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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

Editor
Amy Campbell-Bradt

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THE PRACTICE PAGE

AFFIDAVITS VERSUS AFFIRMATIONS

HON. MARK C. DILLON *

There are circumstances in New York Practice when affidavits *must* be used, and others when affirmations *may* be used instead. The improper use of an affirmation can be fatal to an application or its defense. An affidavit signed by a fact witness should state facts, not legal arguments. Affirmations may properly be filed under penalties of perjury by attorneys to recount a case's procedural history and provide pleadings and other exhibits. Uniform Rule 202.8 instructs that legal arguments should not be included in affidavits but in a separate legal brief, though in practice, our state courts routinely accept legal argument contained within attorney affirmations.

Affirmations are more convenient to prepare than affidavits, if for no other reason than that a notary public or other acknowledging officer need not be enlisted to confirm the identity of the affirmant, administer an oath, and oversee the document's execution. When an attorney is also a party, the attorney should utilize the affidavit format to support or oppose factual matters (CPLR 2106[a]; *Nazario v Ciafone*, 65 AD3d 1240, 1241), notwithstanding that person's status as an officer of the court. If an attorney serves process under CPLR 308 or other statute, or serves litigation paperwork in the normal course, the attorney is best advised to execute an affidavit of service, rather than an affirmation, as such conduct casts the attorney in the role of a fact witness to the task undertaken.

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THE PRACTICE PAGE

AFFIDAVITS VERSUS AFFIRMATIONS

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CPLR 2106[a] provides that affirmations may be used by non-party physicians, osteopaths, and dentists authorized to practice in the state. The provision caters to the convenience and time pressures of medical and dental professionals. By extension, persons authorized in those fields wholly outside of New York may not properly submit information by affirmation (*Kelly v Fenton*, 116 AD3d 923, 924). The language of CPLR 2106 does not extend to chiropractors (*Casas v Montero*, 48 AD3d 728, 729), engineers (*Woodard v City of New York*, 262 AD2d 405), architects (*Laventure v McKay*, 266 AD2d 516, 517), or other non-designated experts and professionals. If an affirmation is improperly used instead of an affidavit, the defect is waived unless the adversary party objects to it (*Sam v Town of Rotterdam*, 248 AD2d 850, 851), though an objection may be cured by an oath taken by a notary public before the return date of the application (*Brightly v Liu*, 77 AD3d 874, 875).

Occasionally, a witness may have a sincere religious objection to swearing an oath to the Almighty. Any person who, for religious reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective, such an affirmation must still be taken before a notary public or other authorized official (CPLR 2309[a]; *Slavenburg Corp. v Opus Apparel, Inc.,* 53 NY2d 799, 801). This procedure is different than that used for physicians, osteopaths, and dentists as those professionals are within the expressed scope of CPLR 2106, whereas persons with religious reservations are not.

Affidavits and affirmations are to be executed "in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs" (CPLR 2309[b]). For this reason, the documents invoke the language of an oath. Affirmations are to be executed to reflect that their content is "affirmed…to be true under the penalties of perjury" (CPLR 2106[a]). A mistake in the form of a submission, or in the right to submit it, will not necessarily be lethal provided it is caught in time, and courts are lenient in allowing the correction of mistakes under the grace provisions of CPLR 2001 (*e.g. Gallucio v Grossman,* 161 AD3d 1049, 1053). However, attorneys should not rely on the discretionary forgiveness of such defects because, absent the favorable exercise of that discretion, a non-compliant affirmation is rendered incompetent as proof of the facts asserted within it (*Law Offices of Neal D. Frishberg v Toman*, 105 AD3d 712, 713).

None of this is rocket science, which is all the more reason that documents should be submitted to courts in their proper forms.

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* Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of the CPLR Practice Commentaries in McKinneys.

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM HIGGINS, ESQ. of LEMIRE & HIGGINS, LLC

Article 31 discovery in the pandemic.

Jones v. Memorial Sloan Kettering Cancer Ctr. (Reynolds Fitzgerald, J., 9/24/20)

Plaintiffs commenced this medical malpractice action in Franklin County, alleging surgical negligence at the defendant hospital (located in New York County). Defendants moved, pursuant to CPLR § 3103(a) and § 3110(1), for a protective order directing plaintiffs to conduct the depositions of four witnesses – including two doctors and physician's assistant - in New York County. Absent a showing of "undue hardship", CPLR 3110(1) calls for depositions to take place within the county where the action is pending. Supreme Court (Ellis, J., Franklin Co.) granted defendants' motion – and the Third Department affirmed, noting proof in the record that conducting the depositions over three days, and 350 miles away from New York County, would likely cause the cancellation and/or rescheduling of patient appointments at the defendant hospital. The Appellate Division also noted that "if the COVID-19 pandemic has proved anything, it is the usefulness (if not preferability) of conducting matters via video".

