

D R A F T
FOR DISCUSSION ONLY

CERTIFICATION OF UNSWORN FOREIGN DECLARATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For April 20-22, 2007 Drafting Committee Meeting

Reporter's Initial Draft

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**National Conference of Commissioners on Uniform State Laws (NCCUSL)
Drafting Committee Meeting on Certification of Unsworn Foreign Declarations Act
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Reporter's Initial Draft¹

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REPORTER'S NOTE: Please note that this document is an initial working draft for committee use only. The draft is drawn in part from an ABA report supplied to us for our use during our drafting project. Naturally, as we address issues and propose provisions, we will rely less on these materials and move more toward a report of our work.

The draft is not intended for circulation outside the committee membership. Moreover, the Reporter normally works in WordPerfect. This document was prepared in Microsoft Word and contains formatting errors which will be addressed in the next draft. The draft contains some notes for future drafting purposes as well as a number of materials which would be deleted from subsequent drafts.

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¹ The Reporter gratefully acknowledges the tremendous support effort of Jonathan (Seth) Gowan – one of my research assistants – on this project. Without his assistance, this draft would not be as far along as it is at this stage.

Section 1 – Preface

The drafting committee is to determine the feasibility of a uniform state law on “unsworn declarations under penalty of perjury” and to draft such a law in a way that would replicate the purpose and effect of 28 U.S.C. § 1746. The goal is the creation of a statute that would allow litigants in state court proceedings to submit unsworn statements or declarations by foreign affiants, rather than getting such evidence notarized, as is now required, but to do so subject to the respective state’s perjury laws. Therefore, the starting point for the research is 28 U.S.C. § 1746 and the existing state laws, procedural rules, or statutes with similar effect.² Twenty-two states with similar laws, statutes, or rules were identified by the American Bar Association’s initial work and were evaluated during the development of this draft report. Of the twenty-two, twelve were eliminated, primarily because each was drafted to serve a specific state purpose or was so distinct from the federal statute that it did not serve the broad needs of a draft uniform statute.³

The remaining state laws, statutes, or rules are from Alaska, Arizona, California, Florida, Kansas, Nevada, Oklahoma, Virginia, Washington, and West Virginia. Each of these provisions was evaluated further and ranked based upon how similar its construction is to that of the federal statute. Six of the statutes were eliminated from the ongoing study list.⁴ Section two of this draft report contains the California statute and explains why it has been provisionally selected as a model from which to draft a uniform law. Section three sets forth the Florida, Kansas, and Alaska statutes and describes why each of these provisions should also be considered during the drafting process.

² See Appendix (A) for the text of 28 U.S.C. § 1746.

³ The state laws, statutes, or rules initially eliminated from further study are from Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, and Texas. See Appendix (B) for these laws, statutes, and procedural rules and an explanation of why each was eliminated from consideration.

⁴ See Appendix (C) for these six state laws.

1 As previously noted, the California statute⁵ seems to be an apt starting point for the
2 NCCUSL draft. This statute is very similar to the federal statute, 28 U.S.C. § 1746, and also
3 includes a recommended form for the declaration when made within or outside the state of
4 California. The statute was also selected as a model by the ABA during its study of unsworn
5 foreign declarations.⁶

6 The California State Assembly enacted its law in 1957 to provide a method of admitting
7 unsworn declarations/statements into state judicial proceedings in a way that the evidence
8 remained subject to the California penalty of perjury. While the California law serves a purpose
9 similar to 28 U.S.C. § 1746, the state legislative history and commentary do not provide much
10 detail of the legislative debate before final passage.

11 Although there is federal law governing the use of unsworn foreign declarations, the
12 drafting of a uniform law to serve the same purpose in state court proceedings requires the
13 consideration of areas of the law that are unique to state courts. Thus, for our purposes, it is better
14 to focus on a state, rather than a federal, statute. Because the California statute is the state statute
15 that Congress used when drafting its federal unsworn foreign declaration statute, it is the logical
16 starting point for the drafting of a uniform statute for states to adopt. In fact, 28 U.S.C. § 1746,
17 adopted in 1976, for the most part simply replicates the language of the California statute as
18 written.

19 The next section discusses the California statute.
20

21 **Section 2 – The California statute: CAL. CIV. PROC. CODE § 2015.5.**

22
23 The California statute provides:

24
25 § 2015.5. Certification or Declaration Under Penalty of Perjury

⁵ CAL. CIV. PROC. CODE § 2015.5.

⁶ Similar to this draft, the ABA's initial work on the feasibility of drafting a uniform state law for unsworn declarations by foreign nationals, identified and ranked state laws based upon similarity to the federal statute as well as inclusion of language that would be important to state law proceedings.

1
2 Whenever, under any law of this state or under any rule, regulation, order or requirement
3 made pursuant to the law of this state, any matter is required or permitted to be supported,
4 evidenced, established, or proved by the sworn statement, declaration, verification, certificate,
5 oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of
6 office, or an oath required to be taken before a specified official other than a notary public), such
7 matter may with like force and effect be supported, evidenced, established or proved by the
8 unsworn statement, declaration, verification, or certificate, in writing of such person which recites
9 that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by
10 him or her, and (1), if executed within this state, states the date and place of execution, or (2), if
11 executed at any place, within or without this state, states the date of execution and that it is so
12 certified or declared under the laws of the State of California. The certification or declaration may
13 be in substantially the following form:

14
15 (a) If executed within this state:

16
17 “I certify (or declare) under penalty of perjury that the foregoing is true and correct”
18

19 -----
20 (Date and Place)

(Signature)

21
22 (b) If executed at any place, within or without this state:

23
24 “I certify (or declare) under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct”:
26

27 -----
28 (Date and Place)

(Signature)

29
30 The project, though, involves more than just tweaking and promulgating a model statute.
31 Given that the enactment of the California statute in 1957 and the federal statute in 1976 required
32 amendments to other laws, states adopting a uniform law likely also will need to amend some of
33 their existing laws. The Florida, Kansas, and Alaska statutes are included for the drafting
34 committee’s consideration because they are similar to the California statute, but each addresses
35 issues beyond the provisions of the California or federal statutes.

36 The committee also should consider the Florida, Kansas, and Alaska statutes, contained
37 in the following section, for discussion and drafting purposes.
38

39 **Section 3 – Additional Statutes for Drafting of Uniform Law**
40

1 In addition to the California statute, which is recommended as the starting point for the
2 drafting committee, it is recommended that the following three state statutes be considered as
3 well. Below are the statutes and research commentary for each.

4 **The Florida Statute: FLA. STAT. § 92.525**

5
6 92.525. Verification of documents; perjury by false written declaration, penalty

7
8 (1) When it is authorized or required by law, by rule of an administrative agency, or by rule or
9 order of court that a document be verified by a person, the verification may be accomplished in
10 the following manner:

11
12 (a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to
13 administer oaths; or

14
15 (b) By the signing of the written declaration prescribed in subsection (2).

16
17 (2) A written declaration means the following statement: “Under penalties of perjury, I declare
18 that I have read the foregoing [document] and that the facts stated in it are true,” followed by the
19 signature of the person making the declaration, except when a verification on information or
20 belief is permitted by law, in which case the words “to the best of my knowledge and belief” may
21 be added. The written declaration shall be printed or typed at the end of or immediately below the
22 document being verified and above the signature of the person making the declaration.

23
24 (3) A person who knowingly makes a false declaration under subsection (2) is guilty of the crime
25 of perjury by false written declaration, a felony of the third degree, punishable as provided in s.
26 775.082, s. 775.083, or s. 775.084.

