AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 13, 2006

RECOMMENDATION

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

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

REPORT

Access to embassies and consulates of the United States in foreign countries has become a precious resource in the post-September 11, 2001 world. Increased security requirements have resulted, in many countries, in a lengthy wait before visitors can even be screened by security, much less enter the facility and see a representative of the United States. In a number of countries, visitors must wait outside exposed to the elements before being screened by security.

An unanticipated result of these procedures concerns the role of U.S. consular officials as notaries public abroad with respect to affidavits and other sworn statements for proceedings before U.S. courts and agencies. In the past, the burden on foreign affiants willing voluntarily to assist U.S. proceedings by supplying an affidavit was only slightly greater than that of those in the United States: they would need to visit the local U.S. consulate to finalize their statement, as opposed to the notary public at the local bank in the U.S., but it did not take long to enter the consulate and have the affidavit notarized. Today's security requirements, however, mean that an affidavit that previously could be notarized in an hour now can take a half-day or more. Furthermore, many individuals residing abroad who are witnesses with knowledge of facts relevant to a U.S. proceeding do not reside near a U.S. consulate, rendering use of consular officials as notaries public impractical. These considerations demonstrate that a significant burden exists on foreign affiants, creating a significant disincentive to provide assistance to U.S. proceedings by foreign witnesses with information material to the matters at issue.

This impact, however, weighs much more heavily with respect to proceedings before state courts and state agencies in the United States. Since 1976, federal law has permitted the use of unsworn declarations under penalty of perjury as a substitute for affidavits in federal proceedings. 28 U.S.C. § 1746 requires that in federal proceedings, such declarations containing prescribed language will be accepted as the equivalent of affidavits.[1] Knowledgeable federal practitioners ask their foreign affiants to include the language suggested in section 1746 in their declarations, thereby permitting them to avoid any trip to a consulate. The experience with section 1746 has been a positive one, with complaints of perjury or other issues with

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[1] Section 1746 provides as follows :

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

  (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).

<div align="center">(Signature)".</div>

  (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).

<div align="center">(Signature)".</div>

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

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

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

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

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

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

and state agencies, would be beyond Congress' constitutional power. Accordingly, the recommendation proposes adoption of a uniform state law.

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

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

Respectfully Submitted,
Michael H. Byowitz, Chair

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

[3] This resolution does not address unsworn declarations subscribed or executed solely in an electronic form.

[4] The proposed language for the uniform law is as follows :

> Wherever, under any law of this state or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person, if such person at the time of execution of the unsworn declaration, certificate, verification, or statement is located outside the United States or its territories, possessions, or commonwealths, and if such unsworn declaration, certificate, verification, or statement is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> "I declare (or certify, verify, or state) under penalty of perjury under the laws of the State of _____ that the foregoing is true and correct. Executed on (date).
>
> (Signature)"