Defamation claim dismissal; "good faith" privilege.

Macumber v. South New Berlin Library (Devine, J., 9/24/20)

Plaintiff's action for defamation arose out of an email - sent to the New York State Education Department - by a fellow member of the defendant library's board of trustees claiming to have proof that the plaintiff had "misappropriated over $20,000 of taxpayer money". Plaintiff eventually resigned from the library board although a criminal investigation found no evidence of wrongdoing on her part. Supreme Court (Burns, J., Chenango Co.) found the emailed statement protected by a qualified (good faith communication) privilege and granted the defendant's motion for summary judgment. Affirming, the Third Department agreed that after the defendant's prima facie showing of conditional privilege, the burden shifted to plaintiff, who "failed to make an evidentiary showing that [the trustee was] motivated by malice alone in making the statement".

Summary judgment dismissal for property owner reversed.

Desroches v. Heritage Builders Group, LLC (Lynch, J., 10/22/20)

Plaintiff and two friends – after consuming alcoholic beverages – took a walk (after midnight) in the Timber Creek subdivision and entered a house that was under construction. Failing to observe an 8-10 foot opening in the floor that was located 10-15 from the front door, plaintiff fell through the hole into an unfinished basement, sustaining head injuries that required hospitalization. Defendants, the property owner/developer and general contractor, won summary judgment (Nolan, J., Saratoga Co.), with Supreme Court concluding that the plaintiff's entry into the property while intoxicated "was not reasonably foreseeable as a matter of law". The Third Department reversed and reinstated the plaintiff's complaint, finding several questions of triable fact (including whether there was a 'no trespassing' sign on the property) and rejecting defendants' contention that plaintiff's intoxication was a superseding cause of the incident.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Errors in jury charge nets Plaintiffs new trial.

Michalko v. DeLuccia (Reynolds Fitzgerald, J., 10/22/20)

Plaintiff, after two heart attacks and cardiac stenting procedures, took medications to reduce the likelihood of blood clots. Prior to, and after, an elective colonoscopy, the medication regimen was stopped, per the direction of the attending cardiologist and gastroenterologist. Five days after the colonoscopy, plaintiff had another heart attack – and later sued his physicians, claiming they negligently failed to consult with each other and negligently directed the patient to stop the medication therapy. Supreme Court (Baker, J., Chemung Co.) denied plaintiff's motion to set aside the jury's defense verdict but the Third Department reversed and ordered a new trial – finding that the trial court's jury instructions were flawed. The habit evidence charge (PJI 1:71) was improper because there was no "evidentiary gap" that required filling with an inference; and the medical judgment charge (PJI 2:150) should not have been given because there was no evidence that the physicians chose between two or more medically accepted alternatives.

Jury's verdict of no "serious injury" affirmed.

Warner v. Kain (Pritzker, J., 9/24/20)

Defendant admitted liability in this auto accident injury action, and after trial Supreme Court (Richards, J., St. Lawrence Co.) denied plaintiff's motion to set aside the jury's verdict and finding that Plaintiff did not sustain a "serious injury" as required under Insurance Law § 5102(d). Plaintiff relied primarily on the expert testimony of an orthopedic surgeon who performed an independent medical exam (IME) and testified that Warner "sustained a bilateral fracture" in his lumbar vertebrae; although the witness did not use the word fracture in his IME report and several diagnostic reports received in evidence specifically noted there was no fracture. Affirming the trial court, the Third Department noted that the jury was "not required to accept an expert's opinion as long as its decision not to do so is supported by some other evidence or cross-examination of the expert".

Lack of expert witness disclosure sinks product liability claim.

Garrison v. Dick's Sporting Goods, Inc. (Devine, J., 10/22/20)

Alleging they were injured while shooting a defectively designed crossbow purchased from the defendant sporting goods store, plaintiffs commenced an action for negligence and products liability. In violation of the Third Judicial District's § 3101(d)(1) rule, plaintiffs did not serve a product liability expert witness disclosure prior to or at the time of filing the Note of Issue. Supreme Court (Cahill, J., Ulster Co.) granted defendant's motion to dismiss the product liability claims, and after granting plaintiffs more time to respond; later issued a second order that also dismissed the negligence cause of action. Affirming dismissal of the products liability claim, the Third Department ruled plaintiffs failed to show "unusual or unanticipated circumstances and substantial prejudice" warranting late disclosure under the Third District rule but did reinstate the negligence cause of action; noting that Dick's may have created a duty of care when one of its employees allegedly tried to repair the crossbow and gave it back to plaintiffs.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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COURT OF APPEALS: "vicious propensities" rule does not shelter veterinary clinic.

