TO: John W. McConnell, Esq., Counsel, Office of Court Administration

FROM: The Commercial and Federal Litigation Section of the New York State Bar Association

DATE: June 14, 2016

RE: Proposed Commercial Division Rule Permitting the Court to Require Certain Direct Testimony to be Submitted in Affidavit Form

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The Commercial and Federal Litigation Section of the New York State Bar Association (***"Section"***) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated May 23, 2016, proposing an amendment of the Rules of the Commercial Division to expressly permit the Court to require certain direct testimony to be submitted in affidavit form (the ***"Proposal"***).

I. EXECUTIVE SUMMARY

The Section has no substantive objection to the practice of requiring parties' direct testimony to be submitted in affidavit form in a non-jury trial and agrees that justices of the Commercial Division should be empowered to require that practice in appropriate cases.

II. SUMMARY OF PROPOSAL

The Proposal describes a proposed new Rule of the Commercial Division that would expressly permit a judge to require a party's own direct testimony to be submitted in affidavit form in a non-jury trial or evidentiary hearing. Under that proposed rule:

> **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 testimony.**

The Advisory Council indicates that it believes this rule will "highlight the availability of a practice" that has proven useful for promoting efficiency in the courts and tribunals where it has been employed. Specifically, the Advisory Council notes the widespread use of this approach in international arbitration, in federal civil practice, and by a number of Commercial Division judges.

The Proposal would not require any judge to use the affidavit procedure. Rather, it would only create a new rule to expressly permit the practice. The Advisory Committee's Subcommittee on Procedural Rules to Promote Efficient Case Management expressly states that

the practice is already allowed under C.P.L.R. R. 4011, and notes that the purpose of the Proposal is merely to "highlight the availability of this option."

III. Response and Suggestions to Further the Goals of the Proposal

The Section agrees with the Advisory Council that the procedure described in the Proposal has been successfully used by judges and arbitrators in a number of sophisticated tribunals, including the Commercial Division itself. The Section also agrees that existing law already permits Commercial Division judges to require parties to submit direct testimony in affidavit form in non-jury trials and evidentiary hearings.

However, to ensure the above mechanism is effectively utilized, the Section suggests that the availability of this mechanism should be highlighted in court conferences, and through the continuing education of the bar.

The Section believes it is essential that judges who chose to require direct party testimony by affidavit continue to ensure appropriate opportunity for live cross and re-direct examination. We believe this is within the contemplation and effect of the Proposal.

Accordingly, the Section recommends that the Proposal be adopted.

Women's Bar Association
OF THE STATE WBASNY OF NEW YORK

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PROPOSED COMMERCIAL DIVISION RULE PERMITTING COURT TO REQUIRE THAT DIRECT TESTIMONY OF A PARTY'S OWN WITNESS IN A NON-JURY TRIAL OR EVIDENTIARY HEARING BE SUBMITTED IN AFFIDAVIT FORM

THE PROPOSED RULE IS OPPOSED

The Women's Bar Association of the State of New York ("WBASNY") submits these comments on the May 23, 2016 request by the Administrative Board of the New York Court for public comment on the recommendation by the Commercial Division Advisory Council to adopt as a Commercial Division Rule (the "Proposed Rule") the following:

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 testimony.

WBASNY opposes the Proposed Rule for the following reasons:

1. The Proposed Rule is merely a suggestion. Though several rules of the Commercial Division are simply suggestive, this Proposed Rule serves only to alert the bench and bar to a practice that is already within the courts' discretion to require. Thus, there is no more point in codifying a rule along these lines than there would be a rule stating that a judge may require direct testimony by telephone or video. As such, it is not only unnecessary to include the Proposed Rule in the Commercial Division Rules, but doing so would dilute the unifying mandatory quality of those Rules.

2. While the Proposed Rule concededly requires nothing, including it in the Commercial Division Rules implies that the practice should be required. WBASNY does not believe that such an implication should be formalized, as it may cause judges, in the pursuit of efficiency, to force evidence to be submitted in a form that may not be appropriate in a given case.

