



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

MEMORANDUM

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

December 23, 2019

To: All Interested Persons
From: Eileen D. Millett
Re: Request for Public Comment on a Proposed Amendment to Commercial Division Rule 6 to Permit the Court to Require Hyperlinking in Electronically Filed Documents

=====

The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (the “Advisory Council”), to amend Commercial Division Rule 6 (22 NYCRR § 202.70(g), Rule 6) to require legal memoranda to include hyperlinks to NYSCEF docket entries when those documents are cited and to allow judges discretion in determining whether to require hyperlinking for cases, statutes, and rules to legal database sites. The proposed rule change also encourages hyperlinking even in those circumstances when it is not required, and notably permits exemptions to required hyperlinking in instances where it would create an undue burden on parties. The Advisory Council submits that this is a more stream-lined version of their hyperlinking proposal submitted in 2016.¹

The Advisory Council’s memorandum supporting this proposal (Ex. A) notes that hyperlinking will enable judges and their staff to access source materials more quickly and improve efficiency. The Advisory Council further notes that the Appellate Division, Second Department has recently required that all electronically filed briefs to contain bookmarks or hyperlinks to legal authorities. The exact text of the proposed rule change may be found on page 6 of Exhibit A. The Advisory Council has also submitted an Appendix A, which compiles hyperlinking rules in other jurisdictions.

=====

Persons wishing to comment on the proposal should e-mail their submissions to

¹ See <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/RPC-Commercial-Division-Hyperlinking.pdf>.

rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than February 24, 2020.

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: February 12, 2019

RE: Proposal for a Rule Concerning the Use of Hyperlinks in E-Filings

INTRODUCTION

The introduction of e-filing through the New York State Courts Electronic Filing System (“NYSCEF”) not only has made accessing court filings immeasurably easier for litigants, court personnel, and the public, but it presents the possibility to incorporate into e-filed documents additional internet-based tools to make those filings easier to navigate and analyze. The Commercial Division has already taken steps in this direction through the provision in Rule 6 of the Rules of the Commercial Division of the Supreme Court (the “Commercial Division Rules”) requiring bookmarking of e-filed memoranda of law to facilitate “easy navigation by the reader within the document.”¹ The logical next step is the use of hyperlinks to external sources to facilitate the reader’s access to parts of the record and authorities cited in the e-filed document.

Hyperlinks make cross-referencing a citation in a brief to the actual source immeasurably easier. Instead of having to retrieve the case or other legal authority, or the

¹ “Each electronically-submitted memorandum of law and, where appropriate, affidavit and affirmation shall include bookmarks providing a listing of the document’s contents and facilitating easy navigation by the reader within the document.” Uniform Civil Rules for the Supreme Court and the County Courts of New York, Section 202.70 Commercial Division Rule of Practice 6; *see also* Supreme Court Civil Branch, N.Y. County, Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, § B(11), Jan. 23, 2019, *available at* <https://www.nycourts.gov/courts/ljd/supctmanh/Efil-protocol.pdf> (last accessed Feb. 1, 2019).

record cite, on which the brief relies through a separate search of the database in which the source material is housed (e.g., Lexis/Nexis or Westlaw for a case, or NYSCEF for a previously filed document in the record), the reader simply clicks on the hyperlink, which calls up the source material immediately. As noted in a recent ABA report, “[h]yperlinked legal citations provide a convenient way for judges, court staff, and attorneys to have immediate access to legal authorities cited in an e-brief.”² Similarly, “[h]yperlinking to the trial court record can be very helpful to readers, in that it allows immediate access to cited record materials. From the reader’s perspective, hyperlinks to the record may be especially helpful because finding a cited item in the record can take longer than calling up a legal authority in Westlaw or Lexis.”³

There 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. As one federal district judge has put it, “I find hyperlinks to be a very convenient way to check case citations, read pin-point case cites, and view attachments without having to open a new window or toggle between screens.”⁴ Another adds: “The technology is simple and inexpensive. Most importantly, the ability to instantly put your finger on a reference is invaluable to the reader.”⁵ A third

² American Bar Association Council of Appellate Lawyers, *The Leap from E-Filing to E-Briefing*, p. 32 (2017), available at https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report_authcheckdam.pdf (last accessed Feb. 1, 2019).

³ *Id.* at 34.

⁴ Hon. John Lungstrum, Senior U.S. District Judge, D. Kan., available at <http://federalcourthyperlinking.org/testimonials/> (last accessed Feb. 11, 2019).

