

**Exhibit III-3. Sample Order Requiring Presentation of Evidence by Declaration**

**TRIAL BY DECLARATION**

by  
BARRY RUSSELL  
U.S. Bankruptcy Judge

The attached “Order re Presentation of Evidence by Declarations for Court Trial . . .” concerns a procedure which I have been using for several years with excellent results, in my opinion, for Court trials. The second introductory paragraph of the Order states:

The purpose of this procedure is to ensure a fair and expeditious trial. The procedure is similar to a motion for summary judgment, except that the admissibility of a declaration is dependent upon the presence of the declarant at trial subject to cross-examination.

Using this procedure, I have been able to try matters that would normally take one to two weeks in one-half to one or two days. Since almost all direct testimony is admitted into evidence by the witnesses’ declarations, the in-court time for this testimony is generally eliminated. This procedure does not work well unless both sides are represented by counsel.

Because counsel are forced to carefully prepare the declarations that are admissible under the Federal Rules of Evidence, I have found the declarations to be very brief and far more direct than if the direct testimony were given orally in open court. I have also found that cross-examination is much shorter and frequently waived. I believe this may be due in part to the fact that many attorneys feel compelled to cross-examine witnesses, especially when the client is present in Court, and after the other side’s counsel has spent considerable time questioning its witnesses on direct examination.

This procedure is most beneficial to the Judge’s needs. In addition to saving a great deal of time, I have found that I am much better prepared to decide the matter. By requiring that briefs be filed with the declarations, I am often ready to decide the matter on the declarations submitted prior to trial. That is to say, in many trials (usually the more simple matters) both sides submit on the declarations without any cross-examination and without argument (they have already argued in the pretrial briefs).

Naturally, to make the procedure work, the Judge must take the time to read the declarations and the briefs prior to trial. This can be done at the Judge’s leisure, either in Chambers or at home relaxing by the pool, etc. An additional benefit is that by requiring the parties to be fully prepared, they often settle matters which I believe would otherwise have gone to trial.

The following comments relate to specific suggestions I have concerning certain aspects of the attached Order.

## **1. DECLARATIONS:**

(a) Since this is a trial, the admissibility of evidence is governed by the Federal Rules of Evidence. I have found that “hearsay” and “irrelevant” are by far the most frequent objections and are easily determined by this procedure. Try not to waste your time by hearing arguments on these unless you are really unsure. In any case, you will decide the relevancy when you render your decision. I would suggest generally overruling objections relating to the form of the answer as opposed to those objections relating to substance. I have found that very few objections of any kind are made to the declarations, and the objections made are easily decided.

(b) Some counsel may hold back evidence that should have been in their declarations as part of their case-in-chief and claim it is merely rebuttal. If you strictly enforce your Order they will soon learn that you will not tolerate such attempts to circumvent your Order. I would stress this and other points at a status hearing with all counsel present.

(c) Requiring exhibits to be attached to the declaration makes the reading of the declaration easier and more understandable. You may have to modify this requirement if there are a large number of exhibits. In that case, the declarant should refer to the exhibits which should be provided to the Court and counsel as part of the Pretrial Order.

(d) The filing of a declaration by counsel, concerning witnesses for whom declarations cannot be obtained, helps to reduce surprises and is important for the Judge and opposing counsel to be aware of all the evidence to be presented by both sides.

(e) It is important to strictly adhere to the requirements of the Order. If a declarant does not appear at the trial, the declarant’s declaration may not be introduced into evidence. The decision to continue the trial because of an unavailable witness is the same as it would be at a trial without declarations.

In the beginning you may encounter some counsel, as I have, who don’t believe you mean it and will appear at trial with witnesses for whom they have not served and/or filed declarations. If you comply with your Order and refuse to allow the witnesses to testify, that particular counsel and others will quickly realize that you really mean it.

## **2. TIME FOR FILING DECLARATIONS, ETC.:**

I generally set the time for filing the declarations so that the last one is filed two weeks before the trial or pretrial hearing. I usually give the plaintiff about three to four weeks to file its declarations; defendant, two to three weeks to file its reply declarations; and the plaintiff, one to two weeks to reply. Any evidentiary objections must be filed with that party’s declarations with the defendant filing its objections, if any, to plaintiff’s reply declarations, at least one week before trial or pretrial.

### **3. TIME FOR FILING BRIEFS:**

I don't order the filing of briefs, but I do order that if they are filed, they may only be filed in accordance with the Order. Almost all counsel file briefs and it is nice not to have them handed to you as you start the trial.

