

over which the Secretary of State, in conjunction with County Election Administrators, are charged with administrating signature gathering in the petition process. Mont. Code Ann. §§ 13-1-201, 202; §13-1-301.

Certification of signatures. An affidavit, in substantially the following form, must be attached to each sheet or section submitted...

Mont. Code Ann §13-27-302.

The Declaratory ruling shall address the “applicability of any statutory provision or any rule or order of the agency. Mont. Code Ann. §2-4-501. 3. Petitioners contend that an unsworn declaration pursuant to Mont. Code Ann. §1-6-105 satisfies the affidavit requirement pursuant to §13-27-302.

DISCUSSION

I. The Use of Unsworn Declarations Pursuant to § 1-6-105

To qualify a constitutional initiative for the ballot, petition gatherers must obtain the signatures of 10% of the total number of qualified voters in the state, including 10% of the voters in each of the 40 legislative districts. Mont. Const. art. XIV, §9; § 13-27-204, MCA. Similarly, to qualify a statutory initiative for the ballot, petition gatherers must obtain the signatures of 5% of the total qualified voters in the state, including 5% of the voters in each of the 34 legislative districts. Mont. Const. art. III, §4; § 13-27-204, MCA.

An integral part of this process requires signature gatherers to submit a standard form “affidavit” certifying the genuineness and authenticity of the signatures to the county election administrators. §§13-27-301 and 13-27-302, MCA. The language of the standard form “affidavit” attests that “the person who is the signature gatherer” swears under oath that:

- (1) he or she “gathered or assisted in gathering the signatures on the petition to which the affidavit is attached on the stated dates;”
- (2) he or she “believe the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person’s signature;” and

(3) “the signers knew the contents of the petition before signing the petition.”

§ 13-27-302, MCA. The standard form affidavit further requires the signature gatherer to attest to the “address of the signature gatherer.” *Id.* Montana law defines an “affidavit” as “a written declaration under oath, made without notice to the adverse party.” §26-1-1001, MCA.

In 2011, the Montana Legislature adopted Montana Code Ann. § 1-6-105 Unsworn Declarations. Mont. Code Ann. §1-6-105 provides, in part:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, **any matter is required or permitted to be supported**, evidenced, established, **or proved by a person's sworn written declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported**, evidenced, established, **or proved by an unsworn written declaration, certificate, verification, or statement that is subscribed by the person as true under penalty of perjury** in substantially the following form...
Mont. Code Ann. §1-6-105 (1). (Emphasis Added)

Mont. Code Ann. § 13-27-301, 302 requires the submission of signatures gathered for initiatives to be supported by a person’s sworn affidavit. Under the plain language of § 1-6-105, the matter may with “like force and effect be supported...or proved by an unsworn written declaration that is subscribed by the person as true under penalty of perjury.”¹ Indeed, Mont. Code Ann. §1-1-203 provide “affidavit” generally “means a sworn written declaration made before an officer authorized to administer oaths or an unsworn written declaration made under penalty of perjury as provided in 1-6-105.”

Therefore, the Secretary of State determines an unsworn written declaration made under penalty of perjury as provided in § 1-6-105 may be submitted with like force and effect as an affidavit pursuant to §13-27-301.

¹The Montana Supreme Court’s Order In the Matter of the Statewide Response by Montana State Courts To the Covid-19 Public Health Emergency (2020) requires courts, under the Governors shelter in place, to apply the provisions of § 1-6-105 that provide for the use of declarations rather than requiring notarized affidavits in both civil and criminal matters.

A. The Plain Language of the Statute Controls

When the legislature adopted the Unsworn Declaration pursuant to § 1-6-105, it did so without limitation. The plain language of the statute is unambiguous. So long as the requirements of § 1-6-105 are met, an unsworn verification may substitute the sworn declaration requirement.

The plain language of the statute is supported by legislative history. Although unnecessary to consult, it worth noting the testimony by Professor Charles Wiley, of the University of Montana School of Law, credited with drafting the legislation. In testimony before the Senate Judiciary Committee on February 17, 2011, he stated:

"There is one item that is not limited to probate and trust matters, and that is the provision for an unsworn declaration. This bill has in it a provision which says in substance that if you would otherwise be required to swear to the truth of an item before a notary public, that is, an affidavit in the old form, that you can have the same legal effect by signing a sworn declaration which says, 'I declare under penalty of perjury that this thing is true and correct.' There is a virtually identical provision in the federal law which allows unsworn declarations in all kinds of federal proceedings. It's a matter of great convenience because if you otherwise have something that requires an affidavit before a notary and it happens to be a weekend or your client is out in the country where there aren't any notaries, it can be a real problem to get things done. This would allow a much more efficient treatment of that."

The last amendment or change by the legislature to § 13-27-302 was adopted in the 2007 legislative session. However, it was 2011 when the legislature adopted §1-6-105. Since that time, the use of an unsworn declaration pursuant to §1-6-105 may be used to legally satisfy the affidavit requirement pursuant to § 13-27-302. While the use of unsworn declarations in place of sworn affidavits has frequented other areas of Montana law since that time, the Secretary is unaware of any such utilization within Title 13, Chapter 27. Nonetheless, the legislature has not altered or limited the authorization since the time of §1-6-105.

