

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 6 of the Commercial Division to Permit the Court to Require Hyperlinking in Electronically-Filed Documents

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 October 6, 2016 (“*Memorandum*”), proposing an amendment to Rule 6 of the Commercial Division Rules, to include a second paragraph that explicitly grants Justices of the Commercial Division the discretion to require bookmarking and/or hyperlinking in electronically-filed documents, by individual part rule or individual case directive (the “*Proposal*”). The Proposal is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Section agrees with the Use of Technology in Commercial Division Subcommittee of the Commercial Division Advisory Council (the “Advisory Council”) that bookmarks and hyperlinking may advance the goal of convenience and efficiency. However, the Section also believes that bookmarks and hyperlinking will only be beneficial to judges and clerks that desire to utilize such conveniences, and that the costs of employing these new technologies may, in some cases, outweigh the benefits. Therefore, the Section also agrees with the Advisory Council that judges should be provided the discretion to require the use of bookmarks and hyperlinking, both on an individual part basis and a case by case basis.

II. SUMMARY OF PROPOSAL

Relying upon the results of the 2014 pilot program implemented with several Commercial Division Justices, the Proposal seeks to revise Rule 6 of the Commercial Division Rules, 22 NYCRR § 202.70[g], by including therein a paragraph that would provide express authority to Commercial Division Justices to implement an individual part rule, or to order by individual case directive, that parties employ the use of bookmarks and/or hyperlinks in electronically filed documents. Specifically, the Council proposes that Rule 6 of the Commercial Division Rules be amended to include a second paragraph that states:

“The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or ‘linked’ to a copy of the authority. A hyperlinked

document may contain hyperlinks only to: (i) other portions of the same document; (ii) other documents filed in the NYSEF system; (iii) a government website (xxx.gov) location on the Internet, which website contains a source document for a citation or an official record; and (iv) statutes, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references/citations to authority/record in accordance with applicable rules is required in addition to the hyperlink. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the pleadings. The Court is not responsible for the functionality of hyperlinks.”

The Advisory Council describes the motivation for this Proposal as, (1) to promote “convenience and efficiency” in “the preparation of responsive pleadings, bench memoranda and decision” by permitting judges, clerks and litigants the ability to move effortlessly between affirmations, affidavits, docket entries, cases, statutes and other legal authorities (Memorandum, Ex. A at 1, 2); (2) to “maintain New York’s preeminence in commercial litigation” (Memorandum, Ex. A at 1); and (3) to “reap the benefits of these readily available technologies that increase the efficiency of litigation in an electronic environment” (Memorandum, Ex. A at 1). The Advisory Council has cited to a number of courts, both state and federal, that have implemented rules or administrative procedures that permit optional hyperlinking (*see* Memorandum, Ex. A at 1-2), including reference to a Second Circuit case in which the use of hyperlinks to relevant sections of the appellate record was considered “useful” (*see* Memorandum, Ex. A at 2, citing *Phansalkar v Andersen, Weinroth & Co., L.P.*, 356 F.3d 188, 190 [2004]), as well as evidence of the use of hyperlinking in court decisions (*see* Memorandum, Ex. A at 2).

The Advisory Council also notes that the time is ripe for implementing these readily available technologies, noting that, “[i]n August of 2015, the Governor signed into law legislation that is moving all courts in the State toward electronic filing[,]” and “electronic filing of appeals is inevitable” (Memorandum, Ex. A at 1).

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

The Section agrees with the Advisory Council that the use of bookmarks and hyperlinking will achieve the goal of convenience and efficiency by providing judges, clerks and litigants “immediate access to the target section, reference or document” (Memorandum, Ex. A at 1). The Section is also sensitive to the uneasiness and apprehension that such a rule will cause some practitioners, primarily those in small law firms with limited resources and/or those who may not consider themselves to be technologically savvy. However, like with the implementation of electronic filing, this sensitivity can be alleviated with a well thought out plan to educate practitioners of the ease with which bookmarks and hyperlinking may be employed with commonly used software and utilities.

