

OATH AND AFFIRMATION

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Scope

This article discusses generally the nature and function of oaths and affirmations, the capacity to take them, their administration by particular persons or entities, and their form and sufficiency.

Federal Aspects

Statutes authorizing certain judicial officers to administer oaths and affirmations are discussed in this article. See "Statutory References" for a list of U.S.C.A. provisions discussed herein.

Treated Elsewhere

Acknowledgments, function and administration of, see Am. Jur. 2d, Acknowledgments

Administration of oath or affirmation in making affidavits, see Am. Jur. 2d, Affidavits § 7; Jurat portion of affidavit, see Am. Jur. 2d, Affidavits § 10

Administrative and quasi-judicial bodies, authority to administer oaths with respect to, see Am. Jur. 2d, Administrative Law § 344; The Administrator of the Veterans' Administration and those to whom he or she delegates such authority, see Am. Jur. 2d, Veterans and Veterans' Laws § 26; Arbitrators, see Am. Jur. 2d, Alternative Dispute Resolution §§ 179, 224; Immigration and Naturalization Service, see Am. Jur. 2d, Aliens and Citizens § 95; Federal Energy Regulatory Commission power to administer oath, see Am. Jur. 2d, Public Utilities § 208

Arrest warrant, oath or affirmation to support, see Am. Jur. 2d, Arrest §§ 18, 19

Attachment, oaths involved in, see Am. Jur. 2d, Attachment and Garnishment § 286

Bankruptcy proceedings, oaths involved in, see Am. Jur. 2d, Bankruptcy §§ 165, 219, 229, 415, 417, 944, 953, 962, 973, 3238 to 3241

Competency of person to take oath, see Am. Jur. 2d, Evidence § 859

Confessions made under oath, see Am. Jur. 2d, Evidence § 759

Congressional officers empowered to administer oath, see Am. Jur. 2d, United States § 18

Contempt, violation of oath by grand juror as, see Am. Jur. 2d, Contempt § 118; Perjury as contempt, see Am. Jur. 2d, Contempt § 80

Corporation's power to take oath, see Am. Jur. 2d, Corporations § 2119; Oath of inspectors of elections at corporate shareholder meetings, see Am. Jur. 2d, Corporations § 1010

Depositions, oaths regarding, Am. Jur. 2d, Depositions and Discovery §§ 18, 80, 89, 113, 125, 127, 130, 217, 233

Extradition, oath for complaints accompanying requests for international extradition, Am. Jur. 2d, Extradition § 50

Failure of election officer to take oath not negation of result of bond election, see Am. Jur. 2d, Public Securities and Obligations § 150

Federal judges, oath of office for, see Am. Jur. 2d, Federal Courts § 26

Federal tax enforcement matters involving oaths and affirmations, see Am. Jur. 2d, Federal Tax Enforcement §§ 2, 4

Hearsay statements made under oath, see Am. Jur. 2d, Evidence §§ 658, 661, 675 to 677

Indictment, oath or affirmation supporting, see Am. Jur. 2d, Indictments and Informations §§ 86 to 89; Dismissal for failure to swear or irregularity in swearing witnesses, see Am. Jur. 2d, Indictments and Informations § 244

License applications submitted under Atomic Energy Act, oath or affirmation requirements as to, see Am. Jur. 2d, Energy and Power Sources § 99

Oaths of particular persons, officers, and public officers, see Am. Jur. 2d, Attorney General § 45 (assistants, deputies, and special counsel); see Am. Jur. 2d, Attorneys at Law § 16; see Am. Jur. 2d, Jury §§ 216 to 224; see Am. Jur. 2d, Coroners § 14 (coroner's jury); see Am. Jur. 2d, Grand Jury §§ 17, 26, 40; see Am. Jur. 2d, Judges §§ 11, 252; see Am. Jur. 2d, Clerks of Court §§ 3, 41, 42; see Am. Jur. 2d, Public Officers and Employees §§ 124 to 127; see Am. Jur. 2d, Notaries Public § 18

Search or wiretapping warrant, oath or affirmation to support, see Am. Jur. 2d, Searches and Seizures §§ 1, 175, 178, 363, 364

United States Supreme Court, oath of attorneys to practice before, Am. Jur. 2d, Federal Courts § 554

Verification of pleadings, see Am. Jur. 2d, Pleading §§ 888 to 898

War, examination on oath of master or crew upon standing interrogatories, Am. Jur. 2d, War § 104

Willful and corrupt false swearing or affirming after an oath lawfully administered, in the course of a judicial or quasi-judicial proceeding, see Am. Jur. 2d, Perjury

Wills, oaths regarding, see Am. Jur. 2d, Wills §§ 200, 801

Zoning, sworn testimony taken at hearing before board of adjustment, appeal, or review, see Am. Jur. 2d, Zoning § 790

Research References

West's Digest References

Oath

Annotation References

L.R. Digest: Oath

L.R. Index: Oath and Affirmation

Forms References

BB Am. Jur. Legal Forms 2d, Oath and Affirmation

BB Am. Jur. Pleading and Practice Forms, Oath and Affirmation

Trial Strategy References

Proof of Matters by Judicial Notice, 60 Am. Jur. Proof of Facts 3d 175

Statutory References

5 U.S.C.A. § 2903

28 U.S.C.A. § 459

28 U.S.C.A. § 636

28 U.S.C.A. § 953

28 U.S.C.A. § 1746

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I. IN GENERAL (§§ 1 TO 6)

A. DEFINITIONS AND DISTINCTIONS (§§ 1 TO 4)

B. FUNCTIONS OF OATH OR AFFIRMATION (§§ 5 TO 6)

II. CAPACITY TO TAKE OATH OR AFFIRMATION (§§ 7 TO 9)

III. ADMINISTRATION BY PARTICULAR PERSONS OR ENTITIES (§§ 10 TO 15)

A. AUTHORITY TO ADMINISTER (§§ 10 TO 14)

B. DUTY TO ADMINISTER (§ 15)

IV. FORM AND SUFFICIENCY (§§ 16 TO 23)

A. REQUIREMENTS FOR VALID OATH OR AFFIRMATION (§§ 16 TO 19)

B. OTHER MATTERS AFFECTING VALIDITY OF OATH OR AFFIRMATION (§§ 20 TO 22)

C. PRESUMPTION OF PROPER ADMINISTRATION (§ 23)

I. IN GENERAL

A. DEFINITIONS AND DISTINCTIONS

§ 1 Oath

§ 2 Affirmation

§ 3 Affidavit

§ 4 Acknowledgment

B. FUNCTIONS OF OATH OR AFFIRMATION

- § 5 To bind conscience
 § 6 To permit prosecution for perjury

II. CAPACITY TO TAKE OATH OR AFFIRMATION

- § 7 Generally
 § 8 Necessity of religious belief
 § 9 Taking of oath by representative

III. ADMINISTRATION BY PARTICULAR PERSONS OR ENTITIES

A. AUTHORITY TO ADMINISTER

- § 10 Courts; clerks of court
 § 11 Interested persons
 § 12 —Attorneys
 § 13 Local officials authority under federal law
 § 14 Judicial notice of authority of officers within jurisdiction

B. DUTY TO ADMINISTER

- § 15 Generally

IV. FORM AND SUFFICIENCY

A. REQUIREMENTS FOR VALID OATH OR AFFIRMATION

- § 16 Generally; unequivocal act
 § 17 Presence of authorized official
 § 18 —Validity of oath by telephone
 § 19 Administration within official's territorial jurisdiction

B. OTHER MATTERS AFFECTING VALIDITY OF OATH OR AFFIRMATION

- § 20 Strict compliance with formalities, generally
 § 21 Touching or kissing Bible
 § 22 Holding up hand

C. PRESUMPTION OF PROPER ADMINISTRATION

- § 23 Generally

I. IN GENERAL

A. DEFINITIONS AND DISTINCTIONS

Research References

West's Digest References
 Oath ⇨ 1, 4

Annotation References

A.L.R. Digest: Oath § 1
 A.L.R. Index: Oath and Affirmation

Forms References

13B Am. Jur. Legal Forms 2d, Oath and Affirmation §§ 189:11 to 189:21
 13B Am. Jur. Pleading and Practice Forms, Oath and Affirmation §§ 3 to 17

§ 1 Oath

Research References

West's Key Number Digest, Oath ⇨ 1
 Oath of witness, interpreter, juror, and others. 13B Am. Jur. Pleading and Practice Forms, Oath and Affirmation §§ 3 to 14
 General forms of oaths. 13B Am. Jur. Legal Forms 2d, Oath and Affirmation §§ 189:11 to 189:21

An oath is a declaration of the truth of a statement,¹ which may be either written or oral.² It has also been said that an oath is a matter of substance, not form, and that it is an essential component of the Fourth Amendment and legal proceedings.³ It is solemn,⁴ and formal,⁵ manifesting an intent to be bound by the statement,⁶ and signifying the undertaking of an obligation to speak the truth at a time when testimony may deeply affect the rights and the character of individuals.⁷

[Section 1]

¹In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984); State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985); Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979); Spradling v. Hutchinson, 162 W. Va. 768, 253 S.E.2d 371 (1979).

"Oath" is affirmation of the truth of statement, which renders one willfully asserting an untruth punishable for perjury. Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

²State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980).

³State v. Tye, 248 Wis. 2d 530, 2001 WI 124, 636 N.W.2d 473 (2001).

⁴In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984); State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980); Hroneck v. People,

134 Ill. 139, 24 N.E. 861 (1890); State v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (App. Div. 1978), certification granted, cause remanded on other grounds, 79 N.J. 485, 401 A.2d 241 (1979); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973); Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

⁵State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

⁶Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

⁷State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980); State v. Grant, 176 Conn. 17, 404 A.2d 873 (1978).

◆ **Observation:** "Verification" is a confirmation of correctness, truth, or authenticity, by affidavit, oath, or deposition, or an affidavit of the truth of the matter stated.⁸

In its strict sense the term refers to an attestation that is coupled with an invocation to the Supreme Being to witness the words of the attesting party and to visit him or her with judgment if the words be false.⁹ In its more general sense, an oath is any form of attestation by which a person signifies that he or she is bound in conscience to perform an act faithfully and truthfully,¹⁰ regardless of whether or not that attestation invokes the Supreme Being or is accompanied by conditional self-cursing.¹¹ In this more general sense of the word, "oath" is synonymous with "affirmation," which does not involve a reference to God.¹² Thus, "oath" has been construed to include "affirmation" in cases where, by law, an affirmation may be substituted for an oath.¹³ The word "oath" has also been construed to include "certification" and "swearing."¹⁴

◆ **Observation:** The oath taken by a witness is just one of the various types of oath that exist. There is also the oath of an affiant to attest the truth of a writing, and the qualifying oath juramentum promissionis, which is a pledge or promise taken by one chosen to perform some duty.¹⁵

§ 2 Affirmation

Research References

West's Key Number Digest, Oath ◀4

Affirmation of witness, interpreter, juror, and others. 18B Am. Jur. Pleading and Practice Forms, Oath and Affirmation, Form 3 to 17

General form of affirmation. 13B Am. Jur. Legal Forms 2d, Oath and Affirmation § 189:12

An affirmation, like an oath, is a declaration of the truth of a statement¹

⁸In re Petition for Writ of Certiorari as to Determination of Election on Brookings School District's Decision to Raise additional General Fund, 2002 SD 85, 649 N.W.2d 581 (S.D. 2002).

