KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 21. Papers

McKinney's CPLR Rule 2106

Rule 2106. Affirmation of truth of statement

Effective: January 1, 2024
Currentness

<[As amended by L.2023, c. 559, § 1. See, also, Rule 2106 as amended by another act.]>

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties 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 _____, ____, 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 this document may be filed in an action or proceeding in a court of law.

(Signature)

Credits
(L.1962, c. 308. Amended Jud.Conf.1973 Proposal No. 3; L.2014, c. 380, § 1, eff. Jan. 1, 2015; L.2023, c. 559, § 1, eff. Jan. 1, 2024.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Thomas F. Gleason

2020
CPLR 2106 Physician Affirmations on Motions for Summary Judgment.

Khalafov v. Wolf (68 Misc.3d 1205[A]) is one of many cases demonstrating the importance of CPLR 2106 compliance on motions for summary judgment, where a failure of proof on technical grounds in the absence of judicial leniency can lose the case. Fortunately, that did not occur in *Khalafov*, though as is usual the mistake was not without cost or consequence.

Khalafov was no-fault personal injury action brought by a plaintiff with some pre-accident history of injury to his wrist. He moved for partial summary judgment that he had suffered a fracture that met the no-fault serious injury prerequisite to suit in Insurance Law § 5104, submitting on the motion radiological reports by two different doctors.

One report was affirmed under penalty of perjury and admissible in accordance with CPLR 2106, but the other was neither affirmed nor sworn to under oath, and therefore was inadmissible and disregarded. The plaintiff failed on his summary judgment motion because he could not definitively connect the fracture documented by the admissible radiology report to the motor vehicle accident. (The admissible radiology report contained conditions on the opinion of the causal connection, and no other proof filled the gap). Summary judgment was denied, and the expense and risk of litigation continued for the plaintiff.

Nelson v. Lighter, et al. (179 A.D.3d 933, 116 N.Y.S.3d 360 [2d Dept. 2020]) was a dental malpractice action against two dentists, who moved for summary judgment dismissing the complaint on the grounds that the dental care received by the plaintiff was neither a departure from accepted dental practice nor the proximate cause of the plaintiff's injuries. Inexplicably, plaintiff submitted in response for one of the defendants an unsworn affirmation, and for the other a sworn affidavit, each by the same New Jersey licensed dental expert. The affirmation by the New Jersey expert failed to comply with CPLR 2106 and was disregarded. The affidavit for the second defendant was substantively insufficient because it was speculative and conclusory. Summary judgment was granted dismissing plaintiff's claims against both defendants. While the affirmation also apparently was conclusory, plainly there was no need for plaintiff to assure that the expert submission would fail to defeat a summary judgment motion, by disregarding the requirements of CPLR 2106.

The Court explained that CPLR 2106(a) permits an affirmation only by a New York physician, osteopath or dentist; and that an otherwise qualified expert physician, osteopath or dentist not licensed in New York may submit a sworn affidavit. (Counsel should also note the requirements of CPLR 2309[c] for the use of out-of-state affidavits, including the certificate of the official taking the oath that would be sufficient for an acknowledged deed to be recorded in New York). Alternatively, the Court notes the 2014 amendment to add 2106(b), allowing the use of affirmations by persons outside the United States (but not persons within the United States as is the case with declarations in federal courts--see 2014 Commentary C:2106 Affirmation outside the United States). Regrettably, out-of-state affirmations under penalty of perjury in accordance with the federal court declaration procedure still are not usable in New York courts. Perhaps in light of new approaches to court procedures during the COVID crisis, the Legislature may revisit this possible change in New York practice.

2019

CPLR § 2106 Beware of the General Release--It is a "General Release"

Among the more effectual types of written stipulation is a general release, a point made clear by *Stevens v. Town of Chenango* (167 A.D.3d 1105 [2018]). Apparently a general release had been executed by the plaintiff releasing the defendant in an action from all claims in law or in equity, using the common broad release language that reasonably is read to cover "any and all" claims. Alleging that the signor of the stipulation did not intend the release to cover a separate claim in a separate action, the Appellate Division held that the assertion that the release was not intended to cover all claims, even if true, was "irrelevant" as a "mere unilateral mistake." Such a unilateral mistake is not sufficient to invalidate a binding contract.

