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Drafting NY Civil-Litigation Documents: Part 21—Summary-Judgment Motions Cont'd

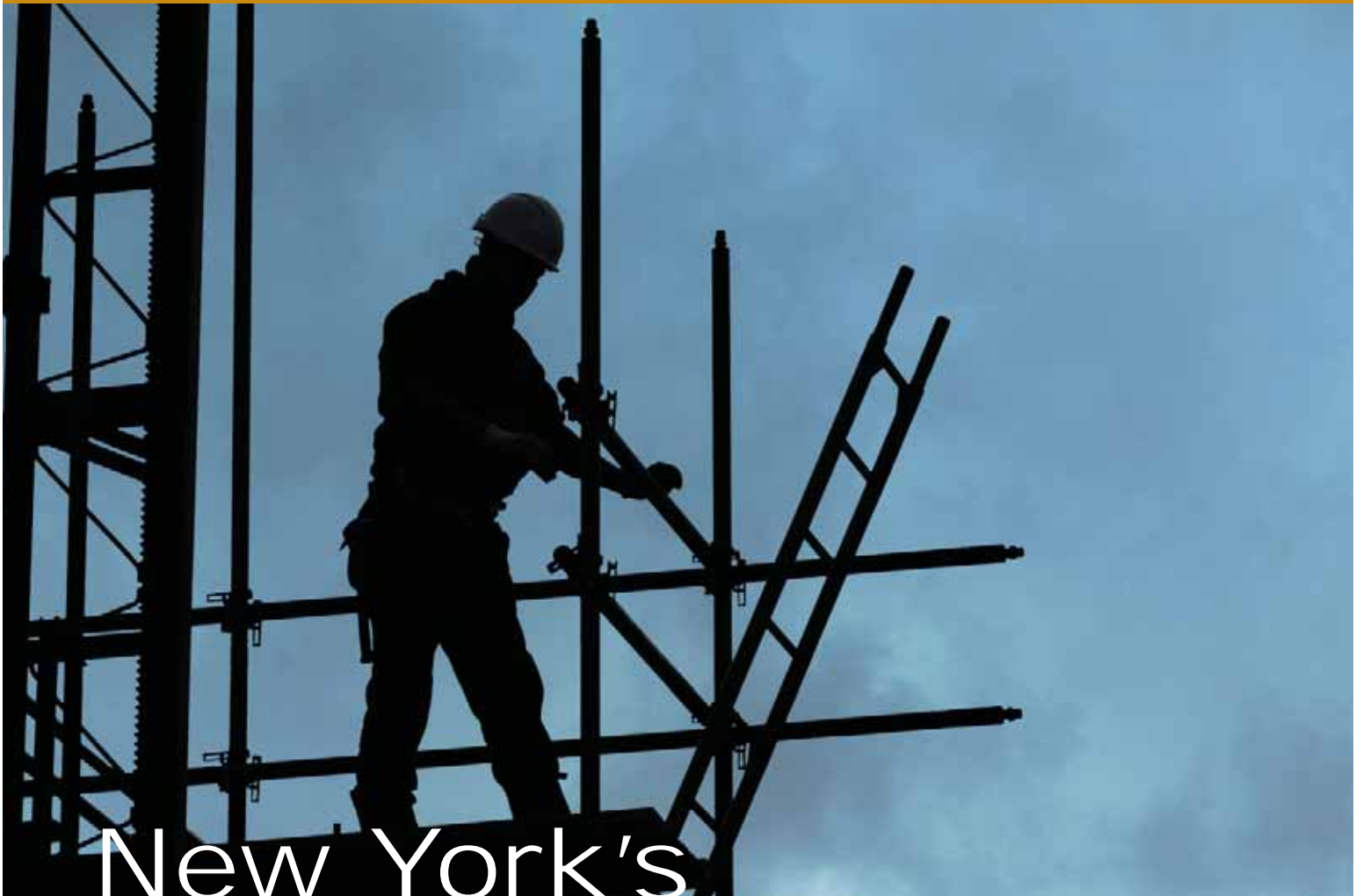
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Scaffold Law and the Evolution of Elevation