⁹In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984); Asher v. Sizemore, 261 S.W.2d 665 (Ky. 1953); Rousseau v. Democratic Parish Executive Committee for Parish of St. Martin, 164 So. 175 (La. Ct. App. 1st Cir. 1935); Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927); Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

¹⁰Asher v. Sizemore, 261 S.W.2d 665 (Ky. 1953); People v. Pribble, 72 Mich. App. 219, 249 N.W.2d 363 (1976); State v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (App. Div.

1978), certification granted, cause remanded on other grounds, 79 N.J. 485, 401 A.2d 241 (1979).

¹¹In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985).

¹²As to a discussion of the affirmation, see § 2.

¹³Bram v. U.S., 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897); Spradling v. Hutchinson, 162 W. Va. 768, 253 S.E.2d 371 (1979).

¹⁴Spradling v. Hutchinson, 162 W. Va. 768, 253 S.E.2d 371 (1979).

¹⁵Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

[Section 2]

¹State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980); Spradling v. Hutchinson, 162 W. Va. 768, 253 S.E.2d 371 (1979).

which may be either written or oral.² While an oath, in its strict sense, involves the idea of calling on God to witness what is averred as truth,³ an affirmation is an undertaking to tell the truth equally as solemn as the oath, but does not invoke the Deity.⁴ An affirmation may usually be interchanged for an oath where there is an expression of conscientious scruples against taking an oath.⁵ "Affirmation" has been construed to be included in the term "oath" where, by law, an affirmation may be substituted for an oath.⁶

§ 3 Affidavit

Research References

West's Key Number Digest, Oath ◀4

An oath, which has been defined as any form of attestation by which a person signifies that he or she is bound in conscience to perform an act faithfully and truthfully,¹ is distinguishable from an affidavit, which is a voluntary written statement of fact under oath sworn to or affirmed by the person making it before some person who has authority under the law to administer oaths and officially certified by the officer under his or her seal of office.² The difference between an affidavit and an oath is that an affidavit consists of a statement of fact, which is sworn to as the truth, while an oath is a pledge.³

Where an affidavit is required in support of or in opposition to a motion, a statement made under oath may be considered by the court as equivalent of an affidavit.⁴

§ 4 Acknowledgment

Research References

West's Key Number Digest, Oath ◀4

There is a vital distinction between an oath and an acknowledgment. As a general rule, an acknowledgment constitutes a formal statement of the person executing an instrument that he or she executed the instrument as a

²State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980).

³§ 1.

⁴State v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (App. Div. 1978), certification granted, cause remanded on other grounds, 79 N.J. 485, 401 A.2d 241 (1979); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

⁵Citizens for Incorporation, Inc. v. Board of County Com'rs of County of Bernalillo, 115 N.M. 710, 858 P.2d 86 (Ct. App. 1993); Oliver v. State Tax Com'n of Missouri, 37 S.W.3d 243 (Mo. 2001).

Notaries public and other officers autho-

rized to administer oaths ought to reasonably accommodate an affiant's refusal, on religious grounds, to swear an "oath" or "affirmation" in connection with his affidavit. Scott v. State, 80 S.W.3d 184 (Tex. App. Waco 2002), reh'g overruled, (July 17, 2002).

⁶§ 1.

[Section 3]

¹§ 1.

²Am. Jur. 2d, Affidavits § 1.

³June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938); Vaughn v. State, 146 Tex. Crim. 586, 177 S.W.2d 59 (1943).

⁴Small v. Frank, 153 L.R.R.M. (BNA) 2480, 1996 WL 426539 (E.D. Pa. 1996).

free deed and act;¹ an oath, on the other hand, signifies the undertaking of an obligation to speak the truth at a time when testimony may deeply affect the rights and the character of individuals.² Consequently, the protection afforded by an application sworn to provides greater protection than an application merely acknowledged, for the oath imposes upon the applicant greater responsibility.³

B. FUNCTIONS OF OATH OR AFFIRMATION

Research References

West's Digest References

Oath ◊1

Annotation References

A.L.R. Digest: Oath § 1

A.L.R. Index: Oath and Affirmation

§ 5 To bind conscience

Research References

West's Key Number Digest, Oath ◊1

The requirement of an oath is not a mere technicality.¹ Its administration, in legal form, is regarded not only as the highest test of truth, but as an instrument appropriated by the law for the ascertainment of the truth in judicial investigations.² The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth,³ and to ensure that the affiant consciously recognizes his or her legal obligation to tell the truth.⁴ Thus, the function of an oath is to bind the con-

[Section 4]

¹H. A. M. S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258 (Alaska 1977), order supplemented, 566 P.2d 1012 (Alaska 1977) (an acknowledgment is a method of authenticating an instrument by showing that it was the act of the person executing it, as distinguished from a sworn statement of the truth of the facts stated in the instrument); State v. Grant, 176 Conn. 17, 404 A.2d 873 (1978).

As to the nature of acknowledgments, generally, see Am. Jur. 2d, Acknowledgments § 1, 2.

²§ 1.

³State v. Grant, 176 Conn. 17, 404 A.2d 873 (1978).

Signed statement containing notice of

penalty for making false statement is the equivalent of statement made under oath. People v. McCulloch, 226 A.D.2d 848, 640 N.Y. S.2d 914 (3d Dep't 1996).

[Section 5]

¹Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979).

²Mattox v. Bays, 35 Ky. 461, 5 Dana 461, 1837 WL 2105 (1837).

³State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999); State v. Tye, 248 Wis. 2d 530, 2001 WI 124, 636 N.W.2d 473 (2001).

⁴In re State, 144 N.H. 85, 736 A.2d 1242 (1999); State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).

science of the speaker at a time when what he says will deeply affect the rights of an individual.⁵

The affirmation has the same purpose: to bind the conscience.⁶ The only difference is that the affirmation does not impress the person who takes the oath with a sense of *religious* obligation.⁷

§ 6 To permit prosecution for perjury

Research References

West's Key Number Digest, Oath ◊1

The administering of an oath has another purpose besides that of binding a person's conscience:¹ it is to make the person who takes an oath or affirmation amenable to prosecution if perjured testimony is given.² The key to a valid oath is that perjury will lie for its falsity, and it is essential to the offense of perjury that the statement considered perjurious be given under an oath actually administered.³ However, an oath not authorized by law is extrajudicial and of no binding force.⁴

II. CAPACITY TO TAKE OATH OR AFFIRMATION

Research References

West's Digest References

Oath ◊1

Annotation References

A.L.R. Digest: Oath § 2

A.L.R. Index: Oath and Affirmation

⁵Brummer v. Stokebrand, 1999 SD 137, 601 N.W.2d 619 (S.D. 1999).

⁶State v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (App. Div. 1978), certification granted, cause remanded on other grounds, 79 N.J. 485, 401 A.2d 241 (1979).

⁷§ 2.

[Section 6]

¹§ 5.

²In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985); Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979); Citizens for Incorporation, Inc. v. Board of County Com'rs of County of Bernalillo, 115 N.M. 710, 858 P.2d 86 (Ct. App. 1993); State ex rel. Ross v. King, 70 Ohio L. Abs. 554, 129 N.E.2d 103 (C.P. 1955); Brummer v. Stokebrand, 1999 SD 137, 601 N.W.2d 619

(S.D. 1999); Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

Generally, a statement is properly sworn if the person giving the statement would be subject to prosecution for perjury if the statement were fabricated. State v. Knight, 128 N.M. 591, 2000 NMCA-016, 995 P.2d 1033 (Ct. App. 2000), cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

As to the crime of perjury, see Am. Jur. 2d, Perjury.

³Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985).

As to the elements essential to a valid oath, see §§ 16 et seq.

⁴State v. Bowman, 90 Me. 363, 38 A. 331 (1897).

As to the fact that the form in which an oath is administered does not affect its sufficiency for the purpose of basing thereon a charge of perjury, see § 20.

§ 7 Generally

Research References

West's Key Number Digest, Oath ⇨1

The competency of a person to take a prescribed oath is a question for the court, and the burden of proof rests upon the objector.¹ A witness must be sensible to the obligation of an oath before he or she can be permitted to testify.² Thus, an infant who does not understand the obligation of an oath may be excluded from testifying in court.³

§ 8 Necessity of religious belief

Research References

West's Key Number Digest, Oath ⇨1

Where an oath is strictly defined as an undertaking to tell the truth coupled with an appeal to God,¹ it becomes readily apparent that one cannot take an oath without believing in God.² However, it is not an abuse of discretion to admit the testimony of a witness who swore an oath to God even though the witness was an atheist, where the witness stated that he took the oath seriously, that he respected the oath, and that he was telling the truth to the best of his ability.³ Moreover, an oath required by statute may be nonetheless valid without having been made expressly to God, where the oath meets the statutory purpose of ensuring that the affiant consciously recognizes his or her obligation to tell the truth despite the failure of the administering judge to use the words "So help you God."⁴ Finally, for those who are unable to take the oath because of a lack of religious belief, the affirmation is available in most jurisdictions as an alternative.⁵

§ 9 Taking of oath by representative

Research References

West's Key Number Digest, Oath ⇨1

The taking of an oath is a personal matter, and it cannot be taken or subscribed in a representative capacity.¹ It is an act which may not be delegated to an agent, for by its very definition, an oath must be administered

[Section 7]

¹Birmingham Ry., Light & Power Co. v. Jung, 161 Ala. 461, 49 So. 434 (1909); State v. Walton, 72 N.J. Super. 527, 179 A.2d 78 (County Ct. 1962).

²Am. Jur. 2d, Witnesses § 164.

³Am. Jur. 2d, Evidence § 859.

[Section 8]

¹§ 1.

²Hroneck v. People, 134 Ill. 139, 24 N.E. 861 (1890) (holding that any person who

believes in God is capable of taking a binding oath, whatever his or her creed).

³U.S. v. Saget, 991 F.2d 702, 37 Fed. R. Evid. Serv. 643 (11th Cir. 1993).

⁴State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).

⁵§ 2.