However, the Section also believes that bookmarks and hyperlinking will only be beneficial to judges and clerks that desire to utilize such conveniences, and agrees with the Advisory Council that the “costs associated with achieving these benefits” supports the conclusion “that not all cases before the Commercial Division will benefit from the use of hyperlinking” (Memorandum, Ex. A at 3). Therefore, the Section also agrees with the Advisory Council that judges should be provided the discretion to require the use of bookmarks and hyperlinking, both on an individual part basis and a case by case basis.

Accordingly, the Section recommends that the Proposal be adopted as drafted.

EXHIBIT A



MEMORANDUM

October 6, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment to Rule 6 of the Rules of the Commercial Division to Permit the Court to Require Hyperlinking In Electronically-Filed Documents

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 6 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 6 ["Form of Papers"]) proffered by the Unified Court System's Commercial Division Advisory Council. In brief, the proposal calls for the addition of a new paragraph to the rule explicitly granting judges the discretion to require, by individual part rule or individual case directive, that parties employ hyperlinks in electronically filed documents. The Council's memorandum supporting this proposal (Exh. A) notes that the functionality of hyperlinks – which permit readers to move quickly to different sections of a document, or to review cited materials and sources over the internet – will bring a convenience and efficiency appropriate to maintain New York's preeminence in commercial practice. The Council's proposal would limit use of hyperlinks to reference other portions of the filed document, other NYSCEF filings, government websites, and "statutes, rules, regulations and court decisions." Further, it would require separate filing of the underlying hyperlinked documents for inclusion in the evidentiary record; preclude reference to sealed or restricted documents; maintain standard citation formats; and require leave of the Court for use with audio or visual files.

The text of the proposed rule is as follows:

"(b) The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or "linked" to a copy of the authority. A hyperlinked document may contain hyperlinks only to: (i) other portions of the same document; (ii) other documents filed in the NYSECF system; (iii) a government website (xxx.gov) location on the Internet, which

website contains a source document for a citation or an official record; and (iv) statutes, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, to be considered as part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references/citations to authority/record in accordance with applicable rules are required in addition to the hyperlink. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the pleadings. The Court is not responsible for the functionality of hyperlinks.”

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Persons wishing to comment on the proposed rule 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 December 5, 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

EMORANDUM

TO: Commercial Division Advisory Council

FROM: Use of Technology in Commercial Division Subcommittee

DATE: August 24, 2016

RE: Proposed Rule on Hyperlinking in the Commercial Division

The Technology Committee first reported in June 2015 on the desirability of the use of bookmarking and hyperlinking as tools to increase the efficiency of addressing the typically document intensive nature of commercial litigation before the Commercial Division. This was not a new issue then as the OCA had, in 2014, implemented a pilot program in the Commercial Division with several Commercial Division Justices. Because the technology is genuinely useful, the Committee undertook to test the use of hyperlinking within NYSECF: the testing was successful and the technology was easy to use.

Bookmarks and hyperlinks provide the reader with immediate access to the target section, reference or document. The convenience and efficiency promised by the effective use of bookmarks and hyperlinks is obvious; the time and energy needed to find a physical copy of the target section, reference or document is reduced to the click of a mouse. When deployed with software that allows the reader to annotate pdfs using "notes," highlighting, text selection and comment bubbles, bookmarks and hyperlinks make the preparation of responsive pleadings, bench memoranda and decisions much more efficient.

In August 2015, the Governor signed into law legislation that is moving all courts in the State toward electronic filing. The electronic filing of appeals is inevitable. The move toward a completely electronic docket is being undertaken because it is more efficient. To maintain New York's preeminence in commercial litigation, the Committee believes that commercial cases should reap the benefits of these readily available technologies that increase the efficiency of litigation in an electronic environment. (The First Department requires the submission of a CD in addition to the traditional paper appeal documents. The Second Circuit requires electronic filing.)

Optional hyperlinking is found in the rules or administrative procedures of many federal courts, including the following - First Circuit Court of Appeals, District of Massachusetts, District of New Hampshire, Second Circuit Court of Appeals, Third Circuit Court of Appeals, Western District of Pennsylvania, District Court of Virgin

Islands, Fourth Circuit Court of Appeals, District of Maryland, Eastern and Middle Districts of North Carolina.

