

# ***CPLR 2106 Amended To Permit Anyone To Submit Affirmation in Lieu of Affidavit; NEW YORK PRACTICE***

New York Law Journal

February 29, 2024 Thursday

Copyright 2024 Copyright Holder for ALM Media Properties, LLC

## ***New York Law Journal***

**Section:** EXPERT ANALYSIS; Pg. p.3, col.1; Vol. 271; No. 40

**Length:** 2114 words

**Byline:** Patrick M. Connors

### **Body**

---

Effective Jan. 1, 2024, *CPLR 2106* was substantially amended to allow any person to submit an affirmation in lieu of an affidavit, "with the same force and effect." This is one of the most significant changes to the CPLR in the 21st century and will impact many areas of practice.

This piece is the first in a two-part treatment of the amendment. Given the many questions generated by the change to *CPLR 2106*, the discussion is broken down to address several discrete issues.

#### The Amendment to *CPLR 2106*

In 2015, *CPLR 2106* was amended to create two subdivisions, (a) and (b). In sum, the provision only allowed certain professionals licensed to practice in New York state and people physically located outside the United States to submit affirmations instead of affidavits. See David D. Siegel & Patrick M. Connors, *New York Practice* §205 (Thomson, 6th ed. 2018) (describing the affirmation rule). The new *CPLR 2106* that became effective this year removes the two subdivisions: the categories of professionals who can affirm and the geographic location of the affirmer. The statute now simply provides:

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)

#### Effective Date and Prior Statutory Language

The new *CPLR 2106* took effect Jan. 1, 2024, and applies in all actions pending on that date, and in any action commenced thereafter. Lawyers should take care to ensure that all affirmations filed on or after Jan. 1, 2024, contain the language prescribed in the new statute. We have already seen some affirmations filed this year that apparently follow an older form. These defective affirmations should be promptly corrected, an issue we address

## CPLR 2106 Amended To Permit Anyone To Submit Affirmation in Lieu of Affidavit; NEW YORK PRACTICE

below. All affirmations filed in an action prior to 2024 and satisfying the prior language in *CPLR 2106* should certainly be deemed valid.

A short-lived amendment to *CPLR 2106(a)*, on the books for just over two months, took effect Oct. 25, 2023 and allowed any "health care practitioner licensed, certified or authorized under title eight of the education law to practice in the state" to submit an affirmation in lieu of an affidavit. The amendment permitted the use of affirmations by health care professionals other than physicians, osteopaths or dentists, but only when they were not a party to the action.

It is important to note that this limitation is no longer applicable under the version of *CPLR 2106* that took effect in 2024 and a party to an action can now submit an affirmation in that action. See Point V below.

#### Legislative Intent and Federal Court Declarations

The legislature presented the following justification for the new law:

The requirement that litigants and other court participants have documents notarized is unduly burdensome, and federal law removed such requirements for federal courts decades ago. Attorneys, physicians, osteopaths and dentists, as well as any person outside the jurisdiction of the United States, are already exempt from the New York requirement to submit affidavits and may submit affirmations instead.

This bill will align New York with the over 20 states that follow federal practice. It will relieve unnecessary burdens on litigants, non-party witnesses, county clerks, and courts.

Sponsor's Mem., A.B. 5772 (N.Y. 2023).

The federal law referenced by the legislature lies in [28 U.S.C. §1746](#), which permits unsworn declarations, subscribed by the declarant as true under penalty of perjury, to be substituted for affidavits. While case law addressing the application of the federal statute should be relevant in interpreting the new *CPLR 2106*, a declaration that satisfies [28 U.S.C. §1746](#) will not necessarily satisfy as an affirmation in a New York state court action. The language required for a declaration in federal court is different from, and not as expansive as, the language required under New York's statute.