[Section 9]

¹Bourgeois v. Szadoff, 209 So. 2d 320 (La. Ct. App. 4th Cir. 1968).

personally.² A corporation, being a purely artificial body separate and distinct from its members, cannot take an oath, although usually when an oath or affidavit is required a duly authorized agent or officer of the corporation may make the oath or affidavit in its behalf.³

III. ADMINISTRATION BY PARTICULAR PERSONS OR ENTITIES

A. AUTHORITY TO ADMINISTER

Statutory References

5 U.S.C.A. § 2903

28 U.S.C.A. § 459

28 U.S.C.A. § 636

28 U.S.C.A. § 953

Research References

West's Digest References

Oath ⇨2

Annotation References

A.L.R. Digest: Oath § 2

A.L.R. Index: Oath and Affirmation

Trial Strategy References

Proof of Matters by Judicial Notice, 60 Am. Jur. Proof of Facts 3d 175

§ 10 Courts; clerks of court

Research References

West's Key Number Digest, Oath ⇨2

A judge may administer the oath or direct anyone in his or her presence, in open court, to administer it, and the oath will be valid.¹ Inasmuch as an oath derives its sanction and validity from the circumstance that it is duly administered in open court with the approval and under the control of the judge presiding, it is not necessary that the person who thus administers it be a legally appointed officer of the court.² A federal judge or justice is authorized by statute to administer oaths and affirmations,³ as are United States Magistrates.⁴

²State v. Tedesco, 175 Conn. 279, 397 A.2d 1352 (1978).

³Am. Jur. 2d, Corporations § 2119.

[Section 10]

¹Crockett v. Cassels, 95 Fla. 851, 116 So. 865 (1928); Bush v. Com., 198 Ky. 226, 248 S.W. 522 (1923); Rousseau v. Democratic Parish Executive Committee for Parish of St.

Martin, 164 So. 175 (La. Ct. App. 1st Cir. 1935); State v. Townley, 67 Ohio St. 21, 65 N.E. 149 (1902).

²Bush v. Com., 198 Ky. 226, 248 S.W. 522 (1923); State v. Townley, 67 Ohio St. 21, 65 N.E. 149 (1902).

³28 U.S.C.A. § 459.

⁴28 U.S.C.A. § 636.

The authority of clerks of state and local courts to administer oaths is purely a creature of statute,⁵ and the authority of clerks of federal courts to administer oaths and affirmations is also granted by statute.⁶

◆ **Caution:** It has been stated that no authority to administer oaths should be construed without statutory authorization.⁷

§ 11 Interested persons

Research References

West's Key Number Digest, Oath ⇨2

It is well settled, even in the absence of statute, that an oath cannot be legally administered by one who is an interested party in the proceeding.¹ Whether an oath administered by an interested person is void or voidable is a question not answered by the courts with uniformity, but it would seem to be the more generally accepted rule that where there is no imputation or charge of improper conduct or bad faith or undue advantage, the mere fact that the oath was taken before an interested officer will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism.² At the most, it will be considered only voidable, and unless timely and proper objection is made to such an oath, the defect will be deemed to have been waived.³

§ 12 —Attorneys

Research References

West's Key Number Digest, Oath ⇨2

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R. 3d 483

In some instances, courts have held attorneys disqualified to take oaths from their clients in connection with attachment, garnishment, and other provisional remedies,¹ although there is also contrary authority.² Courts have also found attorneys disqualified to administer oaths to their clients

⁵Mendez v. Com., 220 Va. 97, 255 S.E.2d 533 (1979).

⁶28 U.S.C.A. § 953.

⁷In re Kaufman, 183 Misc. 2d 581, 706 N.Y.S.2d 589 (Fam. Ct. 2000).

[Section 11]

¹Ott v. Stipe Law Firm, 169 F.R.D. 380 (E.D. Okla. 1996); Fair v. Citizens' State Bank of Sterling, 70 Kan. 612, 79 P. 144 (1905); Asher v. Sizemore, 261 S.W.2d 665 (Ky. 1953); Rousseau v. Democratic Parish Executive Committee for Parish of St. Martin, 164 So. 175 (La. Ct. App. 1st Cir. 1935).

²Fair v. Citizens' State Bank of Sterling, 70 Kan. 612, 79 P. 144 (1905).

³Horkey v. Kendall, 53 Neb. 522, 73 N.W. 953 (1898).

[Section 12]

¹Rorick v. Devon Syndicate, 307 U.S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939) (recognizing rule under Ohio law); Ramsay Motor Co. v. Wilson, 47 Wyo. 54, 30 P.2d 482, 91 A.L.R. 908 (1934).

²Olyphant v. Buie, 134 S.W.2d 751 (Tex. Civ. App. Waco 1939), writ dismissed, judgment correct.

with respect to depositions and other documentary evidence,³ and with respect to constructive service or other acquisition of jurisdiction.⁴ In regard to oaths taken by attorneys from their clients in connection with pleadings, motions and miscellaneous papers and proceedings, some courts have held attorneys qualified to take an oath,⁵ and some have held them disqualified.⁶

The courts which follow the rule that an attorney is disqualified from taking an oath from a client have tended to confine this rule within narrow limits. Thus, courts have held that an attorney was qualified to take an oath from the client where the oath was administered before any legal proceeding commenced,⁷ where the attorney-client relationship was established after the disputed oath was taken by the attorney,⁸ where the attorney-client relationship terminated before trial,⁹ or where the attorney did not participate in the trial.¹⁰

§ 13 Local officials authority under federal law

Research References

West's Key Number Digest, Oath ⇨2

The oath of office of a federal official may be administered by an individual authorized by local law to administer oaths in the state, district, or territory or possession of the United States where the oath is administered.¹

§ 14 Judicial notice of authority of officers within jurisdiction

Research References

West's Key Number Digest, Oath ⇨2

Proof of Matters by Judicial Notice, 60 Am. Jur. Proof of Facts 3d 175

When the question of the authority of an officer to administer oaths arises, the courts will take judicial notice of the officers and their powers within the jurisdiction of the court.¹

³Wuerth v. Wuerth, 264 Mich. 640, 250 N.W. 520 (1933); Clegg v. Gulf, C. & S.F. Ry. Co., 104 Tex. 280, 137 S.W. 109 (1911).

⁴Beck v. Beck, 45 Ohio App. 507, 15 Ohio L. Abs. 326, 187 N.E. 366 (5th Dist. Coshocton County 1933).

⁵Application of Martin, 76 Idaho 179, 279 P.2d 873, 53 A.L.R.2d 582 (1955); Hueston v. Preferred Accident Ins. Co., 161 Iowa 521, 143 N.W. 566 (1913); Rose v. Asam, 240 Mich. 151, 215 N.W. 400 (1927); State ex rel. Taubman v. Davis, 199 Mo. App. 439, 203 S.W. 654 (1918); Frazier, Inc. v. 20th Century Builders, Inc., 188 Neb. 618, 198 N.W.2d 478 (1972).

⁶Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 31 App. D.C. 498 (App. D.C. 1908);

Warner v. Warner, 11 Kan. 121, 1873 WL 626 (1873).

⁷Petition of Jackson, 18 F.2d 462 (C.C.A. 6th Cir. 1927).

⁸Park v. Zellars, 139 Ga. 585, 77 S.E. 922 (1913).

⁹Zilz v. Wilcox, 190 Mich. 486, 157 N.W. 77 (1916).

¹⁰Belinder v. Cupp, 156 Kan. 729, 137 P.2d 139 (1943).

[Section 13]

¹5 U.S.C.A. § 2903.

[Section 14]

¹Hertig v. People, 159 Ill. 237, 42 N.E. 879 (1896).

B. DUTY TO ADMINISTER

Research References

West's Digest References

Oath ¶1, 3

Annotation References

A.L.R. Digest: Oath §§ 1, 2

A.L.R. Index: Oath and Affirmation

Forms References

13A Am. Jur. Legal Forms 2d, Oath and Affirmation § 189:21

§ 15 Generally

Research References

West's Key Number Digest, Oath ¶1, 3

Certificate that oath taken or affirmation made. 13A Am. Jur. Legal Forms 2d, Oath and Affirmation § 189:21

The administration of an oath is a ministerial act,¹ and one which an officer may have a duty to perform.² Indeed, it has sometimes been made an offense for an officer to refuse willfully to administer an oath. In such a case, the intention of the officer and the fact that the officer believed that he or she was not bound to administer the oath, and acted in good faith in refusing to do so, are no defense. Ignorance of the law is no excuse, and an honest conviction that one has a right to do what the law declares to be illegal will not make the act innocent.³

Administrative and quasi-judicial bodies which are authorized to administer oaths to witnesses are required to exercise such authority when a statute expressly directs so, but if there is no such statutory direction, the administration of oaths and affirmations is in the officer's discretion.⁴

V. FORM AND SUFFICIENCY

A. REQUIREMENTS FOR VALID OATH OR AFFIRMATION

Research References

West's Digest References

Oath ¶3, 5

Annotation References

L.R. Digest: Oath § 5

L.R. Index: Oath and Affirmation

As to the necessity for proving the authority of a foreign notary to administer oaths or affidavits, see Am. Jur. 2d, Notaries Pub. § 45.

Section 15]

¹Fair v. Citizens' State Bank of Sterling, Kan. 612, 79 P. 144 (1905).

²Matter of Kappelman, 114 Idaho 136, 754 P.2d 449 (Ct. App. 1988) (referring to the

administration of oaths as one of the duties of an officer); People v. Crosson, 30 Ill. App. 2d 57, 173 N.E.2d 552 (1st Dist. 1961); Smallwood v. Soutter, 5 Ill. App. 2d 303, 125 N.E.2d 679 (1st Dist. 1955).

³People v. Brooks, 1 Denio 457, 1845 WL 4407 (N.Y. Sup 1845).

⁴Am. Jur. 2d, Administrative Law § 344.

Forms References

13B Am. Jur. Legal Forms 2d, Oath and Affirmation §§ 189:11 to 189:20

18B Am. Jur. Pleading and Practice Forms, Oath and Affirmation §§ 3 to 17

§ 16 Generally; unequivocal act

Research References

West's Key Number Digest, Oath ¶3, 5

Sufficiency, under Rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, 127 A.L.R. Fed. 207

Oath or affirmation of witness, interpreter, juror, and others. 18A Am. Jur. Pleading and Practice Forms, Oath and Affirmation §§ 3 to 17

General forms of oaths and affirmations. 13A Am. Jur. Legal Forms 2d, Oath and Affirmation §§ 189:11 to 189:20

While a large liberty is given to the form of an oath, some form remains essential. Something must be present to distinguish between the oath and the bare assertion:¹ an act must be done and clothed in such form as to characterize and evidence it.² Hence, to make a valid oath, there must be, in some form, an unequivocal and present act by which the affiant consciously takes upon himself or herself the obligation of an oath.³ There must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; mere intention, not accompanied by an unambiguous act, is insufficient.⁴ Stated otherwise, in order to have a valid statement under oath, the attention of the person to be sworn must be called to the fact that his or her statement is not

[Section 16]

¹Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985), a mere assertion of truth, without an attestation to that effect by an unequivocal act for which a prosecution for perjury will lie, is not sufficient as an oath.

²Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943) (noting that only by some unequivocal form could the sworn be distinguished from the unsworn averment, and the sanctions of religion add their solemn and binding force to the act); Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927).

