



October 17, 2023

The Honorable Kathy Hochul
Governor of the State of New York
Executive Chamber
New York State Capitol Building
Albany, NY 12224

Re: Urging Enactment of A. 5772 (Lavine) S.5162 (Hoylman-Sigal), an Act to amend the CPLR in Relation to an Affirmation by Any Person, Wherever Made, in a Civil Action

Dear Governor Hochul:

We write on behalf of the New York City Bar Association (City Bar) to urge you to sign A.5772/S.5162, an act to amend the Civil Practice Law and Rules in relation to an affirmation by any person, wherever made, in a civil action.

THE PROPOSAL MAKES PRACTICAL SENSE AND IS CONSISTENT WITH FEDERAL PRACTICE AND THAT OF MANY OTHER JURISDICTIONS

The proposed legislation would permit the use of what are called “unsworn affirmations”¹ by any person in state court litigation 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. In 2008, the ULC promulgated the Unsworn

¹ 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 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.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 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.

Foreign Declarations Act, which has been adopted in 25 states, including New York.² The Uniform Unsworn Declarations Act, since its promulgation in 2016, has been enacted in Colorado, Pennsylvania, Utah and Washington and has been introduced in Wisconsin.³ This amendment has been previously recommended and endorsed by the Office of Court Administration.⁴

Unsworn declarations are already accepted under current New York law in certain limited circumstances. Members of 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. 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.⁵ As witnessed during COVID-19, the burdens of CPLR 2106(a) become all the more acute during times of crisis or emergency.

PROPOSED REPLACEMENT OF CPLR 2106

To alleviate these problems and harmonize New York practice with that of the Federal courts and many other jurisdictions, this bill proposes replacing existing CPLR 2106. 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.

² Unsworn Foreign Declarations Act, Uniform Law Commission, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a5b28eee-3971-498c-bfd9-6e43118ae346#:~:text=Description,-Scroll%20up%20Scroll&text=The%20Uniform%20Unsworn%20Foreign%20Declarations,or%20other%20sworn%20court%20filings> (all websites last visited Oct. 17, 2023).

³ Unsworn Declarations Act, Uniform Law Commission, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2453b1ec-4689-47db-bd74-0bdcfa514d4e>.

⁴ 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/judiciary/legislative/pdfs/2020-CivilPractice.pdf>. See also Support for the OCA Advisory Committee on Civil Practice’s Proposed Amendment of CPLR 2106 To Expand the Use of Unsworn Affirmations, New York City Bar Association, May 25, 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/unsworn-affirmations-expansion-oca>.

⁵ See *id.* “Advisory Committee” Report.

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.⁶

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.

For these reasons, we urge the enactment of A.5772/S.5162 into law and thank you for your consideration.

Respectfully,

Commercial Law & Uniform State Laws Committee
Curtis C. Mechling, Chair

Council on Judicial Administration
Fran R. Hoffinger, Chair

Litigation Committee
Seth D. Allen, Chair

State Courts of Superior Jurisdiction Committee
Amy D. Carlin, Chair

Continue to next page

⁶ See Penal Law 70.00(2) (e), 210.00(1) and (5), 210.10.

Cc:
Senator Brad Hoylman-Sigal
Assembly Member Charles Lavine

Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org