⁵ Hon. Richard Kopf, Senior U.S. District Judge, D. Neb., available at <http://federalcourthyperlinking.org/testimonials/> (last accessed Feb. 11, 2019).

says that when he pulls up a brief with hyperlinks, his “immediate impressions” include “[t]his is going to be easy.”⁶

Although clicking through hyperlinks is an integral part of the internet experience for most internet users, to date the Commercial Division Rules have not required or even encouraged litigants to create hyperlinks to legal research databases when citing cases, statutes, regulations, treatises, law review articles, or other legal authorities. Nor has the Commercial Division required litigants to hyperlink their filings to other previously filed documents already located on NYSCEF, even those filed in the same case. Numerous other courts, however, have begun to encourage or require hyperlinking in e-filed documents. Indeed, the Appellate Division, Second Department, recently promulgated “Technical Guidelines” for all e-filed documents requiring, with certain exceptions,⁷ that “all electronically-filed briefs should contain bookmarks or hyperlinks to the authorities cited in those briefs.”⁸ In the interest of remaining a leader in the efficient and effective administration of justice in complex commercial cases, the Subcommittee recommends that the current e-filing and bookmarking requirements be extended to require or encourage hyperlinking to other sources in appropriate cases, while granting individual Justices wide discretion to make reasoned judgments about when and to what extent the benefits of hyperlinking outweigh the burdens, taking into account the nature of the cases, parties, and practitioners that characterize that individual Justice’s docket.

⁶ Hon. David Nuffer, U.S. District Judge, D. Utah, *available at* <http://federalcourthyperlinking.org/testimonials/> (last accessed Feb. 11, 2019).

⁷ See N.Y. Comp. Codes R. & Regs. Tit. 22, § 1245.4(a) (2018) (exempting from e-filing “attorneys who certify in good faith” that they lack equipment or know-how to e-file).

⁸ E-Filing in the Appellate Division, Second Judicial Department Technical Guidelines, *available at* http://www.courts.state.ny.us/courts/ad2/efiling/Proposed_Amendments_to_Technical_Guidelines_for_Efiled.pdf (last accessed Jan. 31, 2019); Thomas Newman and Steven Ahmuty, *New Practice Rules of the Appellate Division*, *New York Law Journal*, Nov. 6, 2018, *available at* <https://www.law.com/newyorklawjournal/2018/11/06/new-practice-rules-of-the-appellate-division/>.

Hyperlinking proposals have been made before in the Commercial Division. In 2014, New York County piloted an “experimental program” that “strongly encouraged” parties in e-filed cases before Justice Scarpulla (Part 39) and Justice Oing (Part 48) to include bookmarks and hyperlinks in memoranda of law,⁹ but, apart from the incorporation of a bookmarking requirement in Rule 6, the program was not more broadly adopted. In 2016, the Commercial Division Advisory Council (the “Council”) proposed, and the Office of Court Administration (“OCA”) put out for public comment, a proposal permitting Justices to require, by individual part rule or on a case-by-case basis, hyperlinking to other parts of the same document, other documents filed on NYSCEF, government websites, and legal authorities. OCA received a few objections to the perceived burdens and costs of such a rule, however, and to date a hyperlinking rule has not been adopted.

Now, however, with almost three additional years of experience with and expansion of the NYSCEF system, and broader use of hyperlinking in other courts, including those of this State, the Subcommittee believes that the time is right to revisit the costs and benefits of hyperlinking. To that end, the Subcommittee recommends adoption of an amendment to Rule 6 that would:

- *require* hyperlinking to a cited docket entry already available on NYSCEF;
- give Justices *discretion* to require hyperlinking cited legal authorities to Lexis/Nexis or Westlaw, or a government website;
- *encourage* hyperlinking cited legal authorities even if not required; and

⁹ Statement of Procedures Governing Briefs and Certain Other Documents in Hyperlinked and Bookmarked Format in Electronically Filed Cases, Mar. 17, 2014, *available at* www.nycourts.gov/courts/1jd/supctmanh/EF-Protocol-31714.pdf (last accessed Feb. 1, 2019).

- permit *exemptions* from required hyperlinking for parties that certify an inability to comply with the requirement without undue burden.

