COUNCIL ON JUDICIAL ADMINISTRATION

STEVEN M. KAYMAN
CHAIR
ELEVEN TIMES SQUARE
NEW YORK, NY 10036-8299
Phone: (212) 969-3430
Fax: (212) 969-2900
skayman@proskauer.com

STACEY P. EILBAUM
SECRETARY
ELEVEN TIMES SQUARE
NEW YORK, NY 10036-8299
Phone: (212) 969-3000
Fax: (212) 969-2900
seilbaum@proskauer.com

July 25, 2016

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: New York City Bar Comments on Proposed Commercial Division Rule Permitting the Court to Require that Direct Testimony of a Party's Own Witness in a Non-Jury Trial or Evidentiary Hearing be Submitted by Affidavit

Dear Mr. McConnell:

The New York City Bar Association is grateful for the opportunity to provide comments[1] on the proposal by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council") to enact a new Commercial Division rule permitting judges to *require* that the direct testimony of a party's own witness in a non-jury trial or evidentiary hearing take the form of an affidavit. In short, we oppose this rule for a number of reasons.

Although we can appreciate the desire to "streamline" trials, we have serious reservations about turning direct testimony by affidavit into a standard rule. We agree that it may make sense in certain circumstances for some secondary witnesses to submit their direct testimony by affidavit. And the parties, if they wish, can certainly agree on whether it is appropriate to do so in a particular case and for particular witnesses. But we do not believe that it is prudent to create a rule that allows judges to make these decisions for the litigants and that, at least implicitly, creates a presumption that even principal witnesses should submit their direct testimony by affidavit.

According to the Memorandum prepared by the Advisory Council, the proposed rule leaves the use of affidavits "entirely to the discretion of the individual presiding judge." The proposed rule sets no standards and provides no guidance with respect to how this rule would be implemented. There is an expectation from the public and practitioners that trials will be

[1] These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

conducted in a predictable and consistent manner. We do not believe that a trial in one courtroom should be carried out in a manner dramatically different from the next one.

A system in which the litigants are required in advance of trial to deliver scripts for the direct testimony of their witnesses represents a major "sea change" from traditional trial practice. Discovery will generally provide sufficient notice of the parties' evidentiary submissions and legal arguments. At trial, the parties should be afforded a fair degree of flexibility and freedom in the presentation of their cases. For instance, a plaintiff may decide, right before trial, to abandon a particular claim or issue. Likewise, after hearing the other side's case, a party may choose to add or exclude certain evidence. This degree of flexibility and autonomy – a hallmark of trial practice – will be impaired if the judge may require the parties to present their direct testimony by way of affidavit only.

There are good reasons why witnesses should ordinarily present their direct testimony under oath in court. It is one thing for a person to sign an affidavit prepared by his/her lawyer, it is quite another to take an oath in open court and testify to the same evidence. By providing live direct testimony, witnesses reveal important information about the *quality* of that evidence – credibility, demeanor, recall, tone, character, etc. These qualities are not revealed through a document prepared by a lawyer.

Witnesses have been known, on direct examination, to make crucial and unexpected admissions and concessions. The opportunity for such candid statements to be revealed would be significantly diminished if we turn to a system in which judges routinely require that such testimony take the form of a prepared affidavit.

Although the affiants would still provide live testimony on cross examination, under an "affidavit only" direct-testimony regime, we fear that cross examination will become stilted and less effective. The "witness" will likely be defending a script prepared by a lawyer as opposed to his/her own words. This would not advance the truth-seeking process.

We also believe that the costs associated with the rule will outweigh its benefits. The proposed rule will require litigants to spend significant time and money on meticulously-prepared affidavits, instead of simply having their witnesses take the witness stand. In the Commercial Division, the significant witnesses often submit affidavits as part of pre-trial motion practice. We question the utility of promoting an "affidavit only" system for direct testimony at trial when the Court will frequently have held at an earlier stage of the case that such affidavits were not sufficient to resolve the parties' conflict.

The public believes, rightfully, that trials allow litigants to have their "day in court," to tell their side of the story and confront their adversary's witnesses, evidence and arguments. A rule permitting judges to deprive the parties of the right to present live testimony runs counter to these expectations of justice.

We hope our observations prove to be helpful. We stand ready to provide further comments upon request.

Thank you for your consideration.

Very truly yours,

Steven M. Kayman
Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of
Superior Jurisdiction

Cary B. Samowitz
Chair, Committee on Litigation