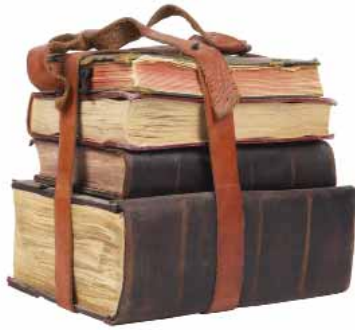
By Hon. George M. Heymann

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Drafting New York Civil-Litigation Documents: Part XXI—Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* presented an overview of summary-judgment motions, discussing the advantages and disadvantages to moving for summary judgment, how courts search the record, and the evidence needed to support a summary-judgment motion.

In this issue of the *Journal*, we continue our overview of summary-judgment motions. We'll discuss the burdens each party has in moving, opposing, and cross-moving for summary judgment and how to compose affidavits in support of and in opposition to a summary-judgment motion.

The Plaintiff's Summary-Judgment Motion: The Burden of Proof

The Moving Party's Burden

The moving party — the party moving for summary judgment — has the initial burden of proof to establish, with facts, each element of a claim or counterclaim. Let's assume that the plaintiff is moving for summary judgment. To prevail, the plaintiff must show that it's entitled to judgment as a matter of law.¹ *Exception:* In some actions — such as strategic lawsuits against public participation (SLAPP actions)² and in limited cases involving licensed architects, engineers, and landscape architects³ — the burden is on the non-moving party in a summary-judgment motion.

If the moving party fails to show evidence proving each element of a claim or counterclaim — its prima facie case — a court will deny the summary-judgment motion, even if the non-moving party proffers no proof in opposition to the motion.⁴

The plaintiff also has the burden to disprove the defendant's affirmative defenses.⁵

The Non-Moving Party's Burden

As the defendant, you oppose the plaintiff's summary-judgment motion by submitting opposition papers. Don't assume that the court will deny the plaintiff's motion if the plaintiff fails to prove its prima facie case. Explain in your opposition papers how the plaintiff failed to prove its prima facie case.

After you've fully explained in your opposition papers that the plaintiff hasn't met its initial burden, demonstrate — with evidence — that a triable issue of material fact exists. Thus, explain to the court that a trial is necessary.

If the plaintiff satisfies its initial burden to establish, with facts, each element of a claim or counterclaim, the burden then shifts to you, the non-moving party, to offer admissible evidence showing "one or more disputes of material fact."⁶ If you, the defendant, meet your burden as the non-moving party, a court will deny the plaintiff's summary-judgment motion.

To meet your burden as the non-moving party, you need to do more than just deny the facts in the plaintiff's summary-judgment motion. Be specific. Don't just dispute facts for the sake of disputing them. Don't dispute immaterial facts. The plaintiff's facts must entitle the plaintiff to a judgment. The facts must be material.

Produce evidence — don't just say that evidence exists — to rebut the facts and show that a trial is necessary. Don't be conclusory. Show; don't just tell.

Don't assume you'll defeat the plaintiff's summary-judgment motion by relying on facts in a new, unpleaded affirmative defense — a defense

Worthless is an affidavit that doesn't state the affiant's basis of knowledge.

that wasn't included in your answer. To prevent problems with your unpleaded defense, cross-move to amend your answer to include the new defense.⁷ The court might consider your unpleaded defense if the defense doesn't surprise or prejudice the plaintiff and if both sides have an opportunity to address the defense.⁸ Your defense must have merit, too.

The Defendant's Summary-Judgment Motion: The Burden of Proof

The Moving Party's Burden

Assume that the defendant is moving for summary judgment. As the moving party, the defendant must offer evidence that negates the plaintiff's claim. The defendant has the initial burden of (1) showing "[e]vidence of facts inconsistent with one or more prima facie elements of plaintiff's case; or (2) establishing, with facts, each element of a complete defense or defenses."⁹

In your motion, you may demonstrate that the plaintiff has failed to prove one or more of the prima facie

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elements of its case. You need show only that the plaintiff failed to prove one of its prima facie elements.

