TO: Commercial and Federal Litigation Section Executive Committee

FROM: Commercial Division Committee

DATE: June 10, 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 Division Committee (***"Committee"***) 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 Committee 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. 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 Committee 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 Committee 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 Committee suggests that the availability of this mechanism should be highlighted in court conferences, and through the continuing education of the bar.

The Committee 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 Committee recommends that the Proposal be adopted.

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

May 23, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Commercial Division Rule Permitting the 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

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The Administrative Board of the Courts is seeking public comment on the following proposed Commercial Division rule, recommended by the Commercial Division Advisory Council, addressing direct testimony in affidavit form by a party's own witness in a non-jury trial or evidentiary hearing:

> **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 believes that such a rule would highlight the availability of a practice, currently employed in federal and state courts and in arbitration fora around the nation and abroad, that has been found by some judges and attorneys to streamline trials and facilitate crisper cross-examination of witnesses. Under the proposed rule, use of the practice would be left entirely to the discretion of the trial judge.

A fuller explanation of this proposed rule is set forth in a memorandum of the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution, attached as Exh. A.

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Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than July 25, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

DATE: March 18, 2016

RE: **Proposed Rule Regarding Direct Testimony in Non-Jury Trials by Affidavit**

INTRODUCTION

In recent years, federal and state judges have increasingly required direct testimony in non-jury trials to be presented through an affidavit or other sworn written statement. Those judges who adopt this practice find that it streamlines the trial for both the Court and the parties. A few justices of the Commercial Division—a notable example being Justice Ramos—have also adopted or experimented with the same practice.

The rule proposed here would not require the adoption of this practice; rather, it would highlight the option to implement the practice at the discretion of each justice. Nor would the proposed rule prescribe the precise mechanics that would flow from adoption of the practice, such as when affidavits are to be exchanged, when and how evidentiary objections to the content of an affidavit are to be made, and the like; such procedural details would also be left to the discretion of the individual justice, as they are today in both the Commercial Division and the federal courts. Rather, the purpose of the rule would be two-fold: (a) to encourage justices of the Commercial Division to consider adoption of a practice that might promote efficiency in their Part; and (b) to promote

awareness in the business community that the Commercial Division embraces procedural innovation designed to promote the efficient and cost-effective resolution of commercial disputes.

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 the testimony.

DISCUSSION AND ANALYSIS

The taking of direct testimony through a sworn writing is not only a long-standing practice in many U.S. courts, but the norm in some common-law jurisdictions. For example, in civil matters in the English court system, including the highly esteemed Commercial Court of the Queen's Bench Division, where most trials are non-jury, a witness's direct testimony ordinarily consists of the witness's summary introduction of a pretrial written statement, which the court will have already reviewed, as well as any amplification of the written statement that the court permits. *See, e.g.*, Civil Procedure Rules 1998 § 32.5 (UK). Similarly, in international arbitration, witness statements are generally submitted in advance, and the witness's direct testimony at the hearing ordinarily consists of his or her confirmation of that detailed written statement. *See, e.g.*, IBA Rules on the Taking of Evidence in International Arbitration art. 8 § 4 (2010). Offering direct testimony through a sworn writing, rather than through what is generally well-rehearsed live testimony, is thus a long-established practice in courts and tribunals with which many commercial enterprises have substantial experience. Particularly in jurisdictions where discovery is less extensive than in the U.S., pretrial witness

statements not only streamline the trial, but reduce surprise at trial, making for a better informed and more effective cross-examination.

Closer to home, many federal judges have also adopted such a practice. In the United States District Court for the Southern District of New York, for example, out of 46 sitting judges, 21 currently require direct testimony by affidavit in non-jury trials and one allows it with permission.[1] To our knowledge, litigants in this premier commercial court have not complained that this requirement in any way compromises the integrity of judicial fact-finding or imposes any additional burden. To the contrary, the feedback has been favorable: that the practice facilitates trial preparation and shortens the trial without compromising the integrity of the record.

Similarly, the New York courts have encouraged experts to submit sworn reports in lieu of direct testimony in non-jury cases. *See* 22 N.Y.C.R.R. § 202.16(g)(2) (in court's discretion, expert's direct testimony in matrimonial actions may be offered through sworn written report); *cf.* § 202.59 (h) and § 202.60(h) (appraisal reports in tax assessment review proceedings); § 202.61 (appraisal reports in eminent domain proceedings). This practice avoids burdening the expert with having to recapitulate lengthy, intricate, and technical data and analysis, while conserving judicial and party resources.

