

SUPREME COURT OF THE STATE OF NEW YORK

PART 44

Hon. Douglas E. Hoffman

PREPARED DIRECT EXAMINATION OF WITNESSES BY AFFIDAVIT

The court utilizes in appropriate actions prepared direct examination of witnesses by affidavit in lieu of live / in vivo testimony in bench trials, on consent of all represented parties, counsel, and court.

As detailed below, once there is a set pretrial schedule, each side would file written direct testimony (in question & answer format) by a certain deadline, which deadlines are set on consent in the pretrial order, followed by: submission of evidentiary objections to opposing party's directs soon thereafter; responses to objections; meet and confer about any outstanding objections, and then upload a redlined written direct testimony (in question & answer format) with any remaining outstanding objections meaningfully before the trial. The court will inform the parties and counsel of rulings on these outstanding objections, usually on a pre-set date, meaningfully before the trial.

The courtroom trial itself would entail live cross- and re-direct examination, unless waived for any witness (re-cross examination in the exercise of discretion by the court).

Benefits of Prepared Direct Examination of Witnesses by Affidavit

This mechanism streamlines the presentation of evidence, promotes settlement of complex trial matters, and eases calendar congestion. It also reduces litigation costs, expedites trials, and provides the court with better opportunity to make thoughtful, carefully measured, more informed judgments.

Trials may be scheduled more expeditiously, continuously and for far less trial time.

Direct examination by affidavit greatly limits the amount of trial time for experts, other witnesses, attorneys, litigants and the court by removing from actual trial time often lengthy direct examination of a witness. This obviates the need for lengthy delays in selecting trial dates because fewer trial dates are necessary. As there is less need for multiple trial dates and decreased time needed for trial, continuity of trial from its inception to conclusion will be facilitated. There will be no need for adjournments during trial to consult with experts or other witnesses, as all counsel will receive the direct examination well in advance of trial. By reducing trial time and waiting, litigation costs may be decreased significantly, particularly relating to cases with expert witnesses. This trial technique compels litigants to resolve to the extent possible evidentiary and substantive pretrial legal disputes without court intervention, avoiding both the attendant costs in legal fees for court appearances and delay to the court, counsel, witnesses and parties.

Direct examination of witnesses by affidavit helps to focus sharply the direct examination, eliminating the need for delay in trial through time unnecessarily spent upon objections to questioning, irrelevant issues and the need for extensive trial notes and transcripts concerning direct examination. It also assists the trier of fact to make a clearer, more accurate and complete trial record.

To the same extent that parties are allowed to settle their case, this protocol allows parties in litigation to have the ability choose to adopt this protocol to set their own procedural course on consent, with counsel, if litigating.

Mechanism for Prepared Direct Examination of Witnesses by Affidavit

By a pre-set deadline (which will be established at the pretrial conference), Petitioner files (via NYSCEF) the affidavit of their witness/es, in numbered question & answer format (almost as if a trial transcript, with question, then answer). Consent to proceed by affidavit is for *each* witness, and may be appropriate for some, none, or all of the witnesses in a particular case.

Please note the page limits: unless otherwise specified by the court, 50 pages for the parties, and 15 pages for non-parties, all numbered, at least size 12 font, and double-spaced.

Other parties shall file affidavits of their witnesses in a like manner within a specified number of days thereafter. The court will direct the attorneys to seek to agree upon the qualification of any expert witness, carefully delineating the scope of the expertise.

Opposing parties must file any written objection to the admissibility of the prepared direct testimony within a specified number of days prior to trial. If no objection is filed, the court may admit the affidavit in its entirety at trial. Attorneys are required to make a good faith effort to resolve any evidentiary issues prior to filing objections, and then file via NYSCEF the final redlined witness direct testimony, with any remaining evidentiary objections/responses.

Please note that the trial court may rule on objections prior to trial in a written decision/order or from the Bench; alternatively, the court may rule upon the objections during trial. While it may be beneficial for the parties to have a pretrial ruling, it may be more appropriate for the court to rule upon relevancy, cumulative nature of the evidence and certain other objections in the context of an ongoing trial.

One method utilized in federal court is for the Judge to take the proposed evidence subject to any objection and rule upon the objections after trial. Case law indicates that it is not prejudicial for otherwise inadmissible evidence to be admitted in a bench trial and to permit the Judge to sort out what is in evidence and what is not. On the other hand, parties may need to know in advance what has been admitted into evidence and what has been ruled inadmissible so that they may seek to admit through other witnesses or documents that which the Judge has ruled to be inadmissible.

Substance of the Affidavit

The affidavit must be based upon personal knowledge, but may include appropriate opinion testimony in the case of an expert witness. For most experts, their expert report, once sworn, and their resume forms that expert's direct testimony.

If the direct testimony is presented by a witness who is not a party, the witness shall state the witness' relationship, if any, to the party.

Duly authenticated exhibits may be appended to the direct testimony and must state the issue and/or paragraphs in the affidavit to which the exhibit relates. Any exhibits admitted on consent of both sides may be referenced by number (or letter), without the need to either attach or duly authenticate within the written testimony.

The affidavit is not limited to English-speaking witnesses. Translations of prepared testimony may be more accurate given the length of time available to interpret correctly the written document, rather than hearing and interpreting live in court.

Witnesses Concerning Whom Prepared Direct Examination by Affidavit Would Be Most Appropriate

Direct examination by affidavit would be beneficial in both specific short hearings, as well as in more complex cases where control and management of a case require intervention and participation by the court.

While this form of direct examination may be utilized for any witness, in matrimonial actions greater emphasis may be placed upon a non-party witness where demeanor and hence credibility may play a somewhat lessened role in the ultimate determination. On the other hand, appropriate witness preparation should lead in any case to direct examination that substantially conforms to the prepared direct examination by affidavit. Credibility is most frequently and best tested through cross-examination and re-direct. It should be kept in mind that the Appellate Division may substitute its own findings of fact upon appeal based solely upon a written record.

An emphasis upon utilization of this form of examination for key witnesses such as experts may assist the parties to focus on decisive issues in the case and may lead to early settlement. In terms of trial efficiency, viewing and analyzing in advance of trial the direct testimony of an opponent's expert may obviate the need for an adjournment at the close of direct examination to consult with one's own expert and permits greater focus upon salient issues. This technique would facilitate more meaningful summations as well.

Authority for Pretrial Submission of Written Direct Testimony by Affidavit

As of July 1, 2022, direct by affidavit is allowed in certain matrimonial hearings, on consent. Part 44 encourages represented parties to meaningfully discuss and consider this valuable litigation tool.

Questions regarding this protocol may be directed to the Part 44 Principal Court Attorney by counsel (copying all sides in the case, as always) via concise email at alewisre@nycourts.gov