As the defendant, you may obtain summary judgment if you prove any affirmative defense you've pleaded in your answer. If the affirmative defense comprises more than one element, you'll have to prove that there's "no triable issue of material fact as to each element."¹⁰

The Non-Moving Party's Burden

Once the defendant meets its initial burden on summary judgment, the plaintiff may show material facts in dispute, thus warranting a trial to resolve those disputes.¹¹ If the defendant has proven in its summary-judgment motion all the elements of an affirmative defense, the plaintiff in its opposition papers may submit facts that "negate any single element of the defense."¹² Don't include speculation or conclusions. Be specific.

More on Affidavits

In the last issue, the *Legal Writer* provided an overview of writing affidavits — the document practitioners use most often to move for summary judgment.

An affidavit is a legal, written document in which the individual (the affiant) attesting to the information in the affidavit (the facts) swears under oath and subject to the penalty of perjury that the information in the affidavit is true.

The first sentence of your affidavit should conform to the following: "I, Jane Watson, being duly sworn, state that the following is true under the penalty of perjury." The next sentences should be contained in consecutively numbered paragraphs. Each paragraph can have several sentences, but the fewer the better. Write short sentences and short paragraphs. Each numbered paragraph should have one unifying thought. Some believe that each consecutively numbered paragraph may contain one sentence only. We disagree.

Use affidavits persuasively to present your version of the facts. Affidavits allow you to piece together the facts of the case in one document for the reader that counts most: the court. You may refer to other documents — which you've attached as exhibits — in the affidavit to substantiate the facts of your case. In an affidavit, you can point to and elaborate on the favorable facts about your case. Sometimes, depending on your case, you might also have to explain away the unfavorable facts in your case.

Writing and editing affidavits for your summary-judgment motion can be a time-consuming process. After speaking with your client or witness or expert, or all these individuals, you'll need to capture the information they've told you and create separate affidavits. Submit the affidavits to each affiant to make sure that the information contained in the affidavit is correct. Make changes to the affidavit — by adding or deleting information — depending on the affiant's suggestions and edits. Ideally, you'll want to do several edits. Determine whether you need to fill in any gaps in the evidence. You determine the gaps in the evidence on the elements of the claim(s) or defense(s) and the corresponding facts you'll need to prove the elements of the claim(s) or defense(s).

Write the affidavit in the first person — from the affiant's point of view.¹³ Typically, practitioners, not the affiants themselves, write the affidavits in support of their summary-judgment motions. Practitioners do this because most affiants aren't lawyers familiar with the elements of a case, don't know what's relevant or irrelevant, and don't know how to write persuasively. The attorney writing the affidavit should try to make it sound as if the affiant is speaking. If you make the affidavit sound like a lawyer wrote it, the affidavit "will be less credible."¹⁴

Attach relevant documents as exhibits. The affiant should refer to these documents and explain them as if the witness were testifying at trial. Doing so is necessary because witnesses must make the documents admissible as if

they were offered at trial. The *Legal Writer* will discuss in greater depth in the upcoming issue(s) the various documents you may refer to in your affidavits, such as examination before trial (EBT) transcripts, business records, and other documents.

Make sure that the affiant is available to work with you on writing and editing the affidavit. You might need to work around the affiant's schedule. You might need to submit supplemental, opposing, or reply affidavits to address, explain, or include facts not addressed, explained, or omitted in your affiant's affidavit. Some witnesses might not want to cooperate with you in this affidavit-writing process. They might be non-parties who have no stake in the outcome of the case and don't care whether you lose or win the case. Anticipate these problems, and plan accordingly.

The drafts you prepare with your client are protected work product not subject to disclosure. Non-client affiants don't have the same privileges. Your communications with other affiants might be subject to disclosure — information your adversary might request that you turn over.