27
28 (4) As used in this section:

29
30 (a) The term “administrative agency” means any department or agency of the state or any county,
31 municipality, special district, or other political subdivision.

32
33 (b) The term “document” means any writing including, without limitation, any form, application,
34 claim, notice, tax return, inventory, affidavit, pleading, or paper.

35
36 (c) The requirement that a document be verified means that the document must be signed or
37 executed by a person and that the person must state under oath or affirm that the facts or matters
38 stated or recited in the document are true, or words of that import or effect.

39
40 **Research Commentary on the Florida Statute.**

41
42 The Florida statute merits consideration for incorporation into the NCCUSL draft for the
43 following reasons:

44 The Florida statute is similar to the California and federal statutes in terms of the goal
45 achieved. However, it is constructed in a different form. The statute explicitly includes

1 administrative agency proceedings as an occasion when the statutory procedure may be used. *See*
2 FLA. STAT. § 92.525(1). The statute incorporates the language “to the best of my knowledge and
3 belief” into the declaration form. *See* FLA. STAT. § 92.525(2).

4 The statute allows for the declaration to be in print or type. *See id.* The statute
5 incorporates a definitions section into the statute for interpretation and application purposes.
6 Finally, note that the Florida statute does not include the exception “(other than a deposition, or
7 an oath of office, or an oath required to be taken before a specified official other than a notary
8 public),” which is found in parenthetical or other form in California, federal, and several other
9 state statutes.

10
11 **The Kansas Statute: KAN. STAT. ANN. § 53-601.**

12
13 53-601. Unsworn declarations; written declaration sufficient, form; exceptions; relationship to
14 notarial acts.
15

16 (a) Except as provided by subsection (b), whenever a law of this state or any rules and
17 regulations, order or requirement adopted or issued thereunder requires or permits a matter to be
18 supported, evidenced, established or proved by the sworn written declaration, verification,
19 certificate, statement, oath or affidavit of a person, such matter may be supported, evidenced,
20 established or proved with the same force and effect by the unsworn written declaration,
21 verification, certificate or statement dated and subscribed by the person as true, under penalty of
22 perjury, in substantially the following form:
23

24 (1) If executed outside this state: “I declare (or verify, certify or state) under penalty of perjury
25 under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date).

26 _____
27 (Signature)”

28
29 (2) If executed in this state: “I declare (or verify, certify or state) under penalty of perjury that the
30 foregoing is true and correct. Executed on (date).

31
32 _____
33 (Signature)”

34
35 (b) The provisions of subsection (a) do not apply to the following oaths:

36
37 (1) An oath of office.
38

1 (2) An oath required to be taken before a specified official other than a notary public.

2
3 (3) An oath of a testator or witnesses as required for wills, codicils, revocations of wills and
4 codicils and republications of wills and codicils.

5
6 (c) A notarial act performed prior to the effective date of this act is not affected by this act.
7 Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other
8 laws of this state or rules and regulations adopted thereunder.

9
10 Note: (d) and (e) are omitted as they pertain to effective date of Kansas Statute.

11
12 **Research Commentary on the Kansas Statute.**

13
14 The Kansas statute, like the federal, California, and Florida statutes, excepts procedures
15 involving an “oath of office [and] oath required to be taken before a specified official other than a
16 notary public” from the statute’s application. *See* KAN. STAT. ANN. § 53-601(b)(1)-(2).

17 In addition to this exception, Kansas also explicitly excepts oaths by a testator or
18 witnesses for wills and codicils. *See* KAN. STAT. ANN. § 53-601(b)(3). Such legal procedures
19 and documents are unique to state proceedings. Therefore, consideration of the Kansas language
20 on this particular issue should be considered in constructing a draft statute.

21 **The Alaska Statute: ALASKA STAT. § 09.63.020**

22
23 Sec. 09.63.020 Certification of documents

24
25 (a) A matter required or authorized to be supported, evidenced, established, or proven by the
26 sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person
27 making it (other than a deposition, an acknowledgment, an oath of office, or an oath required to
28 be taken before a specified official other than a notary public) may be supported, evidenced,
29 established, or proven by the person certifying in writing “under penalty of perjury” that the
30 matter is true. The certification shall state the date and place of execution, the fact that a notary
31 public or other official empowered to administer oaths is unavailable, and the following:

32
33 “I certify under penalty of perjury that the foregoing is true.”

34
35 (b) A person who makes a false sworn certification which the person does not believe to be true
36 under penalty of perjury is guilty of perjury.

37
38 **Research Commentary on the Alaska Statute.**

1 The Alaska statute includes the parenthetical exception “(other than a deposition, an
2 acknowledgment, an oath of office, or an oath required to be taken before a specified official
3 other than a notary public),” just like the statutes *supra*.

4 In addition to this common exception among statutes for consideration, the Alaska statute
5 also requires that the document include “the date and place of execution” and an attestation to
6 “the fact that a notary public or other official empowered to administer oaths is unavailable” for
7 the statute to have legal application and effect.

8 9 **Section 4 – Identified Issues for Drafting Committee to Consider** 10

11
12 1. *Purpose of the exceptions in 28 U.S.C. § 1746, specifically the parenthetical exception*
13 *“(other than a deposition, or an oath of office, or an oath required to be taken before a specified*
14 *official other than a notary public).”*

15
16 The ABA report does not address any reason why this language is included in 28 U.S.C. §1746.
17 The federal statute was enacted into law under Pub. L. No. 94-550 during the second session of
18 the 94th Congress in 1976. House Report 94-1616 to the law states that the statute will allow
19 unsworn statements “in lieu of an affidavit or sworn declaration, with 3 exceptions: (1)
20 deposition, (2) an oath of office, or (3) a document required to be signed before a specified
21 official other than a notary.” However, no commentary is provided as to why these three
22 exceptions are made. H.R. REP. NO. 94-1616 (1976), *available at* 1976 WL 14043.

23 The commentary references California’s unsworn declaration statute being used for some
24 nineteen years prior to the federal statute’s adoption, and the record suggests California’s law was
25 used in drafting the federal statute.

26 28 U.S.C. § 1746, as well as the California, Alaska, and Arizona unsworn declaration
27 statutes, include the parenthetical exception (“other than deposition, or an oath of office, or an

1 oath required to be taken before a specified official other than a notary public”) from the statutes’
2 application. The Kansas statute contains the same exception in different language.

3 Review of the California and congressional legislative history did not reveal answers
4 specific to this exception’s purpose. A review of the California legislative history is relevant
5 because that statute was enacted in the late 1950s, while the federal statute was enacted in 1976.
6 Further, the federal statute duplicates the California statute.

7 A review of the individual exceptions yielded the following possible explanations for
8 why the exceptions were made. One reason to except depositions is found in the California
9 statutory definition that a deposition is “a written declaration, under oath, made upon notice to the
10 adverse party, for the purpose of enabling him to attend and cross-examine.”⁷ A deposition taken
11 ex parte is “regarded suspiciously” under California case law.⁸ In essence, because a deposition is
12 understood as a process conducted before a court reporter (who also would be a notary), and in
13 which the deponent is subject to cross-examination by an adverse party, it would be impossible
14 for the unsworn declaration statute to apply to a deposition and for the process to fulfill its legal
15 definition.