A petition for reassessment was not verified under oath within the meaning of a statute where it failed to appear that the declarant did any public act indicative of his solemn purpose to make a petition under oath, and where it appeared only that the petition included a statement that the declarant stated under penalty of perjury that he was an officer of petitioner, that he was authorized to file the petition, and that the statements made were true to the best of his knowledge and belief. Youngstown Steel Door Co. v. Kosydar, 33

Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

³U.S. v. Yoshida, 727 F.2d 822 (9th Cir. 1983); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985); Youngker v. State, 215 So. 2d 318 (Fla. Dist. Ct. App. 4th Dist. 1968); Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943); Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

Translator's swearing that she translated the tape in issue from Spanish to English to the best of her ability was sufficient oath; there is no constitutional or statutorily required form of oath, and oath administered would have impressed upon translator the importance of truthful and accurate translation. U.S. v. Armijo, 5 F.3d 1229, 38 Fed. R. Evid. Serv. 1264, 127 A.L.R. Fed. 661 (9th Cir. 1993).

As to the requirement that this act take place in the presence of an authorized official, see § 17.

⁴Board of Elections of Taylor County v. Board of Educ. of Campbellsville Independent School Dist., 635 S.W.2d 324, 5 Ed. Law Rep. 669 (Ky. Ct. App. 1982).

a mere asseveration, but must be sworn to, and he or she must do some corporal act in recognition of this.⁵ Moreover, a good faith belief in an obligation to tell the truth does not constitute as an oath a statement that is actually a mere unattested assertion of truth.⁶

§ 17 Presence of authorized official

Research References

West's Key Number Digest, Oath ◊3, 5
Oath or affirmation of witness, interpreter, juror, and others. 18A Am. Jur. Pleading and Practice Forms, Oath and Affirmation §§ 3 to 17
General forms of oaths and affirmations. 13A Am. Jur. Legal Forms 2d, Oath and Affirmation §§ 189:11 to 189:20

To make a valid oath, the declarant must take upon himself or herself the obligations of an oath in the presence of an officer authorized to administer it.¹

§ 18 —Validity of oath by telephone

Research References

West's Key Number Digest, Oath ◊3, 5

The essential elements of an oath are a solemn declaration, the manifested intent to be bound thereby, the signature of the declarant, and an authorized acknowledgment. In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

The essential requirement of an oath is that the party goes through some declaration or formality that indicates that the person consciously affirms the truth of the testimony he or she gives. State v. Healy, 521 N.W.2d 47 (Minn. Ct. App. 1994).

⁵In re Rice, 35 Ill. App. 2d 79, 181 N.E.2d 742 (4th Dist. 1962); Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927).

Claimant and his parents failed to comply with requirements of statute requiring written notice of claim to be "sworn to" by claimant before claimant can bring action against state employee, where claimant and his parent signed notice of claim in front of notary public, without making formal oath or affirmation as to truthfulness of claim. Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

⁶Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985) (holding that an officer's good faith in failing to take an oath before signing an affidavit for a search warrant, believing that his obligation to tell the truth was a sufficient oath, would not prevent the operation of the exclusionary rule).

[Section 17]

¹U.S. v. Yoshida, 727 F.2d 822 (9th Cir. 1983); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985); Youngker v. State, 215 So. 2d 318 (Fla. Dist. Ct. App. 4th Dist. 1968); Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943).

Statute's requirement that notice of medical malpractice claim be "under oath" meant that the declarant must verify the truth of the allegations before an authorized official. Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979).

A petition for reassessment was not verified under oath within the meaning of a statute where the petition did not appear to be sworn to before an authorized official. Although the court did not decide whether it is always necessary that an oath be administered by someone legally empowered to take oaths, it held that it is at least necessary that someone be called upon to bear witness to the fact of the declaration. Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

For a discussion of the requirement that there be some unequivocal act whereby the declarant takes upon himself or herself the obligations of an oath, see § 16.

Although depositions may be taken by telephone,¹ or may even be videotaped,² the law requires the person taking an oath to be in the personal presence of the officer administering it.³ Oaths cannot be taken or administered over the telephone. Such a method of administering oaths has been held to be entirely unauthorized and illegal.⁴ Thus, it has been remarked that "in order to make an affidavit, there must be present the officer, the affiant, and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long-distance swearing is not permissible. Telephonic affidavits are unknown to the law."⁵ The law requires the affiant to be in the personal presence of the officer administering the oath, not to the end that the officer may know that this is the person he or she represents himself or herself to be, for it is not required that the affiant be identified, introduced, or personally known to the officer, but to the end that he or she be certainly identified as the person who actually took the oath.⁶

§ 19 Administration within official's territorial jurisdiction

Research References

West's Key Number Digest, Oath ◊3, 5

For an oath to be valid and binding, it must not only be administered by a person duly authorized to administer the particular oath, but it must be administered within such person's territorial jurisdiction.¹ However, when an oath is administered by a public officer it will be presumed the officer administered the oath in the county within which he or she was authorized to administer oaths, for the presumption is that the officer has done his or her duty.² If an oath is not required to be administered in a particular place within the officer's jurisdiction, as in open court, there is no reason why an oath may not be taken before the officer at any place where he or she happens to be at the time.³

B. OTHER MATTERS AFFECTING VALIDITY OF OATH OR AFFIRMATION

Statutory References

28 U.S.C.A. § 1746

[Section 18]

¹Am. Jur. 2d, Depositions and Discovery § 99.

²Am. Jur. 2d, Depositions and Discovery § 98.

³Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228, 83 S.W. 421 (1904).

⁴In re Napolis, 169 A.D. 469, 155 N.Y.S. 416 (1st Dep't 1915).

⁵Carnes v. Carnes, 138 Ga. 1, 74 S.E. 785 (1912).

⁶Sullivan v. First Nat. Bank, 37 Tex. Civ. App. 228, 83 S.W. 421 (1904).

[Section 19]

¹In re State ex rel. Wootan, 313 So. 2d 621 (La. Ct. App. 4th Cir. 1975), writ denied, 318 So. 2d 47 (La. 1975) (noting that the power of a notary to administer oaths in Louisiana is limited by statute to the parish where the notary is commissioned); Andres v. Judge of Circuit Court, 77 Mich. 85, 43 N.W. 857 (1889).

²§ 23.

³Andres v. Judge of Circuit Court, 77 Mich. 85, 43 N.W. 857 (1889).

Research References

West's Digest References

Oath ◊3, 5

Annotation References

A.L.R. Digest: Oath §§ 1, 2

A.L.R. Index: Oath and Affirmation

§ 20 Strict compliance with formalities, generally

Research References

West's Key Number Digest, Oath ◊3, 5

Sufficiency, under Rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, 127 A.L.R. Fed. 207

Generally, no particular formalities are required for there to be a valid oath,¹ although compliance with certain essential elements is necessary.² While an oath may be taken upon the Gospels or by swearing with uplifted hand,³ it is well settled that the form in which an oath is administered does not affect its sufficiency for the purpose of basing thereon a charge of perjury,⁴ and that any form which appeals to the conscience of the person to whom it is administered and binds the person to speak the truth is sufficient.⁵ On the other hand, the assertion of a statement as true in a manner that would not permit prosecution for perjury is not the making of a sworn statement under an oath.⁶

Statutes prescribing the form of an oath should not be interpreted in an overly technical manner,⁷ and some latitude may be permitted by statutes as to the form in which a required oath or affirmation may be administered.⁸

[Section 20]

¹U.S. v. Yoshida, 727 F.2d 822 (9th Cir. 1983).

²§§ 16 et seq.

³State v. Gay, 59 Minn. 6, 60 N.W. 676 (1894); O'Reilly v. People, 86 N.Y. 154, 1881 WL 12966 (1881).

As to the necessity and sufficiency of an officer's jurat or certificate as to an oath, see Am. Jur. 2d, Affidavits §§ 10, 11.

For a discussion of the form and sufficiency of the verification supporting an indictment or information, see Am. Jur. 2d, Indictments and Informations §§ 88, 89.

⁴Rousseau v. Democratic Parish Executive Committee for Parish of St. Martin, 164 So. 175 (La. Ct. App. 1st Cir. 1935); Cincinnati Finance Co. v. First Discount Corp., 59 Ohio App. 131, 12 Ohio Op. 42, 27 Ohio L. Abs. 11, 17 N.E.2d 383 (1st Dist. Hamilton County 1938).

⁵In re Rice, 35 Ill. App. 2d 79, 181 N.E.2d 742 (4th Dist. 1962); State v. Healy, 521 N.W.2d 47 (Minn. Ct. App. 1994); Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927); State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983); O'Reilly v. People, 86 N.Y. 154, 1881 WL 12966 (1881); Blackburn v. Motor Vehicles Division, Dept. of Transp., 33 Or. App. 397, 576 P.2d 1267 (1978).

⁶§ 6.

⁷State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983); Blackburn v. Motor Vehicles Division, Dept. of Transp., 33 Or. App. 397, 576 P.2d 1267 (1978) (implicitly following rule in holding that statutory provision as to how oath "may" be administered cannot be read as "shall").

⁸H. A. M. S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258 (Alaska 1977), order supplemented, 566 P.2d 1012 (Alaska 1977).

Oath administered to witness indicating

Such statutes are not intended to prescribe an inflexible iron formula, admitting of no deviation in words, but are intended rather to direct and point out the essential matters to be embraced in an oath,⁹ and while it is the duty of the officers to follow the forms prescribed by law, and they should always do so, mere formalities are not, in cases of this kind, essential to the validity of the act, and if there is a substantial compliance with the statute the oath is obligatory and binding.¹⁰ Moreover, it has been said that inasmuch as the contemporary business world has spawned informality in the performance of ceremonial functions, some of which are vestiges of a more ritualistic era, the manifested intent with which an oath is executed weighs more heavily than the observance of punctiliousness in its ceremonial aspects.¹¹ In regard to children, it has been said that so long as the oath ceremony actually performed evinces a commitment by a child to tell the truth out of fear of future punishment of any kind, the child is properly sworn, even if the court failed to administer a formal oath to the child.¹²

◆ **Observations:** It is provided by federal statute that whenever, 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 form prescribed by the statute.¹³ It must be noted, however, that although a wide scope is given to the form of an oath, some form remains essential.¹⁴

defendant's name, crimes charged and fact that testimony was being given in a trial and not grand jury proceeding was proper because oath was not materially different in both form and substance from prescribed statutory oath. Elam v. State, 211 Ga. App. 739, 440 S.E.2d 511 (1994).

⁹Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957); State v. Mazon, 90 N.C. 676, 1884 WL 1900 (1884).

¹⁰Preston v. State, 115 Tenn. 343, 90 S.W. 856 (1905).

See also People v. Carreon, 151 Cal. App. 3d 559, 198 Cal. Rptr. 843 (5th Dist. 1984) (implied overruling on other grounds recognized by People v. Chavez, 231 Cal. App. 3d 1471, 283 Cal. Rptr. 71 (4th Dist. 1991)), noting that the California Legislature has committed California courts to a liberal policy

when ruling on questions regarding formalities and oath taking.

Substantial compliance with the prescribed statutory form of oath or affirmation is often sufficient. H. A. M. S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258 (Alaska 1977), order supplemented, 566 P.2d 1012 (Alaska 1977).

¹¹People v. Walker, 247 Cal. App. 2d 554, 55 Cal. Rptr. 726 (3d Dist. 1967).

