

# New Rule Encourages the Use of Direct Testimony Affidavits to Streamline Trials in the New York Commercial Division

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September 21, 2016

Under a new rule approved yesterday, justices in the Commercial Division of New York State Supreme Court for the first time will be expressly authorized to require parties to submit the direct testimony of their own witnesses in affidavit form as a means of streamlining non-jury trials and evidentiary hearings. Effective October 17, 2016, new Commercial Division Rule 32-a will provide:

The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.

The new rule was promulgated in an Administrative Order signed by New York State's Chief Administrative Judge Lawrence K. Marks. It brings New York's specialized business courts more uniformly in line with federal courts and international arbitration tribunals. There, direct testimony by affidavit is a commonplace means of improving the efficiency of proceedings by avoiding protracted and heavily rehearsed live direct testimony that, in the view of some, can be presented just as effectively and more expeditiously through an affidavit or other sworn written statement.

Significantly, Rule 32-a does not compel Commercial Division justices to adopt the practice of requiring direct testimony affidavits; instead, use of the direct testimony affidavit approach would be at the complete discretion of the individual justices, some of whom already require direct testimony affidavits to varying degrees. Previously, no Commercial Division rule either expressly authorized or prohibited the practice. The Commercial Division Advisory Council had recommended the new rule earlier this year. In requesting public comment on the proposed rule, New York State's Office of Court Administration noted that the practice of submitting direct testimony by affidavit is in wide use in other courts and has been found by some judges and attorneys to streamline trials and facilitate crisper cross-examination. The Advisory Council recommended the new rule as a means of "encourage[ing] justices of the Commercial Division to consider adoption of a practice that might promote efficiency" and "to promote awareness in the business community that the Commercial Division embraces procedural innovation designed to promote the efficient and cost-effective resolution of commercial disputes."

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