TO: The Administrative Board of the Courts

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

DATE: November 28, 2016

RE: Proposed Amendment to Rule 20 of the Rules of the Commercial Division Regarding Applications for Temporary Restraining Orders

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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 November 1, 2016 (***"Memorandum"***), proposing an amendment to Rule 20 of the Rules of the Commercial Division, 22 NYCRR § 202.70[g], to require litigants seeking Temporary Restraining Orders to provide advance copies of all papers supporting such application to their adversaries (the ***"Proposal"***). The Proposal is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Section agrees with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution of the Commercial Division Advisory Council (the "Advisory Council") that the first sentence of Rule 20 requires amendment to clarify that the failure to give notice, in the absence of "significant prejudice," will only prevent the issuance of an ***ex parte*** application for a Temporary Restraining Order ("TRO").

The Section further agrees with the Advisory Council that the second sentence of Rule 20 should be amended to clarify the scope of the notice required to be given to adversaries in advance of an application for a TRO. However, the Section believes that the amendment suggested by the Advisory Council does not remedy all of the concerns identified by the Advisory Council, particularly the issue of the timing of such notice.

II. SUMMARY OF PROPOSAL

The Proposal seeks to revise Rule 20 in two respects: 1) to correct the first sentence of Rule 20, which currently "suggests that a TRO will not be issued unless there will be prejudice by giving notice, which is not what is intended" (Memorandum, Ex. A at 3); and 2) to amend the second sentence of Rule 20, which as currently drafted requires "notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application[,]" but is "silent on whether the moving party must provide copies of papers in support of its TRO at the time that notice is provided" (Memorandum, Ex. A at 2). Specifically, the Advisory Council proposes that Rule 20 of the Rules of the Commercial Division be amended to include the following new text identified in bold/italic font:

> "Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued ***ex parte***. The applicant must give notice, ***including copies of all supporting papers,*** to the opposing parties sufficient to permit them an opportunity to appear and contest the application."

The motivation for the amendment to the first sentence of Rule 20 is self-evident, to correct the suggestion that a TRO will not issue in the absence of evidence that a party will be prejudiced by giving notice, which suggests that a TRO will not issue when sufficient notice is given to opposing parties.

The motivation for the amendment to the second sentence of Rule 20 is described as an effort to provide "meaningful" and "adequate notice" that would allow an opposing party the ability to oppose an application for a TRO effectively. The Advisory Council "recognize[d] that there may be circumstances where it is impracticable for a moving party to provide supporting papers to its adversary prior to submitting them to Commercial Division Motion Support Office due to time exigencies," but stated its belief "that the moving papers should be provided to the opposing party *prior* to the time that they are submitted to the assigned Judge" (Memorandum, Ex. A at 2).

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

The necessity of amendment to the first sentence of Rule 20 is self-evident, and the Section supports the Proposal as drafted.

The Section further agrees that the second sentence of Rule 20 is ambiguous as to the scope of the notice required to be given to adversaries to permit them an opportunity to effectively appear and contest an application for a TRO. Therefore, the Section supports the amendment of the second sentence of Rule 20 to address the scope of notice, requiring that such notice include copies of all supporting papers.

However, the Section also agrees that the timing of such notice is an important consideration that is not adequately addressed in Rule 20 as drafted, or in the amendment proposed by the Advisory Council. The Advisory Council identified the need, in the absence of a showing of "significant prejudice by reason of giving notice," for the papers in support of an application for a TRO to be provided "*prior* to the time that they are submitted to the assigned Judge" (Memorandum, Ex. A at 2). The amendment as proposed by the Advisory Council is ambiguous, requiring only that the supporting papers be provided "to the opposing parties sufficient to permit them an opportunity to appear and contest the application" (Memorandum, Ex. A at 3).

The Section therefore proposes that the second sentence of Rule 20 be amended to reflect this additional timing consideration identified by the Advisory Council, in order to be consistent with the language of the proposal that would provide for review of supporting papers before they are submitted to the assigned judge, as follows:

"The applicant must give notice, ***including copies of all supporting papers,*** to the opposing parties ***prior to the time that such supporting papers are submitted to the court or clerk*** ~~sufficient to permit them an opportunity to appear and contest the application~~."

The Section feels that this proposed amendment encompasses both of the concerns identified by the Advisory Council, scope of notice and timing. However, the Section would recommend endorsing the amendment to the second sentence of Rule 20 as proposed by the Advisory Council, even without additional language related to the timing of such notice.

BOIES, SCHILLER & FLEXNER LLP
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January 20, 2017

Via Email
John W. McConnell
State of New York
Unified Court System
25 Beaver Street
New York, NY 10004
jwmcconn@nycourts.gov

Re: *Proposed Commercial Division Rule 20*

Dear Mr. McConnell:

The Advisory Committee on Civil Practice approves the proposed amendments to Commercial Division Rule 20.