3. The absence of procedures or details regarding the mechanics of the practice may generate substantial additional motion and appellate practice thereby frustrating the intent of promoting the efficiency aspects of the Proposed Rule.

Thank you in advance for your consideration.

Sincerely,

Jacqueline P. Flug
President, WBASNY

From: Cynthia Kouril [redacted]
Sent: Monday, May 23, 2016 6:45 PM
To: rulecomments
Subject: Rules comments

Follow Up Flag: Follow up
Flag Status: Completed

What about cross examination?

From: Brem Moldovsky [redacted]
Sent: Friday, May 27, 2016 10:44 AM
To: rulecomments
Subject: comments about possible rule allowing justices to require a party's own witnesses to testify by affidavit

Follow Up Flag: Follow up
Flag Status: Completed

Good morning,
It seems the rule should have language safeguarding the other side's ability to cross (in person) such a witness and the presenting side's ability to rehabilitate (in person) such a witness.
Enjoy the weekend,
Brem

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From: Michael S. Cole [redacted]
Sent: Wednesday, June 01, 2016 9:23 AM
To: rulecomments
Subject: Comment Proposed Rule Direct Testimony Affidavit

Follow Up Flag: Follow up
Flag Status: Completed

Having been in practice over 35 years my visceral response is against the Rule.

However, given the undeniable size and volume of the cases in New York County in particular and the international trend recited in the proposed rule--*the Rule makes sense and should be implemented.* (But I am still sorry to see it.)

My only comment goes to my concern that there be a requirement prior to trial for a conference where foundational issues viz. the affidavit are addressed so that incompetent statements or statements which lack a reasonable basis for knowledge do not slip through--automatically thus becoming part of the record.

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Michael S. Cole

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MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: [ ], 2016

RE: **Response to Public Comments Concerning Proposed Rule Regarding Direct Testimony in Non-Jury Trials by Affidavit**

EXECUTIVE SUMMARY

On May 23, 2016, the Office of Court Administration ("OCA") released for public comment a recommendation of the Commercial Division Advisory Council ("Council") to adopt a proposed rule highlighting that a justice of the Commercial Division may—but need not—require that direct testimony of a party's own witness in a non-jury trial or hearing come in by affidavit, provided that the witness is under the control of the party offering the testimony. In response, the OCA received comments from the Commercial and Federal Litigation Section of the New York State Bar Association (the "State Bar"), the Women's Bar Association of the State of New York (the "Women's Bar"), and three private practitioners. The Council notes that, of the more than 180 bar associations in New York State, only one commented to express opposition to the proposed rule, and out of the more than 200,000 lawyers in New York State, none commented opposing adoption of the proposed rule.

The comments fall into two categories. *First,* the only bar association expressing opposition questioned the utility of adopting a rule that is precatory rather than mandatory, serving simply to highlight an option that is already available under existing law, and that leaves the mechanics of implementation entirely to the presiding justice's

discretion. The State Bar favors the proposal, while the Women's Bar opposes it. *Second,* the private practitioners' comments seek clarification concerning the ability to cross-examine or rehabilitate the witness through live testimony and suggest a pre-trial conference requirement to address foundational issues concerning the affidavit.

Having considered the points raised by the Women's Bar, the Council remains of the view that a rule highlighting to both bench and bar the availability of a practice that has been used with success in both the Commercial Division and other courts would promote efficiency in the Commercial Division and enhance the perception in the business community that the Commercial Division is a favorable forum for the cost-effective resolution of commercial disputes. Having considered the questions and comments of the private practitioners, the Council believes that the proposed rule as drafted is sufficiently clear that only direct testimony—not cross-examination or re-direct—can come in by affidavit, and the Council does not believe there is any need for the rule to require a pre-trial conference in addition to that contemplated by Rule 30(b) of the Commercial Division Rules.

