNSWORN DECLARATIONS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 125th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

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- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
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- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM UNSWORN DECLARATIONS ACT

PREFATORY NOTE

Declarations of persons are routinely received in state and federal courts and agencies. Many – but not all – of the declarations are affidavits and other documents sworn to by declarants before notaries public or authorized officials.

Courts and agencies do receive unsworn declarations. Unsworn declarations may be oral or in writing. For example, they may be in the form of:

- testimony given under affirmation rather than oath. See, e.g., Fed. R. Evid. 603 (“a witness must give an oath or affirmation to testify truthfully”); Ala. R. Evid. 603 (“every witness [must] declare that the witness will testify truthfully, by oath or affirmation”); Mich. R. Evid. 603 (same); Wash. R. Evid. 603 (same);
- an attested (or witnessed) will. See, e.g., Ala. Code § 43-8-131; Cal. Prob. Code § 6110; Colo. Rev. Stats. § 15-11-502; Tex. Estates Code § 251.051; Va. Code § 64.2-403;
- other unsworn declarations authorized by a state’s law or rules. See, e.g., Cal. Civ. Proc. Code § 2015.5; Fla. Stat. § 92.525; Kan. Stats. § 53-601; Va. Code § 8.01-4.3;
- statements made while under a belief of impending death. See, e.g., Fed. R. Evid. 804(b)(2) (statements under belief of imminent death); Ala. R. Evid. 804(b)(2) (statement under belief of impending death); Mich. Laws § 767.72 (dying declarations admissible as evidence in manslaughter cases); Ohio R. Evid. 804(b)(2) (statement under belief of impending death); or
- declarations made by an officer of the court. See, e.g., *Cox v. State*, 279 So. 2d 143, 144-45 (Ala. Crim. App. 1973) (“[I]t was within the judge’s judicial discretion as to whether or not he would take the unsworn statement of an officer of his court as evidence.”).

In 2008 the Uniform Law Commission completed work on the Uniform Foreign Declarations Act (UUFDA), which allows for the use of unsworn declarations under penalty of perjury when made outside the United States. The UUFDA extends to state proceedings the same flexibility that federal courts have had since 1976 under 28 U.S.C. § 1746. However, 28 U.S.C. § 1746 is broader than the UUFDA in that it also covers unsworn declarations made within the United States. Additionally, while working on the UUFDA, the ULC identified 22 states with existing laws, procedural rules or statutes having a similar effect as 28 U.S.C. § 1746. It is noted in the comments of the UUFDA that the Drafting Committee considered expanding the UUFDA to include unsworn declarations made within the United States but decided against it due to the limited charge of the Committee as well as time and enactability concerns.

Since its promulgation, the UUFDA has been adopted in over 20 states and the District of Columbia. It is under consideration in additional states. Additionally, a number of states have existing or procedural rules that permit the use of unsworn declarations made within the United States.

The Uniform Unsworn Declarations Act (UUDA) affirms the use in state legal proceedings of unsworn declarations made by declarants. Under the UUDA, if an unsworn declaration is made subject to penalties for perjury and contains the information in the model form provided in the act, then the statement may be used as an equivalent of a sworn declaration.

The UUDA excludes use of unsworn declarations for depositions, oaths of office, oaths related to self-proved wills, declarations recorded under certain real estate statutes, and oaths required to be given before specified officials other than a notary.

The UUDA will extend to state proceedings the same flexibility that federal – and a number of state – courts and agencies have employed for decades. Since 1976, federal law (28 U.S.C. § 1746) has allowed an unsworn declaration to be recognized and valid as the equivalent of a sworn affidavit if it contained an affirmation substantially in the form set forth in the federal act. The courts, though, have ruled that 28 U.S.C. § 1746 is inapplicable to state court proceedings. Several states also authorize the use of unsworn declarations (e.g., Cal. Civ. Proc. Code § 2015.5; Fla. Stat. § 92.525; Kan. Stats. § 53-601), but the state procedures are not uniform.

Existing state legislation varies significantly in content, scope and form. Enactment of the UUDA harmonizes state and federal treatment of unsworn declarations. Uniformity is important because many matters as to which the use of unsworn declarations is valuable will involve more than one state or jurisdiction. Further, the UUDA will reduce aspects of confusion regarding differences in federal and state litigation practice. The act also eases some of the declarants' burdens in providing important information for state proceedings.

The Uniform Unsworn Declarations Act should be enacted in every state.

UNIFORM UNSWORN DECLARATIONS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) “Law” includes a statute, judicial decision or order, rule of court, executive order, and administrative rule, regulation, or order.

(2) “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.

(3) “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.

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

(5) “Unsworn declaration” means a declaration in a signed record not given under oath but given under penalty of perjury.

Legislative Note: *An enacting state will need to ensure that its perjury law covers an unsworn declaration. For example, Ore. Rev. Stats. Section 162.065 provides: “(1) A person commits the crime of perjury if the person makes a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false. (2) Perjury is a Class C felony.” If an enacting state uses a term such as “false statement” or “false declaration” instead of perjury in labeling the offense, it will need to ensure that the law covers an unsworn declaration.*

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. The wording is taken from the definition contained in the Revised Model State Administrative Procedure Act.