CPLR § 2106 Affirmations Must Contain "Penalty of Perjury Under New York Law" Language

Under CPLR 2106(b), an affirmation of a person physically located outside the geographic boundaries of the United States must comply with additional formalities of CPLR 2309(c), and "affirm the statement is true under the penalties of perjury under the laws of New York." (This language exposes a foreign false swearer to New York

criminal jurisdiction.) Although the defendant's identity was verified by an authorized official acting in the capacity of a notary in Israel, the affirmation in *U.S. Bank National Association v. Langner* (168 A.D.3d 1021 [2d Dept. 2019]) did not indicate that the statements were true under penalties of perjury. Therefore, the affirmation was deemed without probative value.

CPLR § 2106 Physician Expert Affirmations

Lynch v. Town of Greenburgh (61 Misc.3d 469 [2018]) is another case reminding us that a physician seeking to submit an affirmation instead of an affidavit must be authorized to practice in New York. Affirmations from physicians who are not authorized to practice in New York State, like the plaintiff's expert in *Lynch*, lack probative value.

2018

§ 2106 Attorney parties may not use affirmations

In *Household Finance Realty Corp. of New York v. Della Cioppa*, (153 A.D.3d 908, 61 N.Y.S.3d 259 [2d Dept. 2017]), the court reminds us again that a party to an action or proceeding, even if an attorney, may not submit an affirmation pursuant to CPLR 2106. (An attorney's affirmation under penalties of perjury may be used with the "same force and effect as an affidavit" in an action, provided the attorney is "not a party to the action.") The case involved a mortgage foreclosure action in which the attorney mortgagor submitted an affirmation in support of his motion for discovery sanctions. The court noted that there was insufficient evidence to demonstrate that the plaintiff's failure to comply with prior discovery orders was willful, but also held that the defendant's attorney's affirmation was not admissible under CPLR 2106.

2017

CPLR 2106 makes clear that affirmations are only to be submitted by attorneys admitted in New York, or physicians, osteopaths or dentists authorized to practice in New York. Clearly this does not include an acupuncturist. In *Gentile Acupuncture, PC v. Tri-state Consumer Ins. Co.*, (55 Misc.3d 147(A) [2017]) the court noted that an acupuncturist (who apparently is referred to as a "doctor") is ineligible to submit an affirmation under CPLR 2106, but held that the defendant waived any objection to the non-compliant statement by not raising the issue in the court below.

As noted in past commentaries, the use of such non-complaint "affirmations" is exceedingly dangerous. While some courts allow the defect to be corrected (*see Cleasby v. Archarya*, 150 A.D.3d 605, at 605 [2017]), others treat the paper as a nullity (*see Pasquaretto v. Long Island University*, (150 A.D.3d 1129 [2017]).

2016

CPLR 2106 Affirmations of Truth of Statement.
Only Non-Parties May Use Affirmations

In an unreported decision of the Appellate Term Second Department, *Throgs Neck Multicare, P.C. v. Mercury Cas. Co.* (52 Misc.3d 138(A)), a medical provider sought to recover assigned first-party no-fault benefits, and the defendant moved for summary judgment dismissing the complaint for lack of medical necessity. The plaintiff opposed the motion with an affirmation by the doctor who had provided the service at issue.

This raised the question of whether the affirmation could properly be considered, because under CPLR 2106(a) the affirmation by an attorney, physician, osteopath or dentist must be from a non-party to the action. The defendant

sought to capitalize on a possibly non-compliant affirmation, but failed due to its own technical error--the defendant relied on a computer printout from the New York Department of State website, which apparently indicated some relationship of the affiant-physician to the plaintiff firm. The printout was not in admissible form, which allowed the doctor's conflicting medical expert opinions to be considered, thus presenting a triable issue of fact and denial of the summary judgment motion.

Obviously, assuming there was some issue regarding the physician's ownership status of the plaintiff, the plaintiff took some risk by not carefully following the admonition of 2106 that an affirmation not be used by a party. While the owner of a party many not technically be a party, it makes sense to avoid problems by use of an affidavit whenever there is any question on the point.

