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By Email
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Re: New York City Bar Association Response to Request for Public Comment on a Proposed Amendment to Commercial Division Rule 6 to Permit the Court to Require Hyperlinking in Electronically Filed Documents

Dear Ms. Millett:

We write in response to your December 23, 2019 request for public comment regarding a proposal by the Commercial Division Advisory Council to amend to Commercial Division Rule 6 (the "Proposal").

I. INTRODUCTION

Despite the benefits associated with it, we oppose the Proposal because of the burdens mandatory—or even presumptive—hyperlinking would impose on many small firms and solo practitioners and clients.

We agree with the Commercial Division Advisory Council that (at least for justices who use electronic copies of filings) "[t]here can be no serious question that requiring hyperlinks to authorities and record cites in an e-filed document would enable judges and their staff to access those source materials more quickly, thereby furthering the efficient administration of justice in the overburdened Parts of the Commercial Division." Technology such as hyperlinking would not only ease the burden on the justices of the Commercial Division who use electronic copies of filings, it would allow counsel better to communicate their arguments to the court. We also

acknowledge that the Council has made adjustments to the similar amendment it proposed in 2016, which the New York City Bar Association also opposed.

We nonetheless believe that the Proposal, for all the benefits it could in many circumstances provide to the court system and to counsel receiving hyperlinked filings, should not be adopted because of the significant burdens it would impose on some counsel and parties, burdens the Proposal acknowledges but underestimates. Lawyers with insufficient staff to do the hyperlinking required by the Proposal—hyperlinking that would be extensive and time consuming in a complicated filing—would be forced either to hire additional staff and pay for additional software or to be placed at a competitive disadvantage vis-à-vis larger law firms. This would be unfair not only to those lawyers, it would be unfair to their clients.

That the time is not right for the adoption of the Proposal does not mean that later, with improvements in technology, it would not be worth adopting. And, as we suggest in the final section of this letter, there are many things judges and the court system can and should do in appropriate circumstances to take advantage of this technology now, including amending Rule 8(a) to add "hyperlinking cited court decisions and other authorities and NYSECF filings" to the list of topics counsel should discuss before a preliminary conference. What we object to is making hyperlinking mandatory rather than taking an evolutionary and more measured approach.

II. EXPLANATION

a. Background To Our Objection:

On January 7, 2020, representatives of the Commercial Division Advisory Council made a presentation to the City Bar's Council on Judicial Administration regarding the Proposal. The Council's representatives explained that the Proposal's requirement for hyperlinks to NYSECF docket entries meant not just linking to previously-filed documents referred to in a filing but not included in papers, such as a complaint, but **every** cited document that had been filed on NYSECF, including documents that were **part of the current filing**. So, counsel filing a motion with a memorandum of law, a supporting affidavit with 20 exhibits and a supporting affirmation with 20 exhibits, have to:

- E-file each of the 20 exhibits to the affirmation.
- Edit the affirmation to hyperlink the just-filed exhibits. This means not just the first instance of the exhibit, but every time it is cited (including each "*Id.*"). And, if the affirmation cited to earlier-filed documents, those would have to be hyperlinked as well. Thus, even 20 exhibits could require many dozens of hyperlinks.
- E-file the affirmation.
- E-file each of the 20 exhibits to the affidavit.
- Edit the affidavit to hyperlink each of the 20 just-filed exhibits, plus any earlier-filed documents (here, counsel likely is hyperlinking to a .pdf, unless the affiant

and a notary are waiting around to sign and notarize the affidavit after the links are put in).

- E-file the affidavit.

- Edit the memorandum of law to hyperlink every citation to the (1) affirmation, (2) each exhibit in the affirmation, (3) the affidavit (4) each exhibit in the affidavit and (5) any earlier-filed documents cited in the memorandum of law. Again, this means hyperlinking not just the first reference to a document, but to **every** reference.

- If the court requires hyperlinking to cited court decisions and other authorities, counsel also has to hyperlink all of those citations, again including not just the first instance of the citation but every reference.

- E-file the memorandum of law.

