



OREGON LAW COMMISSION

245 WINTER STREET SE
SALEM, OREGON 97301

PHONE 503-370-6973
FAX 503-370-3158
www.willamette.edu/wucl/olc

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UNSWORN FOREIGN DECLARATIONS ACT

Work Group Report

HB 2833

(with -1 amendment)

Proposal prepared by Chad Krepps
Oregon Law Commission
Law Clerk (2011)

Explanatory Report prepared by John D. Adams
Oregon Law Commission
Law Clerk (2012-13)

Approved by the
Oregon Law Commission on
April 1, 2013



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

I. Introduction:

The Uniform Law Commission (ULC) drafted and passed the Uniform Unsworn Foreign Declarations Act (Act) in 2008. The creation of the Act came as an effort to both harmonize the procedures of state courts with that of federal courts, as well facilitate the ability of declarants outside the United States to provide declarations or statements for use either (1) in U.S. court proceedings or (2) in non-court proceedings.

In Oregon, unsworn declarations may be used in both federal (28 U.S.C. 1746) and state court proceedings (ORCP 1E). Those declarations, if given under penalty of perjury, do not have to be in an affidavit or “sworn” in front of a notary or third person qualified to give an oath. Therefore, federal and Oregon law are consistent and permit those outside the United States to give testimony or provide a statement through a declaration without needing to provide the statement in an affidavit while under oath before a third party.

However, there may be instances under Oregon law where a formal affidavit under oath is required to accomplish an act in Oregon. For instance, certain state agencies require affidavits and do not provide for declarations. This proposed law will allow those abroad to provide a statement that is subject to penalty of perjury to be used in Oregon without having to go to a United States embassy to have the statement sworn to a third party.

II. Statement of the Problem:

Currently, under 28 U.S.C. 1746, unsworn foreign declarations are recognized in federal courts as valid and receive the same recognition as a sworn statement so long as the unsworn statement contains an affirmation that substantially meets the requirements set forth in the federal statute. Oregon law also allows for unsworn declarations to be admitted in Oregon court as long as the declaration is subject to penalty of perjury. *See* ORS 45.010 and ORCP 1E. However, there are instances under Oregon law where an affidavit, sworn before a third person, may be required. *See e.g.*, ORS 109.450; 109.460 (the Department of Human Services maintains a voluntary registry of adoption records open to those family members who provide an appropriate affidavit). The uniform act provides an easy solution that is recommended to all states.

Individuals in the U.S. routinely go to a notary public, often at a local bank, to get statements and declarations notarized – i.e. sworn. These statements are admissible in state and federal court. When overseas, there are no notary publics to visit. Instead, an individual in a foreign country must go to a U.S. consulate or embassy and give their sworn statement in the same manner that an individual living in the U.S. can go to a notary public. Such sworn statement is equally admissible in a federal court as in a state court. After 9/11, access to U.S. consulates or embassies, even for American citizens living abroad, has been greatly curtailed. This has made it increasingly difficult for properly sworn statements to be made. Due to the existence of § 1746, this limited access to consulates and embassies has not had as significant an impact on federal

proceedings as it has to state proceedings. However, with limited access to authorized officials in US consulates and embassies, it is increasingly difficult for foreign declarants to provide admissible declarations to state proceedings. This act allows a foreign declarant, so long as they meet its requirements, to provide an admissible declaration to a state proceeding without needing to access U.S. officials authorized to administer an oath.

III. History of the Project:

The Oregon Law Commission (the Commission) has reviewed and recommended several previous acts from the Uniform Law Commission (ULC), also known as the National Conference of Commissioners for Uniform State Laws. The goal of the ULC is to harmonize state laws; this Act seeks to harmonize state laws, as well as harmonize state court and federal court procedures.

Since its approval by the ULC in 2008, this Act has been enacted in the following seventeen states: Alabama, Colorado, Connecticut, Delaware, District of Columbia, Indiana, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, Washington, and Wisconsin. This year, Idaho, Nebraska, and Massachusetts have also introduced the Act in legislative bill form; in Idaho, the Act was introduced as a court rule. Washington enacted the Uniform Unsworn Foreign Declarations Act in 2011. In short, Oregon's neighboring states, save California, have either enacted the uniform act or are in the process of doing so. Washington House Bill 1345 passed without amendment and featured language identical to that of the uniform act, save portions intended to be inserted to reference state statutes.

In federal courts, proper unsworn foreign declarations have been as valid as sworn statements since 1976. At that time, the U.S. Congress enacted 28 U.S.C. § 1746, which expanded the use of unsworn declarations.

Since the Act does not conflict with Oregon law and is seen as noncontroversial, the Commission did not create a work group for this project and bill. Instead, the Commission submitted the Act to the Legislative Counsel's office to draft into a bill. Commissioners Lane Shetterly and Scott Shorr along with Commission staff reviewed the request to Legislative Counsel and reviewed the bill.

IV. Section by Section Analysis and Explanation of the HB 2833:

Section 1. Short title: This section formally identifies sections 1 through 8 of the bill as the content identified as the Uniform Unsworn Foreign Declarations Act.

Section 2. Definitions: Section 2 sets out the definitions of the terms of art and other important terms. These definitions control for the content of the Act only; however, later sections of HB 2833 update statutory definitions at ORS 162.055 for the laws of criminal perjury (ORS 162.065) and false swearing (ORS 162.075).