As described below, the Subcommittee believes that such an amendment would encourage parties to make voluntary use of an easy-to-use and helpful technological tool; would confer appropriate discretion on individual Justices to require hyperlinking where it would be beneficial to the Court, but not otherwise; and would avoid any undue burden on the diminishing population of e-filers who lack the technical resources to comply with a hyperlinking requirement. Implementing this proposal at this time would advance the goals of Chief Judge DiFiore’s Excellence Initiative, which has already resulted in numerous “measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public.”¹⁰ It would also be consistent with the Commercial Division’s role as a laboratory for innovation in the court system; after new rules and procedures have been introduced in the Commercial Division, other parts of the court system can evaluate whether these innovations might be valuable to them as well. This proposal is an excellent example of the opportunities technology provides to improve the efficiency and productivity of the New York State courts. Finally, many of the law firms that regularly appear in the Commercial Division and their clients already use hyperlinking in their everyday business operations, making the Commercial Division the logical place to begin the introduction of hyperlinking technology to the New York state courts.

¹⁰ State of New York Unified Court System, *The State of Our Judiciary 2018, Excellence Initiative: Year Two* (Feb. 2018), p. i, available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/B18_SOJ-Report.pdf.

THE PROPOSED AMENDMENT TO RULE 6

The Subcommittee proposes adding the following language after the current text of

Rule 6:

In addition, each electronically-submitted memorandum of law or other document that cites to another document previously filed with NYSCEF shall include a hyperlink to the NYSCEF docket entry for the cited document enabling access to the cited document through the hyperlink. Hyperlinks may not provide access to documents filed under seal or otherwise not in the public record. Cited documents filed with NYSCEF that are accessible through bookmarks in the electronically-submitted document need not also be hyperlinked.

The Court may, by individual part rule or in an individual case, 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. If the Court does not require such hyperlinking, parties are nonetheless encouraged to hyperlink such citations unless otherwise directed by the Court.

If a party certifies in good faith that it cannot include hyperlinks as required by this Rule or the Court without undue burden, due to limitations in its office technology or other showing of good cause, the Court may excuse the party from any otherwise applicable hyperlinking requirement.

For purposes of this Rule, a hyperlink means an electronic link between one document and another, and a bookmark means an electronic link permitting navigation among different parts of a single document. Material made accessible by hyperlinking does not thereby become part of the record, and citations to authorities shall appear in standard citation form, even if also hyperlinked.

DISCUSSION

Background. A “hyperlink is a feature in an electronic document that allows the reader to jump to another place with only a mouse click.”¹¹ An “internal” hyperlink “leads

¹¹ American Bar Association Council of Appellate Lawyers, *The Leap from E-Filing to E-Briefing*, p. 31 (2017), available at https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_repo_rt.authcheckdam.pdf (last accessed Feb. 1, 2019).

to another place in the same electronic file.”¹² For example, “numerous documents may be combined into a record appendix that is then combined with a legal brief to create a single PDF for filing with the court,” with hyperlinks in the text of the brief leading to different parts of the appendix. Such internal hyperlinks are commonly called “bookmarks,” which is the term used in the current Rule 6. An “external” hyperlink “leads to somewhere outside the confines of the file in which the hyperlink appears.”¹³ Consistent with common usage, we use the term “hyperlink” here and in the proposed Rule 6 amendment to mean such external hyperlinks from one document to another.

Creation of a hyperlink in a PDF-A file is simple and takes just a few clicks of a mouse. Commonly used programs such as Adobe Acrobat have a “Link Tool” that makes the process easy, and instructions in written or video format are easy to find on the internet.¹⁴ It is a purely mechanical process, requiring no legal acumen and only the basic computer skills that any secretary or other administrative support staff would be expected to have.¹⁵ A hyperlink can be created in under a minute—indeed, often in seconds. Any law office with the technical capacity to e-file documents on NYSCEF—even small offices with limited technological or secretarial support—can create hyperlinks in e-filed documents without purchasing additional software or equipment and without investment of more than roughly a half hour of internet-based computer learning to master the process.

¹² *Id.*

¹³ *Id.*

¹⁴ *See, e.g.*, Links and Attachments in PDFs, <https://helpx.adobe.com/acrobat/using/links-attachments-pdfs.html>; TeachUComp, Creating Links with the Link Tool, <https://www.youtube.com/watch?v=ygH78qHBVKI>, YouTube (July 15, 2014); *see also* Robert McMillen, How to Insert a Hyperlink in Word 2016, Youtube (Oct. 16, 2015), https://www.youtube.com/watch?v=_sUZRHO5HM.

¹⁵ For those unfamiliar with the creation of hyperlinks in a PDF, the process entails clicking on a drop-down menu in “Tools” to add a link; using the mouse to drag a box around the text that will become the link; selecting the desired link action (e.g., “open a file” or “open a web page”); and indicating the destination file or URL that the hyperlink will open up.