As this analysis shows, even a moderately complex filing could require **hundreds** of hyperlinks and considerable time.

b. Basis For Our Objection:

i. Mandatory Hyperlinking to NYSECF Filings

The Proposal would require parties to "include a hyperlink to the NYSECF docket entry for the cited document enabling access to the cited document through the hyperlink." The Proposal argues that the burden of adding such hyperlinks is minimal. (Memorandum re: Proposal for a Rule Concerning the Use of Hyperlinks in E-Filings at 16.) We disagree with the Proposal's assessment.

The Proposal argues that the cost any additional time spent on hyperlinking is minimal because it would be done by a secretary. (Memorandum re: Proposal for a Rule Concerning the Use of Hyperlinks in E-Filings at 16.) This assumption is problematic for several reasons, including that:

- Most law firms that appear in the Commercial Division are not large law firms with robust secretarial, IT and paralegal staffs. After the Council's presentation to the Council on Judicial Administration, we extracted from Web Civil Supreme the active docket listings for Justice Scarpulla in New York County and Justice Bucaria in Nassau County. (*See* Exhibit 1.) We have highlighted columns showing who counsel for the first listed plaintiff and defendant are. To be sure, there are many firms that are not well known big firms that nonetheless are large enough to have secretaries and paralegals who can do the hyperlinking the Proposal would require, but when one looks at who actually litigates in the Commercial Division, it is—contrary to the assumption upon which the Proposal appears to be based—mostly **not** large firms, and many firms are fairly small, including solo practitioners.

- The mere number of hyperlinks is not the largest burden counsel would face under the Proposal. Rather, it is the time needed to file documents and then edit affirmations, affidavits and memoranda of law at the last minute to add in all the hyperlinks. A large firm with experienced staff could devote multiple paralegals or legal secretaries to the task of filing documents and adding links. A small firm or solo practitioner would not have that luxury. Indeed, solo practitioners likely would have to do it themselves. This would add hours to the time it takes to file (reducing by hours the time counsel has to work on the substance of the filing).

- The need to devote time to hyperlinking puts counsel without sufficient staff support in the position of billing a client for this extra, administrative work or writing off the time because the client is unwilling to pay an attorney to do a secretarial task (the Proposal describes hyperlinking as "a purely administrative task, requiring no legal judgment."). This imposes a burden not just on counsel, but also on the client to the extent the client is forced to incur extra expense to meet the hyperlinking requirement.

- The Proposal allows counsel to seek leave of court to be excused from hyperlinking, but the burden is high. If counsel has a computer, access to the internet and word processing software, they cannot certify in good faith that they cannot hyperlink a filing "due to limitations in" counsel's "office technology." The burden here is potentially many lost hours doing "a purely administrative task" that takes time away from counsel focusing on the substance of a filing and for which counsel may not be able to bill clients, not the technical impossibility of hyperlinking.

ii. Optional Hyperlinking to Court Decisions and Other Authorities

The Proposal allows individual justices,

> by individual part rule or in an individual case, [to] require that electronically-submitted memoranda of law include hyperlinks to cited court decisions, statutes, rules, regulations, treatises, and other legal authorities in either Lexis/Nexis or Westlaw databases or in state or federal government websites.

(Memorandum re: Proposal for a Rule Concerning the Use of Hyperlinks in E-Filings at 6.) This partially addresses the concern expressed above about making hyperlinking mandatory, but paradoxically, does so with respect to the aspect of hyperlinking that has become, with advances in technology, the least burdensome for most (but not all) counsel. It is our understanding that both Westlaw[1] and Lexis[2] now have modules that can hyperlink court decisions and other authorities in a filing automatically.

[1] West Drafting Assistant.

[2] Lexis for Microsoft Office.

Law firms pay more than basic subscription rates to get these modules. This additional cost may be unduly burdensome for a firm that only rarely appears in the Commercial Division and that would not otherwise purchase these modules. But for law firms already subscribing to those services, the burden of hyperlinking cited court decisions and other authorities is *de minimis*.

iii. Innovation Does Not Justify Unfair and Undue Burden

The Proposal notes—and we agree—that the Commercial Division serves "as a laboratory for innovation in the court system." (Memorandum re: Proposal for a Rule Concerning the Use of Hyperlinks in E-Filings at 5.) However, innovation does not justify imposing an undue burden on solo and small firm counsel to the benefit of large firms and their clients. The many technological innovations in law practice made over the past several decades have tended to level the playing field between firms of different sizes. The Proposal, despite its laudable goal and good intentions, would achieve the opposite result.