### **4. PRETRIAL ORDERS:**

I almost always, except in the simplest matters when everyone knows what is in issue, require a Pretrial Order. In Los Angeles, we have a Local Rule which spells out the requirements. Many Judges issue their own order. In either case, I require the Pretrial Order to be filed on the same date as the plaintiff's declarations. I do that to force the parties to get together as soon as possible.

### **5. SETTING OF TRIAL OR PRETRIAL:**

I generally order the reply declarations to be filed two weeks prior to trial. If I don't have a good idea how long the trial will take, I set it for a pretrial hearing with the reply declarations to be filed two weeks before the hearing. I have found it helps to emphasize to counsel that you will try their two day trial in one hour, or their one week trial in one-half a day. There is no need for opening statements, and closing arguments should be kept to a minimum unless the cross-examinations have revealed new facts.

I would advise issuing your Order at a status hearing with all counsel present to orally emphasize those points you wish to emphasize, and to answer any questions of counsel. This is especially important when you first initiate this procedure.

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re:	)	Chapter _____
	)	
	)	BK. NO. _____ BR
	)	
	)	ADV. NO. _____ BR
	)	
Debtor(s)	)	ORDER REPRESENTATION OF
_____	)	EVIDENCE BY DECLARATION FOR
	)	COURT TRIAL; FILING JOINT
	)	PRETRIAL ORDER PURSUANT TO
	)	LOCAL RULE 7016- 1
	)	Date:
	)	Time:
Plaintiff(s)	)	Place: Courtroom 1668
	)	255 E. Temple Street
	)	Los Angeles, CA 90012
Defendant(s)	)	
_____	)	

The following procedures are to be followed for the presentation of evidence to be offered at the trial of the above-entitled proceeding on \_\_\_\_\_.

The purpose of this procedure is to ensure a fair and expeditious trial. The procedure is similar to a motion for summary judgment, except that the admissibility of a declaration is dependent upon the presence of the declarant at trial subject to cross-examination.

**1. DECLARATIONS:**

- (a) Except as herein provided, each party shall present the testimony of all its witnesses through declarations of said witnesses, under penalty of perjury, otherwise admissible under the Federal Rules of Evidence.
- (b) The only oral testimony which may be offered at trial by a party through its witnesses will be **STRICTLY** limited to rebuttal testimony.
- (c) If a portion of a witness' declaration concerns an exhibit to be admitted into evidence at trial, the exhibit must be attached to the declaration.
- (d) If a party is unable to obtain a declaration of a witness, counsel for that party shall file a declaration stating the name of the witness and a detailed summary of the expected testimony and why counsel was unable to obtain the witness' declaration.

Failure to make every reasonable effort to obtain the declaration of any such witness will result in the exclusion of any oral testimony of such witness offered by the party.

If a party intends to present the witness' testimony by a transcript of a deposition of the witness only those portions of the transcript intended to be offered, should be attached to its counsel's declaration.

- (e) The declaration of a witness for a party will be admissible at trial, subject to timely objections, and if the declarant is present at trial, and subject to cross-examination.

**2. TIME FOR FILING DECLARATIONS AND OBJECTIONS TO DECLARATIONS:**

- (a) Plaintiff shall serve and file its declaration(s) on or before \_\_\_\_\_.
- (b) Defendant shall serve and file its declaration(s) and any evidentiary objections it has to plaintiff's declaration(s) on or before \_\_\_\_\_.
- (c) Plaintiff shall serve and file its reply declaration(s) and any evidentiary objections it has to defendant's declaration(s) on or before \_\_\_\_\_.
- (d) Defendant shall serve and file any evidentiary objections to plaintiff's reply declaration(s) on or before \_\_\_\_\_.
- (e) NO OTHER DECLARATIONS WILL BE ALLOWED. The only additional evidence a party may offer at trial is **TRUE** rebuttal evidence.

**3. TIME FOR FILING BRIEFS:**

If a party wishes to file a trial brief(s), such brief(s) must be filed with the party's declaration(s). A party may file its brief(s) at the time(s) designated for filing its declarations(s), even though the party chooses not to file a declaration(s). **NO OTHER BRIEFS WILL BE ALLOWED.**

**4. PRETRIAL ORDER:**

The parties shall file a joint pretrial order pursuant to Local Rule 7016-1 on or before \_\_\_\_\_.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
BARRY RUSSELL  
U.S. Bankruptcy Judge