B. Penalty of Perjury by Consent

The required circulation affidavits aid in assuring signature authenticity, protecting against fraudulent or duplicate signatures, and protecting against fraudulent signature

gathering practices. §§ 13-10-601(2)(c), 13-27-302, 13-27-303(1), 13-27-303(3), MCA. *See also*, Larson v. State, 2019 MT 28, ¶ 52, 394 Mont. 167, ¶ 52, 434 P.3d 241, ¶ 52. The affiant attestation to the truth of facts asserted subject to criminal penalty of perjury provides the contemplated circumstantial guarantee of trustworthiness and reliability. Montanans for Justice, CDV-06-1162 (d), (citing Climate Control Co. Inc. v. Bergsieker Refrigeration Inc. (1982), 196 Mont. 405, 409, 640 P.2d 442, 444. Sheehy v. Ferda (1988), 235 Mont. 63, 67, 765 P.2d 722,724-25.)

As noted by the court in Montanans for Justice, further indication of the significance of the affidavit requirement of § 13-27-302, MCA, knowingly falsifying a certification affidavit is a criminal offense, subject to a \$500.00 fine and 6 months in the county jail. §§13-27-106 and 45-7-203, MCA.

Pursuant to §1-6-105 (2) , MCA, falsification in any declaration pursuant to this section constitutes the offense of perjury as provided in 45-7-201 and is punishable as the offense of false swearing as provided in §45-7-202. In order to have a valid unsworn declaration pursuant to § 1-6-105, the person must expressly state declaration under penalty of perjury that the forgoing is true and correct and execute their signature and date. Id., at (a) and (b). In doing so, the declarant affirms understanding of the criminal penalties they may be subjected to if falsification were to occur.

C. Judicial Construction of Affidavit Requirements Apply

The manifest purpose of a statutory affidavit requirement is to obtain a true, accurate, and reliable statement of fact. Montanans for Equal in re Initiative Laws v. State, 2006 Mont. Dist. LEXIS 977 (2006). Unless provided otherwise, an affidavit is legally defective unless the affiant has “personal knowledge of the information contained in the statement” and “swears “to its validity.” McDermott, ¶26. As an unsworn declaration has like force and effect pursuant to statute, an unsworn declaration is subject to the same requirements established by the judiciary for a Title 13, Chapter 27 affidavit.

According to judicial construction, a signature gatherer’s affidavit pursuant to §§13-27-302 and § 26-1-1001, MCA, is legal defective unless, based on the affiant-signature gatherer’s personal knowledge, the following facts are true:

- (1) that he or she “gathered or assisted in gathering the signatures on the petition;”
- (2) that he or she has reason to believe that the “signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person’s signature;” and
- (3) that “the signers knew the contents of the petition before signing the petition.”

See, Montanans for Justice.

Therefore, even upon such a Declaration that an unsworn written declaration made under penalty of perjury as provided in § 1-6-105 has like force and effect of the sworn written declaration before a notary required by Title 13, Chapter 27, the validity of either is contingent upon the established requirements outlined above. A signature gatherer’s unsworn declaration may be deemed legally defective for the same reasons as a signature gatherer’s affidavit may be deemed legally defective.

II. §13-27-302 Form Substantial Compliance

The second issue noticed for the Secretary’s declaration is whether Petitioners’ proposed signature gatherer form is substantially the same as required by §13-27-302.

Mont. Code Ann. §13-27-302 requires “an affidavit, ***in substantially the following form***, must be attached to each sheet or section submitted to the county election official”. (Emphasis added) The contents of the form that follows under the statute consists of the following:

1. An oath by the signature gatherer swearing to gathering the attached signatures on the stated dates;
2. An oath by the signature gatherer attesting to personal knowledge and/or belief of the validity of the signatures;
3. Affirmation that the signatures of the persons whose names they purport to be;
4. Attestation to personal knowledge that the signatures are of Montana electors who are registered at he address or telephone number following the persons signature;
5. Attestation that the signers knew the contents of the petition before signing the Petition.
6. Date on which the signature was gathered.
7. Signature and Address of the Signature Gatherer;
8. Notary block information.

The Affidavit of Petition Signature Gatherer proscribed by the Secretary of State, pursuant to statute, is attached to this decision as Exhibit “A”.

The form submitted by Petitioners is attached as Exhibit “B”. The form submitted by Petitioners’ in conjunction with Petitioners’ Declaratory request consists of inserted additions well beyond what statute and the Secretary provide. For instance, the use of Microsoft Skype to conduct signature gathering is not considered by the plain terms of the statute and judicial interpretation of the same. Likewise, the form provides an area of blank space for a signature gatherer to indicate “doing the thing named on the following line to obtain a signature”. The inclusion of these changes shift Petitioners’ proposed form from a declaration as substantially the same as required by the statutory form.