16 The second exception is “oath of office,” which would address individuals whether elected
17 to public office or appointed to a position of public office within the executive or judicial
18 branches of government on the federal or state level. Because these individuals are required to
19 take specific oaths to hold these positions, the exception from the unsworn declaration is
20 understood.⁹

21 2. *Necessity for the United States Congress and states that have enacted similar laws to*
22 *amend perjury statutes.*
23

⁷ CAL. CIV. PROC. CODE § 2004.

⁸ See *Spring v. Hill*, 6 Cal. 17 (1856)

⁹ See 632 AM. JUR. 2D *Public Officers and Employees* § 124 for further explanation.

1 The 94th Congress, in passing Pub. L. No. 94-550, amended several existing statutes,
2 including the federal perjury laws.¹⁰

3 California did not amend its perjury statute in response to the enactment of the unsworn
4 declaration law in 1957. However, California's perjury law was enacted in its present form in
5 1955, and amendments since then have not addressed conformity issues between the perjury and
6 unsworn declaration laws. The history and case law associated with the California unsworn
7 declaration law indicate that substantial compliance with the law (a declaration subscribed to by
8 the declarant under penalty of the California laws of perjury), subjects the declarant to the perjury
9 law.¹¹

10 As to 28 U.S.C. §1746, the federal unsworn declaration law, Pub. L. No. 94-550 included
11 ten amendments to various federal laws pertaining to perjury to bring them into conformity with
12 28 U.S.C. §1746.

13 A review of the Florida unsworn declaration law and Florida perjury laws revealed no
14 apparent amendment to Florida perjury laws to produce conformity with the unsworn declaration
15 law. (I will continue to research this matter).

16 KAN. STAT. ANN. § 21-3805(a)(2) speaks directly to Kansas' unsworn declaration law.
17 The perjury statute was amended in 1989, the same year the Kansas unsworn declaration law was
18 passed.

19 Alaska's perjury statute does not speak directly to the unsworn declaration statute.
20 However, annotations demonstrate implication of the penalty of perjury to the unsworn
21 declaration statute. *See* ALASKA STAT. § 11.56.200 (attached).

22 ARIZ. REV. STAT. ANN. § 13-2702(A)(2) is a classification of one of the two ways an
23 individual may commit perjury in Arizona. The section includes any "false unsworn declaration,

¹⁰ See Pub. L. No. 94-550, 90 Stat 2534 (1976).

¹¹ *See* CAL. CIV. PROC. CODE § 2015.5.

1 certificate, verification, or statement . . .,” which directly comports with Arizona’s unsworn
2 declaration rule.

3 A review of Alabama’s current perjury laws leads to the conclusion that an unsworn
4 declaration law subject to penalty of perjury under the laws of Alabama would not conform
5 absent amendment to the perjury sections. The closest present law that would be applicable is
6 ALA. CODE § 13A-10-109, Unsworn Falsification to Authorities, which is only a Class C
7 Misdemeanor.

8 Based upon review of the above, any discussion or adoption of a uniform unsworn
9 declaration statute for states also would need to include discussion of any needed amendments to
10 individual state perjury laws to ensure conformity with the purpose of such a law.

11 A secondary note to the Alaska statute is that it also includes the following language:
12 “The certification shall state the date and place of execution, the fact that a notary public or other
13 official empowered to administer oaths is unavailable...”¹²

14 3. *State courts have refused to extend the purpose of 28 U.S.C. § 1746 to state court*
15 *proceedings. This sampling of state cases was identified by the ABA Report and some found in*
16 *research from the ABA identified cases. This is by no means an exhaustive list.*

17
18 *O’Such v. State*, 423 So. 2d 317, 318-19 (Ala. Crim. App. 1982) (holding dismissal of habeas
19 petition was proper where appellant had not verified by oath that statements true as required by
20 ALA CODE § 15-21-4) *distinguished by Ex parte Corbitt*, 468 So. 2d 92 (Ala. 1985) (holding
21 petition need only substantially comply with provisions of ALA CODE § 15-21-4 and any
22 corollary statutes in order to secure writ).

23
24 *Bennett v. Weimar*, 975 P.2d 691, 695-96 (Alaska 1999) (holding declaration in opposition to
25 summary judgment did not satisfy Alaska law for unsworn declaration, as such is allowed only
26 when a notary public is unavailable).

27
28 *Griffin v. State*, 2002 Tenn. Crim. App. LEXIS 132, at *5-6 (Tenn. Crim. App. 2002) (holding
29 that petitioner’s application for appeal of murder conviction to state supreme court where he
30 verified his own oath on petition did not comply with state procedures).

31
32 *Guinn v. Bosque County, Texas*, 58 S.W. 3d 194, 198-99 (Tex. App. 2001) (holding that county
33 commissioner’s unsworn declaration was not an affidavit for summary judgment purposes).

34

¹² ALASKA STAT. § 09.63.020. *See Bennett v. Weimar*, 975 P.2d 691, 695-96 (Alaska 1999).

1 *Whatley v. Ohio State Adult Parole Authority*, 2006 WL 1495123 (Ohio App. Ct. 2006)
2 (affirming dismissal of petitioner’s complaint because statement was not an affidavit and did not
3 comply with the oath requirements under Ohio law).

4
5 *Crain v. State*, 914 So.2d 1015 (Fla. Dist. Ct. App. 2006) (holding that good faith exception to the
6 exclusionary rule applied and failure of affiant officer to take appropriate oath did not render
7 arrest warrant invalid).

8
9 4. *Issues involving rules of evidence. Listed below are annotations involving evidentiary*
10 *issues from states with existing unsworn declaration statutes as well as the federal statute.*

11
12 **28 U.S.C. § 1746**

13
14 A Title VII plaintiff’s document, submitted in response to the Postal Service’s motion for
15 summary judgment, titled “EEO Investigative Report” and signed by an Equal Employment
16 Opportunity (EEO) Complaints Investigator—which document was not sworn, certified, or
17 notarized, did not contain language similar to form language of statute authorizing unsworn
18 declarations, was not printed on letterhead, and contained no insignia or logos of the Postal
19 Service—was inadmissible because much of it was the plaintiff’s hearsay summary, none of the
20 information was based on personal knowledge, and it was neither an “affidavit” nor a qualifying
21 substitute. *Lumoa v. Potter*, 351 F. Supp. 2d 426 (M.D.N.C. 2004).

22
23 A letter from a party’s lawyer recounting a witness’s unsworn statement, on which the witness
24 responded to a request that he “confirm by signing below that these statements convey an
25 accurate representation of some of the things that you advised us” by affixing his notarized
26 signature under the words “I CONFIRM,” failed to satisfy the statutory requirement that a
27 witness certify the truth of an unsworn statement by stating that it is “under penalty of perjury” or
28 using other language substantially similar in form, and thus it was not admissible on a motion for
29 summary judgment. *Network Computing Servs. Corp. v. Cisco Systems, Inc.*, 152 Fed. App’x
30 317, 2005 WL 2857965 (4th Cir. 2005) (unreported).

31
32 **California: CAL. CIV. PROC. CODE § 2015.5**

33
34 A testamentary trustee’s petition for instructions and a beneficiary’s written objections, both
35 verified in the form of declarations under penalty of perjury, were properly considered as
36 evidence in a hearing on the petition, absent objection. *In re Estate of Nicholas*, 223 Cal. Rptr.
37 410, 177 Cal. App. 3d 1071 (Cal. Ct. App. 1986).