Don't use form affidavits. What's missing from form affidavits are the specific, non-conclusory facts you need to add about your case. Without support for the facts in the affidavit, you might lose your motion. Besides, form affidavits are replete with "legalistic terminology, archaic verbiage, and insider legal jargon."¹⁵ If you must use form affidavits, edit them to eliminate the verbiage, jargon, and legalese. Taking the time to edit form affidavits will pay dividends. Tailor each affidavit to each case without resorting to cut-and-paste jobs. Even if your firm prefers the traditional legalese,¹⁶ advise your supervisor or colleagues that "recent research show[s] that a majority of judges prefer a modern, direct writing style without legalese."¹⁷

Change archaic language to plain English. Here are some suggestions.¹⁸ "Duly sworn" becomes "sworn" or "under oath." "Deposes and says" becomes "states." "Affirm" becomes

“state.” “Herein” becomes “here” or “in this affidavit.” “The undersigned” becomes “me,” or use the name of the person signing the affidavit. “Subscribed” becomes “signed.”

You know the affidavit is older than you are when you see this language at the end of the affidavit: “Further Affiant Saith Naught” or “Further Affiant Sayeth Not.” Eliminate these expressions. They’re peculiar and unnecessary. Just use “signed.”¹⁹

Don’t include legal arguments in affidavits. Legal arguments have “no evidentiary value.”²⁰

But sometimes you’ll need to include legal words or legal standards. For example, you might want to have your medical expert offer an opinion in terms of a medical standard. That’s fine, so long as you have your expert explain things in non-conclusory English: “I believe to a reasonable degree of medical certainty that Jane Watson did not suffer a serious physical injury. The only injury she sustained was a torn toenail cuticle one centimeter long.”

CPLR 3212(b) provides that one of the moving affidavits must include a statement attesting to the validity of the movant’s claim or defense or to the invalidity of the other party’s claim or defense. Also, “[t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts.”²¹

Focus on material — instead of immaterial — facts in your affidavits. As we explained in the last issue, moving for summary judgment is appropriate when no dispute exists about the material facts of your case. You don’t want to confuse the court with unimportant facts. Including immaterial facts will invite your adversary to respond and will create confusion.

Because writing affidavits takes time, know your time limit in moving for summary judgment. In the last issue, the *Legal Writer* discussed some of the time constraints you have in moving for summary judgment.²²

Know the specific court rules. If you’re submitting a summary-judgment motion in the Commercial Division Part in New York Supreme Court, for example, the moving party must

submit a statement of material facts with separately numbered paragraphs.²³ The nonmoving party must provide a counterstatement of material facts.

Some component parts of affidavits are required. Some component parts aren’t necessary, but litigators include them out of tradition.²⁴ Here are the parts of an affidavit: (1) the caption; (2) the affidavit’s title; (3) the state and county where the affiant signed the affidavit; (4) the affiant’s name and qualifications in offering the information contained in the affidavit; (5) the basis for the affiant’s knowledge; (6) the facts; (7) the signature line, including the address and telephone number; and (8) the jurat.²⁵

Under CPLR 2101, all court-filed documents must contain a caption, the attorney-of-record’s (or the pro se litigant’s) indorsement (the name, address, and telephone number of the attorney of record or the pro se litigant’s information if a party is appearing pro se) and signature, and a verification.²⁶

The Caption

In preparing the affidavit for your summary-judgment motion, use the same caption you’ve used in the same litigation to identify your case: Use the caption you prepared for the complaint or the answer. The caption should be in the upper left-hand corner of the page. In the caption, “set[] forth the name of the court, the venue, the title of the action, the nature of the paper and the index number of the action if one has been assigned.”²⁷ If you know the name of the assigned judge or justice, include that information as well.²⁸ Sometimes you’ll get an affidavit from a witness when no litigation is pending in the case. In that situation, you wouldn’t have or need a caption.