For the sake of brevity in the Secretary’s analysis, the Secretary declares and provides the *Signature Gatherer Unsworn Declaration Form* attached as Exhibit “C” as substantially in the same form as prescribed by statute and as authorized by §1-6-105.

DECLARATORY RULING

Based on the above, the Secretary makes the following declaratory rulings:

1. A properly performed unsworn declaration or verification pursuant to §1-6-105, MCA, has the same force and effect as a sworn notarized affidavit as applied to §13-27-302 submissions;
2. Petitioners’ Proposed Unsworn Declaration is not substantially in the same form required by statute; and,
3. The *Signature Gatherer Unsworn Declaration Form* prescribed by the Secretary may be used with the same like force and effect as the Signature Gatherer Affidavit form pursuant to statute.

Dated this 7th day of May, 2020.



A. M. James
Secretary of State

cc: Petitioners



Affidavit of Petition Signature Gatherer

An affidavit must be attached to each sheet or section submitted to the election administrator. Separate sheets of a petition may be fastened to this affidavit in sections of not more than 25 sheets.

AFFIDAVIT FILED WITH ELECTION ADMINISTRATOR

I, _____,
(printed name of person who is the signature gatherer)

swear that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, that I believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature, and that the signers knew the contents of the petition before signing the petition.

Date on which the first signature **attached** was gathered

(Do NOT sign on the line below before gathering the signatures on the petition(s) that you attach to this affidavit.)

Signature of petition signature gatherer

Address of petition signature gatherer

City, state and zip code

NOTARY OR AUTHORIZED OFFICER – DO NOT FILL OUT THIS SECTION UNTIL AFTER THE SIGNATURES GATHERED HAVE BEEN ATTACHED TO THIS AFFIDAVIT

Where to file Petition and Affidavit:
County Election Administrator's Office
A list of county election offices may be found at:
sosmt.gov/elections

State of Montana

County of _____

Signed and sworn to before me this _____ day of _____, 20____ by

Printed Name of Signature Gatherer

[SEAL/STAMP]

Signature of Notary or Public Official

Verification of Petition Signature Gatherer

Pursuant to § 1-6-105, MCA, a verification to replace a notarized affidavit must be attached to each sheet or section submitted to the election administrator. Separate sheets of a petition may be fastened to this verification in sections of not more than 25 sheets.

VERIFICATION TO BE FILED WITH ELECTION ADMINISTRATOR:

I, _____,
(printed name of person who is the signature gatherer or who is the person signing [if only one person signs the initiative signature sheet])

swear or affirm under penalty of perjury that the following statements are true that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, by (check all that apply):

- _____ 1) signing the attached initiative petition;
- _____ 2) gathering signatures while safely observing a person signing (e.g. via skype, watching occupants in my house, etc.);
- _____ 3) receiving by mail or pre-arranged social distancing drop-pick up, attached petition(s) containing original signature(s); or
- _____ 4) doing the thing named on the following line to obtain authenticated signature(s) on attached petition(s)_____;

that I believe the signatures on the petitions to which this form is attached, are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address indicated, or have the telephone number following the person's signature, and (in the case of an electronic signature) have the last four digits of the elector's social security number, and that the signers knew the contents of the petition before signing the petition.

(Date on which the first signature attached was gathered)
(Do not sign on the line below before gathering the signatures on the petition(s) that you attach to this verification.)

Signature of petition signature gatherer

Address of petition signature gatherer

City, state and zip code of signature gatherer

Where to file (mail) your Petition(s) and Verification Form: County Election Administrator's Office. A list of County election offices addresses may be found at:
<https://sosmt.gov/Portals/142/Elections/Forms/electionadministrators.pdf>



Unsworn Declaration of Petition Signature Gatherer Under Penalty of Perjury Pursuant to §1-6-105

An affidavit as defined by 1-1-203 must be attached to each sheet or section submitted to the election administrator.
Separate sheets of a petition may be fastened to this affidavit in sections of not more than 25 sheets.

AFFIDAVIT FILED WITH ELECTION ADMINISTRATOR

I, _____,
(printed name of person who is the signature gatherer)

swear that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, that I believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature, and that the signers knew the contents of the petition before signing the petition.

Date on which the first signature **attached** was gathered

(Do NOT sign on the line below before gathering the signatures on the petition(s) that you attach to this affidavit.)

Signature of petition signature gatherer

Address of petition signature gatherer

City, state and zip code

1-6-105, MCA UNSWORN DECLARATION EXECUTED UNDER PENALTY OF PERJURY— **DO NOT FILL OUT THIS SECTION UNTIL AFTER THE SIGNATURES GATHERED HAVE BEEN ATTACHED TO THIS AFFIDAVIT**

Insert the following within the text space below:
"I [Insert Name] declare under penalty of perjury that the foregoing is true and correct"

Where to file Petition and Affidavit:
County Election
Administrator's Office
A list of county election offices may be found at:
sosmt.gov/elections

Dated on this _____ day of _____, 20____ by

Printed Name of Signature Gatherer

Signature