38
39 The rule that relevant and material but incompetent and thus inadmissible evidence, received
40 without proper objection or motion to strike, suffices to establish a fact in support of order or
41 judgment applies to incompetent statements in affidavits as well as statements made under
42 penalty of perjury. *Nalley’s, Inc. v. Corona Processed Foods, Inc.*, 50 Cal. Rptr. 173, 240 Cal.
43 App. 2d 948 (Cal. Ct. App. 1966).

44
45 The general rule in civil actions is that, absent statutory authorization, stipulation of the parties, or
46 a waiver by failure to object, an affidavit or a declaration under penalty of perjury is not
47 competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine
48 the affiant. *Windigo Mills v. Calif. Unemployment Ins. Appeals Bd.*, 155 Cal. Rptr. 63, 92 Cal.
49 App. 3d 586 (Cal. Ct. App. 1979).

1 A permittee's secretary's declaration as to the effect that suspension of pharmacy permits would
2 have on the permittee's customers and that never before had the board imposed suspension for
3 similar violations constituted inadmissible hearsay. *West Romaine Corp. v. Calif. State Bd. of*
4 *Pharmacy*, 72 Cal. Rptr. 569, 266 Cal. App. 2d 901 (Cal. Ct. App. 1968).

5
6 **Nevada: NEV. REV. STAT. § 53.045**
7

8
9 The distinction between an affidavit and a declaration made under penalty of perjury is not such
10 as to affect substantial rights of parties to driver's license revocation proceedings, and thus such
11 declarations may be admitted in lieu of affidavits. NEV. REV. STAT. § 50.315, 53.045; *State*
12 *Dep't of Motor Vehicles v. Bremer*, 942 P.2d 145 (Nev. 1997).

13
14 **Washington: WASH. REV. CODE ANN. § 9A.72.085**
15

16
17 An unsworn written statement will satisfy the requirement that it be under oath, so as to constitute
18 a prior inconsistent statement, if it is signed and contains language such as, "I certify (or declare)
19 under penalty of perjury under the laws of the State of Washington that the foregoing is true and
20 correct." *State v. Nieto*, 79 P.3d 473 (Wash. 2003).

21
22 The form of the "Smith affidavit" satisfied the oath requirement of the hearsay exception
23 providing for substantive admission of a prior inconsistent statement; the series of declarations
24 included in the affidavit satisfied each of the statutory requirements setting forth circumstances in
25 which an unsworn form may be treated as a sworn statement. *State v. Nelson*, 874 P.2d 170
26 (Wash. 1994).

27
28 *5. Whether such a law/statute would have an impact upon inmate litigation in states.*
29

30 The two Alabama cases mentioned in point 3 of this section both involved inmate
31 proceedings and the state's ability to dismiss a case because of non-compliance with the
32 procedural formality of having documents notarized in the litigation.

33 It also should be noted that the Texas statute is specifically for inmate litigation. A
34 Westlaw query of all state courts for "unsworn declaration" yielded 674 hits, with a large
35 majority of them being from Texas and involving inmate litigation. Because of the information
36 evident in the Alabama cases and the number of cases from Texas, this is certainly an issue that
37 the drafters, as well as any states adopting a uniform law, would need to consider. However, if
38 any statute is adopted specific to unsworn declarations involving foreign nationals, this may not
39 be a problem.

40
41 **Section 5 – History of Unsworn Declarations and this Research Project**

1
2
3 In 1957, California enacted its laws to allow for unsworn declarations in state court
4 proceedings. CAL. CIV. PROC. CODE 2015.5. While this statute had nothing directly to do with
5 foreign nationals' ability to make such declarations or statements for purposes of California legal
6 proceedings, Congress adopted, almost verbatim, the language and structure of the California
7 statute when it passed 28 U.S.C. § 1746, "Unsworn declarations under penalty of perjury," in
8 1976. Under the federal statute, litigants may introduce statements or declarations that, while not
9 sworn to or under oath, are nonetheless made subject to the federal penalties for perjury.
10 Congress passed the federal statute to allow foreign nationals to make/submit unsworn statements
11 and declarations in federal court proceedings. However, 28 U.S.C. § 1746 does not cover such
12 declarations in the state courts. Interestingly, the federal statute is almost a carbon copy of the
13 California statute.

14 Following the September 11, 2001, terrorist attacks, the requirement for a foreign
15 national to get an affidavit notarized at a U.S. Consulate became a significant inconvenience for
16 all involved because of increased security measures, according to the American Bar Association's
17 February 2006 report.¹³ According to the ABA, U.S. consulars serve as notaries public on
18 affidavits by foreign nationals for court proceedings in the United States.

¹³ On February 13, 2006, the American Bar Association (ABA) House of Delegates passed a resolution recommending the adoption of a uniform law with the same purpose and effect in state court proceedings as 28 U.S.C. § 1746 in federal court proceedings. The ABA also recommended that its working committee's findings on the project be given to the National Commission on Uniform State Laws (NCCUSL) to continue research and to draft a uniform state law for the states' adoption. The ABA report discusses the effect of post-September 11, 2001, security measures at U.S. Consulates around the world as they relate to foreign-nationals getting affidavits notarized for court proceedings in the United States. Because these issues are unchanged, this history section essentially summarizes the issues already identified by the ABA report. In addition to these issues, the ABA report identified the already existing state laws similar to 28 U.S.C. § 1746 as well as state court cases where the use of unsworn declarations was at issue. From this information, the work done thus far merely was identifying an already existing state law to use as a starting point for drafting purposes and issues to consider specific to state implementation. All credit is given to the ABA for its initial findings. See Appendix (D) for the February 13, 2006, Resolution and Report.

1 After September 11, 2001, accomplishing this notarization became a tremendous burden
2 for litigants, foreign affiants, and personnel at U.S. embassies and consulates around the world.
3 A process that took no more than an hour before the terrorist attacks now takes at least half a day
4 of the foreign national's time, and can take even longer, according to the ABA findings. This
5 newly created burden has therefore negatively impacted the interests of the federal and state
6 governments as they relate specifically to court proceedings. For a full summary of these
7 negative consequences, see the ABA Report in Appendix (D).

8 The ABA set out to identify how best to ease this burden in state court proceedings and
9 concluded that adoption of a law similar to 28 U.S.C. § 1746 for states was the best avenue. The
10 ABA committee working on this project determined that a constitutional amendment to extend
11 the purpose of 28 U.S.C. § 1746 to state court and agency proceedings was not feasible, as these
12 are beyond the powers of Congress. In its report, the ABA identified those states with already
13 existing statutes, laws, or rules with a similar purpose as that of 28 U.S.C. § 1746. Additionally,
14 in its report, the ABA notes the variance in language, form, and scope of the different state laws
15 and/or rules. Finally, the ABA suggests any draft uniform law be for the purpose of unsworn
16 declarations executed outside the United States and provides suggested language for such a law in
17 the report's footnote 4.

18 Section 5 – Appendixes

21 Appendix A. The Federal Unsworn Declarations Statute for Foreign Affiants

22 28 U.S.C. § 1746. Unsworn declarations under penalty of perjury

23
24
25
26 Wherever, under any law of the United States or under any rule, regulation, order, or requirement
27 made pursuant to law, any matter is required or permitted to be supported, evidenced, established,
28 or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in
29 writing of the person making the same (other than a deposition, or an oath of office, or an oath
30 required to be taken before a specified official other than a notary public), such matter may, with
31 like force and effect, be supported, evidenced, established, or proved by the unsworn declaration,
32 certificate, verification, or statement, in writing of such person which is subscribed by him, as
33 true under penalty of perjury, and dated, in substantially the following form:
34

(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).”