The efficiency and convenience provided by hyperlinks is obvious. Bookmarks—internal hyperlinks—enable a reader to navigate a lengthy, multi-part filing much more quickly, and Rule 6 of the Commercial Division Rules already requires parties to incorporate bookmarks in such documents. Hyperlinks to external sources, such as other parts of the court record or cited legal authorities, can save even more time and effort, yet they take no greater time or effort to create than bookmarks.

In light of these obvious benefits, in 2016, the OCA put out for public comment the Council’s recommendation that Rule 6 be amended to include the following addition:

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, 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 compliance 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 2016 proposal was not adopted. Although the New York State Bar Association recommended adoption of the proposal as drafted, agreeing that it would “achieve the goal of convenience and efficiency by providing judges, clerks and litigants ‘immediate access

to the target section, reference or document,”¹⁶ the Association of the Bar of the City of New York (the “City Bar”) and the Managing Attorneys and Clerks Association, Inc. (“MACA”) opposed it on the ground that the perceived burden, particularly to smaller law firms, would outweigh the benefits.¹⁷

Since 2016, other courts have continued to explore ways to require or encourage hyperlinking. The Second Department of the Appellate Division, for example, has adopted Technical Guidelines for e-filed briefs requiring that “all electronically-filed briefs should contain bookmarks or hyperlinks to the authorities cited in those briefs. If utilized, bookmarks should take the reader to a copy of the cited authority, that is, the case, statute or rule, which will be part of the brief submitted.”¹⁸ In the Second Department, litigants thus have the option to hyperlink cited authorities to an external source, such as Lexis/Nexis or Westlaw, or to bookmark to a copy of the cited authority that becomes part of the brief as filed, but either way they must create an external or internal hyperlink to cited authorities by means of which the Court can access the cited authorities with the click of a mouse. A few federal district judges also require either that briefs be hyperlinked to

¹⁶ Comments of the Commercial and Federal Litigation Section of the New York State Bar Association on Proposed Amendment to Rule 6 of the Commercial Division to Permit the Court to Require Hyperlinking in Electronically-Filed Documents, Nov. 28, 2016, at 2.

¹⁷ See Report by the Council on Judicial Administration, State Courts of Superior Jurisdiction Committee and Litigation Committee of the Association of the Bar of the City of New York, 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, Dec. 2016 (“City Bar Comments”); Response of Managing Attorneys and Clerks Association, Inc. to Proposed Amendment to Commercial Division Rule 6, Dec. 5, 2016 (“MACA Comments”).

¹⁸ E-Filing in the Appellate Division, Second Judicial Department Technical Guidelines, *available at* http://www.courts.state.ny.us/courts/ad2/efiling/Proposed_Amendments_to_Technical_Guidelines_for_Efiled.pdf (last accessed Jan. 31, 2019).

supporting authorities or exhibits¹⁹ or that proposed findings of fact be hyperlinked to supporting evidence.²⁰

It is more common, however, for trial courts to encourage rather than require hyperlinking. In the Delaware Chancery Court, for example, e-filing is mandatory, and hyperlinking in the e-filing is not required, but parties have the option to file an additional copy of their brief on a CD-ROM containing hyperlinks.²¹ At least one federal district court, the District of Utah, encourages practitioners to hyperlink to “other portions of the same document,” to “material elsewhere in the record,” “to a government site,” and “to legal authority from recognized electronic research services, such as Westlaw, Lexis/Nexis, Google Scholar, Casemaker, Fastcase or Findlaw.”²² Similarly, the individual practices of many federal district judges encourage but do not require hyperlinking in briefs, including

¹⁹ Civil and Criminal Practices and Procedures of Judge Janis Graham Jack (S.D. Tex.) (“All exhibits and cases must be hyperlinked.”), *available at* <https://www.txs.uscourts.gov/sites/txs/files/jgj.pdf> (last accessed Feb. 11, 2019); Practice Pointers and Preferences of Judge Nancy Brasel (D. Minn.) (“If possible, parties should submit briefs and exhibits that are hyperlinked and searchable.”), *available at* <http://www.mnd.uscourts.gov/Judges/practice-pointers/NEB.pdf> (last accessed Feb. 11, 2019); Practice Pointers and Preferences of Judge Donovan Frank (D. Minn.) (“If possible, parties should submit briefs and exhibits that are hyperlinked and searchable.”), *available at* <http://www.mnd.uscourts.gov/Judges/practice-pointers/DWF.pdf> (last accessed Feb. 11, 2019).