¹²State in Interest of R. R., 79 N.J. 97, 398 A.2d 76, 6 A.L.R.4th 140 (1979).

¹³28 U.S.C.A. § 1746.

¹⁴State v. Healy, 521 N.W.2d 47 (Minn. Ct. App. 1994); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

§ 21 Touching or kissing Bible

Research References

West's Key Number Digest, Oath ◊3, 5

The touching¹ or kissing of the Bible or Testament is not essential to the taking of an oath.²

§ 22 Holding up hand

Research References

West's Key Number Digest, Oath ◊3, 5

The ceremony of holding up the hand is not essential to the validity of the oath of a witness,¹ the provision of the statute as to this form being merely directory.² Thus, a valid oath was held to have been properly administered to circulators of recall petitions who, despite a statutory provision requiring the uplifting of a hand as part of the oath ceremony, failed to do so.³ There is, however, contrary authority where, pursuant to an express statute, the usual mode of administering an oath is by the person who swears holding up his right hand, failing which there is no formal valid oath.⁴ Also, in the absence of an actual recitation that a required oath was made to God, or "So help you God," it sufficed to require the affiant to uplift his hand and swear to the truthfulness of his statements.⁵

C. PRESUMPTION OF PROPER ADMINISTRATION

Research References

West's Digest References

Oath ◊3, 5, 6

Annotation References

A.L.R. Digest: Oath §§ 1, 2

A.L.R. Index: Oath and Affirmation

§ 23 Generally

Research References

West's Key Number Digest, Oath ◊3, 5, 6

[Section 21]

¹Cox v. State, 13 Ga. App. 687, 79 S.E. 909 (1913).

²Preston v. State, 115 Tenn. 343, 90 S.W. 856 (1905).

[Section 22]

¹U.S. v. Troutman, 814 F.2d 1428, 22 Fed. R. Evid. Serv. 1020 (10th Cir. 1987); State v. Parker, 81 Idaho 51, 336 P.2d 318 (1959); People v. Coles, 141 Misc. 2d 965, 535 N.Y. S.2d 897 (Sup 1988); Means v. State, 92 Tex. Crim. 323, 244 S.W. 149 (1922).

²Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927); Blackburn v. Motor Vehicles Division, Dept. of Transp., 33 Or. App. 397, 576 P.2d 1267 (1978).

³In re Rice, 35 Ill. App. 2d 79, 181 N.E.2d 742 (4th Dist. 1962).

⁴Dawson v. Austin, 44 Mich. App. 390, 205 N.W.2d 299 (1973).

⁵State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).

When an oath is administered by a public officer, it will be presumed, in the absence of direct evidence to the contrary, that the oath was taken properly and that the mode of administering it was accepted as valid by both the officer and the person taking the oath.¹ Thus, when a witness comes before a tribunal to be sworn, it is presumed that the witness has settled with himself or herself the manner in which the oath is to be administered, and it is generally held that the burden is on the witness to make known any preference as to the form of the oath, and that if the witness fails to do so, an oath administered in any form recognized by law will be binding.² It will also be presumed that the officer administered the oath in the county within which he or she was authorized to administer oaths.³

The actual taking of an oath in the nature of a pledge may be shown by extrinsic evidence where it does not appear by a jurat that the oath was administered.⁴

[Section 23]

¹State v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

²O'Reilly v. People, 86 N.Y. 154, 1881 WL 12966 (1881); State v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

Where a person affirms or declares and no objection is made at the time, it will be held that the person to whom the affirmation was administered preferred that form, and such affirmation, without objection, conclusively

establishes the existence of conscientious scruples against taking an oath. *Bram v. U.S.*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897).

³Hertig v. People, 159 Ill. 237, 42 N.E. 879 (1896); Teutonia Loan & Building Co. v. Turrell, 19 Ind. App. 469, 49 N.E. 852 (1898).

⁴June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938).

(D) CRIMINAL PROSECUTIONS

Research References

Legal Encyclopedias
 Am. Jur. 2d, Nuisances §§ 390 to 397
 C.J.S., Nuisances §§ 149 to 158

91. Indictment or information

91(1) In general

Headnotes:

An indictment that charged defendant "at divers other times within twelve months next before the finding of indictment, did publicly upon the public streets of Jefferson County, unlawfully, wilfully, and continuously expose his person in a lewd, filthy and indecent manner to infant girls and to women of various ages, * * * and was a common nuisance * * * "was sufficient to charge offense of maintaining a common nuisance, consisting of indecent exposure of person. *Nichols v. Com.*, 312 Ky. 171, 226 S.W.2d 796, 13 A.L.R.2d 1478 (1950).

92. Evidence

Annotations:

Validity, construction, and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances, 31 A.L.R.5th 760

Validity and construction of state statutes criminalizing the act of permitting real property to be used in connection with illegal drug activities, 24 A.L.R.5th 428

Headnotes:

Conviction of maintaining a common nuisance by repeated leaving of nitroglycerin on a road held sustained by the evidence. *Kentucky Glycerine Co. v. Commonwealth*, 188 Ky. 820, 224 S.W. 360, 11 A.L.R. 715 (1920).

Evidence that some one was annoyed by what to him was a disagreeable smell is not in and of itself a "nuisance" so as to warrant a prosecution under ordinance prohibiting as a public nuisance commercial enterprises emitting offensive odors. *City of Milwaukee v. Milbrew, Inc.*, 240 Wis. 527, 3 N.W.2d 386, 141 A.L.R. 277 (1942).

A showing by clear and convincing evidence that a particular use by an industry singled out as objectionable is detrimental to the public health or welfare is a prerequisite to a conviction under a city ordinance defining and punishing public nuisances. *City of Milwaukee v. Milbrew, Inc.*, 240 Wis. 527, 3 N.W.2d 386, 141 A.L.R. 277 (1942).

Evidence did not sustain conviction of corporation operating a factory located in a manufacturing district from which emanated the odor of dried yeast, for violation of Milwaukee ordinance prohibiting as public nuisances, commercial enterprises emitting foul or offensive odors, gases, effluvia or stenches, or which shall be dangerous or prejudicial to public health. *City of Milwaukee v. Milbrew, Inc.*, 240 Wis. 527, 3 N.W.2d 386, 141 A.L.R. 277 (1942).

OATH

SUBJECTS INCLUDED

Solemn declarations or affirmations, with or without invocation of or appeal to God or other especial sanction, made in verification of averments, testimony, or promises to perform the duties of a trust or office
 Nature and necessity of making oath
 Administering, making, form, requisites, and sufficiency of such oaths and other affirmations in general

SUBJECTS EXCLUDED AND COVERED BY OTHER TOPICS

False swearing, see PERJURY
 Oath or affirmation of—
 Arbitrators, see ARBITRATION
 Jurors, see JURY
 Witnesses, see WITNESSES
 Qualification for office or position of trust, see OFFICERS AND PUBLIC EMPLOYEES, and topics relating to particular officers, TRUSTS, EXECUTORS AND ADMINISTRATORS and other specific topics
 Profane swearing, see CRIMINAL LAW 45.20
 Verification of—
 Affidavits, see AFFIDAVITS
 Pleadings, see PLEADING, FEDERAL CIVIL PROCEDURE

1. Nature and functions in general
2. Authority to administer
3. Mode of administration
4. Affirmation or other substitute
5. Making and sufficiency
6. Evidence of taking

Research References*A.L.R. Library**A.L.R. Index, Oath and Affirmation**Legal Encyclopedias**Am. Jur. 2d, Oath and Affirmation* §§ 1 to 23*C.J.S., Oaths and Affirmations* §§ 1 to 13*Forms**Am. Jur. Legal Forms 2d, Oath and Affirmation* §§ 189:1 to 189:12*Am. Jur. Pleading and Practice Forms, Oath and Affirmation* §§ 1 to 20⇐ **1. Nature and functions in general****Headnotes:**

An "oath" is an external pledge or asseveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false. *June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938).*

The difference between an "affidavit" and an "oath" is that an affidavit consists of statement of fact, which is sworn to as the truth, while an oath is a pledge. *June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938).*

[Annotated at 116 A.L.R. 587]

"Oath" is appeal to God by affiant to witness truth of what he swears. *Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927).*

Performance of some corporal act by affiant, after being informed that statement must be sworn to, constitutes an "oath." *Atwood v. State, 146 Miss. 662, 111 So. 865, 51 A.L.R. 836 (1927).*

[Annotated at 51 A.L.R. 840]

The statute which adds to the oath of allegiance and to the oath pledging support to the Constitution, an oath that person swearing does not believe in use of force or unconstitutional means to overthrow the government, and which requires disavowal of membership in any organization believing in such overthrow, qualifies the constitutional oath and is invalid as beyond the legislature's authority. *P.L. 1949, c. 21; R.S. 41:1-1, N.J.S.A.; Const. art. I, par. 2; art. IV, § VIII, par. 1; art. VII, § I, par. 1,*

N.J.S.A. Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241 (1950).

[Annotated at 18 A.L.R.2d 268]

An affidavit implies that person making the affidavit has taken an oath. *W.S. 1957, § 22-229. Fugate v. Mayor and City Council of Town of Buffalo, 348 P.2d 76, 97 A.L.R.2d 243 (Wyo. 1959).*

⇐ **4. Affirmation or other substitute****Annotations:**

Sufficiency, under Rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, *127 A.L.R. Fed. 207*

Headnotes:

The oath given to an affiant swearing to an affidavit in support of a search warrant need not be made to God and is sufficient as long as the affiant is consciously made to recognize his legal obligation to tell the truth. *RSA 516:19, 516:20; U.S.C.A. Const. Amend. 4. State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).*

No particular ritualistic form is necessary for one to take an oath; rather, emphasis is upon some unequivocal act by which a person consciously takes on himself the obligation of an oath. *RCWA 9.72.040. State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).*

⇐ **5. Making and sufficiency****Annotations:**

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant, *80 A.L.R.3d 278*

False oath or account as bar to discharge in bankruptcy proceedings, *59 A.L.R.2d 791*

Headnotes:

Merely signing an affidavit in presence of a notary or other official authorized to administer oaths is sufficient to constitute the taking of an oath. *RCWA 9.72.040. State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).*

⇐ **6. Evidence of taking****Annotations:**

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant, *80 A.L.R.3d 278*

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, *21 A.L.R.3d 483*

False oath or account as bar to discharge in bankruptcy proceedings, *59 A.L.R.2d 791*

Validity of governmental requirement of oath of allegiance or loyalty, *18 A.L.R.2d 268*

Expatriation by foreign naturalization or by taking oath of allegiance to a foreign state, *15 A.L.R.2d 550*

Headnotes:

The actual taking of an oath in the nature of a pledge may be shown by evidence

where it does not appear by jurat that the oath was administered. *June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938).*

Where school teacher at time of signing employment contract took statutory oath to support Federal and State Constitutions and to faithfully discharge her duties, but where jurat of officer administering oath was lacking, the actual, taking of such oath could be established by evidence. *Pub. Acts. 1931, No. 19. June v. School Dist. No. 11, Southfield Tp., 283 Mich. 533, 278 N.W. 676, 116 A.L.R. 581 (1938).*

I. IN GENERAL

Research References

Text References

Williston on Contracts (4th ed.) §§ 21:1, 27:3, 27:4

West's Digest References

Frauds, Statute of ≈121, 125(1)

Annotation References

A.L.R. Digest: Contracts §§ 107 to 195
A.L.R. Index: Frauds, Statute of

§ 1 Origin of statutes; English statute, generally

Research References

Williston on Contracts (4th ed.) § 21:1.
West's Key Number Digest, Frauds, Statute of ≈121

The progenitor of the statutes of frauds in this country was the English statute¹ entitled "An Act for the Prevention of Frauds and Perjuries."² This English statute was enacted by Parliament and approved by King Charles II in 1676, and it became effective in Great Britain on June 24, 1677.³

It is to be noted in passing, although it has no effect on the statutes of frauds in this country,⁴ that all provisions of the English statute of frauds except those relating to land and guaranty contracts have been repealed by The Law Reform (Enforcement of Contracts) Act, 1954,⁵ effective retroactively from June 4, 1954.⁶ This repeal of the statute of frauds in England was based on the conclusion that the statute of frauds permitted the assertion of a "technical" defense as a means of avoiding just obligations, and on the ground that with the right of parties in interest to testify, there was no longer the need for a writing to protect them from the perjured testimony of third persons.⁷

§ 2 —Adoption of English statute in United States

Research References

Williston on Contracts (4th ed.) § 21:1.
West's Key Number Digest, Frauds, Statute of ≈125(1)

The English statute became effective in the English colonies in this country

[Section 1]

¹29 Charles II (1676) Ch. 3.