(2) If 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).”

Appendix B. Identified State Laws Not as Suitable for Drafting Project

The twelve state laws, rules, and statutes in this section initially were eliminated because the form and construction of each was so uniquely different from the federal statute for a variety of reasons. However, during the course of drafting, these state laws, particularly the policy concerns addressed by the Texas laws, certainly do not need to be ignored all together.

Hawaii: HAW. CIR. CT. R. 7(g).

(g) Declaration in lieu of affidavit. In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

I, (name of person), do declare under penalty of law that the foregoing is true and correct.

Dated:

(Signature)

Research Commentary on the Hawaii Rule.

The Hawaii rule applies to procedures in the state’s circuit courts, enforcing the state’s perjury laws on unsworn declarations. It provides for a simple declaration, but does not provide a form for declarations made outside of the state.

Illinois: 735 ILL. COMP. STAT. ANN. 5/1-109.

§ 1-109. Verification by certification. Unless otherwise expressly provided by rule of the Supreme Court, whenever in this Code any complaint, petition, answer, reply, bill of particulars, answer to interrogatories, affidavit, return or proof of service, or other document or pleading filed in any court of this State is required or permitted to be verified, or made, sworn to or verified under oath, such requirement or permission is hereby defined to include a certification of such pleading, affidavit or other document under penalty of perjury as provided in this Section.

Whenever any such pleading, affidavit or other document is so certified, the several matters stated

1 shall be stated positively or upon information and belief only, according to the fact. The person or
2 persons having knowledge of the matters stated in a pleading, affidavit or other document
3 certified in accordance with this Section shall subscribe to a certification in substantially the
4 following form: Under penalties as provided by law pursuant to Section 1-109 of the Code of
5 Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true
6 and correct, except as to matters therein stated to be on information and belief and as to such
7 matters the undersigned certifies as aforesaid that he verily believes the same to be true.
8

9 Any pleading, affidavit or other document certified in accordance with this Section may be used
10 in the same manner and with the same force and effect as though subscribed and sworn to under
11 oath.
12

13 Any person who makes a false statement, material to the issue or point in question, which he does
14 not believe to be true, in any pleading, affidavit or other document certified by such person in
15 accordance with this Section shall be guilty of a Class 3 felony.
16

17 **Research Commentary on the Illinois Rule.**

18

19 The Illinois law is unique in its form and bears very little resemblance to the California
20 and federal statutes, which have been replicated by several other states. The Illinois code section
21 allows for the certification of the document/statement by the court where it is unsworn in civil
22 proceedings.
23

24 **Indiana: IND. R. CIV. P. 11.**

25 **Rule 11. Signing and verification of pleadings**

26

27 (A) Parties Represented by Attorney. Every pleading or motion of a party represented by an
28 attorney shall be signed by at least one [1] attorney of record in his individual name, whose
29 address, telephone number, and attorney number shall be stated, except that this provision shall
30 not apply to pleadings and motions made and transcribed at the trial or a hearing before the judge
31 and received by him in such form. A party who is not represented by an attorney shall sign his
32 pleading and state his address. Except when specifically required by rule, pleadings or motions
33 need not be verified or accompanied by affidavit. The rule in equity that the averments of an
34 answer under oath must be overcome by the testimony of two [2] witnesses or of one [1] witness
35 sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a
36 certificate by him that he has read the pleadings; that to the best of his knowledge, information,
37 and belief, there is good ground to support it; and that it is not interposed for delay. If a pleading
38 or motion is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken
39 as sham and false and the action may proceed as though the pleading had not been served. For a
40 wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.
41 Similar action may be taken if scandalous or indecent matter is inserted.
42
43
44

45 (B) Verification by affirmation or representation. When in connection with any civil or special
46 statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or
47 other document of any kind, be verified, or that an oath be taken, it shall be sufficient if the
48 subscriber simply affirms the truth of the matter to be verified by an affirmation or representation
49 in substantially the following language:
50

1 “I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.

2
3 (Signed) _____”
4

5 Any person who falsifies an affirmation or representation of fact shall be subject to the same
6 penalties as are prescribed by law for the making of a false affidavit.
7

8 (C) Verified pleadings, motions, and affidavits as evidence. Pleadings, motions and affidavits
9 accompanying or in support of such pleadings or motions when required to be verified or under
10 oath shall be accepted as a representation that the signer had personal knowledge thereof or
11 reasonable cause to believe the existence of the facts or matters stated or alleged therein; and, if
12 otherwise competent or acceptable as evidence, may be admitted as evidence of the facts or
13 matters stated or alleged therein when it is so provided in these rules, by statute or other law, or to
14 the extent the writing or signature expressly purports to be made upon the signer’s personal
15 knowledge. When such pleadings, motions and affidavits are verified or under oath they shall not
16 require other or greater proof on the part of the adverse party than if not verified or not under oath
17 unless expressly provided otherwise by these rules, statute or other law. Affidavits upon motions
18 for summary judgment under Rule 56 and in denial of execution under Rule 9.2 shall be made
19 upon personal knowledge.
20

21 **Research Commentary on the Indiana Law.**
22

23 The Indiana law is unique, as it provides guidance for special exceptions within Indiana
24 civil proceedings when the court accepts pleadings or motions from individuals who are not
25 represented by an attorney.
26

27
28 **Iowa: IOWA CODE § 622.1.**
29

30 **622.1. Certification under penalty of perjury**
31

32 1. When the laws of this state or any lawful requirement made under them requires or permits a
33 matter to be supported by a sworn statement written by the person attesting the matter, the person
34 may attest the matter by an unsworn written statement if that statement recites that the person
35 certifies the matter to be true under penalty of perjury under the laws of this state, states the date
36 of the statement’s execution and is subscribed by that person. This section does not apply to
37 acknowledgments where execution is required by law, to a document which is to be recorded
38 under chapter 558 or to a self-proved will under section 633.279, subsection 2.
39

40 2. The certification described in subsection 1 may be in substantially the following form:
41

42 I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding
43 is true and correct.
44

45 _____ Date
46 Signature
47

48 **Research Commentary on the Iowa Law.**
49

1 The Iowa law allows for unsworn statements in civil proceedings only. The Iowa law
2 excepts from application “acknowledgments where execution is required,” documents “to be
3 recorded,” and “a self-proved will.”

4 While the Iowa statute was eliminated mainly because of its uniqueness, the exceptions
5 are reflective of legal proceedings common in all states and will need to be considered when
6 drafting a uniform statute for state use.

8
9 **Maryland: MD. R. 1-202.**

10
11 **RULE 1-202. DEFINITIONS.**

12
13 In these rules the following definitions apply except as expressly otherwise provided or as
14 necessary implication requires:

15
16 **(b) Affidavit.** “Affidavit” means a written statement the contents of which are affirmed under the
17 penalties of perjury to be true. Unless the applicable rule expressly requires the affidavit to be
18 made on personal knowledge, the statement may be made to the best of the affiant’s knowledge,
19 information, and belief.

20
21 **Research Commentary on the Maryland Rule.**

22
23 The Maryland law was eliminated because, as is evident, it only provides the definition of
24 an affidavit for use in Maryland proceedings.

26
27 **Massachusetts: MASS. GEN. LAWS ANN. ch. 268, § 1A.**

28
29 1A. Statements containing declaration relative to penalties of perjury; verification; false
30 statements.