The Title

Give the affidavit a title. The title should identify the affiant. *Examples:* “Affidavit of Adam Johnson”; “Affidavit of Clarissa Moses.” If you want to be concise, cut out unnecessary words. *Better examples:* “Adam Johnson’s Affi-

davit”; “Clarissa Moses’s Affidavit.” If you’re using the affidavit in support of your motion or in opposition to your adversary’s summary-judgment motion, include it in the title. *Example:* “Adam John’s Affidavit in Support of Defendant’s Summary-Judgment Motion.” *Example:* “Clarissa Moses’s Affidavit in Opposition to Plaintiff’s Summary-Judgment Motion.”

The State and County

Identify the state and the county where the affiant signed the affidavit. In archaic affidavits, you might see “s.s.” to the right of the location. The “s.s.” means “so sworn.”²⁹ Eliminate it. It adds nothing to your affidavit.

The Affiant’s Name and Qualifications

The opening lines of the affidavit should identify the affiant’s name and “qualifications to give the affidavit.”³⁰ State that the affiant has personal knowledge of the facts in the affidavit. If any part of the affidavit is based on the affiant’s information and belief, state that the affiant believes the information to be true and give the affiant’s source of belief.

The Basis of the Affiant’s Knowledge

You’ll need to show how the affiant has “personal knowledge of the facts stated in the affidavit.”³¹ Some practitioners believe that it’s acceptable to state in a conclusory way that the affiant has personal knowledge of the facts in the affidavit. Worthless is an affidavit that doesn’t state the affiant’s basis of knowledge. Explain to those reading the affidavit — your adversary, the court, other witnesses, and other parties — why the affiant knows what the affiant knows. You’ll need to show the reader(s) how the affiant is connected to the case.³² The affiant might be, among others, a person who signed the contract in dispute, an eyewitness, an expert, or “the custodian of the records the affidavit proves up.”³³

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The Facts

The body of the affidavit contains the facts. There's no hard-and-fast rule about the length of this section. Include as many facts as you need to support your motion or to oppose your opponent's motion and to win the relief you're seeking. But be concise and succinct. Less is always more.

Some useful pointers:

1. Make sure that your facts support each legal element(s), claim(s), or defense(s) you need to advance.
2. For each separate part of your facts, have separate headings to help the reader understand where you're going.
3. Under each heading, start each paragraph with a topic sentence giving your point.
4. Tell the story chronologically.
5. Tell a story. Use story-telling techniques to engage your reader.
6. Don't throw in the kitchen sink. Limit the atmospheric; get to what's relevant.
7. Use the key words your witness used during your interview.
8. Limit your acronyms, and explain them if you use them.
9. No legalisms.
10. Don't be conclusory.
11. Your facts must be in admissible form.
12. Use your specific facts to force your opponent to rebut them in its opposition papers or to concede.

The Signature Line

The signature line is self-explanatory. Have the affiant sign the affidavit. Type or print the affiant's name beneath the signature.³⁴ Have the affiant sign in front of a notary public.

Every paper you file with the court — including affidavits — must contain the name, address, and telephone number of the attorney of record.³⁵ Parties appearing pro se must give their name, address, and telephone number on affidavits.³⁶

The Jurat

Jurat means "to swear." By signing an affidavit, the affiant swears to a notary public that the affidavit's contents are true. Affidavits must be notarized. A notary public must sign and stamp an affidavit "[a]fter confirming the affiant's identity and watching the affiant sign the affidavit."³⁷ Example: "Sworn and signed before me, a notary public for the State of New York, on November, 26, 2012." Right underneath this, include a line for the notary public to sign the affidavit. Underneath the signature, type or print the notary public's name. If you don't know the notary public's name, leave a space for the notary to write his or her name. Not all affiants will sign their affidavit in your office in front of a notary public of your choosing. Also, leave a space for the notary's stamp (or seal, if the notary is fancy). Most notary stamps will indicate when the notary's commission expires. To ensure that the notary public's stamp includes when the notary's commission expires, include the following language on the affidavit: "My commission expires: [date]." The notary can fill in the date.

If you submit an unnotarized affidavit to the court, a patient and understanding judge will allow you to correct the error.³⁸ But — surprise — not all judges are patient and understanding.

