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Accessing the Courts: Why New York Should Eliminate The Dreaded, Needless and Unduly Complex ‘Certificate Of Conformity’

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On May 31, 2023, the New York Legislature passed a bill that would eliminate the requirement to notarize affidavits in civil lawsuits. A.B. 5772, 2023-2024 Leg. Assem. (N.Y. 2023) (“A5772”). Should Governor Hochul sign the bill into law, New York courts will admit into evidence the statement of any witness without requiring it to be notarized, so long as the witness affirms the truthfulness of their statement “under the penalties of perjury.”

The bill substantially changes how litigants can introduce witness testimony in New York, N.Y. C.P.L.R. §2106, bringing New York in line with federal courts and other jurisdictions that allow witnesses to offer sworn statements merely by declaring what they say is true “under penalty of perjury,” 28 U.S.C. §1746.

New York’s bill has rightfully been celebrated as a “major access-to-justice victory.” Marco Poggio, *NY Legal Aid Orgs. Cheer New Law Ditching Civil Notarization*, Law360 (June 1, 2023). It reduces costs and complexity for litigants needing to submit evidence in all sorts of cases because affidavits will not need to be notarized.

But legislators should also address another arcane New York procedural requirement posing



the very same problem: the dreaded certificate of conformity. Under New York law, a party that needs to submit written testimony from a witness not physically present in New York State needs to submit a certificate of conformity.

Specifically, the litigant has to append to the witness’s affidavit a document confirming that the witness’s oath complied with local laws. That document is called the certificate of conformity. N.Y. C.P.L.R. § 2309(c) (McKinney 2023); N.Y. Real Prop. § 299-a. Only attorneys admitted to practice in the witness’s state or attorneys that reside in that state

may issue the certificate. N.Y. Real Prop. § 299-a. That means that to submit out-of-state witness testimony, a party or a witness needs access to local counsel to attest to compliance with local oath-making laws.

Because the certificate of conformity requirement is needlessly complicated and poses the very same access to justice issues that led New York to propose eliminating notarized affidavits, New York legislators should eliminate the certificate of conformity, too.

The certificate of conformity requirement is needless. Although the certificate aims to improve reliability, *Midfirst Bank v. Agho*, 121 A.D.3d 343, 348 (2nd Dep't 2014), many jurisdictions—including New York with its new bill on affidavits more broadly—have recognized the threat of perjury as sufficient to achieve that aim, see 28 U.S.C. §1746. There is, simply put, no need to go to all the trouble of retaining a lawyer to watch someone swear to written testimony under penalty of perjury.

The process is so needless, in fact, that even well-resourced litigants have forgotten the certificate of conformity requirement entirely. See, e.g., *Great Health Care Chiropractic, P.C. v. Nationwide Ins.*, 7 N.Y.S.3d 242, at *1 (App. Term. 2nd Dep't 2014); *Bank of Am., N.A. v. Figueroa*, 173 N.Y.S.3d 478, at *2 (Civ. Ct. 2022).

The New York Legislature has recognized these problems. After all, that's why the legislature has moved to dispense with a notary requirement for all affidavits. A.B. 5772. But they haven't eliminated the certificate of conformity. In fact, the new bill says *nothing* of CPLR 2309, which codifies the

certificate of conformity requirement in the first place. And that omission is a missed opportunity.

Like the notary requirement New York is proposing to eliminate, the certificate of conformity creates “barriers for people with lower incomes.” Poggio, *supra*. For the 80% of low income individuals who cannot afford a lawyer—let alone a lawyer in another state—compliance with the certificate of conformity requirement is simply out of the question. See Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, ABA (Dec. 3, 2017), <https://perma.cc/Q78P-MSJH>.

Yet courts have even gone so far as to reject affidavits—and even claims—because certificates of conformity were missing. *Akron Scott v. Westmore Fuel Co.*, 96 A.D.3d 520, 521 (1st Dep't 2012); *Green v. Fairway Operating Corporation*, 72 A.D.3d 613, at *1 (1st Dep't 2010).

New York Legislators have heralded A5772 as bringing New York “one step closer to making [its] court processes less burdensome and more equitable for all.” Poggio, *supra*. But the legislature's work is not done. With the certificate of conformity requirement still on the books, New Yorkers are far from being relieved of “undue financial burden” posed by witnesses located outside of New York. To improve fairness, efficiency and access to justice, legislators should also eliminate the certificate of conformity.

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