An early decision interpreting the revised *CPLR 2106* makes the point. In *Great Lakes Insurance v. American Steamship Owners Mutual Protection & Indemnity Association*, 2024 WL 144976, at \*4 (Sup. Ct., N.Y. County, 2024), defendants submitted affirmations in support of their motion for summary judgment that included language stating they were made "under the penalties of perjury under the laws of the United States pursuant to [28 U.S.C. §1746](#)" and that the defendants "affirm that the following is true and correct."

The court ruled that the language in the affirmations failed to satisfy both the former *CPLR 2106(b)*, which allowed people physically located outside the United States to submit affirmations, and the current version of *CPLR 2106*. These deficiencies, among others, led to denial of the motion for summary judgment seeking dismissal of the complaint.

#### Can Affidavits Still Be Used?

Affidavits have not exited the stage and will undoubtedly still be kicking around after the new *CPLR 2106* takes effect. If an affidavit is in proper form, it can be used as a source of proof. While *CPLR 2106* now provides that an affirmation "may be used in an action in New York in lieu of and with the same force and effect as an affidavit," there are still some remaining instances where an affirmation will not satisfy, and the document must be signed by the witness before an officer authorized to administer an oath. See Point VIII below.

Until the new law settles in and we have appellate authority addressing its application in some vague areas, the cautious lawyer will continue to rely on affidavits.

#### Can a Party Submit Affirmations?

## CPLR 2106 Amended To Permit Anyone To Submit Affirmation in Lieu of Affidavit; NEW YORK PRACTICE

This point is referenced above in the discussion of the short-lived 2023 amendment to *CPLR 2106(a)*, but it is worthy of its own separate heading. The former *CPLR 2106(a)* permitted certain professionals to submit an affirmation, but only if they were "not a party to an action." See, e.g., [John Harris P.C. v. Krauss, 87 A.D.3d 469, 469 \(1st Dep't 2011\)](#) ("[E]ven those persons who are statutorily allowed to use...affirmations cannot do so when they are a party to an action."). The former *CPLR 2106(b)*, which permitted a person physically located outside the United States to submit affirmations instead of affidavits, did not contain such a restriction and allowed a party to an action to submit an affirmation.

The current version of *CPLR 2106* imposes no such restriction and, therefore, permits a party to an action to submit an affirmation in that action.

## Using an Affirmation In Lieu of an Affidavit

*CPLR 2106* now expressly provides that an affirmation "may be used in an action in New York in lieu of and with the same force and effect as an affidavit." By our count, there are 63 sections of the CPLR that refer to affidavits. Some of the more common ones encountered in civil practice are:

[CPLR 306\(d\)](#): discussing the form of proof of service, which can be "in the form of an affidavit."

[CPLR 403](#): authorizing use of affidavits to be submitted with pleadings in a special proceeding.

bCPLR 2214(b): referring to the use of supporting affidavits, answering affidavits, and reply affidavits submitted on a motion.

[CPLR 3020\(d\)](#) and [CPLR 3021](#): addressing verification.

[CPLR 3122-a](#): requiring business records produced pursuant to a subpoena to be accompanied by a certification in the form of an affidavit.

[CPLR 3201](#) and [CPLR 3218](#): referring to affidavit of confession of judgment.

[CPLR 3212\(b\)](#): referring to the use of supporting affidavits, answering affidavits and reply affidavits on a motion for summary judgment.

[CPLR 3215](#): discussing various affidavits to be submitted with an application for a default judgment.

[CPLR 6212\(a\)](#), [CPLR 6312\(a\)](#), [CPLR 6514\(d\)](#), [CPLR 7102\(c\)](#), [CPLR 7103\(a\)](#): addressing affidavits to be submitted on motions related to a provisional remedy, such as an attachment, a preliminary injunction, a notice of pendency and an order of seizure.

[CPLR 7804\(c\)](#), [\(d\)](#), [\(e\)](#): addressing the use of affidavits in an Article 78 proceeding, including those submitted with the petition, answer and reply.

[CPLR 8401](#) and [CPLR 8402](#): addressing affidavits submitted with a bill of costs.