The benefits of hyperlinking have not gone unnoticed in courts where the technology has been used. In a 2004 decision in Phansalkar v. Andersen, Weinroth & Co., L.P., the Second Circuit, noted the use of hyperlinks to relevant sections of the appellate record, and found them to be "more versatile" and "more useful." 356 F.3d 188, 190 (2d Cir. 2004). Similarly, there are courts that have used hyperlinks in decisions to cite to documents filed in the case. See, e.g., Carter v. Allied Ins., 2008 WL 2228851 at *1 n.1 (D. Neb. 2008); Tracy Broadcasting Corp. v. Spectrum Scan, LLC, 2008 WL 2079917, at *1 n.1 (D. Neb. 2008); AWG Leasing Trust v. U.S., 592 F. Supp. 2d 953,957 n.1 (N.D. Ohio 2008).

The United State Supreme Court used a hyperlink in its decision in Scott v. Harris, 550 U.S. 372, 378 n.5 (2007). The Court accepted a hyperlink brief in the case of Harris Trust and Savings Bank v. Solomon Smith Barney Inc., 530 U.S. 238 (2000).

Recommendations on Hyperlinking

As noted above, hyperlinking is helpful to judges, clerks and litigants. Affirmations and affidavits may contain dozens upon dozens of exhibits. Likewise, briefs may contain dozens upon dozens of references to docket entries, cases, statutes and other legal authorities. Moving effortlessly among these documents electronically from a memorandum of law for example, is very desirable and efficient.

There are two ways to hyperlink. First, documents may be self-contained and static. As explained in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, in such documents,

PDF-A files of the texts of cited cases, statutes, and other legal authorities shall be aggregated as attachments to the text of the brief in PDF-A format and copies of exhibits shall be aggregated to the affirmation or affidavit to which they are annexed in the same format. Links in such a brief shall be to the full text of a case or law review article, the relevant section of a statute or rule cited, and, if the authority is a treatise or other lengthy work, the full text of the relevant portion thereof.

Id. This can result in a filing being hundreds of pages long.

Alternatively, "links may be inserted to authorities on Westlaw and websites of state or Federal courts" and "may also be made to other documents filed with NYSCEF." Id. This can be accomplished by selecting "Insert" in Microsoft Word" and then selecting "Hyperlink," and then adding the URL of the docket entry, case cite in Westlaw or Lexis, or other website in the "Address" field. When a judge, clerk or litigant clicks on a

hyperlinked Westlaw or Lexis citation, they will be taken to the case after being prompted for their log-in details.

The benefits of hyperlinking are obvious. Inasmuch as there are costs associated with achieving these benefits, the Committee concluded that the Court and parties may conclude that not all cases before the Commercial Division will benefit from the use of hyperlinking. Accordingly the Committee believes that while a Commercial Division Rule is desirable as the next step beyond the Pilot Program, each Justice should have the discretion to require the use of these technologies.

Accordingly, the Subcommittee recommends that Rule 6 of the Commercial Division Rules also be amended to include a second paragraph stating as follows:

The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or "linked" to a copy of the authority. A hyperlinked document may contain hyperlinks only to: (i) other portions of the same document; (ii) other documents filed in the NYSECF system; (iii) a government website (xxx.gov) location on the Internet, which website contains a source document for a citation or an official record; and (iv) statutes, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, to be considered as part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references/citations to authority/record in accordance with applicable rules is required in addition to the hyperlink. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the pleadings. The Court is not responsible for the functionality of hyperlinks.

As should be clear from the language of the proposed rule on hyperlinking, it is not mandatory and grants discretion to Commercial Division justices to require hyperlinking where appropriate.

To address security concerns raised by the court system regarding unfettered hyperlinking to the Internet at large, the proposed rule limits Internet hyperlinking to government websites, statutes, rules, regulations and court decisions.

The Subcommittee requests that the Advisory Council vote on the proposed amendment to Rule 6 at the Council's September 15, 2016 meeting.