

BILL TEXT:

STATE OF NEW YORK

4215

2007-2008 Regular Sessions

IN SENATE

March 30, 2007

Introduced by Sen. VOLKER -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules and the penal law, in relation to unsworn affirmation of truth of statement under penalty of perjury

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Rule 2106 of the civil practice law and rules, as amended
2 by judicial conference proposal number 3 for the year 1973, is amended
3 to read as follows:

4 Rule 2106. Affirmation of truth of statement [~~by attorney, physician,~~
5 ~~osteopath or dentist~~]. The statement of [~~an attorney admitted to prac-~~
6 ~~tice in the courts of the state, or of a physician, osteopath or~~
7 ~~dentist, authorized by law to practice in the state, who is not a party~~
8 ~~to an action~~] any person, when subscribed and affirmed [~~by him~~] to be
9 true under the penalties of perjury, with knowledge that it may be
10 [~~served or filed~~] used in [~~the~~] a legal action or proceeding in lieu of
11 and with the same force and effect as an affidavit. An affirmation
12 shall be in substantially the following form:

13 "I affirm this _____ day of _____,
14 _____ , under the penalties of perjury, which
15 I understand may include a felony conviction
16 punishable by a fine or imprisonment, that
17 the foregoing is true, and I further
18 understand that this document may be used
19 in a legal action or proceeding.
20 (Signature)"

21 § 2. Subdivision 1 of section 210.00 of the penal law is amended to
22 read as follows:

EXPLANATION--Matter in italics (underscoring) is new; matter in brackets
[-] is old law to be omitted.

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1 1. "Oath" includes an affirmation, including but not limited to an
2 affirmation under rule twenty-one hundred six of the civil practice law
3 and rules, and every other mode authorized by law of attesting to the
4 truth of that which is stated.

5 § 3. This act shall take effect on the first of January next succeed-
6 ing the date on which it shall have become a law.

SPONSORS MEMO:

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4215

SPONSOR: VOLKER

TITLE OF BILL:

An act to amend the civil practice law and rules and the penal law, in relation to unsworn affirmation of truth of statement under penalty of perjury

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice.

This measure would amend CPLR 2106 to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation - a procedure modeled upon the federal declaration procedure (See 28 USCA §1746; unsworn declarations under penalty of perjury). Recently, demands of commercial litigants give added impetus for a change in practice.

Within the state, it is increasingly difficult to find a notary outside of central business districts, and when found, usually in banks, they often refuse to notarize for anyone not known to a branch officer. For the poor, especially, this often results in unnecessary cost and delay. Frequently, notary services may be necessary outside business hours. In the era of electronic filing, an impediment caused by lack of a notary is an absurd result. Also, New York notarial fees have increased (L. 1991, c. 143), adding to increased fees for litigants generally. In addition, we are advised that some persons have religious objections to swearing but have no such objections to affirming. Most recently, commercial litigants with international cases in the Commercial Division of State Supreme Court increasingly must go to extraordinary lengths to get affidavits notarized overseas. It is important to maintain the courts of New York as a forum for international commercial disputes.

Under current New York law, an affidavit must be sworn to before a person "authorized to take acknowledgments of deeds by the real property law" (CPLR 2309(a)). (Where the oath of the affiant is administered in another American state, see, Real Property Law §299: also compare, Discover Bank v Kagen, 8 Misc.3d 134(A)(Sup.Ct., App. Term, 2005) with Cit/bank (South Dakota) N A. v. Santiago, 4 Misc.3d 138(A)(Sup. Ct.,

App. Term, 2004)).

It is far more burdensome to execute an affidavit abroad (See Real Property Law §§301, 301-a.). Questions arise as to the equivalence of a person administering the oath to a New York notary and whether an affidavit obtained in a foreign country may be unusable in New York litigation (See Matter of Eggers, 122 Misc.2d 793 (Surr. Ct., Nassau Co., 1984)).

Rule 2106 currently allows only specified professional persons (affirmation of truth of statement by attorney, physician, osteopath or dentist) to substitute an affirmation for an affidavit in judicial proceedings. This measure broadens the statute to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation.

In addition, current case law suggests that, to be considered the equivalent of an oath, an affirmation should "be administered in a form calculated to awaken the conscience and impress the mind" (See People v. Coles, 141 Misc.2d 965 (Sup. Ct., Kings Co., 1988); People v. Lennox, 94 Misc.2d 730 (Sup. Ct., Westchester Co., 1978)). Accordingly, the proposed form reads:

"I affirm this ___day of __, __, under the penalties of perjury, which I understand may include a felony conviction punishable by a fine or imprisonment, that the foregoing is true, and I further understand that this document may be used in a legal action or proceeding.

(Signature)"

Finally, this measure would amend Penal Law 210.00(1) to clarify that prosecution lies for the filing of a false affirmation as perjury in the second degree, currently an E felony, the same as for filing a false affidavit. (See Penal Law 210.10). (A class E Felony is punishable by up to four years imprisonment, Penal Law 70.00(2)(b)). The Penal Law defines "oath" to include "...an affirmation and every other mode authorized by law of attesting to the truth of that which is stated," Penal Law 210.00(1). Arguably, prosecution for perjury in the second degree could be brought currently for the filing of a material, false, written affirmation before a judge or other public official made with intent to mislead that official in the performance of his official functions. (See Penal Law 210.00(4) and (5), 210.10) However, there is no case law on a prosecution for filing a false affirmation.

Moreover, case law suggests that the "affirmation" described by current Penal Law section 210.00(1) must be the equivalent of an oath Sworn to an officer or a notary to be considered eligible for perjury charges. (See People v. McAndris, 300 A.D.2d 1 (1st Dept., 2002); People v. Grier, 42 A.D.2d 803 (3d Dept., 1973); People v. Lieberman, 57 Misc.2d 1070 (Sup., Queens County, 1968)). Notably, the federal statute allows prosecution for a violation of 28 USCA §1746 by imprisonment for not more than five years (See 28 USCA §1621).

For the foregoing reasons, we recommend this amendment to the Penal Law to clarify the ambiguity in the law and to insure that there will be no difference between the outcome of a prosecution for filing a false affidavit and a prosecution for filing a false affirmation pursuant to CPLR 2106.

This measure, which would have no fiscal impact on the State, would take effect on January first next after it becomes a law.

2006 LEGISLATIVE HISTORY:

OCA 2006-70

Senate 6752-A (Volker)

Codes
