

Use of an Affirmation by All Persons: Has the Time Come?

By Richard B. Long

Under current New York law, as we all know, only a select group of professionals—attorneys, physicians, osteopaths and dentists—may use an affirmation declared to be true under penalty of perjury in civil actions in lieu of and with the same effect as an affidavit (CPLR Rule 2106(a)). With one recent and notable exception, all other persons must swear to tell the truth of a document in the presence of a notary public, in short, by the use of an affidavit.

The one exception: if a person is physically located outside of the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that person may also use an affirmation declared to be true under penalty of perjury in place of an affidavit (CPLR Rule 2106(b)).

This exception is patterned after the Uniform Unsworn Foreign Declarations Act, promulgated by the Uniform Law Commission, (ULC) in 2008, and adopted to date in 25 states. The act was adopted to address the problem of obtaining a valid document requiring a sworn signature at a time when the declarant from America is outside of the country.

Affiants in foreign countries with information relevant to an action in the U.S. were required to visit the nearest U.S. consular office to finalize an affidavit in a manner similar to a person within the U.S visiting a notary public. The authority of a New York (or other state) notary public does not extend beyond the borders of the state of the notaries' residence. In recent years, particularly since 9/11, access to U.S. embassies and consulates has become more difficult, and, as a practical matter, might be located several hours away from the affiant's overseas location.

By enactment of the Uniform Unsworn Foreign Declarations Act, New York's Rule 2106(b) has extended to state proceedings the same flexibility that federal courts have employed for over 40 years. Since 1976, federal law (28 U.S.C. § 1746) has allowed an unsworn declaration (or affirmation) whether it is executed outside of or within the continental United States to be recognized as valid and the equivalent to a sworn affidavit if it was accompanied by a declaration that the document was true under penalty of perjury.

Recognizing the popularity and success of the Unsworn Foreign Declarations Act, the ULC in 2016 promulgated two new acts: the Uniform Unsworn Domestic Declarations Act for states that had already adopted

the foreign declarations act, and the Uniform Unsworn Declarations Act, for states that had no similar laws.

Which brings us to where we are in New York. The current law in our state, 2106(a), because of the limits it places on those persons who are entitled to use an affirmation, has created a significant problem by requiring a notarized affidavit for all others including litigants, often unrepresented, who by reason of location or time constraints have difficulty locating a notary. In rural areas of the state it is often difficult to even find a notary outside of central business districts.

Picture this situation: a timely supporting affidavit is needed in a summary judgment motion and the rural client to whom you have mailed the affidavit for sworn signature cannot locate a notary because she resides on a farm several miles from your office and from the nearest town; or it is a weekend and the only available notary is at the bank, and the bank is closed.

In the City of New York, and other large New York cities, there are other problems. The significant needs of pro se litigants for notary services has resulted in a heavy demand upon the county and court clerk's offices, resulting in a load on those offices and a time burden upon the unrepresented parties. Delay and unnecessary cost often results for the poor, for persons residing outside of cities, and for those for whom notary services may be necessary outside of business hours.

A solution is now within reach, provided by the uniform laws mentioned above which address the broad use of unsworn declarations. The ULC, as well as OCA's Advisory Committee on Civil Practice, are seeking the enactment in New York of the following replacement for current CPLR R. 2106:

Rule 2106. Affirmation of truth of statement. The statement of any person, wherever made, subscribed and affirmed by the person to be true under the penalty of

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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 _____, at _____ under 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 the foregoing may be used in an action or proceeding in a court of law.

Signature."

The effect of this amendment will be the extension of the use of an unsworn affirmation to all persons whether the declaration is made within or outside of the continental United States. It will thus repeal New York's limited available use of an affirmation in 2106(a) and its version of the Unsworn Foreign Declarations Act in 2106(b), and enact for use in civil actions the Uniform Unsworn Declarations Act.

A few potential concerns have been advanced: 1. The proposal is anti-notary public; 2. It will totally eliminate the use of an affidavit; 3. It conflicts with other laws which require an oath as to the identity of the declarant, a document's authenticity, or an oath of office; 4. An oath taken in the presence of a notary public is more apt to promote truth than a declaration made under penalty of perjury. Each of these concerns lack substance for the following reasons:

1. When the three uniform acts were being considered in their respective ULC drafting committees, leaders of several national and state notaries public organizations including the American Society of Notaries, the National Notary Association, and the Pennsylvania Association of Notaries participated in the drafting process. These leaders firmly stated that their organizations would support the Unsworn Foreign Declarations Act and would not oppose enactment in the states of the unsworn domestic declarations and unsworn declarations acts.
2. The proposed amendment to R. 2106 does not preclude or affect the efficacy of a notarized affidavit or its continued use. Sworn affidavits are still being used frequently by attorneys and by the other professionals who are entitled by current 2106(a) to use an affirmation. An unsworn affirmation will simply be a permissive alternative to the use of an affidavit when circumstances cause difficulty in obtaining a notary.
3. The proposed changes in CPLR R. 2106 are limited to the establishment of the "truth" of a document

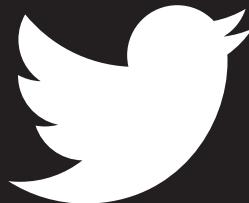
or statement. They do not affect the obligation to establish the identity of the declarant (for example the witness at a deposition (CPLR R. 3113(b))), the authenticity of the applicable document (for example R. 3116), or the taking of an oath of office, when required by other law.

4. The collective wisdom from the 40-plus years of the use of unsworn declarations in the federal court system, and the use of such declarations in several states, as well as in New York by those eligible professionals, has demonstrated that making a declaration under penalty of perjury is as great as, and in the opinion of many, an even greater incentive to be truthful, than swearing in the presence of a notary public, usually a perfect stranger, that the subject document or statement is true. And, the making of a false statement made with intent to mislead the court, whether that statement is made by a notarized affidavit or by an affirmation made under penalty of perjury, will constitute perjury in the second degree, a Class E. felony punishable by up to four years imprisonment. (Penal Law 70.00(2), and 210.00(1)).

CONCLUSION

It is hoped and indeed anticipated that comments from members of the NYSBA Trial Lawyers Section, based upon their practical experiences, will assist in securing the enactment of proposed amended CPLR R.2106 in New York in 2019.

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