6.05. Oath or Affirmation for a Witness to Testify

(1) Except as otherwise provided in subdivision two and subdivision three, before testifying, a witness must declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness in accordance with that witness's religious or ethical beliefs.

(2) In a criminal proceeding:

(a) A witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath.

(b) A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath.

(c) A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

(d) A witness ineligible to testify under oath pursuant to paragraph (a) or (b) may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.

(3) In a Family Court proceeding, a judge may dispense with the formality of placing a minor under oath before taking the minor's testimony.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent that holds that requiring a witness to take an oath or make an affirmation is a "traditional safeguard[ ] to truthfulness" (*Matter of Hecht v Monaghan*, 307 NY 461, 474 [1954]). The requirement of an oath or affirmation, the Court has observed, serves two functions: "(1) to awaken the witness to his moral duty to tell the truth, and (2) to deter false testimony by providing a legal ground for perjury prosecutions" (*see Matter of Brown v Ristich*, 36 NY2d 183,189 [1975]). The form of the oath or affirmation as stated in this rule is taken substantially verbatim from CPLR 2309 (b).

The choice whether to take an oath or affirmation rests with the witness. As to this choice, the Court of Appeals has observed that as a general proposition "any attempt to discredit or otherwise penalize a witness because of his . . . exercise of his right to affirm the truth of his testimony is improper" (*People v Wood*, 66 NY2d 374, 378 [1985]).

Whether the witness has sufficient intelligence to understand the nature of an oath or affirmation raises an issue of competency to be decided by the court before the witness is sworn (*see* Guide to NY Evid rule 6.01 and Note).

Subdivision (2). This rule restates verbatim CPL 60.20 (2). Of note, CPL 60.20 (3) provides a defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to CPL 60.20 (2).

Subdivision (3). This rule is taken substantially verbatim from Family Court Act § 152 (b). Appellate Division decisions hold that this statutory provision applies to Family Court proceedings that are civil in nature (*see e.g. Matter of Danielle M.*, 151 AD2d 240 [1st Dept 1989]; *Matter of Elizabeth D.*, 139 AD2d 66 [4th Dept 1988] [child protective proceedings]). In quasi-criminal proceedings in Family Court, however, the Appellate Division has held that CPL 60.20 (3)'s requirement of corroboration of an unsworn witness applies (see *Matter of Wade H.*, 41 AD2d 817 [1st Dept 1973]; *Matter of Steven B.*, 30 AD2d 442, 444 [1st Dept 1968] [juvenile delinquency proceedings]).