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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION, STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE AND LITIGATION COMMITTEE

COMMENTS ON THE OFFICE OF COURT ADMINISTRATION'S PROPOSED AMENDMENT TO RULE 6 OF THE RULES OF THE COMMERCIAL DIVISION TO PERMIT THE COURT TO REQUIRE HYPERLINKING IN ELECTRONICALLY-FILED DOCUMENTS

The New York City Bar Association opposes the adoption of the proposed rule which would authorize, and implicitly encourage, Commercial Division Justices to require that electronically-filed documents contain hyperlinks. Although the goal of improving the efficiency of New York's courts is important, the routine imposition of a hyperlinking requirement would impose a time-consuming ministerial burden on counsel and, by extension, a significant financial burden on clients (i.e., the public) without providing a proportional benefit. We recognize, however, that, as a matter of discretion, judges might well encourage or even require hyperlinking in particular cases, taking into account the magnitude of the dispute, the technical proficiency of (and back office support available to) counsel and other appropriate factors. We can also envision that, over time, hyperlinking could become a more economical practice, as some of the technical hurdles identified below are addressed.

We believe that, at the present time, requiring the inclusion of hyperlinks to statutes, rules, regulations and court decisions would present significant logistical and potentially costly hurdles. Legal research databases are run by private, subscription-based services, and not all practitioners use the same databases. Therefore, unless the court has access to all databases used by all filing attorneys, each cited case would have to be downloaded, converted to PDF format and attached to the memorandum. This preparation could easily metastasize into a document hundreds of pages long and require many hours of additional, non-legal work to prepare and file documents. If the main objective of on-line research is to eliminate the cost and burden of maintaining and using a paper library and a hyperlinking requirement is meant to further such efficiencies, we respectfully submit that the effect will be just the opposite: compliance with the proposed rule would generate voluminous filings, inclusive of the hyperlinked documents.[1]

[1] Furthermore, a hyperlink from a memorandum of law to, for example, Westlaw, will take the reader just to the first page of the case, not to a specific pinpoint citation. If the proposed rule is interpreted to require a hyperlink to the specific page of the case cited in the memorandum, an even greater burden is imposed on counsel.

Moreover, this practice will impose additional costs on all firms which, in turn, will mean added client expense (to the extent clients are willing to reimburse counsel for such efforts, which they may not be). It would be an even greater imposition on small firms and solo practitioners, which tend to have limited or no paralegal or administrative assistance. Such a burden would give larger firms an unfair advantage in Commercial Division practice.

The proposed rule seems even more untenable when one considers all of the moving pieces required for a filing (including argument, legal citations, tables of authorities, and supporting affidavits). As a practical matter, the proposed rule would effectively advance every filing deadline by imposing an extensive ministerial task that must be done after papers are drafted, but before they are filed – a particularly concerning result when applications for emergency relief or other situations with short deadlines are involved.

An indication of the cost that would be imposed by a hyperlinking requirement may be found in *Phansalkar v. Andersen, Weinroth & Co., L.P.*, 356 F.3d 188 (2d Cir. 2004), which is cited in the Memorandum supporting the proposed rule. In that case, a successful appellant sought $16,065 in costs for preparing and submitting appendices and briefs in "hyperlinked CD-ROM format." The court disallowed the costs while observing, "CD-ROM submissions that hyperlink briefs to relevant sections of the appellate record are more versatile, more useful, and *considerably more expensive*." *Id*. at 190 [emphasis added]. The recognition that hyperlinking entails an onerous cost likely explains why, in contrast to the proposed rule, the rule governing electronic filing in the Second Circuit provides: "A document filed under this rule *may* contain hyperlinks . . . " C2R 25.1(i)[emphasis added]. It is unknown how many litigants have availed themselves of this option or if the efficiency of the Second Circuit has in any way been enhanced from its use.

That the proposed rule is discretionary provides an inadequate safeguard against potential problems because it imposes no limits on the discretion of those who apply it. A judge could adopt the hyperlinking requirement by individual part rule and, therefore, impose substantial burdens on all litigants without regard to the particular circumstances of the parties, counsel, and the size and complexity of a case. Or the judge could adopt the hyperlinking practice "by a case directive," which may still result in problems that outweigh benefits. Such practice could be a source of potential friction among practitioners and between bench and bar. Will the availability of hyperlinking create a perverse incentive for attorneys to curry favor by assenting to hyperlinking for a judge's claimed convenience? Will an attorney who stands in opposition to his or her adversaries on the question of hyperlinking be perceived by the judge as recalcitrant, uncooperative, and less worthy of respect?

Court rules, whether promulgated in the Commercial Division or otherwise, should promote uniformity and consistency. Ideally, "rules" should not vary from case to case or judge to judge. Here, though, the proposed rule raises several significant questions about its application. Must all papers – affidavits, memoranda of law, statements of undisputed fact – contain hyperlinks? Must all references – to cases, exhibits, previously-filed papers – be hyperlinked? If a document or testimony is summarized or paraphrased, which portion of the referenced record must be hyperlinked? Will different judges impose different standards? If an attorney fails to file papers with the required hyperlinks or does not do as thorough a job as the

judge would have preferred, does the judge have the authority to issue an adverse ruling, impose sanctions, or simply refuse to read the papers? How will practitioners advise their clients with respect to cost and the potential effects of non-compliance?

Judges have substantial discretion in managing the cases before them and hyperlinking is surely a permissible tool where appropriate, but incorporating such discretion into a "rule" creates unnecessary confusion and imposes a substantial burden on parties that appear before the court and their counsel. We respectfully recommend that the proposal not be adopted.

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