The Advisory Committee has long recommended that parties seeking a temporary restraining order should be required to provide notice to opposing counsel unless it can be shown that prejudice will arise therefrom. We support the proposed addition because it makes it clear that opposing party should also receive copies of all supporting papers. We, therefore, also suggest that consideration be given to amending Uniform Rule 202.7(f) so that, in all courts, the movant should be required to provide copies of all supporting papers to any adversary affected by the temporary restraining order absent a showing of prejudice.

Sincerely,

George F. Carpinello

GFC:slb

cc: via email:

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By Email

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

January 6, 2017

Re: New York City Bar Comments on Proposed Commercial Division Rule Relating to Applications for Temporary Restraining Orders

Dear Mr. McConnell:

The New York City Bar Association appreciates the opportunity to provide comments[1] on the proposal by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council") to amend Rule 20 of the Rules of the Commercial Division to require advocates seeking temporary restraining orders to provide adversaries with advance copies of the papers supporting the application. Although we certainly support this amendment, we believe that this same requirement should be included in 22 NYCRR 202.7(f), which governs applications for temporary injunctive relief in all courts statewide.

We applaud the Advisory Council for its ongoing efforts to devise new rules, and amend old rules, in order to enhance efficiency in the Commercial Division and maintain its status as a premier forum for the resolution of business disputes. However, we believe that it is important to bear in mind that some initiatives should have equal application outside of the Commercial Division as well. This proposed amendment to Rule 20 presents a perfect example of an instance

[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.

in which a pre-existing rule concerning the same subject matter – Rule 202.7(f) – would likewise benefit from the same improvement proposed for the Commercial Division. Amending both rules would maintain consistency in state court practice and help improve the efficient operation of the court system as a whole.

Accordingly, we recommend revising the language of Rule 202.7(f) as follows:

"~~Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.~~ "Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, an application for temporary injunctive relief, including, but not limited to, a motion for a stay or a temporary restraining order, will not be issued *ex parte*. In all other cases, the applicant must demonstrate by affirmation that a good faith effort has been made to notify the party against whom the application is sought of the time, date and place that the application will be made, and that copies of all supporting papers have been provided to such party, in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court."

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

Thank you for your consideration.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

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

Barbara Seniawski
Chair, Committee on Litigation

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

January 9, 2017

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

Re: Proposed Commercial Division Rule 20

Dear Mr. McConnell:

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the proposal to amend Commercial Division Rule 20. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of over 120 large, litigation based law firms and corporate legal departments. Our members' positions within their respective firms and companies and concomitant responsibilities afford them a breadth of understanding of the day to day operation of the various state and federal courts systems. In particular, our members have extensive experience in obtaining temporary injunctive relief.

For the reasons so ably detailed in the memorandum prepared by the Subcommittee on Procedural Rules to Promote Efficient Case Resolution, we strongly support the proposed requirement of providing the opposing party with the supporting papers in conjunction with applications for injunctive relief prior to the papers being presented to the assigned Justice. We believe, however, that this requirement should be made applicable to all

Parts in the Supreme and County Courts. We see no reason why a distinction should be made among different case types when seeking injunctive relief in the Supreme or County Courts. We therefore would suggest that instead of amending the present Commercial Division Rule 20, that rule be eliminated and that 22 NYCRR § 202.7(f) instead be amended to read as follows:

> "Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking ***temporary injunctive relief*** ~~the restraining order~~ by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary ***injunctive relief*** ~~temporary restraining order~~ is sought, ***including providing copies of all supporting papers***, of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. ***Except in cases assigned to the Commercial Division or in unassigned cases in which assignment to the Commercial Division has been requested,*** ~~T~~this subdivision shall not be applicable to orders to show cause or motions in special proceeding brought under Article 7 of the Real Property Actions and Proceedings Law; nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court."

In addition to mandating that papers be given to an opposing party prior to submission to the Court, this proposed amendment clarifies that the rule pertains to all applications for temporary injunctive relief, including TROs and interim stays. The present rule is unclear in that regard, defining "temporary injunctive relief" in its first sentence as including stays and TROs but then only mentioning TROs further in the rule. This amendment will eliminate any confusion.

We believe that eliminating Commercial Division Rule 20 in its entirety and providing that the notice and supporting papers requirements be included for <u>all</u> case types in § 202.7(f) will reduce the number of rules, consistent with § 202.70 (g)'s incorporation of § 202.7, resulting in benefits to the Court and the bar in clarity and simplification.

We are grateful for this the opportunity to comment on this proposed rule. Should you have any question or would like further elaboration on the foregoing, please contact Henry J. Kennedy at hkennedy@willkie.com, Owen G. Wallace at owallace@cgelaw.com, or Timothy K. Beeken at tkbeeken@devevoise.com.

