

Proposed Rule Would Promote the Use of Direct Testimony Affidavits in the New York Commercial Division

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Justices in the Commercial Division of New York State Supreme Court would be expressly authorized to require parties to submit the direct testimony of their own witnesses in affidavit form in non-jury trials and evidentiary hearings under a new rule proposed yesterday.

If incorporated into the Statewide Rules of the Commercial Division, the proposed rule could bring New York's specialized business courts more uniformly inline with the federal courts and international arbitration tribunals. There, testimony-by-affidavit is a commonplace means of improving the efficiency of proceedings by avoiding protracted and intensely 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. The proposed rule is the latest in a series of recent steps taken to promote increased efficiency in resolving the kinds of complex business disputes that are heard in the Commercial Division, a leader among the specialized business courts that have been established in some two dozen states across the country since the early 1990s.

Proposed by the Administrative Board of the Courts upon the recommendation of the Commercial Division Advisory Council, the rule would 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.

Seeking public comment on the proposed rule, the Administrative Board of the Courts 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 of witnesses." Significantly, the proposed rule would not compel Commercial Division justices to adopt the practice; 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. No existing rule expressly authorizes or prohibits the practice. The purpose of the proposed rule, according to the Advisory Council, is to "encourage 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."

In its memorandum analyzing the proposed rule, the Advisory Council noted that of the 46 sitting judges in the United States District Court for the Southern District of New York, 21 currently require

direct testimony by affidavit in non-jury trials while one allows the practice with prior permission. "To our knowledge," the Advisory Council stated, "litigants in this premier commercial court have not complained that this requirement in any way compromises the integrity of judicial fact-finding or imposes any additional burden. To the contrary, the feedback has been favorable: that the practice facilitates trial preparation and shortens the trial without compromising the integrity of the record."

Comments on the proposed rule should be emailed to rulecomments@nycourts.gov or forwarded to John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Floor, New York, NY 10004. Comments must be received by no later than July 25, 2016.

For more information on this advisory, please contact:

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