31
32 No written statement required by law shall be required to be verified by oath or affirmation before
33 a magistrate if it contains or is verified by a written declaration that it is made under the penalties
34 of perjury. Whoever signs and issues such a written statement containing or verified by such a
35 written declaration shall be guilty of perjury and subject to the penalties thereof if such statement
36 is wilfully false in a material matter.

37
38 **MASS. SUP. JUD. CT. R. 2:06.**

39
40 **RULE 2:06 ELIMINATING REQUIREMENT FOR VERIFICATION BY OATH OR**
41 **AFFIRMATION**

42
43 (Applicable to criminal cases.)

44
45 No written statement in any proceeding in this court required to be verified by affidavit shall be
46 required to be verified by oath or affirmation if it contains or is verified by a written declaration
47 that it is made under the penalties of perjury.

48
49 **MASS. SUP. JUD. CT. R. 15.**
50

1 RULE 15. ELIMINATING REQUIREMENT FOR VERIFICATION BY AFFIDAVIT

2
3 (Applicable to all cases)

4
5 No written statement in any proceeding in this court required to be verified by affidavit shall be
6 required to be verified by oath or affirmation if it contains or is verified by a written declaration
7 that it is made under the penalties of perjury.

8
9 **Research Commentary on the Massachusetts Laws.**

10
11 Massachusetts has a general law rule, a rule for criminal proceedings, and a rule for
12 criminal proceedings. Essentially, unsworn statement/declaration may be verified so long as they
13 are under penalty of perjury. However, because the Massachusetts laws are unique and bear no
14 similarity to the federal statute, they were eliminated.

15
16
17 **Minnesota: MINN. STAT. ANN. § 524.1-310.**

18 § 524.1-310. Verification of filed documents

19
20 Every document filed with the court under this chapter or chapter 525 shall be verified except
21 where the requirement of verification is waived by rule and except in the case of a pleading
22 signed by an attorney in accordance with the rules of civil procedure. Whenever a document is
23 required to be verified:

24 (1) such verification may be made by the unsworn written declaration of the party or parties
25 signing the document that the representations made therein are known or believed to be true and
26 that they are made under penalties for perjury, or

27
28 (2) such verification may be made by the affidavit of the party or parties signing the document
29 that the representations made therein are true or believed to be true.

30
31 A party who makes a false material statement not believing it to be true in a document the party
32 verifies in accordance with the preceding sentence and files with the court under this chapter or
33 chapter 525 shall be subject to the penalties for perjury.

34
35 **Research Commentary on the Minnesota Statute.**

36
37 The Minnesota statute allows for the unsworn declaration to be made under penalty of
38 perjury through verification of an affidavit. Though the Minnesota statute is unique in its
39 construction, it also is similar to all that have been eliminated and bears no similarity to the
40 federal statute.

41
42
43 **Missouri: MO. ANN. STAT. 509.30.**

44
45 509.30. Pleading attributed, by whom

46
47 Every pleading of a party represented by an attorney shall be attributed to at least one attorney of
48 record in his individual name, whose address shall be stated. A party who is not represented by an
49 attorney shall affix his name to his pleading and state his address. Except when otherwise
50 specifically provided by rule or statute, pleadings need not be verified or accompanied by
51 affidavit. Pleadings shall be attributed to a party or attorney or signed in the manner provided by

1
2
3
4
5
6 **Research Commentary on the Missouri Statute.**
7

8 The Missouri statute requires that every pleading be signed by an attorney except when a
9 pleading is submitted by a person not represented by counsel. The Missouri statute is unique and
10 not similar to the federal statute. Therefore, it is not recommended for use in drafting a uniform
11 law.
12

13
14 **New Jersey: N.J. R. GEN. APP. 1:4-4.**
15

16 **1:4-4. Affidavits**

17 **(a) Form.** Every affidavit shall run in the first person and be divided into numbered paragraphs as
18 in pleadings. The caption shall include a designation of the particular proceeding the affidavit
19 supports or opposes and the original date, if any, fixed for hearing. Ex parte affidavits may be
20 taken outside the State by a person authorized to take depositions under R. 4:12-2 and R. 4:12-3.
21

22 **(b) Certification in Lieu of Oath.** In lieu of the affidavit, oath or verification required by these
23 rules, the affiant may submit the following certification which shall be dated and immediately
24 precede the affiant's signature: "I certify that the foregoing statements made by me are true. I am
25 aware that if any of the foregoing statements made by me are wilfully false, I am subject to
26 punishment."
27

28 **(c) Facsimile Signature.** If the affiant is not available to sign an affidavit or certification, it may
29 be filed with a facsimile of the original signature provided the attorney offering the document
30 certifies that the affiant acknowledged the genuineness of the signature and that the document or
31 a copy with an original signature affixed will be filed if requested by the court or a party.
32

33 **Research Commentary on the New Jersey Rule.**
34

35 The New Jersey rule is unique in its form and not similar to the federal statute. The rule
36 allows for a facsimile signature where the affiant is unavailable.
37

38
39 **New York: N.Y. C.P.L.R. 2106.**
40

41 Rule 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist
42

43 The statement of an attorney admitted to practice in the courts of the state, or of a physician,
44 osteopath or dentist, authorized by law to practice in the state, who is not a party to an action,
45 when subscribed and affirmed by him to be true under the penalties of perjury, may be served or
46 filed in the action in lieu of and with the same force and effect as an affidavit.
47

48 **Research Commentary on the New York Rule.**
49

50 The New York rule is designed to allow the affirmation only by an attorney or physician
51 who is licensed to practice in the state. The rule is unique and not similar to the federal statute.

Pennsylvania: PA. R. CIV. P. 76.

Rule 76. Definitions

The following words and phrases when used in the Rules of Civil Procedure shall have the following meanings, respectively, unless the context clearly indicates otherwise or the particular word or phrase is expressly defined in the chapter in which the particular rule is included:

“affidavit,” a statement in writing of a fact or facts, signed by the person making it, that either (1) is sworn to or affirmed before an officer authorized by law to administer oaths, or before a particular officer or individual designated by law as one before whom it may be taken, and officially certified to in the case of an officer under seal of office, or (2) is unsworn and contains a statement that it is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities;

“verified,” when used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities;

Research Commentary on the Pennsylvania Law.

The definition of “affidavit” under the Pennsylvania Rules of Civil Procedure includes an unsworn statement that is made subject to the Commonwealth’s perjury laws. There is no specific statute, but instead an allowance of unsworn declarations/statements via the definitions section. Therefore, the Pennsylvania law was eliminated.

Texas: TEX. CIV. PRAC. & REM. CODE ANN. § 132.001 et seq.

§ 132.001. Use by Inmates in Lieu of Sworn Declaration

(a) Except as provided by Subsection (b), an unsworn declaration made as provided by this chapter by an inmate in the Texas Department of Corrections or in a county jail may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.

(b) This chapter does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public.

§ 132.002. Requirements of Declaration

An unsworn declaration made under this chapter must be:

- (1) in writing; and
- (2) subscribed by the person making the declaration as true under penalty of perjury.

