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**Re: New York City Bar Association Comments on Proposed Revision
to Commercial Division Rule 1 to Facilitate Remote Appearances by Counsel**

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed amendment to Commercial Division Rule 1 to facilitate the voluntary participation of counsel in court proceedings from remote locations. The New York City Bar Association (the “City Bar”) commends the Commercial Division Advisory Council (the “Advisory Council”) for undertaking this analysis and for its thoughtful comments on its proposed amendment of the Rule.¹

As a general matter, the City Bar favors the adoption of this rule, because remote participation in court conferences and oral arguments can conserve the resources of parties, counsel and the court in appropriate circumstances. Although such practices may already be included in the individual practices or “Part Rules” of certain Commercial Division justices, the City Bar agrees with the Advisory Council that formally adopting a Commercial Division Rule authorizing remote participation as an available option will have the benefit of reminding counsel and the courts of the availability of this option and of promoting its use in appropriate circumstances.

¹ In addition to the Council on Judicial Administration, the State Courts of Superior Jurisdiction Committee, and the Litigation Committee, the Disability Law Committee supports the OCA’s efforts in expanding voluntary participation of counsel in court proceedings from remote locations.

After careful consideration of the proposal, the City Bar suggests the following minor changes to the language of the proposed rule, as follows:

Rule 1. Appearance by Counsel with Knowledge and Authority.

(d) Counsel may request the court’s permission to participate in court conferences and oral arguments of motions from remote locations through use of telephone conferencing, videoconferencing or other technologies. Such requests may be granted in the court’s discretion; however, nothing contained in this subsection (d) is intended to limit any rights which counsel may otherwise have to participate in court proceedings by appearing in person. In considering such requests, the court shall give due consideration to the protection of the public’s right of access to open court proceedings.

Thus, the proposed rule with the suggested changes would read as follows:

Rule 1. Appearance by Counsel with Knowledge and Authority.

(d) Counsel may request the court’s permission to participate in court conferences and oral arguments of motions from remote locations through the use of telephone conferencing, videoconferencing or other technologies. Such requests may be granted in the court’s discretion; however, nothing contained in this subsection (d) is intended to limit any rights which counsel may otherwise have to participate in court proceedings by appearing in person. In considering such requests, the court shall give due consideration to the protection of the public’s right of access to open court proceedings.

By way of explanation of the suggested revisions to the proposed rule, although the City Bar appreciates the Advisory Council’s detailed consideration of the availability and affordability of videoconferencing, the City Bar believes that telephone conferencing, which does not require additional expensive equipment or technical knowledge, is often sufficient for the needs of the parties, counsel, and the court, and potentially more convenient than videoconferencing for certain conferences, in the court’s discretion. Accordingly, the City Bar recommends that telephone conferencing should be expressly enumerated in the Rule, at least as an option.

The City Bar is also concerned that the proposal’s use of the word “will” in the second sentence could be construed to mean that the court is required to grant permission for remote participation. The City Bar believes that courts are best situated to determine when remote participation is appropriate, based on the court’s own resources (which vary from county to county and, even within the same courthouse, from courtroom to courtroom), and on the needs of the case and litigants.

The City Bar also suggests that it would be desirable to delete the phrase “for good cause shown,” which is generally employed in rules of procedure where a party or counsel is seeking a variance from existing rules or deadlines, requiring an evidentiary showing, and perhaps even necessitating full-blown motion or pre-motion procedures. The City Bar believes that such requests can be, should be, and often are, handled informally, through telephone conference calls or letters to the court.

To the extent that, absent a “good cause shown” standard, counsel may routinely seek remote participation without sufficient basis or justification for failing to appear in person, the City Bar believes that such applications can be curbed or controlled in the sound discretion of the court, and will in any event be tempered by the parties’ and counsel’s recognition that in-person participation is more conducive to persuasion and effectiveness, in contested or important conferences and hearings, than remote participation.

Some members of the City Bar expressed concern that, because telephone or videoconferencing facilities may not be present in courtrooms, the proposed rule could lead to conferences and hearings that might otherwise be held in open court could be moved to chambers, robing rooms, or other non-public spaces in the courthouse. The City Bar suggests that the addition of a sentence reminding courts and parties of the right of public access to court proceedings would therefore be appropriate.

Finally, the City Bar believes that the proposed rule, subject to the comments above, would benefit courts beyond the Commercial Division, and encourages the Office of Court Administration to consider promulgating a similar rule for the other State trial courts.

Very truly yours,

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