²⁰ Instructions for Bench Trial Proposed Findings of Fact and Conclusions of Law of Judge Vince Chhabria (N.D. Cal.) “The parties should hyperlink the citations in the proposed findings of fact to the exhibits and trial transcripts and may provide the Court with the proposed findings of fact on a flash drive if needed.”, *available at* <https://www.cand.uscourts.gov/filelibrary/1411/Chhabria-Civil-Trial-Standing-Order-rev-d2018.pdf> (last accessed Feb. 11, 2019); Instructions for Findings of Fact and Conclusions of Law of Judge William Orrick (“The Court requests that the parties hyperlink each proposed Finding of Fact to any supporting evidence.”), *available at* https://www.cand.uscourts.gov/filelibrary/1211/Civil_Pretrial_Order_February_2017.pdf ((last accessed Feb. 11, 2019)/ Order for Pretrial Preparation of Judge Claudia Wilken (N.D. Cal.) (“The Court requests that the parties hyperlink each proposed Finding of Fact to any supporting evidence.”), *available at* <https://www.cand.uscourts.gov/filelibrary/360/Order-for-Pretrial-Prep.pdf> ((last accessed Feb. 11, 2019).

²¹ See Delaware Chancery Court Rule 79.1 (Electronic Filing) (“every civil action and civil miscellaneous action in the Court of Chancery is subject to electronic filing”); Delaware Chancery Court Rule 171A (CD-ROM Briefs) (“in addition to the electronically or conventionally filed paper copies of the brief . . . a party *may* file a brief on CD-ROM. . . . The CD-ROM brief shall contain hyperlinks to all cases, statutes, reference materials, exhibits and such other items as are cited in the brief. . . .”).

²² See District of Utah Civil Rule 7-5(a).

hyperlinks of cited legal authority to recognized electronic research services such as Westlaw and Lexis/Nexis.²³

Hyperlinking in e-filed briefs is thus a tool with which the bench and bar are becoming increasingly familiar but that has not yet been exploited to its full potential. Hyperlinking presents the greatest opportunity to assist a court in navigating the record and the relevant legal authorities in large, complex cases in which much is at stake and lengthy briefs with extensive citations are most likely to be filed—that is, in cases like those within the jurisdiction of the Commercial Division. For these reasons, hyperlinking presents an opportunity for the Commercial Division to pursue its mandate to innovate and improve the efficient administration of justice, but with sensitivity to the attendant costs.

Rationale for Proposed Rule. The proposed amendment to Rule 6 seeks to balance the convenience to the Court and, often, to other parties that hyperlinks provide against the burden of creating them. It balances these benefits and burdens as follows:

First, it requires hyperlinks only to cited documents that have been previously filed on NYSCEF. This is only an incremental extension of Rule 6’s current requirement that memoranda of law and, where appropriate, affidavits and affirmations include bookmarks, and Rule 16’s requirement that motion papers attach “copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the

²³ See, e.g., Chamber Preferences of Judge Sheri Polster Chappell (M.D. Fla.), available at <https://www.flmd.uscourts.gov/judges/sheri-polster-chappell> (last accessed Feb. 11, 2019) (“Judge Chappell strongly encourages counsel to insert hyperlinks in documents filed electronically.”); Practices and Procedures of Judge Arthur J. Schawb (W.D. Pa.), Jan. 11, 2017, available at <https://www.pawd.uscourts.gov/sites/pawd/files/JudgeShwabPP20170111.pdf> (last accessed Feb. 1, 2019) (strongly encouraging “[t]he use of hyperlinks to other documents previously filed within the CM/ECF” and to “either Westlaw or Lexis/Nexis for cited legal authority”); see also Appendix A (listing examples of federal district courts and chambers rules that encourage hyperlinking).

motion”²⁴ Documents required to be attached to motion papers under Rule 16 are also required to be bookmarked under Rule 6, obviating any need for a separate hyperlink (as the proposed amendment makes clear). Thus, while some e-filed documents may include citations to other documents in the record in the same case or a related case, few are likely to contain large numbers of such citations, and the convenience to the Court of being able to access the cited documents with a single mouse-click is substantial. The proposed amendment therefore makes this narrow category of hyperlinking mandatory, subject to the exception explained below for parties for whom this modest requirement would genuinely be unduly burdensome. As with the current bookmarking requirement, such a requirement would have material benefits for the Court while gently nudging all practitioners further in the direction of acquiring the modest technical skills necessary to take advantage of the convenience hyperlinking offers.

