



**REPORT BY THE  
COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE,  
COUNCIL ON JUDICIAL ADMINISTRATION,  
LITIGATION COMMITTEE AND  
STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE**

**SUPPORT FOR THE OCA ADVISORY COMMITTEE ON CIVIL PRACTICE'S  
PROPOSED AMENDMENT OF CPLR 2106  
TO EXPAND THE USE OF UNSWORN AFFIRMATIONS**

The Advisory Committee on Civil Practice of the New York Office of Court Administration (“OCA”) has proposed an amendment of the New York Civil Practice Law and Rules (“CPLR”), modeled on Federal law and the Uniform Unsworn Declarations Act promulgated by The Uniform Law Commission (“ULC”), to permit the use of what are called “unsworn affirmations”<sup>1</sup> under penalty of perjury in the place of sworn affidavits or affirmations notarized by a notary public in a civil action or proceeding wherever made and for all purposes. This proposal is consistent with Federal practice, which has permitted the use of unsworn declarations under 28 U.S.C. § 1746 since 1976. As of 2016, the ULC identified 22 states with laws or procedural rules similar to the Federal law. In 2008, the ULC promulgated the Unsworn Foreign Declarations Act, which has been adopted in 24 states, including New York. The Uniform Unsworn Declarations Act, since its promulgation in 2016, has been enacted in Colorado, Pennsylvania, Utah and Washington and has been introduced in Rhode Island. OCA previously recommended this amendment to the CPLR in 2020.<sup>2</sup>

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<sup>1</sup> An “affirmation” is generally understood to be indistinguishable from an affidavit, in that both are statements stated to be true and correct before a notary. The difference is that for an affidavit, the notary administers an oath but for an affirmation, the notary administers an affirmation. In this sense, all affirmations are “unsworn”, but they are affirmed to be true before a notary. In technical notarial language, these instruments are called “verifications taken under oath or affirmation”. The OCA proposed amendment to the CPLR, perhaps confusingly, uses the term “affirmation” to mean a declaration that is neither sworn to nor affirmed before a notary, but is made under penalty of perjury. To avoid confusion, this Report will use the term “unsworn declarations” to describe the CPLR amendment proposed by OCA.

<sup>2</sup> Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (Jan. 2020) at 85-6, <https://www.nycourts.gov/LegacyPDFS/IP/judiciarylegislative/pdfs/2020-CivilPractice.pdf>. (Last visited May 24, 2021).

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

Unsworn declarations are already accepted under current New York law in certain limited circumstances. Members of only a few professions (attorneys, physicians, osteopaths and dentists) may use an unsworn declaration made within the United States in place of a notarized affidavit or affirmation (CPLR 2106 (a)). All persons may use an unsworn declaration made outside the jurisdiction of the United States (CPLR 2106 (b)). The limitations of CPLR 2106 (a) create significant difficulties for litigants and non-party witnesses, particularly the unrepresented and those residing outside cities, who do not have ready access to a notary or who may require notarial services outside normal business hours. As noted by OCA, the requirements of CPLR 2106 (a) also impose undue burdens on the offices of the county clerks and courts who are often called upon by poor and pro se litigants to notarize affidavits or affirmations.

The burdens of CPLR 2106 (a) become all the more acute during times of crisis or emergency, such as was recently witnessed during COVID-19 shutdowns and “stay at home” orders. The continued requirement for notarized affidavits during the pandemic put litigants and non-party witnesses at risk of exposure to COVID-19 by compelling them to go to banks and other crowded locations to obtain notarizations. While an Executive Order issued by the Governor still permits virtual notarization via the internet, the practice is difficult, especially for unrepresented parties, and is not available for out-of-state witnesses.

## **PROPOSED REPLACEMENT OF CPLR 2106**

To alleviate these problems and harmonize New York practice with that of the Federal courts and many other jurisdictions, the OCA Advisory Committee proposes the following legislation to replace existing CPLR 2106:

Section 1. Rule 2106 of the civil practice law and rules is amended to read as follows:

Rule 2106. Affirmation of truth of statement. The statement of any person wherever made, subscribed and affirmed by the person to be true under the penalty of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this—day of -----, at ----- under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that the foregoing may be used in an action or proceeding in a court of law.

Signature

§ 2. This act shall take effect immediately and apply to all actions commenced on or after the date on which it shall have become law and all actions pending on the date on which it shall have become law.

This amendment would permit all persons to use unsworn declarations, whether made within or outside the United States, in place of notarized affidavits or affirmations in New York state court litigation.

A number of potential objections to the proposed amendment have been raised. These include that it may encourage the filing of untruthful witness statements, that it will eliminate the use of affidavits altogether, or that it is “anti-notary”. Upon consideration, however, it appears that these concerns are without substance.

## **TRUTHFULNESS**

The successful use of unsworn declarations for over forty years in Federal courts and the courts of many other states, not to mention the use of unsworn declarations as currently permitted by CPLR 2106, provides ample evidence that mere elimination of notarization will not reduce the truthfulness of witness statements filed with the New York courts. Notaries do not investigate the truth of the facts being sworn to. Unfortunately, many notaries do not even go through the formality of administering an oath. If anything, the incentive to tell the truth is even greater when an affirmation is expressly made under penalty of perjury. A false statement made with intent to mislead the court will constitute perjury in the second degree, a Class E felony punishable by up to four years imprisonment. See Penal Law 70.00(2) (e), 210.00(1) and (5), 210.10.

## **ELIMINATION OF AFFIDAVITS OR THE NEED FOR NOTARIES**

The proposed amendment of CPLR 2106 will not eliminate the use of notarized affidavits and affirmations or the need for notaries. Amended CPLR 2106 would merely make unsworn declarations an alternative method of presenting a written witness statement in New York state court litigation. Nor would the proposed amendment eliminate the need for notarization when a declarant is required by other law to establish the declarant’s identity (for example, the witness at a deposition (CPLR 3113(b)) or the authenticity of a document (for example, CPLR 3116), or to take an oath of office. Significantly, we understand that two leading notarial associations, the American Notarial Association, and the National Society of Notaries, have determined that they do not object to enactment of laws permitting the use of unsworn declarations.

## **CONCLUSION AND RECOMMENDATION**

For the reasons stated, the New York City Bar Association recommends that the proposed amendment to CPLR 2106, as set forth by the OCA Advisory Committee on Civil Practice, be enacted into law.

Commercial Law & Uniform State Laws Committee  
Alan Kolod, Chair

Council on Judicial Administration  
Michael P. Regan, Chair

Litigation Committee  
John M. Lundin, Chair

State Courts of Superior Jurisdiction Committee  
Bart J. Eagle, Chair

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**Contact**

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)