DISCUSSION AND ANALYSIS

The State Bar's comments state that it has "no substantive objection to the practice of requiring parties' direct testimony to be submitted in affidavit form in a non-jury trial and agrees that justices of the Commercial Division should be empowered to require that practice in appropriate cases." The State Bar notes its agreement "that the procedure described in the Proposal has been successfully used by judges and arbitrators in a number of sophisticated tribunals, including the Commercial Division itself," and is already permitted under existing law. The State Bar suggests that "the availability of this mechanism should be highlighted in court conferences, and through the continuing

education of the bar," and notes its belief that it is "essential that judges who cho[o]se to require direct party testimony by affidavit continue to ensure appropriate opportunity for live cross and re-direct examination. We believe this is within the contemplation and effect of the Proposal." For these reasons, the State Bar "recommends that the Proposal be adopted." These views are in substantial accord with those of the Council, and the State Bar is correct that the proposed rule contemplates that parties will continue to have the same rights to cross-examine and re-direct witnesses live as they would otherwise have; the proposed rule does not purport to change existing law or practice in that regard.

The Women's Bar opposes adoption of the proposed rule for three reasons: (1) It is "merely a suggestion" and "serves only to alert the bench and bar to a practice that is already within the courts' discretion to require." It is accordingly "not only unnecessary" but "would dilute the unifying mandatory quality" of the Commercial Division Rules. (2) While the proposed rule "concededly requires nothing," it "implies that the practice should be required," potentially causing judges "to force evidence to be submitted in a form that may not be appropriate." (3) The absence of procedures governing "the mechanics of the practice" may lead to additional motion and appellate practice, frustrating efficiency.

The Council appreciates the thoughtful comments of the Women's Bar but respectfully disagrees with its reasoning. *First,* it is not the case that the Commercial Division Rules are uniformly mandatory. *See, e.g.,* Rules 3, 4(b), 11(c), 11-d(e), 12, 30(a). The proposed rule does not represent a departure from the existing framework of the Rules in that respect. *Second*, the Council does not agree that the proposed rule "implies" that direct testimony by affidavit "should be required"; to the contrary, the

proposed rule is clear that a judge "may" require it but need not. The Council has confidence that the justices of the Commercial Division will exercise their discretion appropriately. *Third*, the proposed rule leaves to the presiding justice the responsibility to decide "the mechanics of the practice" for his or her courtroom. The Council does not believe it is necessary or appropriate to constrain judges' exercise of discretion regarding these mechanics, nor does it believe that conferring such discretion will lead to increased motion practice or other inefficiencies. The Council notes that in federal district courts, where direct testimony by affidavit is common in non-jury cases, judges generally establish individual chambers rules respecting mechanics, and the Council is not aware of any resulting inefficiencies. By expressly permitting but not requiring direct testimony by affidavit, and leaving the details of implementation to the individual justice's discretion, the proposed rule seeks to advance the Commercial Division's role as a laboratory for innovation and to encourage individual justices to experiment as they see fit with a procedural device that has proven efficient and fair in other jurisdictions.

Michael C. Cole of Cole Hansen Chester LLP comments that, "given the undeniable size and volume of the cases in New York County in particular," "*the Rule makes sense and should be implemented*" (emphasis in original). He expresses concern, however, "that there be a requirement prior to trial for a conference where foundational issues viz. the affidavit are addressed so that incompetent statements or statements which lack a reasonable basis for knowledge do not slip through—automatically thus becoming part of the record." The Council believes that Mr. Cole's concern is already met by the pre-trial conference contemplated under Rule 30(b) of the Commercial Division Rules. In addition, the opposing party would have the opportunity to object to admission of the

affidavit or request an opportunity to voir dire the witness when the affidavit is offered and before it is admitted, as with any other evidence; if counsel is alert, the affidavit would not simply "slip through."

Brem Moldovsky of Brem Modolvsky L.L.C. comments that "the rule should have language safeguarding the other side's ability to cross (in person) such a witness and the presenting side's ability to rehabilitate (in person) such a witness." Similarly, Cynthia Kouril asks: "What about cross examination?" As noted above, the proposed rule addresses only direct testimony in a non-jury trial. The Council believes it is sufficiently clear that the proposed rule would not infringe any party's existing right to cross-examine the witness or re-direct the witness after cross in person.

CONCLUSION

For the reasons set forth above, the Council respectfully requests that the proposed rule be adopted.