Correction Of Deficient "Affirmation" Allowed

In *Defina v. Daniel* (140 A.D.3d 825, 33 N.Y.S.3d 421 [2016]), the plaintiff sued to recover damages for personal injury suffered in an automobile accident. The defendant moved for summary judgment dismissing the complaint, on the grounds that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The plaintiff responded to the motion with an unnotarized statement of a chiropractor, which caused the Supreme Court to grant the defendant's motion, holding that the statement of the plaintiff's chiropractor did not meet the requirements of CPLR 2106, and was not proof opposing the motion. (A chiropractor, though a "doctor" is not listed as a permissible affiant under CPLR 2106.)

The plaintiff moved for leave to renew her opposition to the defendant's motion, this time submitting a notarized affidavit of the chiropractor, with an affirmation by counsel stating that he had mistakenly included an unnotarized copy of the chiropractor statement with the plaintiff's original opposition papers, instead of the notarized affidavit. The Supreme Court denied plaintiff's motion for leave to renew, but on appeal the Appellate Division reversed, holding that the Supreme Court improvidently exercised it's discretion in declining to accept the compliant affidavit on the renewal motion. The Appellate Division noted that the inadvertent mistake of the plaintiff's attorney (including an unnotarized statement rather than the notarized affidavit) was "law office failure and constituted a reasonable justification for the plaintiff's failure to provide the affidavit to the court and opposing the original motion." Whew!

A similar bullet was dodged in *Green v. Canada Dry Bottling Co. of New York, L.P.* (133 A.D.3d 566 [2015]), another case in which the plaintiff sought damages for personal injury arising out of an automobile accident in which the defendant moved for summary judgment dismissing the complaint on the grounds that the plaintiff had not suffered serious injury. The plaintiff initially opposed the motion with an expert affirmation, but the "affirmation" did not comply with CPLR 2106. The plaintiff moved for leave to renew, offering a supplemental affirmation that did comply with CPLR 2106. The Supreme Court denied the motion for leave to renew and reargue, and the Appellate Division reversed, holding that the Supreme Court improvidently exercised its discretion in denying the motion. The Appellate Division also noted that the compliant affirmation did raise triable issues of fact on the question of whether the plaintiff had suffered serious injury. Obviously this appellate forbearance, while appropriately focusing on the merits of the dispute, provides no endorsement of inattention to the requirements of CPLR 2106.

Physician-Affiant Must Be Licensed In New York

Lopez v. Gramuglia (133 A.D.3d 424 [2015]), the plaintiff had brought a medical malpractice action claiming that the defendant had failed to diagnose a medical condition that developed into a pulmonary embolism. The defendant moved to dismiss the complaint, supporting the motion with a physician affirmation that recited the physicians credentials (including his certification as an orthopedic surgeon, graduation from New York medical school and

completion of a residency in New York). However, CPLR 2106 requires that an affirmation by a doctor be by a physician "authorized by law to practice in the state" and the affirmation did not specifically state that the physician was duly licensed in the state of New York. The Appellate Division considered the affirmation on the ground that the plaintiff had failed to raise this alleged defect in the affirmation until the appeal. The better practice of course is to ensure that the affirmation states the physician's qualification as a doctor authorized to practice in New York.

2015

C2106 Affirmations

In *Auto One Insurance Co. v. Hillside Chiropractic, P.C.,* 2 N.Y.S.3d 343, 126 A.D.3d 423 (1st Dept. 2015) the Appellate Division held a no-fault arbitrator's rejection of an independent medical examination prepared by a chiropractor to be arbitrary. Unlike attorneys, physicians, osteopaths and dentists, chiropractors are not authorized to submit affirmations under CPLR 2106. It appears, however, that a chiropractor's un-notarized report may be given weight in the narrow area of no-fault arbitration practice. The Appellate Division held that the no-fault arbitrator's decision to adhere, with "strict conformity," to the requirements of CPLR 2106 was arbitrary in this narrow context. There may be some leeway with respect to no-fault arbitrations, but the better practice is to use sworn affidavits as proof in all cases in which CPLR 2106 affirmations are not authorized.