²McIntosh v. Murphy, 52 Haw. 29, 52 Haw. 112, 469 P.2d 177, 54 A.L.R.3d 707 (1970); Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966); Weber v. De Cecco, 1 N.J. Super. 353, 61 A.2d 651 (Ch. Div. 1948).

³Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966); Gulf Liquid Fertilizer Co. v. Titus, 163 Tex. 260, 354 S.W.2d 378 (1962).

⁴§ 2.

⁵2 & 3 Eliz II Ch 34.

⁶Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661, 7 U.C.C. Rep. Serv. 1281 (1970); Gulf Liquid Fertilizer Co. v. Titus, 163 Tex. 260, 354 S.W.2d 378 (1962).

⁷Azevedo v. Minister, 86 Nev. 576, 471 P.2d 661, 7 U.C.C. Rep. Serv. 1281 (1970).

at the same time it became effective in Great Britain.¹ In some states, the statute is regarded as a part of the common law of the state² or has been made effective in the state by reason of a state constitutional provision.³ However, elsewhere, the English statute is usually not considered as extending to this country and is of force here only by virtue of its adoption by the legislatures of the several states, directly or indirectly.⁴ The adoption of the statute has usually been by an express re-enactment of some or all of its provisions, frequently with variations of language or wording.⁵

§ 3 Validity of statutes

Research References

Williston on Contracts (4th ed.) §§ 27:3, 27:4.
West's Key Number Digest, Frauds, Statute of ≈1

Statutes requiring contracts to be in writing or evidenced by a written memorandum thereof do not deprive the parties of the right to contract with respect to the matters therein involved, but merely regulate the formalities of the contract necessary to render it enforceable and are intended to prevent frauds and perjuries; their constitutionality has never been seriously contested, although the courts have frequently taken occasion to point out that while the legislature may not interfere with the absolute individual right to contract, except on the ground of public policy, it may regulate the manner in which that right shall be exercised,¹ and, pursuant to this latter right and for the purpose of preventing fraud and perjury, it may require that contracts or certain classes thereof shall be in writing.² Thus, the constitutionality of a statute requiring a contract for the employment of an agent to sell land to be in writing to entitle the agent to recover compensation for services rendered in negotiating such a sale is upheld.³ Legislation of this class is not in conflict with a constitutional provision that no person's property or particular services shall be taken without just compensation, nor is it in conflict with a provision prohibiting the grant to any citizen or class of citizens of special privileges or immunities, in that it unjustifiably singles out

[Section 2]

¹Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966).

²Coseboom v. Marshall's Trust, 64 N.M. 170, 326 P.2d 368 (1958).

³The English statute of frauds was continued in Maryland after the American Revolution by virtue of the Maryland constitutional provision, and except for certain minor statutory modifications in regard to the sale of goods by the Uniform Sales Act and the Uniform Commercial Code, has remained effective in Maryland in its original form since its effective date. Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966).

⁴Fletcher v. Williams, 153 So. 2d 759 (Fla. Dist. Ct. App. 1st Dist. 1963) (disapproved of

on other grounds by, Hawkins v. Williams, 200 So. 2d 800 (Fla. 1967)).

⁵§ 5.

[Section 3]

¹Am. Jur. 2d, Constitutional Law § 599.

²Fletcher v. Williams, 153 So. 2d 759 (Fla. Dist. Ct. App. 1st Dist. 1963) (disapproved of on other grounds by, Hawkins v. Williams, 200 So. 2d 800 (Fla. 1967)); Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N.E. 1005 (1903); Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S.W.2d 898 (1941); Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869 (1913).

³Selva v. Talbott, 175 Ind. 648, 95 N.E. 114 (1911); Mohr v. Rickgauer, 82 Neb. 398, 117 N.W. 950 (1908).

OATHS AND AFFIRMATIONS

By Kimberly C. Simmons, J.D.

Scope

This title discusses solemn declarations or affirmations made with or without invocation or appeal to God. The title deals with the nature of oaths and affirmations; particular types of oaths; the capacity to take oaths; the administering of oaths and affirmations, and evidence of such administration; and the requisites and sufficiency of oaths.

Treated Elsewhere

False swearing, see C.J.S., Aliens § 339; C.J.S., Military Justice § 42; C.J.S., Contempt § 26; C.J.S., New Trial § 123

Oaths of jurors, see C.J.S., Juries § 496

Oaths of witnesses, see C.J.S., Witnesses § 394

Oaths or affirmations for affidavits, see C.J.S., Affidavits § 34

Profane swearing, see C.J.S., Telecommunications § 181

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I. IN GENERAL (§§ 1 TO 3)

II. CAPACITY AND ADMINISTRATION (§§ 4 TO 7)

III. ELEMENTS (§§ 8 TO 11)

IV. SUFFICIENCY (§§ 12 TO 13)

I. IN GENERAL

- § 1 Definitions and purpose
- § 2 Types of oaths
- § 3 Affirmation

II. CAPACITY AND ADMINISTRATION

- § 4 Capacity to take oath
- § 5 Authority to administer
- § 6 Authority to administer—Inherent or express authority
- § 7 Evidence of administration

III. ELEMENTS

- § 8 Generally

- § 9 Solemn declaration
- § 10 Acknowledgment by authorized person
- § 11 Unequivocal act; manifestation of intent

IV. SUFFICIENCY

- § 12 Generally; form of oath
- § 13 Under constitutional or statutory provisions

I. IN GENERAL

Research References

- A.L.R. Digest: Oath § 1
- A.L.R. Index: Oath and Affirmation

§ 1 Definitions and purpose

Generally, an oath is an appeal by a person to God to witness the truth of what he or she declares, though a binding oath does not necessarily have to make reference to or include words of invocation to God.

Research References

- West's Key Number Digest, Oath ⇨1

Generally, an oath is an appeal by a person to God to witness the truth of what he or she declares,¹ and an imprecation of divine punishment or vengeance on him or her if what he or

she says is false.² However, a proper oath does not necessarily have to make reference to or include words of invocation to God.³ In its broadest sense, an oath includes any form of attestation by which a party signifies that he or she is bound in conscience to perform an act faithfully and truthfully,⁴ but it does not include those forms of attestation which are not accompanied by an imprecation.⁵

The purpose of the oath requirement is to impress upon the affiant the solemnity of the occasion and the need to tell the truth.⁶ Thus, the oath's main purpose is to ensure that affiant consciously recognizes his or her legal obligation to tell the truth.⁷ Another function of an oath is to bind the conscience of the speaker at a time when what he or she says will deeply affect the rights of an individual.⁸ A further function of an oath is to provide a

[Section 1]

¹Mo.—State v. Betts, 646 S.W.2d 94 (Mo. 1983).

N.M.—Lackey v. Mesa Petroleum Co., 90 N.M. 65, 559 P.2d 1192 (Ct. App. 1976).

Other definitions

Conn.—State v. Assuntino, 180 Conn. 345, 429 A.2d 900 (1980).

Hawaii—State v. Ponteras, 44 Haw. 71, 351 P.2d 1097 (1960).

Mich.—People v. Ramos, 430 Mich. 544, 424 N.W.2d 509 (1988).

Tax form invoking God not violation of equal protection

Mo.—Oliver v. State Tax Com'n of Missouri, 37 S.W.3d 243 (Mo. 2001).

"Deposition" and "oath" as synonymous, see C.J.S., Depositions § 1.

²U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

Signed statement with notice of penalty equivalent of oath

N.Y.—People v. McCulloch, 226 A.D.2d 848, 640 N.Y. S.2d 914 (3d Dep't 1996).

³Idaho—State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

N.H.—State v. Sands, 123 N.H. 570, 467 A.2d 202, 37 A.L.R.4th 904 (1983).

As to affirmation, see § 3.

U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

⁴Idaho—State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

⁵Idaho—State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

⁶S.C.—State v. Robinson, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999).

Wis.—Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

Five-year-old who correctly distinguished between truth and untruth given equivalent of oath

Minn.—State v. Morrison, 437 N.W.2d 422 (Minn. Ct. App. 1989).

⁷N.H.—In re State, 144 N.H. 85, 736 A.2d 1242 (1999).

Wis.—State v. Tye, 248 Wis. 2d 530, 2001 WI 124, 636 N.W.2d 473 (2001).

⁸S.D.—Brummer v. Stokebrand, 1999 SD 137, 601

basis for a perjury action upon proof of falsification.⁹

§ 2 Types of oaths

There are several types of oaths given for different purposes.

Research References

- West's Key Number Digest, Oath ⇨1

There are several types of oaths given for a variety of purposes.¹ A corporal oath is an oath made solemn by touching a sacred object, such as the Bible.² An extrajudicial oath is an oath that, although formally sworn, is taken outside a legal proceeding or outside the authority of the law.³

A judicial oath is one taken in the course of a judicial proceeding, especially in open court.⁴ It is taken as a sanction for the truth of an affirmation or declaration in legal or quasi-legal matters, like the oath of a witness or an affiant.⁵

A promissory oath is one in which the affiant swears that he or she will perform some duty to be performed subsequent to the taking of the oath.⁶ A promissory oath binds the party to observe a certain course of conduct, or to fulfill certain duties in the future, or to demean one's self thereafter in a stated man-

N.W.2d 619 (S.D. 1999).

⁹Fla.—Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 2d Dist. 1985).

S.D.—Brummer v. Stokebrand, 1999 SD 137, 601 N.W.2d 619 (S.D. 1999).