Second, the proposed amendment permits individual Justices, in their discretion, to require hyperlinks to cited legal authorities in the Lexis/Nexis or Westlaw databases, or in state or federal government websites, either by Part rule or in particular cases. This aspect of the proposed amendment permits individual Justices to weigh the benefits and costs of hyperlinking cited authorities to legal databases based on their own docket and internal chambers practices. For example, a Justice sitting in New York County who makes substantial use of online resources in his or her chambers may consider that the burden of hyperlinking to the large law firms representing sophisticated commercial enterprises in the large, complex cases constituting a substantial part of his or her docket is far outweighed by the increased efficiency hyperlinking would offer the Court in such cases.

²⁴ Uniform Civil Rules for the Supreme Court and the County Courts of New York, Section 202.70 Commercial Division Rule of Practice 16.

Conversely, a Justice sitting in an upstate County with a lower monetary threshold for Commercial Division jurisdiction may feel that hyperlinking is too burdensome for the parties in most or all cases on his or her docket. The proposed amendment leaves those decisions entirely to the good judgment of the individual Justice, who knows his or her docket best.

Third, the proposed amendment encourages hyperlinking to legal databases even when it is not required. The purpose of this element of the proposed Rule is to give Justices and their staff more experience with hyperlinking, even if the Justice has chosen not to require it, thereby facilitating a more informed assessment of the benefits and burdens of hyperlinking, and to encourage practitioners to incorporate hyperlinking into their routine preparation of papers for filing. Practice makes perfect, and the more experience the bar gains with the simple process of creating hyperlinks in court documents, the quicker, easier, and less burdensome this task will become.

Finally, in those increasingly rare instances where a party that is able to e-file cannot without undue burden insert hyperlinks as required in an e-filed document, the proposed amendment provides that the party may be exempted from the otherwise applicable hyperlinking requirements by certifying an inability to comply without undue burden. This approach mirrors that for mandatory e-filing in the Supreme Court, which permits exemptions from mandatory e-filing “upon a showing of good cause therefor.”²⁵ The proposed amendment provides guidance as to what might constitute good cause for exemption from the hyperlinking requirement—it requires the party seeking an exemption to certify “in good faith that it cannot include hyperlinks as required by this Rule or the

²⁵ Uniform Civil Rules for the Supreme Court and the County Courts of New York, Section 202.5-bb(e)(3).

Court without undue burden, *due to limitations in its office technology* or other showing of good cause” (emphasis added), thereby making clear that a concrete, factual showing of technological inability to comply is expected—but leaves the ultimate decision entirely to the discretion of the presiding Justice. By requiring the party seeking an exemption to take an affirmative step, albeit a simple one—filing a certification—the proposed rule discourages parties from seeking such an exemption frivolously and encourages them to devote the short time it would take to prepare and file such a certification to mastering the simple task of inserting hyperlinks in a document instead.

The proposed amendment also incorporates those elements of the 2016 proposal that the Subcommittee deems necessary to clarify the parameters of the rule, but in a more streamlined form. These elements include providing that a hyperlink does not, in and of itself, make the linked document a part of the record in the case; that proper citation form must still be used; and that hyperlinks should not be used to access documents filed under seal or otherwise not part of the public record.

Objections to the Prior Hyperlinking Proposal. The Subcommittee believes that the proposed amendment addresses all of the legitimate objections to the hyperlinking rule proposed in 2016.

Objections to the Cost and Burden of Hyperlinks to Legal Research Databases. The City Bar objected to the prior proposal on the following ground:

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.²⁶

The Subcommittee does not believe that this objection is well-founded. It is true that some practitioners subscribe to Westlaw but not Lexis/Nexis, and others do the reverse, but it is the rare practitioner indeed who does not subscribe to one or the other, and the Subcommittee is advised that the Commercial Division has access to both. It therefore is a matter of indifference from the Court's perspective which database of the two a party uses to hyperlink its citations. If that party's adversary happens to subscribe to the other service and is unable to use the hyperlinks, the adversary is no worse off than if hyperlinks had not been required in the first place; the proposed amendment makes clear that conventional citations are still required, and the principal objective of hyperlinking is to assist the Court, not the adversary. In the rare case where a practitioner does not subscribe to either Westlaw or Lexis/Nexis and can show that doing so would not be warranted in the circumstances, that may be a basis for granting an exemption from mandated hyperlinking.

