



# NEW YORK STATE BAR ASSOCIATION

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## REAL PROPERTY LAW SECTION

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November 2, 2010

Via Electronic Mail [PLEWIS@courts.state.ny.us](mailto:PLEWIS@courts.state.ny.us) and First Class Mail

Mr. Paul Lewis  
New York State Office of Court Administration  
25 Beaver Street  
New York, NY 10004

Dear Paul:

This letter is intended as a follow up to our meeting held on the 26<sup>th</sup> of October 2010 wherein the Court agreed to review a proposal for revisions to the Attorney Affirmation requirement in residential foreclosure actions.

Attached is the revised Affirmation and proposed Affidavit of the attorney's client. The following explains our reasoning behind the changes.

- **The N.B. has been removed from the Affirmation.** As currently written, the N.B. contains factual allegations about other attorneys that should not be part of an affirmation that any particular attorney is required to swear to. The Affirmation is a legal document in which an attorney must swear under penalty of perjury about the steps and due diligence that that *particular* attorney has taken in a particular matter. Nevertheless, the "N.B" recites background "facts" regarding the alleged conduct of *other* attorneys (and their clients) from around the nation. Mandating the inclusion of this preamble in the Affirmation creates an unfair and prejudicial connection between any attorney who submits the document and the unidentified attorneys "around the nation" who have allegedly committed the specified wrongs.
- **Paragraph 2 of the Affirmation has been revised to reflect an Affidavit to be executed by the client, since the current version requires an attorney to disclose privileged communications.** In addition, the proposed Affidavit of the client directly addresses the OCA's concerns. As currently written, paragraph 2 requires the attorney to swear that he or she has "communicated" with an

- o identified representative of the lender in connection with the attorney's providing of legal services, and to disclose to the Court the substance of those communications, to wit, that that representative "informed" the attorney that "he/she (a) has personally reviewed plaintiff's documents and records relating to this case; (b) has reviewed the Summons and Complaint, and all other papers filed in this matter in support of foreclosure; and (c) has confirmed both the factual accuracy of the these court filings and the accuracy of the notarizations contained therein." To force the attorney to swear to what the client "communicated" to or "informed" the attorney impermissibly invades the attorney-client privilege because it requires an attorney to reveal the fact and substance of his privileged communications with his clients.
  
- o The OCA should recognize the impropriety of this conflict and allow revision of the Affirmation on its own accord, given that the judiciary has long recognized the importance of protecting the attorney-client privilege, which has been codified in Section 4503(a) of the CLPR. In any event, this State's Constitution prohibits the OCA from promulgating a rule that is inconsistent with a state statute. This portion of the Affirmation may make the rule vulnerable to a challenge in its new filing rule. See *People v. Ramos*, 85 NY2d 678, 686-89 (1995) (construing N.Y. Const. art VI §30).
  
- o As the OCA memorandum explains, the OCA promulgated the Affirmation requirement to combat reported deficiencies in the foreclosure process stemming from the conduct of mortgage owners, including "deficiencies in notarization" and "robosigning." The existing paragraph 2 of the Affirmation addresses this issue only indirectly; rather than requiring the client to attest to any of the needed facts, under the penalty of perjury or otherwise, it merely requires the lawyer to swear as to what the client told him about those facts. For this reason, the OCA should forego paragraph 2 of the Affirmation and instead require *the client* to affirm the noted facts. This is how the OCA has proceeded in the past, when it was concerned about the factual accuracy of certain court filings. See, e.g., 22 N.Y. Ct. Rules § 202.16(b); *id.* app. A (requiring clients, but not their attorneys, to certify the accuracy and truthfulness of statements of net worth filed in matrimonial actions). Obtaining an affirmation directly from clients attesting to the factual accuracy of their mortgage papers would allow OCA to accomplish its goals directly, and in a way that would avoid paragraph 2's impermissible conflict with the attorney-client privilege.
  
- o The proposed Affidavit of the client serves two purposes: first, to accomplish the OCA's goals, and secondly to allow remediation of existing foreclosure actions to take place simultaneously with the filing of the affirmation. Submission of the Affirmation and Affidavit will avoid inundating the court system with motions to remediate/ratify current actions and then

subsequently making further motions or submissions that includes the Affirmation.

- o **Paragraph 3 of the Affirmation has been modified to make it clear that rule 130-1.1 obligations extend to the underlying foreclosure documents.** We believe the intention of the Affirmation was to make clear that an attorney's obligation to conduct a reasonable inquiry into the facts must, in the foreclosure context, extend to the underlying factual information and documents supporting the foreclosure papers. We think that obligation is already implicit in § 130-1.1 – a note or mortgage that is attached to a paper that the lawyer signs and files is part of that "paper," and subject to § 130-1.1. Still, we recognize that, given the practices at certain banks that have recently come to light, it may be appropriate for the Affirmation to draw attention to that obligation in this context. The Bankruptcy Reform Act of 2005 is a useful guide. Despite the existence of Fed. R. Civ. P. 11, and a special bankruptcy rule imposing similar obligations, Congress wished to be certain that debtor's counsel understood its obligation to certify the accuracy of the schedules that debtors filed in Bankruptcy Court. Accordingly, the Bankruptcy Reform Act of 2005 amended the Bankruptcy Code to provide: "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information *in the schedules filed with such petition* is incorrect." 11 U.S.C. § 707(b)(4)(D) (emphasis added). If that was the intention behind the Affirmation, we think it should be revised to make that precise point. Thus, Paragraph 3 has been rewritten to state that: "to the best of my knowledge, information and belief, the Summons and Complaint and all other documents filed in support of this action for foreclosure are correct and do not contain any false statements."

The Real Property Law Section submits these changes enhance the OCA's desire to protect the integrity of the judicial system while at the same time recognizing the importance of allowing attorneys to adequately and appropriately represent the interests of their clients.

Please contact me at (518) 436-4170 to discuss whether the OCA will agree to these revisions.

Very truly yours,



Anne Reynolds Copps