2014

C:2106 Affirmations outside the United States

A recent amendment to CPLR 2106 broadens the use of unsworn affirmations (instead of affidavits) beyond attorneys, physicians, osteopaths or dentists. Chapter 380 of the Laws of 2014 allows New York courts to consider unsworn affirmations by any person physically outside the United States or its possessions.

The unsworn foreign statement must have particular verbiage, including an acknowledgement of perjury penalties, but there will be no need for an oath or statement before a foreign official. The proposal meets concerns over the ability of courts to punish perjury contained in such an out-of-state document by requiring the affirmation to state the understanding that it may be filed in a court of law, and is made "under the penalties of perjury under the laws of the State of New York, which may include a fine or imprisonment."

This amendment does not go as far as the recommendation of the Advisory Committee, which endorsed the federal approach to allow "declarations" under penalty of perjury by any person, with no need for an appearance before a notary public or other formal execution procedure. There are good arguments in favor of the federal approach, but the Legislature has not been persuaded. For sworn statements out of New York but inside the United States, the somewhat complicated CPLR 2309(c) procedure (which requires a certificate and an oath before an out-of-state official) still is required.

2013

C:2106:2 Form of Affirmation; Current Licensure Use only by Non-parties

Use of an affirmation remains the privilege of New York admitted attorneys, as well as physicians, osteopaths or dentists authorized to practice in the state (provided that they are not a party to the action). The strict limits are evident from a case declining to allow law students, who are permitted under certain court rules to represent clients in court, to submit affirmations in the course of that representation. So holds the Supreme Court, Bronx County in *People v. Christian P.* (38 Misc.3d 241 [2012]).

Under a 2012 order of the Appellate Division, First Department, the law graduates were able to "perform all duties, functions and responsibilities of attorneys in the conduct of the foregoing activities, including ... drafting documents, briefs and memoranda of law ... under the supervision of a [Legal Aid] Society staff attorney ...." The practice rule still required, however, conformance with Rule 130-1.1-a of the Rules of the Chief Administrative Judge (which required the certification by an admitted attorney that the presentation of the papers in question are not frivolous within the meaning of Part 130-1.1). The practice rule did not allow an affirmation by a law graduate, which the court holds "deficient on its face" because it is not authorized by CPLR 2106.

The Court in *People v. Christian P.* declined to follow a 1982 Court of Claims decision to the contrary under a 1980 practice order. (*Matter of Breece v. State of New York*, 105 Misc. 2d 765, 766, Ct. of Claims, 1982). Although the Court characterized the holding of *Breece* as "well-reasoned," the Court found the language of CPLR 2106 unambiguous and that any such authorization required legislative action.

In *Pierre v. Young* (39 Misc. 3d 1218(A)), the court rejected an affirmation that did not contain the critical language that the affirmed matter is "true under penalties of perjury" even though there had been no objection by the opposing party. Although the court granted the defendant's motion to dismiss the complaint, the court stated that:

[T]he submissions would have been sufficient to raise triable issues had they been in admissible form, and since the court is reluctant to penalize a client for the deficiencies of counsel, and since Defendant's reply does not object to the submission on evidentiary grounds, Plaintiff will be given an opportunity to renew her opposition, but on condition.

The court stayed the entry of the dismissal order for sixty days, to permit a renewal motion, and required the plaintiff to pay costs on the motion. Professor Siegel has an excellent discussion of the case in *Siegel's Practice Review* for May 2013 (see, 257 Siegel's Practice Review 2). As Professor Siegel recommends, those who intend to use the affirmation procedure on a critical motion should read the specific language of CPLR 2106 before affirming.

In *Matos v. Schwartz* (104 A.D.3d 650, 960 N.Y.S.2d 209 [2013]), the Appellate Division, Second Department reversed a lower court order that denied certain medical malpractice defendants' motions for summary judgment, despite a non-compliant 2106 affirmation. (The defendant had improperly relied on an expert affirmation from a physician not licensed in New York State.) That deficiency, however, had been corrected in a reply submission. Under such circumstance, the Appellate Division held that the original defect in form did not require denial of the defendants' motion (104 A.D.3d 650, 653, 960 N.Y.S. 209, 212).