III. RECOMMENDATIONS

First, there is no reason that individual justices cannot, after consultation with the parties and after due consideration of the potential burdens and benefits (that is, whether the court even uses electronic copies of the parties' filings) direct the parties to hyperlink cited court decisions and other authorities and NYSECF filings in a particular case. The courts do not need a rule to do so; the court and counsel just need to analyze the burdens and benefits of hyperlinking so that they can make an informed decision regarding whether it is appropriate in a particular case. This process could be facilitated by amending Rule 8(a) to add "hyperlinking cited court decisions and other authorities and NYSECF filings" to the list of topics counsel should discuss before a preliminary conference.

In our view, any justice—not just one assigned to the Commercial Division—could, after consultation with the parties, adopt hyperlinking in a particular case. Thus, our objection to the Proposal is not to hyperlinking; we strongly support it **where appropriate**. Our objection is to **mandatory** hyperlinking done without regard to the burdens on the parties and the benefits to the court.

In this regard, it is significant that the vast majority of the court rules cited in Appendix A to the Proposal (1) are individual judges rules, not generally-applicable court rules and (2) leave hyperlinking optional, although encouraged. In short, the federal courts are doing something close to what we suggest as an alternative to the Proposal: let judges and counsel make an informed decision regarding how to use hyperlinking in a particular case.

Second, allowing justices and counsel to consider hyperlinking on a case-by-case basis is consistent with continued technological change. The balancing of burdens to benefits will change as technology changes. Indeed, we note below the federal court's development of free software to make hyperlinking record cites less burdensome. Consistent with the Commercial Division serving as a laboratory for innovation, the better course is to let individual justices and counsel work out what works best, not imposing a blanket rule that will be needlessly burdensome in some cases.

Third, and related to the two points above, the court and counsel need to be educated about hyperlinking so they understand the burdens and benefits. Perhaps this task could be undertaken by the OCA's excellent E-Filing Resource Center (provided it was given sufficient resources to undertake this additional burden). The more the court and counsel understand the costs and benefits or hyperlinking, the better they will be able to determine whether it is appropriate in a particular case.

For example, as discussed above, the Commercial Division Advisory Council has underestimated the burden of hyperlinking to NYSECF filings. As to the burden of hyperlinking to cited court decisions and other authorities that are on Westlaw or Lexis, as noted above, Westlaw and Lexis now have modules that can hyperlink court decisions and other authorities. This later point is indicative of the effect of technological change: what was a major concern raised by the City Bar Association and others in 2016 is now a more limited concern because of changes in technology. Still, the modules impose an extra expense on counsel (and clients) and there is additional expense if a filing cites authorities outside of the Lexis/Westlaw subscription for counsel, so hyperlinking court decisions and other authorities could be a burden notwithstanding the existence of Lexis/Westlaw modules that can insert hyperlinks.

Fourth, there are things the courts (and not just the Commercial Division) can do on their own to take advantage of hyperlinking and to advance the use of hyperlinking. We understand that OCA's Lexis and Westlaw contracts include the modules that can hyperlink court decisions and other authorities in an already-filed brief by (1) converting the filing to Word format and then (2) inserting the hyperlinks. Thus, for justices that rely on electronic rather than paper filings, their staff easily can create hyperlinks in the filings.

Moreover, while the Proposal looks to the example of the federal courts, it does not discuss that the federal courts have created free software that facilitates (if not perfectly automates) the insertion of hyperlinks to PACER filings, just as the Westlaw and Lexis modules discussed above do for court decisions and other authorities. (*See* Exhibit 2.) Given sufficient funding and time, perhaps OCA could create a similar (or better) product, reducing (or perhaps even eliminating) the burden of hyperlinking NYSECF filings for all courts and litigants.

We hope our comments and discussion of alternatives to the Proposal are useful for the Office of Court Administration.

Respectfully,

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Council on Judicial Administration, Chair

Bart J. Eagle
State Courts of Superior Jurisdiction Committee, Chair

John M. Lundin
Litigation Committee, Chair