Hewitt v. Palmer Veterinary Clinic, P.C. (Stein, J., 10/22/20)

Under New York law, an owner of a dog may be liable for injuries caused by the animal only when the owner knew or should have known of the dog's vicious propensities. In reversing an order of summary judgment to the defendant here – where the plaintiff claimed she was injured by a dog that had been returned to the clinic's waiting room after a medical procedure to remove a broken toenail – the Court of Appeals found the vicious propensities rule does not extend to veterinary clinics; given that clinics have "specialized knowledge" in the treatment of animals who are ill, injured or distressed, which makes the clinics "uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior".

2021

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

Happy New Year everyone! What a year 2020 was! An understatement to say the least. I'm happy to see it left behind in the rear view mirror. Along with the fourth (and mercifully the last) year of the Trump Administration, we "welcomed" a once-in-a-lifetime pandemic to our shores and all the misery that came as a result of it.

As I reflect back on 2020, there's no doubt that the human toll, and specifically the death toll, was awful. Most experts say it's going to get worse before it gets better. That said, I think the toll on our collective mental health has been equally as bad, and some might argue worse.

And as bad as it's been for you and I, imagine the uncertainty of being an immigrant in America, whether you're here lawfully or not. Combine that with a pandemic that has thus far taken the lives of almost 350,000 souls in the United States, and infected (as far as we know) more than 20 million, it's not hard to imagine the stress that immigrants are under during these incredible times.

Trump's legacy will include many things. It will also be long-lasting. The mark he has left on U.S. immigration policy will be indelible in some cases. Plain and simple, President Trump and his minions like Stephen Miller have been more hostile to U.S. immigration policy and the immigrants that policy is meant to serve than any other administration I can think of, making it unnecessarily more difficult for people to visit friends and families, and to live or work in our communities.

I recently saw an interview that Ken Cuccinelli, Acting Director of U.S. Citizenship and Immigration Services ("USCIS"), gave on FOX News in 2019.[1] I quote: "First of all, I see USCIS as a vetting agency, not a benefits agency," Cuccinelli said. He went on to say, "[w]e have benefits that we give when people meet legal thresholds but it's on them to prove they've done it and it's our job to make sure those are going to people who have in fact met those thresholds, and we're protecting America by screening people trying to come in and stay here a long time."

[1] https://www.foxnews.com/politics/cuccinelli-immigration-agenda-just-2-months-into-uscis-job.

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2021

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

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I don't disagree that USCIS must do its job responsibly, and vetting an applicant for an immigration benefit like permission to work or getting a Green Card is part of that process. But that's part of how USCIS effectuates its mission, which is to adjudicate benefits for foreign nationals. Mr. Cuccinelli's viewpoint is symptomatic of the larger Trump Administration view that immigration is a bad thing for our country.

Over the past four years, we have recommended to our clients, contrary to our practice pre-Trump, that if they are eligible, they should apply for citizenship in the United States. I think it's a very personal thing for someone to give up citizenship to their original country in order to become one in ours. We're apparently not the only ones who make this recommendation now. According to the Migration Policy Institute, the number of naturalization applications filed annually has increased in recent years.[2]

Most credit this to the President's anti-immigration rhetoric during the 2016 election cycle which continued into and throughout his administration. No one was spared. Legal immigrants, undocumented immigrants, asylum seekers, and applicants for citizenship. Also not spared were individuals seeking to extend their temporary status in the United States where that benefit had previously been "vetted" by USCIS. Go figure. These are but a few of dozens and dozens of examples.

Citizens of the United States have so many more protections under our law than someone who is not. Hasn't that proven to be the case over the past four years (at least within the immigration context)? But still, how did we arrive at this point?

We're now into a New Year, and in a couple of weeks, we'll have a new president. Although we may be in the midst of a dark winter as far as COVID-19 is concerned, even with COVID-19 we can now start seeing the hint of a light at the end of the tunnel. President-elect Biden has a lot of work ahead of him, if nothing else, to try to get our immigration system back to where it was before President Trump was sworn in (imperfect as it was even back then). I hope he's up to the task.

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[2] https://www.migrationpolicy.org/article/naturalization-trends-united-states-2017.