In *Law Office of Neal D. Frishberg v. Toman*, (105 A.D.3d 712 [2013]), the court again makes clear that an attorney cannot use an affirmation when they are a party to a case. As the court held:

When an attorney is a party to an action and affidavits are required to support or oppose a request for relief, that attorney may not rely on an unnotarized affirmation in lieu of an affidavit, as the facts alleged in that affirmation would not be in admissible form.

(*Law Office of Neal D. Frishberg v. Toman*, 105 A.D.3d 712 [2013], citing CPLR 2106; *Schwartz v Sayah*, 83 A.D.3d 926, 927 [2011]; *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 82 A.D.3d 586 [2011]; *Lessoff v. 26 Ct. St. Assoc., LLC*, 58 A.D.3d 610, 611 [2009]; *Muniz v. Katlowitz*, 49 A.D.3d 511, 513 [2008]).

The case is noteworthy because the submission of an affidavit by a party-attorney did not mean that the mistaken party would inevitably lose on the motion. The court notes that CPLR 3211 allows a plaintiff to submit affidavits on a motion to dismiss, but it does not oblige a plaintiff to do so on penalty of dismissal. Therefore, plaintiff's failure to submit an affidavit in admissible form was not fatal, and the Appellate Division remitted the matter for a determination on the merits of the motion to dismiss.

A non-compliant affirmation may still have some effect, as is noted in *Loucks v. Klimek* (108 A.D.3d 1037 [4th Dept. 2013]), a case in which a malpractice plaintiff failed to respond to a defendant's demand for a bill of particulars, and defendant moved to preclude. The plaintiff did not oppose the motion. After a conditional order of preclusion was granted, the plaintiff still did not provide the required responses, and so defendant moved to dismiss the complaint. Plaintiff failed to oppose this motion too, and the court dismissed the complaint. Plaintiff later moved for leave to "renew and/or reargue" and the Supreme Court granted the plaintiff's motion to vacate the dismissal.

The Appellate Division found this dispensation a provident exercise of the lower court's discretion, but the interesting point was the court's consideration of whether the plaintiff had a meritorious case. The plaintiff had submitted an affirmation of a Florida expert who was not authorized to practice in New York state. The Appellate Division noted that the affirmation would have been sufficient to show merit had it been in proper evidentiary form under CPLR 2106, and held that the court below had discretion to permit the plaintiff an opportunity to supply the affidavit from the Florida expert within thirty days of notice of entry of its order. Thus, this plaintiff took three strikes but was not out. Obviously, counting on such discretion is not recommended.

PRACTICE COMMENTARIES

by Thomas F. Gleason

C2106:1 Affirmations in General.

An affirmation under CPLR 2106 is broader than the certification of a copy under CPLR 2105, because it permits an attorney, physician, osteopath or dentist to submit their unsworn written statements, affirmed to be true under penalty of perjury, in the same manner as an affidavit.

CPLR 2106 had no counterpart in pre-CPLR days, and was adopted to allow attorneys the convenience of submitting sworn statements without having to find a person before whom an oath could be taken, usually a notary public (*see* Executive Law § 130). The provision was broadened in 1973 to include physicians, osteopaths and dentists, whose sworn statements are frequently used in personal injury civil litigation (*see* Jud. Conf. 1973 Proposal No. 3). Except for these specified professionals, an unsworn affirmation may not be used by any other person as a substitute for an affidavit, even licensed persons such as engineers, architects, accountants or chiropractors. (*See, Brightly v. Liu*, 2010, 77 A.D.3d 874, 910 N.Y.S.2d 114 [2d Dep't]).

The assumption behind the rule is that the professional (and licensed) status of the authorized users (together with the possibility of prosecution or professional discipline for making a false statement) would be sufficient safeguard of truth, and dispenses with the need to take an oath before a notary public or other authorized official. The measure provided a significant convenience to attorneys in particular, especially those practicing in small law offices.

