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New York Law Journal

Attorney Affirmations, Beware!

By Matthew A. Feigin
December 18, 2023

Starting Jan. 1, a new state law will eliminate the need for notarized affidavits and allow any person to submit an affirmation for use in civil litigation. The legislation has an apparently unintended side effect, however: it will render the existing form of attorneys' affirmations ineffective and require attorneys (among others) to use a new, and slightly longer, signature block for any affirmation to be filed in a civil action in state court.

Those who overlook the change and continue using old forms after Dec. 31, 2023, risk the embarrassment and inconvenience of having to redo their affirmations and perhaps harsher consequences.

The bill (A.5772 / S.5162, now chapter 559 of the Laws of 2023) has been justly praised for easing low-income persons' access to justice by removing the notary requirement. That, indeed, was the sponsors' intent. The way the bill was drafted, however, abolishes a simpler form of affirmation that attorneys and others have long used.

CPLR Rule 2106 currently allows two forms of affirmations to be served and filed in state court with "the same force and effect as an affidavit." Subdivision (b) allows an affirmation

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that is signed and affirmed to be true "under the penalties of perjury under the laws of New York, which may include a fine or imprisonment," if the signer acknowledges that the document "may be filed in an action or proceeding in a court of law."

That subdivision was enacted in 2014, and it can be used only if the signer is outside the United States at the time of signing. It was intended to help signers in other countries, where notaries or the equivalent are not readily available.

The 2023 legislation removes the location requirement from Rule 2106(b), so affirmations

using that signature block will become effective if signed anywhere. The problem is that it also deletes current subdivision (a) of Rule 2106.

Current subdivision (a) offers a shorter-form affirmation to any attorney or health care practitioner who is authorized to practice New York State and who is not a party to the action. We can submit an affirmation that is signed and "affirmed . . . to be true under the penalties of perjury." We need not acknowledge that the penalties for perjury can include a fine or imprisonment. Nor must we acknowledge that the document may be filed in a court action or proceeding.

(Until October 25, 2023, the shorter-form affirmation could be used only by a licensed attorney, doctor, osteopath or dentist. A separate bill signed the same day as chapter 585 of the Laws of 2023 amended subdivision (a) to cover all health care practitioners licensed under Title 8 of the Education Law. Those practitioners include physicians' assistants, chiropractors, nurses, dentists, veterinarians, and podiatrists, among others. That change was effective immediately. Apparently, however, it will apply for only about two months, until chapter 559 goes into effect and deletes subdivision (a) entirely.)

Chapter 559 will remove the subdivisions, so that Rule 2106 offers only one type of affirmation, whether or not the signer is an attorney or health care practitioner, and whether he or she is inside or outside the U.S. It will require all affirmations in civil litigation to 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.

The drafters of chapter 559 intended to remove the notarization requirement – in other words, to enable people to file affirmations who must currently use notarized affidavits. They likely thought subdivision (a) would be superfluous once any person could use the form of affirmation prescribed in current subdivision (b). They may not have realized that the form in subdivision (b) was longer than the form in subdivision (a) and therefore that they were imposing additional requirements on people who can currently use subdivision 2106(a).

Chapter 559 becomes effective Jan. 1, 2024, and it specifically states that it applies to actions pending on that date. Under a very literal reading of the legislation, affirmations that were validly filed pursuant to CPLR 2106(a) before Jan. 1, 2024 will lose their effectiveness on that date, because CPLR 2016(a) will cease to exist, and such affirmations will not satisfy CPLR 2106 as it then exists. That reading would create chaos. For example, pending motions would become insufficient because the affirmations supporting them would become ineffective. Such a hyper-technical reading, with such bad results, seems implausible.

One might argue that affirmations using the pre-2024 signature block are good enough to satisfy the new law, because they are in "substantially" the form required by the new law. The missing acknowledgements do not appear significant. Any signer, especially an attorney, should recognize that the penalties for perjury under New York law may include a fine or imprisonment.

It will also usually be obvious to the signer that his or her affirmation may be filed in court, particularly if the affirmation bears a case caption at its top. That argument, however, is far from certain. If it were not material that the signer know about the penalties for perjury, or that the affirmation might be filed in court, then

there would never have been a need to have two different subdivisions of CPLR 2106.

Since the Legislature repeatedly, as recently as this year, passed statutes that affect subdivision (a) but not subdivision (b), one can infer that the Legislature thought those differences between the two forms of affirmation mattered. It follows that an affirmation in the form required by current subdivision (b) is not in "substantially" the form that will be required starting January 1.

Even after that effective date, judges nonetheless can, and probably should, accept affirmations that use the pre-2024 signature block by invoking two other provisions of the CPLR. CPLR § 2001 empowers judges to correct a "mistake, omission, defect or irregularity" or to disregard one entirely if no substantial right of a party is prejudiced.

Similarly, Rule 2101(f) states that a "defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given." The "shall" in Rule 2101(f) suggests that judges are obliged to ignore defects that do not affect a substantial right of a party. The following words, however, undercut that reading; if the defect were to be ignored, then "leave to correct" it would not be needed.

An attorney or health care practitioner who submits an affirmation with the wrong signature block apparently does not prejudice anyone. The signature block can affect the merits of the case only by affecting whether an affirmation is made or what the affirmation asserts. And the signature block can have such an effect only if the affirmation is false and if the signer would have been deterred from false swearing by the additional information in the new signature block. But that additional information, as noted above, is almost self-evident. It could hardly deter from perjury someone who is willing to commit perjury using the old signature block. So prejudice is unlikely, and so judges can simply disregard the error under CPLR § 2001 or Rule 2101(f).

Even in the absence of prejudice, courts may require an error to be "corrected" rather than ignoring it. Several reported cases involve oaths or affirmations signed outside the state, before a notary or other official, but without a certificate of conformity showing that they satisfied CPLR § 2309(c). Sometimes that error is ignored, but sometimes signers must "correct" the error by re-filing the paper with the proper certificate of conformity.

For example, in *JPMorgan Chase Bank v. Diaz*, the Supreme Court gave the proponent of an affidavit "one final opportunity" to correct a problem under CPLR §2309(c), because the defective affidavit concerned service and so was deemed jurisdictional. 6 Misc. 3d 1136, 1140, 57 N.Y.S.3d 358, 362 (2017).

To "correct" an affirmation made with an outdated signature block will mean to have the affirmation re-signed with the new signature block and then to file the new affirmation. The lawyer responsible will suffer delay, added cost, and perhaps embarrassment in asking the signer to re-do what he or she has already done. If the signer is traveling, has died, or has otherwise become unavailable, it may be impossible to correct the error.

Better not to run such risks!

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