Section 3. Applicability: This section limits the Act’s applicability to declarants who make unsworn declarations while outside the boundaries of the United States. While in the United States, declarants may use notary publics.

Section 4. Validity of unsworn declaration: Section 4 establishes that an unsworn statement is entitled to the same recognition for situations that requires or permits the use of a sworn statement, as long as the statement complies with all of the requirements set out in sections 1 through 8 of this Act. Affidavits are one example of commonly used sworn statements. Subsection 2 of this section lists the exceptions for which an unsworn statement will NOT suffice in place of a sworn statement: in depositions, taking an oath of office, an oath required before an official other than a notary public, declarations to be recorded pursuant to Oregon’s property recording laws, and for oaths required for a witness attesting to a will.

Section 4 also has the only two substantial instances of Oregon law being added to the uniform act. The ULC directs adopting states to insert the appropriate sections of state real estate law and will attesting as exceptions. For Oregon, the needed recording law cross-reference is “the recording laws of this state, including but not limited to ORS 205.130 and ORS chapters 92, 93, 94, 100 and 105.” This exception is in Section 4(2)(d) of the bill. The exception for attesting witnesses to a will is made by referencing ORS 113.055 and is in Section 4(2)(e) of the bill.

Section 5. Required medium: This section merely directs that an unsworn statement must be presented in the same medium, if Oregon law requires a specific medium, as an acceptable sworn statement.

Section 6. Form of unsworn declaration: Section 6 sets out a sample form for recording an unsworn statement and specifies that the declaration must be made under penalty of perjury. Section 6 provides that the unsworn declaration must be in substantially the same form as the sample form.

Section 7. Uniformity of application and construction: This section speaks to the presumption of interpreting the Act in a manner that promotes uniformity among the states that enacted the Act. An effort to promote uniformity of interpretation is made in all of the ULC’s uniform laws with this type of provision. This provision essentially directs courts and practitioners to look to how other states are interpreting the Act and to strive for consistency.

Section 8. Relation to Electronic Signatures in Global and National Commerce Act: This section addresses the possible preemption of state law under the federal Electronic Signatures in Global and National Commerce Act. This section specifically avoids the preemption of state law that would otherwise occur under this federal statute.

Sections 9-17. Conforming Amendments: These sections acknowledge that ORCP 1E already permits unsworn declarations in lieu of any affidavit required or allowed by the Oregon Rules of Civil Procedure. Conforming changes are made in these sections to allow this bill’s new procedure to be used when appropriate too – as an alternative to the ORCP 1E method when the declarant is outside the U.S.

Section 18. Perjury: This section is outside the substantive content of the uniform Act, but is necessarily included in the bill so that the current definition section within Oregon’s “Perjury and Related Offenses” section, found at ORS 162.055, is updated and conforms to the bill to include a statutory definition for “unsworn declaration.” The new definition is found at ORS 162.055(5).

Section 19. Perjury: Like section 18, this section is also outside the substantive content of the uniform Act, but is included in the bill to add “or a false unsworn declaration” to Oregon’s perjury statute so that perjury occurring in an unsworn statement can be prosecuted with the same force of law as a sworn statement.

Section 20. Perjury: Like sections 18 and 19, this section makes an Oregon conforming amendment to add “or a false unsworn declaration” to the false swearing statute so that the act of stating a falsehood in an unsworn statement can be prosecuted with the same force of law as a sworn statement.

Section 21. Captions: This section merely provides that the captions in the Act are for the reader’s convenience and do not become part of statutory law. This is a standard Legislative Counsel provision.

Section 22. Operative Date: This section is included to prevent any possible ex post facto application of the modifications to ORS 162.055, 162.065, and 162.075. That is, the amended criminal provisions only apply to unsworn declarations made after the effective date of the Act. The new provision and the amended provision apply to unsworn declarations made on or after the effective date of the bill.

V. Conclusion:

The Uniform Unsworn Foreign Declarations Act is an uncontroversial but helpful tool that would harmonize Oregon state courts with the federal courts by allowing more flexibility for declarants to make unsworn declarations while outside of the United States. The Act fits within current Oregon law with only minor adjustments to definitions and does not present a change to the rights of parties in litigation. The Act merely alleviates some of the difficulties experienced by declarants outside the United States who face adversity in seeking to have their statements officially sworn via consular officials. This procedure should not increase the number of statements made – rather it simply will change form – from sworn to unsworn.

VI. Appendix:

The Uniform Unsworn Foreign Declarations Act with comments is attached.

APPENDIX

**UNIFORM UNSWORN FOREIGN
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

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
IN BIG SKY, MONTANA
JULY 18 – 25, 2008

WITHOUT PREFATORY NOTE OR COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 8, 2008

UNIFORM UNSWORN FOREIGN DECLARATIONS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “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.

(4) “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.

(5) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

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

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

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

country or a federally recognized Indian tribe.

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 pursuant to [insert appropriate section of state's real estate law]; or
- (5) an oath required by [insert appropriate section of state's law relating to self-proved wills].

Legislative Note: *Enacting states will need to ensure that the perjury laws of the enacting state include 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 that medium.

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 enacting state] that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

Executed on the ____ day of _____, _____, at _____,
(date) (month) (year) (city or other location, and state)

(country)

(printed name)

(signature)

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

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.

SECTION 8. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal 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).

SECTION 9. REPEALS. The following are repealed: _____.

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