As discussed below, oaths are allowed under CPLR 2309(b) in any form calculated to invoke religious or ethical principles, so it is common to hear an oath administered in the form "do you swear or affirm...." However, that latitude in the form of the oath does not permit a simple affirmation to suffice as proof, without compliance with CPLR 2106. (*See* Commentary below: C2106:5 Declarations Not Yet Usable In New York Actions).

C2106:2 Form of Affirmation; Current Licensure; Use only by Non-parties.

The affirmation must be "subscribed," meaning signed at the end of the affirmed matter, and must specifically state that the matter is "true under the penalties of perjury." The affirmation may then be served or filed with the same

effect as an affidavit. However, the unsworn affirmation under CPLR 2106 may be used by the listed professionals only if they are currently licensed in New York, and only in cases in which they are *not* a party.

"[E]ven those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action" (*Slavenburg Corp. v. Opus Apparel*, 53 N.Y.2d 799, 801 n [1981]). In *John Harris P.C. v. Krauss* (87 A.D.3d 469, 928 N.Y.S.2d 295 [2011]), an attorney submitting an affidavit purporting to be notarized failed in his effort to vacate a default judgment, because the "notary" was not licensed as a notary under Department of State records. The court also noted that the attorney-defendant, as a party, could not have the document treated as an affirmation under CPLR 2106.

C2106:3 Facsimile Signatures.

As is the case with certifications under CPLR 2105, a printed or stamped signature will not suffice for an affirmation under CPLR 2106 (*see Macri v. St. Agnes Cemetery, Inc.*, 1965, 44 Misc.2d 702, 255 N.Y.S.2d 278). In *Vista Surgical Supplies, Inc. v. Travelers Ins. Co.* (50 A.D.3d 778, 860 N.Y.S.2d 532, 2008), the Second Department rejected as incompetent proof certain physician reports submitted by a defendant in opposition to a motion for summary judgment, because they "contained computerized, affixed, or stamped facsimiles of the physician's signature." Such reports could not be considered affirmations under CPLR 2106 because they were not subscribed and affirmed, and because there was no showing as to who placed the signatures on the reports, or that the physicians actually authorized them.

An attorney's signature "affixed by a rubber stamp" on an affirmation was held invalid in *Sandymark Realty Corp v. Creswell* (67 Misc.2d 630 [Civ.Ct., N.Y. County 1971]), because such a signature "may be affixed by any clerk or interloper, with or without authority" (*see id.* at 631). Similarly, a report of a treating orthopedist that contained a stamped facsimile signature and a notation the report had been "dictated ... but not read" was rejected as not being "in admissible form." (*Dowling v. Mosey*, 32 A.D.3d 1190 [4th Dep't 2006]).

C2106:4 Electronic Signatures.

However, the First Department recently held that affirmations containing electronic signatures do meet the "subscribing" requirement of CPLR 2106. (*Martin v. Portexit Corp.*, 98 A.D.3d 63, 948 N.Y.S.2d 21, [1st Dep't 2012]). *Martin* was an automobile accident no-fault case, in which the plaintiff's ability to sue was limited by Insurance Law § 5104. Under that statute, a no-fault plaintiff generally cannot sue for loss of income or medical expenses unless such economic losses are greater than "basic economic loss," nor can the plaintiff sue for pain and suffering unless he or she suffers "serious injury." (Both terms are defined in Insurance Law § 5102, and CPLR 3016, which requires particularity in pleading in certain types of actions, requires such injuries to be specifically alleged in the complaint. (*See* CPLR 3016[g]).

The defendant in *Martin* moved for summary judgment, supporting the motion with electronically signed physician affirmations claiming that the plaintiff had not suffered the required serious injury. The plaintiff asserted that electronically signed expert affirmations were inadmissible, but the First Department held that electronic signatures can be appended to a CPLR 2106 affirmation, under authority of State Technology Law § 304. That statute provides "an electronic signature may be used by a person in lieu of a signature affixed by hand."