Translator's Affidavit

If the affiant does not speak English, you'll need an English affidavit and a translator's affidavit. At trial, a non-English speaking witness may not give testimony without an English translator. The translator helps the court, the attorneys, the parties, and other witnesses understand what the witness is saying. The same concept applies to summary-judgment motions. The evidence you proffer in your motion — your affidavits — must be in admissible form. Under CPLR 2101(b), "[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Without a translator's affidavit, a court will find

a witness's English affidavit facially defective and inadmissible.³⁹

In the upcoming issue(s) of the *Journal*, the *Legal Writer* will also discuss, among other things, the various nuances to putting together summary-judgment motions, including writing affirmations, opposing summary-judgment motions, cross-moving for summary judgment, and replying to opposition papers. ■

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1. 1 Byer's Civil Motions at § 77:04 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), available at http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).
2. CPLR 3212(h).
3. CPLR 3212(i); CPLR 214-d.
4. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:160, at 37-22 (2006; Dec. 2009 Supp.).
5. *Id.* § 37:161, at 37-22.
6. *Id.* § 37:172, at 37-22.
7. *Id.* § 37:174, at 37-23.
8. *Id.* § 37:174, at 37-23.
9. *Id.* § 37:181, at 37-23.
10. *Id.* § 37:201, at 37-24.
11. *Id.* § 37:210, at 37-25.
12. *Id.* § 37:211, at 37-25.
13. Kamela Bridges & Wayne Schiess, Writing for Litigation 127 (2011).
14. *Id.* at 129 (quoting Steven D. Stark, Writing to Win: The Legal Writer 167 (1999)).
15. *Id.* at 125.
16. *Id.* (citing Wayne Schiess, *When Your Boss Wants It the Old Way*, 12 Scribes J. Leg. Writing, 163, 165-66 (2008-2009); Wayne Schiess, *What to Do When a Student Says "My Boss Won't Let Me Write Like That,"* 11 Persps.: Teaching Leg. Research & Writing 113, 114 (2003)).
17. *Id.* (citing Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 Leg. Writing 183 (2010)).
18. *Id.*
19. *Id.* (quoting Joseph Kimble, *Nuts to "Further Affiant Sayeth Naught,"* Mich. B.J. 48, 48 (Sept. 2004)).
20. Barr et al., *supra* note 4, § 37:283, at 37-31.
21. CPLR 3212(b).

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22. If the court doesn't set a date, a party may move for summary judgment "no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown." *Har-rington v. Palmer Mobile Homes, Inc.*, 71 A.D.3d 1274, 1275, 900 N.Y.S.2d 152, 154 (3d Dep't 2010); accord CPLR 3212(a).
23. 22 N.Y.C.R.R. 202.70(g), Rule 19-a.
24. Bridges, *supra* note 13, at 124.
25. *Id.* at 126.
26. Affidavits need not contain a separate verifi-cation.
27. CPLR 2101(c).
28. 22 N.Y.C.R.R. 202.5(b), applicable to New York Civil, Supreme and County Courts.
29. Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice 113 (2004).
30. Bridges, *supra* note 13, at 126.
31. *Id.* at 126.
32. *Id.*
33. *Id.*
34. CPLR 2101(a).
35. CPLR 2101(d).
36. *Id.*
37. Bridges, *supra* note 13, at 127.
38. Barr et al., *supra* note 4, § 37:263, at 37-29.
39. David Paul Horowitz, 2012 Motion Practice Update, New York State Judicial Institute, 12th Jud. Dist. Legal Update Program 1, 28 (Apr. 18, 2012) (citing *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d 47, 54-55, 919 N.Y.S.2d 44, 50-51 (2d Dep't 2011); but see *Yi v. JNJ Supply Corp.*, 274 A.D.2d 453, 454, 711 N.Y.S.2d 906, 907 (2d Dep't 2000) (consid-ering affidavit from non-English speaking witness without translator's affidavit in opposition to summary-judgment motion despite no excuse for failing to provide the translator's affidavit).