Statement properly sworn if giver is subject to perjury for fabrication

N.M.—State v. Knight, 128 N.M. 591, 2000 -NMCA-016, 995 P.2d 1033 (Ct. App. 2000), cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

Oath to support search warrant protects by creating liability for perjury

Wis.—State v. Tye, 248 Wis. 2d 530, 2001 WI 124, 636 N.W.2d 473 (2001).

[Section 2]

¹Utah—McKnight v. State Land Bd., 14 Utah 2d 238, 381 P.2d 726 (1963).

²Black's Law Dictionary (7th ed.).

³Black's Law Dictionary (7th ed.).

⁴Black's Law Dictionary (7th ed.).

⁵Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

ner with reference to specified objects or obligations.⁷

§ 3 Affirmation

An affirmation is a solemn undertaking to tell the truth, without invoking a deity.

Research References

- West's Key Number Digest, Oath ⇨4

An affirmation is a solemn undertaking to tell the truth, without invoking a deity.¹ Under some statutes, an affirmation may be taken instead of an oath.² It may not be necessary to state the reasons, in an affidavit or in the record, for the making of an affirmation rather than an oath.³

An affirmation is made under a penalty of perjury.⁴

II. CAPACITY AND ADMINISTRATION

Research References

- A.L.R. Digest: Oath §§ 1, 2
- A.L.R. Index: Oath and Affirmation

§ 4 Capacity to take oath

At common law, a person cannot take a valid oath unless he or she entertains a belief in the existence of a God who will

Oath of witness, generally, see C.J.S., Witnesses § 394.

⁶Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

⁷Utah—McKnight v. State Land Bd., 14 Utah 2d 238, 381 P.2d 726 (1963).

[Section 3]

¹N.J.—State v. Zamorsky, 159 N.J. Super. 273, 387 A.2d 1227 (App. Div. 1978), certification granted on other grounds, cause remanded on other grounds, 79 N.J. 485, 401 A.2d 241 (1979).

Equivalent to oath

W.Va.—Spradling v. Hutchinson, 162 W. Va. 768, 253 S.E.2d 371 (1979).

Term "oath" includes concept of affirmation

U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

²§ 13.

³Md.—White v. State, 244 Md. 188, 223 A.2d 259 (1966).

⁴N.M.—Citizens for Incorporation, Inc. v. Board of County Com'rs of County of Bernalillo, 115 N.M. 710, 858 P.2d 86 (Ct. App. 1993).

punish him or her if he or she swears falsely.

Research References

West's Key Number Digest, Oath ⇨3, 15

At common law, a person cannot take a valid oath unless he or she entertains a belief in the existence of a God who will punish him or her if he or she swears falsely.¹

Due to the fact that an oath is personal in nature, it may not be taken by another person in a representative capacity.²

The contention that only citizens may in good conscience take an oath to support the Constitution is lacking in merit.³

§ 5 Authority to administer

Only those officers who are authorized by law to do so may administer effective oaths or affirmations.

Research References

West's Key Number Digest, Oath ⇨2

An oath, in order to be effective, must be administered by some officer authorized by law to administer oaths.¹ Any officer who is given general authority to administer oaths and affirmations may do so, not merely when

they are required, but in all cases.² However, the authority to administer oaths should not be construed without statutory authorization.³

The administration of an oath by an officer is a ministerial,⁴ and not a judicial⁵ or quasi-judicial,⁶ act. Although there is some authority to the contrary,⁷ the interest of the one administering the oath does not disqualify him or her from administering it.⁸ However, ordinarily an officer cannot administer an oath to himself or herself.⁹

The authority of an officer of another state or country to administer an oath in the local forum, whether for use within the forum or in the other locale, is based upon authority granted by the forum and not the foreign state.¹⁰ Such rule applies to authority which may be extended by the federal government.¹¹

§ 6 Authority to administer— Inherent or express authority

A court has inherent authority to administer an oath.

Research References

West's Key Number Digest, Oath ⇨2

A court has inherent authority to administer

As to the power of a notary to administer oaths, see C.J.S., Notaries § 15.

²La.—Alleman v. Dufresne, 203 La. 79, 13 So. 2d 468 (1943).

³N.Y.—In re Kaufman, 183 Misc. 2d 581, 706 N.Y. S.2d 589 (Fam. Ct. 2000).

⁴Mo.—Giacopelli v. Clymer, 521 S.W.2d 196 (Mo. Ct. App. 1975).

⁵Okla.—Vahlberg v. State, 96 Okla. Crim. 102, 249 P.2d 736 (1952).

⁶Tex.—Doughty v. DeFee, 152 S.W.2d 404 (Tex. Civ. App. Amarillo 1941), writ refused w.o.m., (Oct. 1, 1941).

⁷Ohio—State ex rel. Reed v. Malrick, 165 Ohio St. 483, 60 Ohio Op. 431, 137 N.E.2d 560 (1956).

⁸N.C.—Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12 (1948).

⁹N.J.—Application of Gould, 81 N.J. Super. 579, 196 A.2d 278 (Law Div. 1963).

¹⁰Tex.—Kumpe v. Gee, 187 S.W.2d 932 (Tex. Civ. App. Amarillo 1945).

¹¹Tex.—Kumpe v. Gee, 187 S.W.2d 932 (Tex. Civ. App. Amarillo 1945).

an oath.¹ Under its inherent powers, a court may delegate the ministerial function of administering witness oaths to a clerk.²

Where an oath is required by statute, it cannot be waived by the court.³ However, a trial court does not have authority to require a party to take action under oath where an oath is not required by statute.⁴

Express authority.

Except where the administration of an oath or affirmation may be deemed to be an exercise of the inherent power of a court, an officer or other person has only such authority, if any, to administer oaths or affirmations as is conferred on him or her by constitution or statute.⁵ Such rule has been applied to various officers and persons,⁶ such as clerks of courts and their deputies.⁷ This rule has also been applied to justices of the peace⁸ and masters.⁹ Further application of the rule is found in the case of prosecuting attorneys and their assistants,¹⁰ and school board trustees.¹¹

[Section 6]

¹Wis.—State v. Johnston, 133 Wis. 2d 261, 394 N.W.2d 915 (Ct. App. 1986), review denied.

²Wis.—State v. Johnston, 133 Wis. 2d 261, 394 N.W.2d 915 (Ct. App. 1986), review denied.

³Tenn.—Storey v. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000).

⁴Tex.—In re Gist, 974 S.W.2d 843 (Tex. App. San Antonio 1998), reh'g overruled, (July 16, 1998).

⁵S.C.—State v. Brandon, 186 S.C. 448, 197 S.E. 113 (1938).

Delegation of authority

Pa.—Com. v. Weitkamp, 255 Pa. Super. 305, 386 A.2d 1014 (1978).

⁶U.S.—Hardwick v. U.S., 257 F. 505 (C.C.A. 9th Cir. 1919).

Commissioner of state agency

Mass.—Com. v. Bessette, 345 Mass. 358, 187 N.E.2d 810 (1963).

Criminal commission

Pa.—Com. v. Weitkamp, 255 Pa. Super. 305, 386 A.2d 1014 (1978).

⁷U.S.—U. S. v. Lawson, 523 F.2d 15 (8th Cir. 1975).

Va.—Mendez v. Com., 220 Va. 97, 255 S.E.2d 533 (1979).

⁸Ind.—State v. Reichard, 59 Ind. App. 338, 109 N.E. 438 (Div. 2 1915).

Justices appointed as bail commissioners

§ 7 Evidence of administration

Evidence of the administration of an oath or affirmation may be in the form of a jurat.

Research References

West's Key Number Digest, Oath ⇨6

A jurat containing the words "deemed duly sworn" is simply evidence of the fact that an oath was, in fact, properly administered.¹ A jurat is not part of the oath or conclusive evidence of its due administration, and it may be attacked and shown to be false.² The jurat must be executed with absolute honesty.³ Where the jurat of the officer administering the oath is lacking, the actual taking of the oath may be established by other evidence, at least where the oath is in the nature of a pledge required by a statute.⁴

The presumption is that, where an oath or affirmation was administered by a proper officer, it was properly administered.⁵

III. ELEMENTS

Research References

Me.—State v. Blaisdell, 253 A.2d 341 (Me. 1969).

⁵Pa.—Com. v. Beddick, 180 Pa. Super. 221, 119 A.2d 590 (1956).

¹⁰Tex.—Greer v. State, 437 S.W.2d 558 (Tex. Crim. App. 1969).

¹¹Tex.—Texarkana Independent School Dist. v. Lewis, 470 S.W.2d 727 (Tex. Civ. App. Texarkana 1971).

[Section 7]

¹N.Y.—People v. Coles, 141 Misc. 2d 965, 535 N.Y. S.2d 897 (Sup 1988).

²N.Y.—People v. Coles, 141 Misc. 2d 965, 535 N.Y. S.2d 897 (Sup 1988).

Annotation References: False oath or account as bar to discharge in bankruptcy proceedings, 59 A.L.R. 2d 791.

³N.J.—Immerman v. Ostertag, 83 N.J. Super. 364, 199 A.2d 869 (Law Div. 1964).

⁴Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

Jurat not deficient for not bearing notary public seal

Utah—Baker v. Schwendiman, 714 P.2d 675 (Utah 1986).

⁵Cal.—People v. Carreon, 151 Cal. App. 3d 559, 198 Cal. Rptr. 843 (5th Dist. 1984) (implied overruling on other grounds recognized by People v. Chavez, 231 Cal. App. 3d 1471, 283 Cal. Rptr. 71 (4th Dist. 1991)).

N.Y.—Collins v. AA Trucking Renting Corp., 209 A.D.2d 363, 618 N.Y.S.2d 801 (1st Dep't 1994).

A.L.R. Digest: Oath §§ 1, 2
A.L.R. Index: Oath and Affirmation

§ 8 Generally

The elements of an oath are a solemn declaration, manifestation of intent to be bound by the statement, the signature of the declarer, and an acknowledgment by an authorized person that the oath was taken.

Research References

West's Key Number Digest, Oath ⇨1, 3, 5

The elements of an oath include a solemn declaration, manifestation of intent to be bound by the statement, the signature of the declarer, and an acknowledgment by an authorized person that the oath was taken.¹

The elements of a valid oath do not vary with the nature of the oath.²

§ 9 Solemn declaration

A solemn declaration is one of the essential elements of an oath.

Research References

West's Key Number Digest, Oath ⇨1, 5

One of the elements of an oath is a solemn declaration.¹

At common law, an appeal to God as the rewarder of truth and the avenger of falsehood is necessary and sufficient to constitute a valid oath.² However, such appeal is only necessary where the person taking the oath entertains a belief in the existence of a Supreme Being who will punish him or her if he or she swears falsely.³

[Section 8]

¹U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

Wis.—Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

As to solemn declaration, see § 9.

As to acknowledgment by officer, see § 10.

As to unequivocal act, see § 11.

²Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

[Section 9]

¹U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

²N.J.—In re Breidt, 84 N.J. Eq. 222, 94 A. 214 (Ch. 1915).

As to definition of oath, see § 1.

§ 4.