The State Technology Law states that the effect of an electronic signature is the same as one affixed by hand, but this does not instruct the practitioner on the method to prepare hard-copy motion papers that incorporate an electronic record or signature. The definitions of an electronic record and an electronic signature (*see* State Technology Law § 302[2][3]) suggest that the entirety of an electronic affirmation, with signature attached, may be reproduced in paper form for filing in a civil action. Although CPLR 2101(e) provides that copies of papers may be served or filed, the attorney may use CPLR 2105 to certify the paper copy of an electronically signed affirmation has been compared with and is identical to the "original."

In *Martin*, the First Department stated that it did not follow the reasoning of the Second Department in *Vista Surgical*, noted above, because there was no indication that the signatures on the report were authorized by the physicians (98 A.D.3d 63, 67). However, it appears that *Martin* and *Vista Surgical* may be reconciled if the signatures in *Vista Surgical* did not meet the standards of State Technology Law § 302(3), because the signatures may not have been "attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."

Another interesting question is whether the *Martin* case supports the use of electronic signatures for affidavits, which are more common than affirmations in civil practice. If so, the electronic equivalent of the "notorial act" must be considered. For example, does the swearing to the electronic record have to be done in the physical presence of the notary? There has been a fair amount of work done on electronic notary programs in other states, but although a new section 137-A of the Executive Law has been proposed to address the subject, the security issues that arise have not all been resolved. For the present, swearing in the physical presence of the notary is advised.

C2106:5 Declarations Not Yet Usable In New York Actions.

Under the Penal Law, to "swear" is to state something under oath (*see* Penal Law § 210.00), and under CPLR 2309(b) oaths may be given in any "form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs." This referenced moral compulsion to tell the truth regrettably is far from universal, and the real deterrent to false statements is the threat of prosecution for a crime.

This suggests the wisdom of the federal approach, which allows declarations under penalty of perjury by any person, without the need for an oath before a notary public. (*See* 28 USC § 1746, Unsworn Declarations Under Penalty of Perjury). All the declarant needs to do under the federal system is recite that the statement is subscribed under penalty of perjury, if the statement is executed in the United States. If the declaration is executed outside the United States, the declarant merely states the truth of the statement "under penalty of perjury under the laws of the United States of America." For some reason, proposals to adopt the federal declaration approach have been frequently proposed but rejected by the Legislature.

C2106:6 Mistakes.

A mistake as to the form of (or right to submit) an affirmation will not necessarily be lethal, provided it is caught in time, and the court is lenient in allowing correction of the mistake under CPLR 2001. However, it is dangerous to rely on forgiveness of such a defect because it renders the non-compliant affirmation incompetent as proof (*see, Bourgeois v. North Shore Univ. Hosp. at Forest Hills*, 290 A.D.2d 525, 737 N.Y.S.2d 101, N.Y.A.D. [2d Dep't, 2002]).

Brightly v. Liu (2010, 77 A.D.3d 874, 910 N.Y.S.2d 114 [2d Dep't]), however, shows that a defect in an affirmation is not invariably fatal. It was another automobile accident, no-fault summary judgment case, in which the defendant moved for summary judgment on the ground that plaintiff had no serious injury. The plaintiff opposed the motion with an unsworn affirmation by the treating chiropractor. The Supreme Court declined to consider this affirmation, resulting in summary judgment for the defendant.

The plaintiff sought leave to renew (*see* CPLR 2221[e]), and submitted a notarized affidavit by the chiropractor and an explanation of the mistake. The Appellate Division held that the contents of the affidavit could be considered on the motion to renew, and that it was sufficient to make the serious injury question a triable issue of fact that precluded summary judgment.

The *Brightly* holding suggests that leave to correct such a defect might ensue under CPLR 2101(f). Similarly, *Sam v. Town of Rotterdam* (1998, 248 A.D.2d 850, 852, 670 N.Y.S.2d 62, 64 [3d Dep't], *leave to appeal denied* 92 N.Y.2d

804, 677 N.Y.S.2d 779, 700 N.E.2d 318), suggests that forgiveness is possible on appeal, if objection to the non-compliant affirmation is not made in the court below. In *Sam* a party's failure to object to the submission of an affirmed but not sworn deposition transcript resulted in a waiver of the defect at the appellate level.