§ 132.003. Form of Declaration

The form of a declaration under this chapter must be substantially as follows:

1 “I, (insert name and inmate identifying number from Texas Department of Corrections or
2 county jail), being presently incarcerated in (insert Texas Department of Corrections unit
3 name or county jail name) in _____ County, Texas, declare under penalty of
4 perjury that the foregoing is true and correct. Executed on (date). (signature)”
5

6 **Research Commentary on the Texas Statutes.**

7

8 The Texas laws are unique in that they are designed specifically for inmate civil
9 litigation. The laws are made applicable on an unsworn declaration made in writing and
10 subscribed to under penalty of perjury. The form declaration includes a requirement that the
11 place of incarceration and incarceration number be identified. While the Texas laws were
12 eliminated from consideration for drafting purposes, the fact that they are designed for inmate
13 litigation is certainly something drafters of a uniform law should consider when producing a law
14 for implementation by the states.
15

16 17 **Appendix C. State Statutes Similar to the California Statute.**

18

19 The six state laws in this appendix are all similar to the California and federal statutes.
20 They are included as reference for the committee to consider in the drafting of a uniform law.
21 These laws are listed in alphabetical order.
22

23 **Arizona: ARIZ. R. CIV. P. 80(i).**

24 Rule 80(i). Unsworn Declarations Under Penalty of Perjury
25

26 Wherever, under any of these rules, or under any rule, regulation, order, or requirement made
27 pursuant to these rules, any matter is required or permitted to be supported, evidenced,
28 established, or proved by the sworn written declaration, verification, certificate, statement, oath,
29 or affidavit of the person making the same (other than a deposition, or an oath of office, or an
30 oath required to be taken before a specified official other than a notary public), such matter may,
31 with like force and effect, be supported, evidenced, established, or proved by the unsworn written
32 declaration, certificate, verification, or statement, subscribed by such person as true under penalty
33 of perjury, and dated, in substantially the following form:
34

35 “I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and
36 correct. Executed on (date).
37

38 (Signature).”
39

40 **Research Commentary on the Arizona Statute.**

41

42 The Arizona statute contains the parenthetical exception consistently found in the
43 statutes. This statute, however, does not include a declaration form for unsworn declarations
44 made outside the state.
45

46 **Nevada: NEV. REV. STAT. § 53.045.**

47

48 53.045. Use of unsworn declaration in lieu of affidavit or other sworn declaration
49
50

Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form:

1. If executed in this State: “I declare under penalty of perjury that the foregoing is true and correct.”

Executed on.....(date).....(signature)

2. If executed outside this State: “I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.”

Executed on.....(date).....(signature)

Research Commentary on the Nevada Statute.

The Nevada statute does not contain the exception found in most of the statutes being considered in either parenthetical or other form. The statute does include declaration forms for unsworn declarations made in and outside of the state.

Oklahoma: OKLA. STAT. ANN. tit. 12 § 426.

§ 426. Statement under penalty of perjury

Whenever, under any law of Oklahoma or under any rule, order, or requirement made pursuant to the law of Oklahoma, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or any oath of office, or an oath required to be taken before a specified official other than a notary public), the matter may with like force and effect be supported, evidenced, established, or proved by the unsworn statement in writing of the person made and signed under penalty of perjury setting forth the date and place of execution and that it is made under the laws of Oklahoma. The statement under penalty of perjury may be substantially in the following form:

“I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

(Date and Place) (Signature)”

The signed statement under penalty of perjury shall constitute a legally binding assertion that the contents of the statement to which it refers are true. This section shall not affect any requirement for acknowledgment of an instrument affecting real property.

Research Commentary on the Oklahoma Statute.

The Oklahoma statute includes the parenthetical exception found in the California, federal, and several other statutes. Note also that where there is a specific acknowledgement requirement affecting real property, the statute does not apply.

1
2 **Virginia: VA. CODE ANN. § 8.01-4.3.**

3 § 8.01-4.3. Unsworn declarations under penalty of perjury; penalty

4
5 If a matter in any judicial proceeding or administrative hearing is required or permitted to be
6 established by a sworn written declaration, verification, certificate, statement, oath, or affidavit,
7 such matter may, with like force and effect, be evidenced, by the unsworn written declaration,
8 certificate, verification, or statement, which is subscribed by the maker as true under penalty of
9 perjury, and dated, in substantially the following form:

10
11 “I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and
12 correct.”

13
14 This section shall not apply to a deposition, an oath of office, or an oath required to be taken
15 before a specified official other than a notary public.

16
17 **Research Commentary on the Virginia Statute.**

18
19 The Virginia statute includes exceptions of depositions, oaths of office, and oaths
20 required before someone other than a notary public. The Virginia statute does not include
21 separate declaration forms for statements made in or outside the Commonwealth.

22
23
24 **Washington: WASH. REV. CODE ANN. § 9A.72.085.**

25 9A.72.085. Unsworn statements, certification

26
27 Whenever, under any law of this state or under any rule, order, or requirement made under the
28 law of this state, any matter in an official proceeding is required or permitted to be supported,
29 evidenced, established, or proved by a person’s sworn written statement, declaration, verification,
30 certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced,
31 established, or proved in the official proceeding by an unsworn written statement, declaration,
32 verification, or certificate, which:

33
34 (1) Recites that it is certified or declared by the person to be true under penalty of perjury;

35
36 (2) Is subscribed by the person;

37
38 (3) States the date and place of its execution; and

39
40 (4) States that it is so certified or declared under the laws of the state of Washington.

41
42 The certification or declaration may be in substantially the following form:

43
44 “I certify (or declare) under penalty of perjury under the laws of the State of Washington that the
45 foregoing is true and correct”:

46
47 (Date and Place) (Signature)

48
49 This section does not apply to writings requiring an acknowledgement, depositions, oaths of
50 office, or oaths required to be taken before a special official other than a notary public.

1 **Research Commentary on the Washington Statute.**

2
3 The Washington statute provides the elements and/or requirements for the statute's
4 applicability. *See* WASH. REV. CODE ANN. § 9A.72.085(1-4). The Washington statute does not
5 include separate declaration forms for statements made in or outside the state. The statute does
6 except depositions, oaths of office, and oaths to be taken before someone other than a notary
7 public.
8

9
10
11 **West Virginia: W. VA. CODE § 39-1-10a.**

12 § 39-1-10a. Verification by written statement under certain conditions

13
14 Any certificate, return, form, statement, or other document which is required by the State of West
15 Virginia, or any office, department or agency thereof, and which does not require an
16 acknowledgment under this article or other laws of recordation of the State of West Virginia, may
17 be verified by written declaration that it is made under the penalties of perjury and such
18 declaration shall be in lieu of any oath otherwise required.
19

20 Any person making any false statement in any certificate, return, statement, or other document
21 verified by such written declaration shall be subject to the same penalties as would be applicable
22 had the same been verified by oath duly taken and acknowledged.
23

24 **Research Commentary on the West Virginia Statute.**

25
26 As drafted, the West Virginia statute is applicable in state court and administrative
27 proceedings. The statute does not include the common exception found in many of the other
28 statutes. Also, the statute does not include separate declaration forms for statements made in or
29 outside the state.
30

31
32 **Appendix D. The American Bar Association Resolution and Report**

33
34 **AMERICAN BAR ASSOCIATION**
35 **ADOPTED BY THE HOUSE OF DELEGATES**
36 **February 13, 2006**
37 **RECOMMENDATION**

38
39 RESOLVED, That the ABA urges the adoption by states and territories of a uniform law
40 that would permit unsworn declarations under penalty of perjury to be executed by persons
41 located outside the United States in lieu of affidavits, verifications, or other sworn documents, as
42 is currently the federal practice under 28 U.S.C. §1746.
43

44 FURTHER RESOLVED, That this resolution be submitted to the National Conference of
45 Commissioners on Uniform State Laws.
46