For these reasons, there is no basis whatsoever to anticipate the "metastasis" envisioned by the City Bar.²⁷ The proposed amendment confers discretion on the presiding Justice and provides for exemptions precisely to guard against such absurd outcomes.

²⁶ City Bar Comments at 1.

²⁷ During the 2014 hyperlinking pilot program in New York County, Justices Scarpulla and Oing permitted parties to hyperlink to external sources—"authorities on Westlaw and websites of state or Federal courts" and "other documents filed with NYSCEF"—or to file "self-contained and static" documents "including the linked material as part of the file submitted." Statement of Procedures Governing Briefs and Certain Other Documents in Hyperlinked and Bookmarked Format in Electronically Filed Cases, Mar. 17, 2014, available at www.nycourts.gov/courts/1jd/supctmanh/EF-Protocol-31714.pdf (last accessed Feb. 1, 2019). The proposed amendment removes the "self-contained and static" option, the only scenario in which the "metastasis" feared by the City Bar would arise, except to the extent that Rule 6 and Rule 16 already require the attachment and bookmarking of other documents in the record.

Objections to the Time and Cost of Inserting Hyperlinks Before Filing. The City Bar further contended in response to the 2016 proposal that a hyperlinking requirement would impose an “extensive ministerial task” immediately prior to filing.²⁸ MACA similarly objected that “such a requirement could necessitate the inclusion of dozens or hundreds of hyperlinks within a single memorandum of law or affidavit,” which “in our collective experience . . . adds substantial time to the process of finalizing the briefs, ranging from several hours to more than a day.”²⁹

The Subcommittee believes that these objections exaggerate the burden of creating and testing hyperlinks. A hyperlink can be created in well under a minute; it takes on average four clicks of a mouse. A hyperlink is tested by clicking on the link to confirm that it leads to the desired source. In a lengthy filing with extensive citations, adding and testing hyperlinks may add an hour or more to the final preparation of a brief for filing—but so do cite-checking, the preparation of tables of contents and tables of authorities, and bookmarking, all of which are necessary steps in the preparation of a brief for filing in the Commercial Division today, but only one of which (cite-checking) was routine in the days before the widespread use of computer software and the later advent of e-filing made them well worth the trouble. Moreover, unlike cite-checking, inserting hyperlinks in a brief and testing them is a purely administrative task, requiring no legal judgment. The incremental cost of hyperlinking is therefore simply the incremental cost of the required secretarial or other administrative time. If a law firm’s fully-loaded cost of secretarial support is \$75 per hour, for example, the incremental cost of hyperlinking 100 citations might be on the order of \$125 (100 minutes of time at \$1.25 per minute)—less than the time and cost of preparing

²⁸ City Bar Comments at 2.

²⁹ MACA Comments at 1.

backs; printing and assembling file, service, and courtesy copies; and filing and serving papers manually, as all lawyers had to do in the days before e-filing. The Subcommittee believes that hyperlinking is on the verge of becoming at least as useful to the Court as the bookmarking now required and the tables that practitioners routinely include in filings of any length, and that the negligible burden of hyperlinking will quickly become as routine to commercial practitioners as these other pre-filing tasks.

CONCLUSION

Hyperlinks are a great convenience familiar to even the most casual internet users. They enable the reader of one document to access another document discussed or referred to in the text of the first document in seconds, with a single mouse-click. The case for making greater use of this simple yet powerful technology in judicial filings is obvious and compelling, and it presents an opportunity for the Commercial Division to continue its innovation and leadership in the smart adoption of technology in aid of the efficient administration of justice. The proposed amendment represents a modest extension of the current requirements of Rule 6, is in line with the approach of other state and federal trial courts with a large volume of commercial cases on their dockets, confers substantial discretion on individual Justices to deploy hyperlinking in the way that makes sense for their particular docket, and is calculated to avoid any genuine undue burden to the few e-filers who would have difficulty complying with a hyperlinking requirement. The Subcommittee recommends building on the hyperlinking program piloted in New York County five years ago and the experience of other courts by adopting the proposed amendment to Rule 6.