THE JOY OF FAMILY LAW

MICHAEL FRIEDMAN, ESQ.

"I am a marvelous housekeeper. Every time I leave a man, I keep his house." Zsa Zsa Gabor
"A lot of people ask me how short I am. Since my last divorce, I'm about $100,000 short." Mickey Rooney

When I started practicing law in the late 1970's, there was no child support standards act, no equitable distribution law and no maintenance (alimony) standards act. Family law was much simpler, and many lawyers, especially in more rural areas, helped people with divorces as well as criminal matters, wills, estates and real estate transactions. But Albany County had its matrimonial specialists and they were wonderful lawyers and friends.

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THE JOY OF FAMILY LAW

MICHAEL FRIEDMAN, ESQ.

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At the time, the Catholic Church did not recognize civil divorces and it discouraged the practice of divorce law by Catholic lawyers. As a result many local family lawyers were Jewish or from other religions. They were the wonderful Robert Kahn, Larry Gordon, the hilarious Sandy Soffer and then the younger generation of Stan Rosen and Timothy Tippins. Then there was the legendary Anthony Cardona who became the Presiding Justice of the Third Department. In 2002 Pope John Paul II said that Roman Catholic lawyers should not handle divorces. "We cannot surrender to the divorce mentality. When a couple encounters difficulties in their marriage, priests and other members of the faith must be united to help them positively resolve the crisis. Lawyers must always decline to use their professional skills for ends that are contrary to justice, like divorce."

As a result of the influence of the Catholic Church, it was not until 2010 that New York became the last state in the nation to recognize no fault divorces. Prior to that, one could defeat the distribution of assets by proving the lack of fault. One could also ask for a jury trial to decide if grounds for divorce had been proven. I never asked for a jury, but I endured four such trials. In my last divorce jury trial, I represented a plaintiff with weak fault grounds. She had to endure the testimony (without cross examination by me) of her 14-year-old son who testified he saw her holding the hands of another man at the Empire State Plaza. I was able to convince the jury to grant the divorce simply by saying, "What kind of a husband puts his 14-year-old son on the stand to testify in public before a jury and his mother about her holding someone's hand." That did not stop business owners and professionals from preventing the distribution of their marital businesses by claiming no fault, i.e. no adultery, abandonment, or cruel and inhuman treatment. In the meantime they would all be afflicted with the disease we called RAIDS, Recently Acquired Income Deficiency Syndrome. I think it is in the DSM-5.

Yes, it was a different time but it was infinitely enjoyable. I can still hear Sandy Soffer telling a bunch of lawyers at a "motion day" (Thursday) at the courthouse, "If I had sex with all my clients as I was accused by their husbands, I'd be so tired I couldn't get to work in the morning."

Family Law had another bright spot. When I started practicing at Ainsworth, Sullivan, Tracy and Knauf, there were no women trying civil cases before juries and never any women associates at large litigation firms like Ainsworth and Carter, Conboy. There were no such restrictions in family law. Within a few years we saw the elevation, among others, of future Court of Appeals Judge Leslie Stein at McNamee, Lochner, Flo Richardson in Bob Kahn's firm and Eleanor DeCoursey in Larry Gordon's firm as some of the best matrimonial lawyers in the state. Did you know that the first county-wide female Albany jurist was a Family Court judge, even before I was admitted to practice? Her name was Eileen A. Sullivan and she passed last year at the age of 103. She was appointed by Republican Governor Nelson Rockefeller in the early 1970's in overwhelmingly Democratic Albany County when an opening occurred. She served until the next election where she was defeated by the legendary Michael Tepedino. She has two cases published in New York's Miscellaneous Citations.[1]

Over the years, the legislature in their wisdom made Family Law beyond complicated which ended the part time family practitioners and dramatically increased the hourly rates of family law "specialists" as there were far more people seeking the services of fewer lawyers. As one attorney said at one of my NYS Bar Association CLE programs, "I think it is disgusting that someone in Albany has to pay you, Mr. Friedman, $490 per hour just to get divorced." I replied, "I agree with you. And I'll stop charging it as soon as people stop paying me."

But as you can see it was a fun ride thanks to the wonderful professionals who made it so. Or as the great Zsa Zsa Gabor once said, "I have learned that not diamonds but divorce lawyers are a girl's best friend." Amen.

Postscript: When I moved to California in 2015, I was treated by a local cardiologist. After a series of tests he said to me, "Mr. Friedman, I understand you were a divorce lawyer in New York." I said, "Yes, doctor, but why?" He said, "Because you have a heart that's never been used before." THAT made me laugh.