While some Commercial Division justices require the use of reports in lieu of direct testimony by experts in bench trials, requiring direct testimony by affidavit of fact

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[1] Judges Abrams, Batts, Berman, Briccetti, Carter, Castel, Cote, Engelmayer, Failla, Forrest, Furman, Gardephe, Kaplan, McMahon, Nathan, Ramos, Román, Seibel, Sullivan, Torres, and Woods currently require that direct testimony come in by affidavit; Judge Marrero permits it with leave of court. In addition, Judge Stanton requires experts' direct testimony to come in by affidavit.

witnesses in non-jury trials is less prevalent in the Commercial Division. It is mandatory, however, in Justice Ramos's Part:

> **Direct Testimony in Affidavit Form:** All **direct testimony** of a party's own witness shall be submitted in **affidavit form.** Upon being called at trial, a witness shall first swear to the contents of his/her affidavit, which is followed by opposing counsel's objections (if any) to the testimony, followed by cross-examination, and re-direct examination (if any). Parties shall exchange direct testimony affidavits, ten business days prior to the commencement of the trial. **Direct testimony affidavits should be delivered directly to the Part and need not be E-filed.**
>
> Exception: Where the witness is not within a party's control, counsel need not submit a direct testimony affidavit from him/her.

Trial Rules for Non-Jury Trials in Part 53 § 2 (2014). Other justices, such as Justice Driscoll and Justice Scarpulla, have used a direct-testimony-by-affidavit procedure in bench trials in certain cases, without imposing a blanket or mandatory rule. CPLR 4011 provides statutory authority for use of such a procedure at an individual justice's option. *See, e.g., Campaign for Fiscal Equity* v. *State of New York*, 182 Misc. 2d 676, 678, 699 N.Y.S.2d 663 (Sup. Ct. N.Y. Co. 1999) ("The CPLR and the Uniform Rules for Trial Courts neither expressly allow nor prohibit the use of affidavits in lieu of direct testimony. However, the court finds that it has the power to do so pursuant to CPLR 4011, which empowers this court '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 purpose of the proposed rule is to highlight the availability of this option. In recommending the adoption of the proposed rule, the Subcommittee does not intend to advocate for or against the use of direct testimony by affidavit. Some judges may feel that this practice streamlines the trial and facilitates a crisper and more targeted cross-

examination. Others may prefer to assess the credibility of the witness, and have an opportunity to question the witness from the bench, during direct as well as cross- and redirect examination. The proposed rule leaves such judgments entirely to the discretion of the individual presiding justice.

Similarly, the Subcommittee does not seek to impose any particular set of procedures for implementation of a direct-testimony-by-affidavit requirement, if a justice were to adopt one. Among judges who impose such a requirement, there is considerable variation in the practices surrounding it. For example, while many judges require all direct testimony to be by affidavit in non-jury trials, as Justice Ramos does, the practice of others is to decide at a pretrial conference which witnesses the Court will hear live and which by affidavit. *Compare, e.g.*, Trial Rules for Non-Jury Trials in Part 53 (Justice Ramos) *to* Individual Rules and Practices in Civil Cases of Southern District of New York Judge Engelmayer § 5.C.i. Similarly, judges have different requirements for the timing of affidavit exchange; some require the affidavit to be in narrative form and others in numbered paragraphs; some permit limited supplemental live direct to cure evidentiary objections or for other purposes; and so on. Justices choosing to adopt a direct-testimony-by-affidavit rule are left free to determine the mechanics of its implementation as they see fit: the proposed rule imposes no requirements or limitations in that regard. The only constraint it imposes is the obvious one, that a party offering testimony of a witness not under that party's control should not be compelled to offer that testimony by affidavit, because the party would be unable in most instances to procure an affidavit from a witness whom the party does not control.

The proposed rule, in short, would not compel any departure from current practice. Any justice of the Commercial Division is free now to require direct testimony by affidavit if he or she deems it appropriate in non-jury cases, as Justice Ramos has done, or to hear direct testimony live in some or all cases, as most justices do. The proposed rule would continue to leave that choice entirely to the discretion of each individual justice. Its purpose would be to heighten awareness, among both justices and practitioners, that the choice exists, so that justices who might not otherwise have considered such an option may be encouraged to experiment with it, and litigants who believe that direct testimony by affidavit would help to streamline a particular trial or evidentiary hearing may be encouraged to suggest it to the presiding justice. In that way, the proposed rule would signal that the Commercial Division is receptive to innovations that have proven successful in the federal courts and elsewhere, and would encourage the justices to consider the adoption of such practices where appropriate.

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and its incorporation into the Statewide Rules of the Commercial Division.