In navigating these sections of the CPLR, a party should be permitted to now submit an affirmation "in lieu of and with the same force and effect as an affidavit." *CPLR 2106*.

## Circumstances in Which an Affirmation Will Not Suffice

Despite the amendment to *CPLR 2106*, the notary public has not been rendered obsolete. The statute merely allows an affirmation to "be used in an action in New York in lieu of and with the same force and effect as an affidavit," but does not authorize the use of an affirmation in other contexts. For example, a notary will be required to acknowledge a conveyance of real property in New York state. See Real Property Law §298 ("Acknowledgments and proofs within the state").

## CPLR 2106 Amended To Permit Anyone To Submit Affirmation in Lieu of Affidavit; NEW YORK PRACTICE

Even in civil practice, there are a few situations in which a simple affirmation will not suffice and the services of a notary must be secured to produce an affidavit. For example, [CPLR 3116\(a\)](#), which addresses the signing of the deposition transcript by the deponent, requires that "any changes in form or substance...shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." See Siegel & Connors, New York Practice §357.

After any changes are made, "[t]he deposition shall then be signed by the witness before any officer authorized to administer an oath." [CPLR 3116\(a\)](#); see also [CPLR 5224\(e\)](#) (requiring transcript of deposition to aid enforcement of judgment "to be signed by the witness before any officer authorized to administer an oath").

The requirement in [CPLR 3116\(a\)](#) is consistent with the fact that the original deposition testimony was sworn to before such an officer. See [CPLR 3113\(b\)](#). An affirmation in compliance with *CPLR 2106* stating that any changes made are true will not suffice here. Similarly, any additional amendment or supplementation of deposition testimony under [CPLR 3101\(h\)](#) should be signed by the witness before an officer authorized to administer an oath. See Siegel & Connors, New York Practice §352A.

#### Circumstances in Which It Is Uncertain Whether an Affirmation Will Suffice

[CPLR 3123](#) addresses the notice to admit, one of the many disclosure devices in Article 31 of the CPLR. See Siegel & Connors, New York Practice §364. Under [CPLR 3123\(a\)](#), the matters contained within a notice to admit are deemed admitted unless "the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters" (emphasis added).

We have stressed that despite some conflicting caselaw, it should be a party who signs this statement, and not the party's lawyer. See Siegel & Connors, New York Practice §364. Does this require the party denying the matter to swear before a notary public or will an affirmation suffice?

"The term swear includes every mode authorized by law for administering an oath." General Construction Law §36. "The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated." *CPLR 2106* now authorizes any party to attest to the truth of their statements in an affirmation.

Therefore, these rules, in combination, would appear to allow a party to now use a *CPLR 2106* affirmation when responding to matters in a notice to admit. Until appellate authority sanctions this approach, it is probably wise for a party to have a sworn statement in response to a notice to admit notarized.

Stay Tuned!

In Part II of this discussion, scheduled to publish March 7, 2024, we will address whether a party can verify a pleading or bill of particulars with an affirmation, whether an affirmation can be used when submitting answers to interrogatories, whether a certificate of conformity and certificate of authentication are required by [CPLR 2309\(c\)](#) when an affirmation is signed outside New York and whether a defective affirmation can be corrected.

PATRICK M. CONNORS is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School. He is the author of Siegel & Connors, New York Practice (Thomson, 6th ed. 2018), which is supplemented biannually in January and July.

## Classification

---

**Language:** ENGLISH

**Publication-Type:** Newspaper

CPLR 2106 Amended To Permit Anyone To Submit Affirmation in Lieu of Affidavit; NEW YORK PRACTICE

**Subject:** HEALTH CARE PROFESSIONALS (89%); PROFESSIONAL WORKERS (89%); COPYRIGHT (73%); PERJURY (65%); New York Practice (%)

**Industry:** HEALTH CARE PROFESSIONALS (89%); HEALTH CARE (62%)

**Geographic:** NEW YORK, USA (95%); UNITED STATES (79%)

**Load-Date:** February 29, 2024

---

End of Document