Respectfully submitted,

s/Henry J. Kennedy
Henry J. Kennedy, Esq.
Member, MACA Rules Committee
Managing Attorney,
Willkie Farr & Gallagher LLP

s/Owen G. Wallace
Owen G. Wallace, Esq.
MACA Rules Committee Chair
Managing Attorney, Director of Legal Support Services
Epstein Becker Green

s/Timothy K. Beeken
Timothy K. Beeken, Esq.
MACA President
Counsel & Managing Attorney
Debevoise & Plimpton LLP

From: Daniel Adams [redacted]
Sent: Monday, November 14, 2016 10:21 AM
To: rulecomments
Subject: OCA Proposed Rule 20

Categories:

I write to voice my approval of the OCA proposed amendment to Commercial Division Rule 20 regarding temporary restraining orders that would provide:

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued **ex parte**. The applicant must give notice, **including copies of all supporting papers**, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

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Memorandum

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Date: January 13, 2017

Re: Response to Public Comments on Proposed Amendments to Rule 20 of the Commercial Division Rules

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INTRODUCTION

The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") has given consideration to the public comments made by (1) the Commercial and Federal Litigation Section of the New York State Bar Association ("ComFed Section"); (2) the New York City Bar Association ("City Bar"); and (3) the Managing Attorneys and Clerks Association, Inc. ("MACA") to the proposed amendments to Rule 20 of the Commercial Division Rules, which is the rule regarding temporary restraining orders ("TROs") in the Commercial Division.

BACKGROUND

By memorandum dated November 1, 2016, John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, sought public comments on proposed amendments to Commercial Division Rule 20, regarding TROs. Proposed amended Rule 20, marked to show changes to the second sentence only, provides as follows::

> Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice**, including copies of all supporting papers,** to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

In public comments contained in a memorandum, dated November 28, 2016, the ComFed Section recommends that proposed amended Rule 20 be edited to read as follows:

> Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant

must give notice, including copies of all supporting papers, to the opposing parties ***prior to the time that such supporting papers are submitted to the court or clerk*** ~~**sufficient to permit them an opportunity to appear and contest the application**~~.

In public comments contained in a letter, dated January 6, 2017, the City Bar supports amended Rule 20, but also advocates for a corresponding change to Rule 202.7(f), which governs applications for TROs in all courts statewide.

In public comments contained in a letter, dated January 9, 2017, MACA states its belief that Commercial Division Rule 20 should be eliminated in its entirety, and instead that Rule 202.7(f) should be amended consistent with the amendments suggested by the City Bar.

ANALYSIS

1. The ComFed Section Comments[1]

The ComFed Section asserts in its memorandum that the timing of the notice to be given under Rule 20 "is an important consideration that is not adequately addressed ... in the amendment proposed by the Advisory Council." The Section thus recommends that its language above be used so as to require the papers supporting the TRO to be provided to the opposing parties *prior* to the time that such papers are submitted to the court or clerk. The Subcommittee respectfully disagrees with the foregoing assertion and recommendation by the ComFed Section.

In crafting the language of the proposed amendment to the second sentence of Commercial Division Rule 20, the Subcommittee was mindful of the time exigencies that oftentimes exist when a party is seeking a TRO. Depending on the circumstances, a party may need to get to court as quickly as possible to obtain relief, and could be unduly hampered by the necessity of providing copies of supporting papers to opposing parties in advance of filing, particularly if the opposing parties are not yet represented by counsel. In the Subcommittee's view, it is enough that the party opposing the TRO has the papers in time that is "sufficient to permit them an opportunity to appear and contest the [TRO] application."[2] Thus, the Subcommittee recommends that proposed amended Rule 20 be adopted as submitted by the Subcommittee.

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[1] The ComFed Section agrees with the correction made to the first sentence of Rule 20, so that correction will not be addressed in this memorandum. This memorandum will address the edits recommended by the ComFed Section to the second sentence of the Rule amendment proposed by the Subcommittee regarding the scope and timing of the notice to be provided prior to seeking a TRO.

[2] The Subcommittee thanks the ComFed Section for its statement that the Section "would recommend endorsing the amendment to the second sentence of Rule 20 as proposed by

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2. The City Bar and MACA Comments

The City Bar "certainly supports" the amendment to Commercial Division Rule 20 that was recommended by the Subcommittee. However, in its January 6, 2017 letter, the City Bar advocates for a corresponding change to Rule 202.7(f) which governs applications for TROs in all courts statewide. In its January 9, 2017 letter, MACA takes a different approach from City Bar. It states its belief that Commercial Division Rule 20 be eliminated "in its entirety" and that "the notice and supporting papers requirements be included for all case types in § 202.7(f)" (emphasis in original).

The Commercial Division Advisory Council only has jurisdiction to recommend changes to the rules of the Commercial Division. There are other bodies that can recommend statewide court rule changes like the rule changes suggested by the City Bar and MACA to Rule 202.7(f), such as the Advisory Committee on Civil Practice. It may make great sense to have a rule change considered and adopted that would apply to courts statewide, but such a rule change must be separately recommended, subjected to public comment and then adopted. It is respectfully urged by the Subcommittee that adoption of the amendments to Commercial Division Rule 20 not be delayed by consideration of a rule that would apply in all courts statewide.

CONCLUSION

For the reasons set forth above, the Subcommittee recommends that the ComFed's edits not be adopted, and that proposed amended Rule 20 be approved as submitted by the Subcommittee, without waiting for consideration of a rule that would apply in courts statewide.

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the Advisory Council, even without the additional language [suggested by the Section] related to the timing of [the required] notice."