In most instances, “law” is referring to the law of the enacting state. Section 7 is the exception; in that section, “law” would address the general law on the subject of declarations because the provision encourages interpretation to achieve uniformity in the law.

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. APPLICABILITY. This [act] applies to an unsworn declaration by a declarant who at the time of making the declaration is physically located within or outside the boundaries of the United States, whether or not the location is subject to the jurisdiction of the United States.

Comment

This act applies to unsworn declarations made by a declarant regardless of where the declarant was located at the time of the declaration. The declaration could have been made within the United States whether within the enacting state or in a different state (even if the location is under the control of another sovereign, such as foreign embassies or consulates or federally recognized Indian lands), or in a foreign country.

SECTION 4. VALIDITY OF UNSWORN DECLARATION.

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

(b) This [act] does not apply to:

- (1) a deposition;
- (2) an oath of office;
- (3) an oath required to be given before a specified official other than a notary

public;

(4) a declaration to be recorded under [insert appropriate section of state real-estate law]; or

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

Comment

Except as provided in subsection 4(b) of this section, an unsworn declaration meeting the requirements of this act may be used in a state proceeding or transaction whenever other state law authorizes the use of a sworn declaration. Thus, if other state law permits the use of an affidavit, an unsworn declaration meeting the requirements of this act would also suffice. Additionally, if other state law authorizes other substitutes for a sworn declaration, such as an affirmation, then as provided in subsection (a) of this section, an unsworn declaration meeting the requirements of this act could serve as a substitute for an affirmation. Nothing in this act affects the efficacy of sworn declarations. An unsworn declaration is an alternative to a sworn declaration. In perhaps most cases, sworn or notarized declarations may be preferred; unsworn declarations though may be used when necessary or suggested by circumstances.

The use of unsworn declarations is not limited to litigation. Unsworn declarations would be usable in civil, criminal, and regulatory proceedings and settings. However, there are certain contexts in which unsworn declarations should not be used, and these contexts are listed in subsection (b) of this section.

This act does not relieve a party from establishing the necessary foundation for the admission of an unsworn declaration. Authenticity is not addressed in this act.

The authenticity of the declaration must be established in accordance with the law of the enacting state. If authorized by the law of the enacting state, authenticity of written declarations might be established through, for example, testimony of witnesses to the declaration, handwriting experts or lay witnesses familiar with the signature of the declarant, comparison with authenticated specimens, or other recognized methods of authentication. See Fed. R. Evid. 901. Such approaches are commonly acceptable in cases involving attested wills. Although subscribing witnesses are preferred, their testimony is not necessary for authentication of the declaration if its authenticity can be established by other means. See, e.g., Fed. R. Evid. 903; Cal. Prob. Code §§ 8220-21, (attested wills may be proved by testimony or deposition to subscribing witness or absent a witness by proof of handwriting and affidavit of person with personal knowledge); Iowa Code § 622.24 (absent testimony of subscribing witness to attested will, execution of will may be proved by other evidence); Mass. Gen. Laws 190B § 3-406(a) (due execution of an attested will may be proved by evidence other than testimony of attesting witness); Mich. Comp. Laws § 700.3405(2) (authentication of attested wills by witnesses or other evidence authorized).

As noted in the Legislative Note, an enacting state should ensure that its perjury law includes unsworn declarations. For example, see Ore. Rev. Stats. § 162.065, which provides: “(1) A person commits the crime of perjury if the person makes a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false. (2) Perjury is a Class C felony.” See also 11 Del. Code § 1224 (definition of “swears falsely” includes unsworn declarations).

SECTION 5. REQUIRED MEDIUM. If a law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in the same 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 seeking to introduce an unsworn declaration.

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

I declare under penalty of perjury under the law of [insert name of the enacting state] that the foregoing is true and correct.

Signed on the ____ day of _____, _____, at _____.
Date Month Year City or other location, and state or country

Printed name

Signature

Legislative Note: *An enacting state will need to replace “[insert name of the enacting state]” in the declaration form with the name of the enacting state so that the declaration is made under penalty of perjury under the law of the enacting state. For example, if the State of Texas is the enacting state, the declaration form would state: “I declare under penalty of perjury under the law of Texas that the foregoing is true and correct.”*

An enacting state will need to ensure that its perjury law covers an unsworn declaration. If an enacting state uses a term such as “false statement” or “false declaration” instead of using

“perjury” in its law, the form will need to use the enacting state’s name for the offense in the form.

Comment

The form informs the declarant that the declaration is made under penalty of perjury, thereby reminding the declarant of the potential liability it establishes. Section 3 of this act authorizes the use of unsworn declarations regardless of where the declaration was made. The form seeks the location of the declarant at the time of making the declaration which may be helpful for authentication purposes even though location does not affect admissibility.

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

Comment

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

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

Comment

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

SECTION 9. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

Comment

Any state enacting the Act likely will need to amend the state's laws by repealing any conflicting statutory provisions. This Section was added based on comments at the National Conference during consideration of the UUFDA.

SECTION 10. EFFECTIVE DATE. This [act] takes effect