47
48 **REPORT**
49

50 Access to embassies and consulates of the United States in foreign countries has become
51 a precious resource in the post-September 11, 2001 world. Increased security requirements have
52 resulted, in many countries, in a lengthy wait before visitors can even be screened by security,

1 much less enter the facility and see a representative of the United States. In a number of
2 countries, visitors must wait outside exposed to the elements before being screened by security.
3

4 An unanticipated result of these procedures concerns the role of U.S. consular officials as
5 notaries public abroad with respect to affidavits and other sworn statements for proceedings
6 before U.S. courts and agencies. In the past, the burden on foreign affiants willing voluntarily to
7 assist U.S. proceedings by supplying an affidavit was only slightly greater than that of those in
8 the United States: they would need to visit the local U.S. consulate to finalize their statement, as
9 opposed to the notary public at the local bank in the U.S., but it did not take long to enter the
10 consulate and have the affidavit notarized. Today's security requirements, however, mean that an
11 affidavit that previously could be notarized in an hour now can take a half-day or more.
12

13 Furthermore, many individuals residing abroad who are witnesses with knowledge of
14 facts relevant to a U.S. proceeding do not reside near a U.S. consulate, rendering use of consular
15 officials as notaries public impractical. These considerations demonstrate that a significant burden
16 exists on foreign affiants, creating a significant disincentive to provide assistance to U.S.
17 proceedings by foreign witnesses with information material to the matters at issue.
18

19 This impact, however, weighs much more heavily with respect to proceedings before
20 state courts and state agencies in the United States. Since 1976, federal law has permitted the use
21 of unsworn declarations under penalty of perjury as a substitute for affidavits in federal
22 proceedings. 28 U.S.C. § 1746 requires that in federal proceedings, such declarations containing
23 prescribed language will be accepted as the equivalent of affidavits. Knowledgeable federal
24 practitioners ask their foreign affiants to include the language suggested in section 1746 in their
25 declarations, thereby permitting them to avoid any trip to a consulate. The experience with
26 section 1746 has been a positive one, with complaints of perjury or other issues with
27

28 ¹ Section 1746 provides as follows :

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

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

41 (Signature)".

42 (2) If executed within the United States, its territories, possessions, or commonwealths: ``I
43 declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and
44 correct. Executed on (date).

45 (Signature)".
46

47 declarations under section 1746 no greater than with more traditional forms of sworn statements,
48 such as affidavits.
49

1 Most state courts that have addressed the question have held that section 1746 does not
2 apply in state court proceedings. See *O'Such v. State*, 423 So. 2d 317, 318-319 (Ala. Crim. App.
3 1982); *Bennett v. Weimar*, 975 P.2d 691, 695-696 (Alaska 1999); *Griffin v. State*, 2002 Tenn.
4 Crim. App. LEXIS 132, *5-6 (Tenn. Crim. App. 2002); *Guinn v. Bosque County, Texas*, 58
5 S.W.3d 194, 198-199 (Tex. App. – Waco 2001, pet. denied); *Staples v. Young*, 125 Wis. 578, 373
6 N.W.2d 89, 1985 Wisc. App. LEXIS 3588, *5 n. 2 (Wisc. App. 1985). Accordingly, section 1746
7 does not extend to affiants supporting state proceedings the convenience that the statute affords to
8 those in federal proceedings. This difference between federal and state proceedings benefits the
9 interests of neither the federal government, the states nor members of the bar and their clients.

10
11 The present state of affairs negatively impacts the interests of the federal government in
12 several respects. First, it imposes a needless burden on the resources of United States consular
13 facilities abroad. Foreign affiants that could otherwise make an unsworn declaration under
14 penalty of perjury for state proceedings are required to queue up, pass through security and take
15 the time of a consular officer for the ministerial act of notarizing their statement. Reducing the
16 numbers of such affiants visiting consular facilities would reduce the wait-times for U.S. citizens
17 requiring access to consular facilities and free up consular officers to devote more time to more
18 essential consular functions. Second, requiring foreign affiants to spend hours at the embassy for
19 a simple notarization reinforces negative impressions abroad of U.S. litigation. Such impressions
20 make more difficult the federal government's efforts to promote international judicial assistance
21 to and recognition of judgments rendered in U.S. court proceedings.

22
23 The present state of affairs also does not benefit the states. Affidavits are typically
24 supplied by voluntary witnesses who are under no compulsion to do so. The significant burden of
25 consular notification today means that fewer foreign witnesses are willing to provide information
26 important to proceedings before state courts or state agencies. The decreased flow of information
27 from abroad makes it harder to achieve justice in proceedings in state courts and state agencies at
28 a time when cases with transnational implications are becoming more and more common.

29
30 Finally, the present state of affairs benefits neither members of the bar nor their clients.
31 Where important witnesses are abroad, it is, for the reasons outlined above, harder today to obtain
32 evidence from them in a form usable in state proceedings. Resorting to compulsory methods for
33 obtaining evidence abroad is time-consuming and expensive. And for foreign clients, the burden
34 of participating in state proceedings is increased substantially.

35
36 We have analyzed the question of whether an amendment to 28 U.S.C. §1746 to make it
37 applicable to state proceedings with regard to declarations of witnesses located outside the United
38 States would be appropriate. However, research of the constitutional issues associated with such
39 an amendment revealed significant risk that such an amendment, modifying procedures
40 applicable in proceedings in state courts

41
42 ² A chart describing the current state statutes and rules that provide for some form of unsworn
43 declaration procedure is posted on the International Litigation Committee website, found at
44 <http://meetings.abanet.org/webupload/commupload/IC756000/newsletterpubs/unsworndecs.doc>

45
46 ³ This resolution does not address unsworn declarations subscribed or executed solely in an
47 electronic form.

48
49 ⁴ The proposed language for the uniform law is as follows :
50

1 Wherever, under any law of this state or under any rule, regulation, order, or
2 requirement made pursuant to law, any matter is required or permitted to be supported,
3 evidenced, established, or proved by the sworn declaration, verification, certificate,
4 statement, oath, or affidavit, in writing of the person making the same (other than a
5 deposition, or an oath of office, or an oath required to be taken before a specified official
6 other than a notary public), such matter may, with like force and effect, be supported,
7 evidenced, established, or proved by the unsworn declaration, certificate, verification, or
8 statement, in writing of such person, if such person at the time of execution of the
9 unsworn declaration, certificate, verification, or statement is located outside the United
10 States or its territories, possessions, or commonwealths, and if such unsworn declaration,
11 certificate, verification, or statement is subscribed by him, as true under penalty of
12 perjury, and dated, in substantially the following form:

13 “I declare (or certify, verify, or state) under penalty of perjury under the laws of
14 the State of _____ that the foregoing is true and correct. Executed on (date).
15 (Signature)”

16
17 and state agencies, would be beyond Congress’ constitutional power. Accordingly, the
18 recommendation proposes adoption of a uniform state law.
19

20 We have reviewed legislation that is already in place in the states that authorizes use of
21 unsworn declarations. There are at least 19 states that have adopted statutes or rules that provide
22 some form of unsworn declaration procedure. However, there are variations in language, and
23 some of the statutes apply only in specific situations, e.g., to inmates or to foreign service
24 personnel.² Others apply only to state court filings.
25

26 Because the interest in uniformity of state laws is most pressing in the context of
27 declarations executed outside the United States, the proposed uniform state law would apply only
28 in that context.³ Proposed text for the uniform law is set out in footnote 3 below.⁴
29

30 Respectfully Submitted,
31 Michael H. Byowitz, Chair
32

February 2006