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1 Cossart v. Cossart, 74 Misc.2d 199 (Alb. Fam. Ct., 1972); Bertsche v. Bertsche, 74 Misc.2d 206 (Alb. Co. Fam. Ct., 1972).

BOND'S ALBANY OFFICE RECOGNIZED IN 2021 "BEST LAW FIRMS"

Bond, Schoeneck & King's Albany office has been recognized by the 2020 *U.S. News-Best Lawyers*® "Best Law Firms" in ten categories. *U.S. News-Best Lawyers* evaluated more than 15,000 firms across the United States.

In Albany, Bond was recognized for: Commercial Litigation; Employment Law – Management; Labor Law – Management; Litigation - Labor & Employment; Trusts & Estates Law; Administrative / Regulatory Law; Health Care Law; Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants; and Corporate Law.

Bond, Schoeneck & King PLLC is a law firm with 250 lawyers serving individuals, companies, non-profits and public sector entities in a broad range of practice areas. Bond has eight offices in New York State as well as offices in Boston, Naples, Florida and Kansas City. For more information, visit bsk.com

THE TOWNE LAW FIRM WELCOMES TWO ADDITIONAL ATTORNEYS

The Towne Law Firm, P.C. (TLF) proudly announces the addition of recently retired Judge Eugene Devine of the Appellate Division along with Attorney Jessica A. Rounds to its team.

Eugene, an Albany native, has been engaged in private general practice for more than 30 years, with a focus in the fields of pension/health insurance, labor, commercial, banking, real estate, and criminal law. Prior to joining TLF, Judge Devine was elected Justice of the New York Supreme Court in 2006. In 2014, he was appointed by Governor Andrew M. Cuomo to the Appellate Division of the New York State Supreme Court, Third Department. Before taking the bench, he was the Albany County Public Defender overseeing a staff of 35 attorneys and was also the Chief Attorney for the Albany County Department of Social Services.

Jessica A. Rounds joins TLF as an associate attorney in its Albany office, focusing her practice in the areas of civil litigation, commercial litigation, professional malpractice, personal injury, and general negligence. Professionally, Ms. Rounds has extensive experience in handling all phases of litigation and trial preparation. Jessica earned her J.D. from Western New England University Law School and is admitted to practice in both New York State and Massachusetts.

Both attorney Jessica Rounds and Judge Devine bring a wealth of experience and expertise to the firm, greatly augmenting TLF's continued growth and expansion.

MATRIMONIAL AND FAMILY ATTORNEY LESLIE SILVA JOINS TULLY RINCKEY PLLC

Tully Rinckey PLLC is pleased to announce that Leslie Silva has joined the firm's matrimonial and family law practice as a Partner. Ms. Silva represents individuals in all areas of matrimonial and family law and has particular experience in high net worth matrimonial litigation.

Ms. Silva began her career managing a small general practice that focused on family law and criminal defense in both Connecticut and New York. Since 2016, Ms. Silva has been practicing specifically in the Capital Region in all areas of matrimonial and family law. She represents spouses and parents going through divorce, and matters related to child custody and child support litigation.

She also has Appellate work experience in both New York and Connecticut.

Ms. Silva is a member of the New York State Bar Association, and has provided pro bono legal services through Connecticut' Women's Education and Legal Fund (CWEALF) to victims of domestic violence. She has also done pro bono work through the Legal Aid Society of Northeastern NY.

"We are very pleased to welcome Leslie to the firm as a member of our team" said Michael Macomber Chief Executive Officer at Tully Rinckey. "Her extensive background and experience greatly strengthens our family and matrimonial practice."

Ms. Silva earned a bachelor's degree in Political Science from Sacred Heart University in 2005, and her Juris Doctorate from Western New England University School of Law in 2008. She is recognized as one of Super Lawyers 'Rising Stars' for 2020.

Tully Rinckey PLLC is an international, multi-state, full-service law firm that bases its commitment to client service on developing an intimate knowledge of each client's needs and objectives. Headquartered in Albany, New York, Tully Rinckey is a Service-Disabled Veteran-Owned Small Business, with 70 attorneys and offices located across New York State in Binghamton; Manhattan; Syracuse; Rochester; Saratoga Springs; and Buffalo, Austin and Houston, Texas, Washington, DC, San Diego, California, and internationally in Dublin, Ireland. The Firm handles a wide variety of legal matters including federal and private labor and employment law, real estate law, regulatory compliance and litigation, corporate law, military law, family and matrimonial law, trusts and estate law, immigration law and criminal law.

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