

# THE CPLR COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

## REPORT RECOMMENDING PROPOSED AMENDMENTS TO CPLR § 2106 AND PENAL LAW §210.00

CPLR § 2106 provides that a declaration affirmed under penalty of perjury, when made by an attorney at law or by certain specified medical professionals, may be “served or filed” in a civil action “in lieu of and with the same force and effect as an affidavit.”

This Section has long advocated modification of CPLR § 2106 to provide that any person may give an unsworn declaration under penalty of perjury in the same manner and with the same effect as the statute presently allows for stated classes of professionals. Unsworn declarations are authorized in federal practice pursuant to 28 U.S.C. § 1746, and there is no principled or pragmatic reason not to extend the practice to New York state courts. Efforts to achieve such an amendment have been complicated, however, by several factors, including the following:

(i) the interaction of CPLR § 2106 with CPLR § 2309(b), which provides that “an oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs”;

(ii) the question whether, in light of the structure and complexity of Penal Law Article 210, any such amendment would inadvertently weaken or eliminate the penalties that would otherwise apply in cases where an affiant submitted an intentionally false statement with intent to mislead the court;

(iii) a long-standing tradition in the caselaw finding that a charge for perjury would not lie unless it could be shown that the declarant had made some “unequivocal and present act in some form in the presence of an officer authorized to administer oaths by which the affiant conscientiously takes upon himself the obligation of an oath.” *People v. Lieberman*, 57 Misc. 2d 1070, 294 N.Y.S.2d 117 (Supreme Court, Queens County 1968).

In an effort to accommodate these issues, this Section in 1995 endorsed a proposal to (i) amend CPLR § 2106 to permit any person to give an unsworn affirmation under penalty of perjury with the same effect as an affidavit, and (ii) amend Penal Law Article 210 by adding a new Section 210.46, providing that such an unsworn affirmation, if made falsely, would be punishable as a Class E Felony. In order to satisfy the mandate of CPLR § 2309(b), this Section recommended that CPLR § 2106 specify that such an unsworn affirmation be made as follows in the following words:

I affirm under the penalties of perjury that the foregoing is true. If it is knowingly false, I may be prosecuted for the crime of perjury and if convicted may be sentenced to fine and imprisonment.

This Section's 1995 proposal was outlined in detail in an article published in *The NY Litigator* in May 1996 entitled "Permitting Use of Affirmations By All Persons." The proposal was adopted by the Office of Court Administration's Advisory Committee on Civil Practice, replacing an earlier proposal by the Advisory Committee. Despite the endorsement of both the OCA and this Section, however, the proposal was never adopted by the Legislature, and ultimately the OCA dropped the proposal from its annual package of recommended amendments to the CPLR.

Recently, however, this Section asked the CPLR Committee to reconsider whether a workable modification of CPLR 2106 might be found. Simultaneous with our Committee's considerations, the Advisory Committee undertook to revisit the issue. Their deliberations led, in stages, to (i) the adoption of a revised proposal (a copy of which, together with the Advisory Committee's report in support thereof, is attached as Exh. A), and (ii) certain modifications to the proposed language of CPLR 2106, made in response to comments from the OCA's Advisory Committee on Criminal Law and Procedure (a copy of the modified version is attached as Exh. B). We believe the final version, as adopted by the Advisory Committee, satisfactorily addresses the various components of the problem. The key elements of the proposal are described below.

First, as with the earlier proposal, the Advisory Committee seeks to amend CPLR 2106 to provide that an unsworn affirmation may be given by "any person," and that such an affirmation is fully usable in a civil action with the same force and effect as an affidavit. (On the latter point, the Advisory Committee proposal would replace language specifying that such an affirmation may be "served or filed" in a civil action, with a more general statement that such an affirmation may be "used" in a civil action.)

In addition, similar to the 1995 version, the Advisory Committee proposal sets forth specific language to be used in making an unsworn affirmation, language that is intended to allay any concern that such an affirmation would not satisfy the requirements of CPLR § 2309(b). The proposed language has been revised, however, to confirm that the declarant is aware that the affirmation may be submitted to a court of law, and that knowingly giving a false affirmation may result in a felony conviction. The revised affirmation also includes a statement of the date on which it is given:

I affirm this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, under the penalties of perjury, which may include a felony conviction punishable by a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Finally, rather than proposing a new section of the Penal Law setting out a particular penalty for false unsworn declarations, the Advisory Committee would amend the Penal Law's definition of "Oath" – which already includes "an affirmation" – to specify that an unsworn affirmation made pursuant to CPLR 2106 qualifies as an "oath" within the meaning of the Penal Law. This proposed change is intended to address statements in cases such as *People v. Lieberman*, which appear to require not merely that the form of an unsworn affirmation be made in a manner that "awakens the conscience," as required by CPLR 2309(b), but in addition that an unsworn affirmation be made before an officer authorized to administer an oath.

In this Committee's view, the Advisory Committee's proposal is well-structured, satisfies the concerns for both conformity with CPLR 2309(b) and existing provisions of the Penal Law, and clearly distinguishes the new form of affirmation from the earlier caselaw requiring that even an unsworn affirmation be made before an official with the same ceremony attending an oath. In addition, the Advisory Committee's accompanying memorandum cogently sets forth the reasons for seeking these amendments. As stated in that memorandum, these include the increasing burden and complexity for many civil litigants – including persons who may not have ready access to notaries, or litigants who come to New York from other jurisdictions – of complying with the requirement of providing a sworn affidavit. In our view, a properly structured affirmation (such as the form of affirmation proposed by the Advisory Committee) affords ample assurance that the declarant has been properly advised of the seriousness of the matter, of the need for accuracy in statements made to a court, and of the penalties that may follow from intentionally offering a false affirmation.

### *Conclusion*

For the reasons stated, the CPLR Committee recommends that the proposed amendments to CPLR 2106 and Penal Law 210.00, as set forth in the proposal of the Office of Court Administration's Advisory Committee on Civil Practice, be APPROVED.