§ 10 Acknowledgment by authorized person

The oath-taker must acknowledge that the oath was taken.

Research References

West's Key Number Digest, Oath ⇨1, 5

Generally, an oath must be made in the presence of an officer authorized to administer oaths.¹ The officer administering the oath is under no obligation to know the veracity of the declaration, or to know for a certainty that the taker of the oath is the person he or she represents himself or herself to be.² Further, an oath may be administered without any affirmative act by an oath-taker.³ However, the oath-taker must acknowledge that the oath was taken.⁴ The administering officer is required to know and state that the person who took the oath did declare himself or herself to be the person mentioned in the oath and that he or she manifested an intention to be bound by it.⁵ The administration of an oath is a solemn and important act which should never be done in a perfunctory manner.⁶ The person administering the oath must realize it to be such an act.⁷

§ 11 Unequivocal act; manifestation of intent

One element of an oath is an unequivocal act by which a person consciously takes on the obligation of the oath.

Research References

[Section 10]

¹N.Y.—People v. Ragusa, 44 Misc. 2d 940, 255 N.Y. S.2d 269 (County Ct. 1964).

Taking of oath by phone not invalid

Utah—McKnight v. State Land Bd., 14 Utah 2d 238, 381 P.2d 726 (1963).

Authority to administer, see §§ 5, 6.

²Utah—McKnight v. State Land Bd., 14 Utah 2d 238, 381 P.2d 726 (1963).

³N.H.—In re State, 144 N.H. 85, 736 A.2d 1242 (1999).

⁴Wis.—Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

⁵Utah—McKnight v. State Land Bd., 14 Utah 2d 238, 381 P.2d 726 (1963).

⁶N.J.—Immerman v. Ostertag, 83 N.J. Super. 364, 199 A.2d 869 (Law Div. 1964).

⁷Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

West's Key Number Digest, Oath ⇨1, 5

One of the elements of an oath is a manifestation of intent to be bound by the statement.¹ Thus, some unequivocal act, by which a person consciously takes on the obligation of the oath, is necessary to make an oath valid.² Such act also distinguishes between an oath and a bare assertion or unsworn statement.³ A mere intention, not accompanied by an unambiguous act, is not sufficient.⁴

While the uplifting of the hand is formal enough to make an oath legal and binding,⁵ the holding up of the hand is not necessary.⁶ It is enough if the person swearing does some corporal act after having been called on to do so and after his or her attention has been directed to the necessity of swearing to his or her statement.⁷ It is also sufficient if both the person swearing and the officer understand that what is done is proper for the administration of the oath and is all that is necessary to complete the act of swearing.⁸

Signing of affidavit in presence of officer.

There is authority that an affiant, by appearing in front of a notary and signing a document in the form of an oath, aware that it is

[Section 11]

¹U.S.—In re Williamson, 43 B.R. 813 (Bankr. D. Utah 1984).

Wis.—Kellner v. Christian, 197 Wis. 2d 183, 539 N.W.2d 685 (1995).

²U.S.—U.S. v. Yoshida, 727 F.2d 822 (9th Cir. 1983).

Minn.—State v. Healy, 521 N.W.2d 47 (Minn. Ct. App. 1994).

Emphasis on unequivocal act

Wash.—State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).

³Ill.—In re Rice, 35 Ill. App. 2d 79, 181 N.E.2d 742 (4th Dist. 1962).

⁴Ky.—Board of Elections of Taylor County v. Board of Educ. of Campbellsville Independent School Dist., 635 S.W.2d 324, 5 Ed. Law Rep. 669 (Ky. Ct. App. 1982).

As to sufficiency of oath, generally, see §§ 12, 13.

⁵Utah—Baker v. Schwendiman, 714 P.2d 675 (Utah 1986).

⁶La.—Plauche-Locke Securities, Inc. v. Johnson, 187 So. 2d 178 (La. Ct. App. 3d Cir. 1966).

N.Y.—People v. Coles, 141 Misc. 2d 965, 535 N.Y. S.2d 897 (Sup 1988).

⁷Ill.—In re Rice, 35 Ill. App. 2d 79, 181 N.E.2d 742

to be accepted and processed as a sworn document, has sufficiently bound his or her conscience to constitute the procedure as an oath.⁹ However, there is also authority that the mere signing of an affidavit before an officer is not an act which constitutes an oath.¹⁰

IV. SUFFICIENCY

Research References

A.L.R. Digest: Oath § 1
A.L.R. Index: Oath and Affirmation

§ 12 Generally; form of oath

An oath is a matter of substance, not form.

Research References

West's Key Number Digest, Oath ⇨5

Although the elements of an oath are generally required to be present,¹ an oath is a matter of substance, not form.² In the absence of a constitutional or statutory provision prescribing the form or method of administering an oath, a person may and should be sworn in a form which he or she regards as binding on his or her conscience.³ When this requirement is satisfied, the form of the oath⁴ or ceremony⁵ may be immaterial. However, merely citing in a piece of paper that one has accepted an oath

(4th Dist. 1962).

⁸U.S.—U.S. v. Yoshida, 727 F.2d 822 (9th Cir. 1983).

La.—State v. Snyder, 304 So. 2d 334 (La. 1974).

⁹Utah—Mickelsen v. Craiggco, Inc., 767 P.2d 561 (Utah 1989).

¹⁰Nev.—White v. State, 102 Nev. 153, 717 P.2d 45 (1986).

[Section 12]

¹As to elements, see §§ 8 to 11.

²Wis.—State v. Tye, 248 Wis. 2d 530, 2001 WI 124, 636 N.W.2d 473 (2001).

³Iowa—Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943).

Form of oath inferred

N.J.—Seiden v. Allen, 135 N.J. Super. 253, 343 A.2d 125 (Ch. Div. 1975).

As to administration, see §§ 5 to 7.

As to sufficiency under constitutional and statutory provisions, see § 13.

⁴Wash.—State v. Lewis, 85 Wash. 2d 769, 539 P.2d 677, 80 A.L.R.3d 273 (1975).

Inadvertent use of future, rather than past, tense in administering oath irrelevant

upon one's self does not constitute "swearing."⁶

In upholding the validity and binding effect of an oath taken, the courts have accorded weight to the fact that the person sworn took the oath without objection to its form.⁷ It is presumed, in the absence of an objection to the form of the oath, that it conforms to his or her conscience.⁸

§ 13 Under constitutional or statutory provisions

Constitutional or statutory provisions regulating oaths should be followed.

Research References

West's Key Number Digest, Oath ◊5

Constitutional or statutory provisions regulating oaths,¹ their administration,² and the filing of oaths³ should be given effect. Further, a statute requiring an oath to be used as an

instrument may be mandatory.⁴ Thus, an oath required by statute is not a mere technicality.⁵

Substantial compliance.

Substantial compliance with the form of an oath prescribed by a statute is generally all that is necessary.⁶ In some cases, however, faithful compliance with the statute is absolutely necessary to the validity of the instrument.⁷

Affirmation instead of oath.

An affirmation, instead of an oath, may be taken where the case falls within the scope and meaning of a constitutional or statutory provision permitting it.⁸ Some statutes provide that an affirmation may substitute for a sworn statement only when a person has conscientious scruples against taking an oath which invokes a deity.⁹

Ohio—State v. Wilmoth, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986).

Annotation References: Sufficiency, under Rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness' testimony, 127 A.L.R. Fed. 207.

⁵Symbolism and solemnity distinguishable

Cal.—People v. Walker, 247 Cal. App. 2d 554, 55 Cal. Rptr. 726 (3d Dist. 1967).

⁶N.Y.—People v. Coles, 141 Misc. 2d 965, 535 N.Y. S.2d 897 (Sup 1988).

⁷Iowa—State v. Browning, 153 Iowa 37, 133 N.W. 330 (1911).

⁸Ky.—Pierce v. Com., 408 S.W.2d 187 (Ky. 1966).

[Section 13]

¹U.S.—Miller v. Johnson, 541 F. Supp. 1165 (D.D.C. 1982).

Me.—Paradis v. Webber Hospital, 409 A.2d 672 (Me. 1979).

²Wash.—State v. Collier, 23 Wash. 2d 678, 162 P.2d 267 (1945).

Admission of statement under hearsay rule not violating administration of oath requirement

Tex.—Bernal v. State, 13 S.W.3d 852 (Tex. App. Austin 2000), petition for discretionary review refused, (June 28, 2000).

³Iowa—Miller v. Palo Alto Bd. of Sup'rs, 248 Iowa 1132, 84 N.W.2d 38 (1957).

⁴Tenn.—Storey v. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000).

⁵Tenn.—Storey v. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000).

⁶Alaska—H. A. M. S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258 (Alaska 1977), order supplemented on other grounds, 566 P.2d 1012 (Alaska 1977).

Ga.—Elam v. State, 211 Ga. App. 739, 440 S.E.2d 511 (1994).

Or.—Blackburn v. Motor Vehicles Division, Dept. of Transp., 33 Or. App. 397, 576 P.2d 1267 (1978).

⁷Tenn.—Storey v. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000).

⁸Ohio—Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 62 Ohio Op. 2d 420, 294 N.E.2d 676 (8th Dist. Cuyahoga County 1973).

⁹N.M.—Citizens for Incorporation, Inc. v. Board of County Com'rs of County of Bernalillo, 115 N.M. 710, 858 P.2d 86 (Ct. App. 1993).

OBSCENITY

By John R. Kennel, J.D., of NLRG

Scope

This title deals with lewd or immodest acts, conduct, or language, offensive to the public sense of decency or to the public morals, in general, the public exhibition or dissemination of publications, or representations of lewd or indecent character, and the publishing of obscene libels. The discussion extends also to the nature and elements of the crimes of indecent exposure, using obscene language, dealing in indecent articles or publications, and obscene libel, the nature and extent of criminal responsibility therefor, and the prosecution and punishment of such acts as public offenses.

Treated Elsewhere

Indecent assaults, see C.J.S., Assault and Battery § 74

Lewdness, generally, see C.J.S., Lewdness §§ 1 to 13

Mailing obscene matter, see C.J.S., Postal Service and Offenses Against Postal Law § 49

Obscenity as to telephone service, see C.J.S., Telecommunications § 115

Obscenity as to television and radio programs, see C.J.S., Telecommunications § 181

Obscenity as to violations of public welfare, see C.J.S., Injunctions § 136

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I. IN GENERAL (§§ 1 TO 6)

II. PARTICULAR FORME OR ASPECTS OF OBSCENITY (§§ 7 TO 16)

III. PROSECUTION AND PUNISHMENT (§§ 17 TO 28)

I. IN GENERAL

- § 1 Definitions and general considerations
- § 2 Power to regulate; statutory provisions
- § 3 Power to regulate; statutory provisions—Limitations on power
- § 4 Nature and elements of offenses
- § 5 Nature and elements of offenses—Intent, knowledge, and scienter
- § 6 Test of obscenity

II. PARTICULAR FORME OR ASPECTS OF OBSCENITY

- § 7 Nudity and nudist activities
- § 8 Public indecency
- § 9 Indecent exposure