

BUSINESS LAW TODAY

The Time Has Come (Accompanied by Affidavits): A Method for More Expeditious Trials in Commercial Cases

By [Timothy S. Driscoll](#)

Lawyers, clients, and judges are all too well aware of the time commitment attendant to litigating complex business disputes. Whether due to the high stakes at issue in many commercial cases, or the sheer depth and breadth of evidence because of the proliferation of electronically stored information, or perhaps a concern as seemingly pedestrian as ever-increasing caseloads, it is challenging for business court judges to complete a commercial trial in a manner that ensures that each party has its “day in court” while simultaneously ensuring that each case that will follow that trial can also avail itself of scarce judicial resources. Indeed, the number of “in-court” hours that a judge can offer each year, without incurring overtime for non-judicial personnel, is less than 1,500—and that assumes that the judge is never reflecting in chambers, much less taking a vacation day.

New York State, which continues to pride itself on offering a specialized court—the Commercial Division of the Supreme Court—to state, national, and international businesses that wish to litigate their disputes, offers a solution to this dilemma. More specifically, Chief Administrative Judge Law-

rence Marks, upon the advice and consent of the Administrative Board of the New York State Courts, has approved two key measures that allow judges to conduct and complete trials with even greater efficiency:

- (1) Permitting the judge to require direct testimony by affidavit, in lieu of live testimony, in non-jury proceedings, and
- (2) Permitting the judge to limit each party’s total number of trial hours.

These measures were recommended by the Chief Judge’s Commercial Division Advisory Council, chaired by Robert L. Haig of Kelley Drye & Warren. As with the other initiatives spearheaded by the Advisory Council since its inception in March 2013 by then-Chief Judge Jonathan Lippman and continuing under Chief Judge Janet DiFiore, these measures are designed to further ensure that the Commercial Division remains an efficient and cost-effective forum for the resolution of business disputes. When deployed together, these measures offer a powerful tool for judges to manage their (and trial counsel’s) in-court time.

Direct Testimony by Affidavit

Direct testimony by affidavit in non-jury proceedings is now codified in Rule 32-a of the Rules of the Commercial Division:

The court may require that direct testimony of a party’s own witness in a non-jury 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.

Thus, this somewhat modest proposal applies only when (1) there is a non-jury trial or hearing, and (2) the witness is under the party’s control. Moreover, presenting an affidavit in lieu of live direct testimony will not change the adversary’s ability to cross-examine the witness, or the proponent’s ability to utilize re-direct examination.

While Rule 32-a is, of course, a potential time-saver, it is not the first attempt

by Commercial Division judges to use its technique. Indeed, the concept in the Commercial Division that a party present direct testimony by affidavit for witnesses under its control has its genesis in the courtroom rules of the Honorable Charles Edward Ramos, who has presided in the Commercial Division since shortly after its inception over 20 years ago. In turn, Judge Ramos's practices are supported by Civil Practice Law and Rules 4011, which permits the trial judge to "regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum."

The mechanics of implementing Rule 32-a are within the discretion of the trial judge. Trial judges may wish to consider (1) the timing of the exchange of affidavits and objections to the proposed testimony by affidavit, and (2) the form of the affidavit, such as whether it should follow the sequentially numbered paragraph format of many affidavits, or a "question and answer" format akin to a transcript of trial proceedings. Counsel directed to follow Rule 32-a should consider exchanging affidavits electronically, which readily facilitates lodging objections as a "comment" to the proposed objectionable testimony.

The Timed Trial

Recognizing that trial judges can no longer metaphorically offer lawyers "all you want" in their time to try cases, the Advisory Council promulgated an amendment to Commercial Division Rule 26, which will take effect on July 1, 2017. The amendment recognizes that, just as a judge may set time limits for components of the trial (such as opening statements), so too may the judge limit the total amount of in-court trial time for each party's presentation:

At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. If requested by the court, the estimate shall also con-

tain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours.

Thus, Rule 26 implicitly provides that any time limit set by the court is not some *Deus Ex Machina* pronouncement, but rather is set in reliance on counsel's initial estimate of the time needed if the case were tried in the "conventional" manner. There is also a fail-safe that permits the court to extend the number of hours, although counsel would do well not to claim that the unpredictability of trial—which is by nature unpredictable—requires an increase in the number of hours.

The mechanics of timing the trial are unremarkable. The author often uses a "chess clock," and has the "belt and suspenders" of the courtroom clerk's minutes sheet. An estimate is then provided to counsel at the end of each day as to how much time each side has used and how much time remains. Counsel may also assume the timing function themselves, and confer at the end of each court day as to how much time has been used.

Timed trials are, of course, neither limited to nor the invention of the Commercial Division. As Gregory Diskant of Patterson Belknap recognized in his article "Timed Trials—Worth a Try" (*Litigation*, Volume 43, Number 1, Fall 2016), many federal judges since at least 1984 have limited the amount of in-court time each party may take in its presentation. In addition to convenience of the jury (which is not typically a concern in commercial litigation as most trials are bench trials), Mr. Diskant noted several salutary purposes of such a technique:

1. Convenience of witnesses (especially expert witnesses), who can know in advance with some assurance when they must appear,

2. Convenience of the court, as the judge can schedule other proceedings with confidence,
3. Convenience of counsel, who know when they can re-focus their attention on the "next" case, and
4. Sharpening the focus of attorneys who can leave extraneous issues on the proverbial cutting-room floor.

Perhaps an addition to those purposes could be an increased confidence in the judicial system, as the public at large can readily see the efforts made by judges, non-judicial personnel and counsel to manage the court's caseload.

Direct by Affidavit AND the Timed Trial—Together

Taken together, direct testimony by affidavit and a timed trial can exponentially increase efficiency and production. Indeed, any potential hostility that lawyers may have to the time limitation can be tempered by permitting direct testimony by affidavit, which effectively removes live direct testimony (at least for witnesses under each party's control) from the number of in-court hours. The author has employed such a protocol—without significant articulated resistance—for the past three years. More specifically:

1. Shortly after the close of discovery, counsel provide an estimate of how long it would take to try their case in the "conventional" way.
2. If the estimate is longer than one week, the court sets a time limit, typically with equal hours per side, of the amount of in-court hours available.
3. The court further provides that, in an effort to assist counsel in using their in-court time productively, any party may offer direct testimony by affidavit.
4. To the extent that any party wishes to offer direct testimony by affidavit, such affidavit(s) should be exchanged electronically, and provided to the court, at least six weeks before trial.
5. Any objections to the proposed affidavit(s) should be filed and ex-

changed electronically at least three weeks before trial.

6. The court rules on the proposed objections two weeks prior to trial.
7. Each side may supplement, with live direct testimony, any direct testimony offered by affidavit. Such supplementation may be necessary to cure proposed objectionable testimony, or lay a foundation for the admissibility of documents to which there is not consent to admission, or simply to elucidate potentially complicated issues. Such live testimony, like all other live direct, cross examination, and redirect examination, is “on the clock.”

This process is designed to meet the goals identified by Mr. Diskant, while giving trial counsel an avenue to use their in-court time even more efficiently than merely limiting the time for in-court presentations.

Just as no two cases are alike, so too are there no hard-and-fast rules for how much time each trial should take. Moreover, in the author’s view, counsel should have the opportunity—within the time constraints—to try their case as they wish. Combining direct testimony by affidavit with a timed trial permits the court to control its calendar, while offering counsel the flexibility to present its case as it desires within the time limits.

[Timothy S. Driscoll](#) is a Justice of the Commercial Division of the New York State Supreme Court. He is a member of the New York State Chief Judge’s Commercial Division Advisory Council.