As *Sam* suggests, there are cases in which affirmation deficiencies have been deemed waived (*see Scudera v. Mahbubur*, 299 A.D.2d 535, 750, N.Y.S.2d 644, N.Y.A.D., 2002), but there are numerous other cases in which unsworn affirmations are considered incompetent as proof. (*See e.g. Simms v. APS Truck Leasing Corp.*, 14 A.D.3d 322). Moreover, the Court of Appeals has characterized a defective affirmation as having "no probative value because the affirmant would not be answerable for the crime of perjury should he make a false statement..." (*Slavenburg Corp. v. Opus Apparel*, 53 N.Y.2d 799, 801 n [1981]). It follows that although a mistake in the use of an affirmation may be correctible under 2101(f), the failure to submit proof in admissible form due the failure to follow the requirements of CPLR 2106 is very dangerous.

Finally, on the side of leniency, an affirmation failing to use the precise wording "true under the penalties of perjury" was accepted by the Appellate Term in *Jones v. Schmitt* (2005, 7 Misc.3d 47, 794 N.Y.S.2d 568 [App.T., 2d and 11th Jud.Dist.]), but the use of that affirmation was careless and dangerous. The affirmation omitted the explicit reference to perjury, but did say "I, Dr. [name], pursuant to CPLR sec. 2106 and as a physician duly licensed to practice in the State of New York, hereby affirm the truth of the foregoing." The court distinguished another unreported case involving a simple statement of affirmation, without the reference to truth or penalty of perjury, and it is apparent that the Court viewed such a naked affirmation as insufficient. However, this affirmation was sufficient because the doctor did affirm the truth of the contents, and expressly referenced CPLR 2106, which the Court charitably construed as supplying the affirmation under penalty of perjury.

LEGISLATIVE STUDIES AND REPORTS

This rule has been inserted by the Revisers and has no counterpart in the civil practice act or in the rules of civil practice.

It is noted by the Revisers in the Sixth Report to the Legislature that a number of bills have been introduced in the Legislature in recent years to allow attorneys to certify their statements in certain proceedings instead of taking an oath to verify them. See, e.g. 1958 N.Y. County Lawyers Ass'n, Reports on New York State Legislative Bills, Report No. 138; 1959 N.Y. County Lawyers Ass'n, Reports on New York State Legislative Bills, Report No. 43 (recommending approval). In California anyone may certify an unsworn statement to be true under the penalty of perjury. Such an unsworn statement has the same effect as a sworn statement, except in three specified instances. See Cal.Civ.Proc.Code § 2015.5 (Supp.1960). Similarly, any statement required to be made under the Federal Internal Revenue Laws is not verified by an oath but by a declaration that the statement is made under the penalty of perjury. See 26 U.S.C.A. § 6065(a). New Jersey, it should also be noted, permits oaths to be taken before attorneys. See N.J.S.A. § 41:2-1 (Supp.1960).

It is said that the purpose of this rule is to save an attorney appearing in a civil action the trouble of taking an oath where he must presently make an affidavit or verification of a paper to be served or filed in the action. An oath requires an appearance before someone authorized to administer it. The appearance takes some time and if there is no one in the attorney's office to administer the oath at the time he is executing a paper, what is otherwise an annoyance can become a substantial nuisance. The matter is particularly burdensome to the attorney practicing in a small law office.

While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of the possibility of prosecution for perjury for a false statement.

An attorney who certifies falsely will also be subject to the sanctions for professional misconduct established by § 90 of McKinney's Judiciary Law, and is subject to perjury pursuant to McKinney's Penal Law § 1620(5) [see § 210.00].

The term “affirmation” rather than “verification” is used to distinguish this statement from verification of a pleading under § 3020 and certification of the accuracy of a copy under § 2105.

Official Reports to Legislature for this rule:

5th Report Leg.Doc. (1961) No. 15, p. 359.

6th Report Leg.Doc. (1962) No. 8, p. 205.

Notes of Decisions (102)

McKinney's CPLR Rule 2106, NY CPLR Rule 2106
Current through L.2024, chapters 1 to 49, 61 to 105. Some statute sections may be more current, see credits for details.