APPENDIX A

	Court	Judge or Court Encouraging Hyperlinking	Rule	Link
Third Circuit	W.D. Pa.	Judge Arthur Schwab	Practices and Procedures: Hyperlinking "strongly encouraged (except for pro se parties). The use of hyperlinks to . . . any websites other than Westlaw or Lexis/Nexis . . . is prohibited . If citing to a website, the website must be converted to a .pdf file that clearly shows the date the website was accessed and attached as an exhibit." (emphasis in original).	https://www.pawd.uscourts.gov/sites/pawd/files/JudgeShwabPP20170111.pdf
Fourth Circuit	E.D.N.C.	Judge Louise Flanagan	Practice Preferences and Procedures: "Judge Flanagan encourages use of tools such as hyperlinking and/or 'electronic briefs' to assist in review of lengthy documents."	http://www.nced.uscourts.gov/pdfs/preferences/practice/flanagan.pdf
Fifth Circuit	S.D. Tex.	Chief Judge Lee Rosenthal	Procedure for Cases: "Counsel is encouraged to include a hyperlink to cases cited in briefs filed by CM/ECF procedure."	https://www.txs.uscourts.gov/sites/txs/files/lhr_procedures.pdf
	S.D. Tex.	Judge Janis Graham Jack	Practices and Procedures: "All exhibits and cases must be hyperlinked."	https://www.txs.uscourts.gov/sites/txs/files/jgj.pdf
	W.D. Tex.	Judge Kathleen Cardone	Fact Sheet: "Parties are encouraged to hyperlink citations in their briefs for Westlaw or Lexis access."	https://www.txwd.uscourts.gov/?mdocs-file=2296
	W.D. Tex.	Judge Xavier Rodriguez	Fact Sheet: "Parties are encouraged to hyperlink citations in their briefs for Westlaw access."	https://www.txwd.uscourts.gov/?mdocs-file=2298
Seventh Circuit	N.D. Ill.	Judge Virginia Kendall	Case Procedures-Memoranda of Law: "The Court strongly encourages all filings to include hyperlinks to any cases or docket entries referred to in the pleadings. If possible, the Court prefers hyperlinks to exhibits as well but recognizes that this may entail more time and expense. To the extent possible, the Court prefers any citation to exhibits, cases, and docket entries to be hyperlinked."	https://www.ilnd.uscourts.gov/judge-info.aspx?DHdGTdq2+Go=
Eighth Circuit	D. Minn.	Judge Nancy Brasel	Practice Pointers and Preferences: "If possible, parties should submit briefs and exhibits that are hyperlinked and searchable."	http://www.mnd.uscourts.gov/Judges/practice-pointers/NEB.pdf
	D. Minn.	Judge Donovan Frank	Practice Pointers and Preferences: "If possible, parties should submit briefs and exhibits that are hyperlinked and searchable."	http://www.mnd.uscourts.gov/Judges/practice-pointers/DWF.pdf

Ninth Circuit	C.D. Cal.	Judge Dean Pregerson	Mandatory Chambers Copies Practices and Procedures: "The court encourages parties to prepare hyperlinked versions of documents and submit them as courtesy copies on CD or flash drive. As an alternative to submitting mandatory courtesy copies in paper format, parties may submit two CD's or flash drives containing the hyperlinked documents. Hyperlinks shall be limited to case or statutory citations, exhibits, and other portions of the record. Hyperlinks can greatly facilitate the analysis of a motion and can assist counsel in effectively presenting arguments. Hyperlinks also encourage accuracy by allowing quick confirmation of references and citations. At present, ECF will not accept electronically filed documents containing hyperlinks. The court is hopeful that hyperlinking will be permitted in electronically filed documents in the near future."	https://www.cacd.uscourts.gov/honorable-dean-d-pregerson
	N.D. Cal.	Judge Vince Chhabria	Instructions for Bench Trial Proposed Findings of Fact and Conclusions of Law: "The parties should hyperlink the citations in the proposed findings of fact to the exhibits and trial transcripts and may provide the Court with the proposed findings of fact on a flash drive if needed."	https://www.cand.uscourts.gov/filelibrary/1411/Chhabria-Civil-Trial-Standing-Order-rev-d-2018.pdf
	N.D. Cal.	Judge William Orrick	Instructions for Findings of Fact and Conclusions of Law: "The Court requests that the parties hyperlink each proposed Finding of Fact to any supporting evidence."	https://www.cand.uscourts.gov/filelibrary/1211/Civil_Pretial_Order_February_2017.pdf
	N.D. Cal.	Judge Yvonne Gonzalez Rogers	Standing Order in Civil Cases: "In motions involving voluminous citations to evidence or records, parties are encouraged to submit chambers copies of their briefing in an electronic format with hyperlinks to evidence on flash drives or other removable media."	https://www.cand.uscourts.gov/filelibrary/867/Standing-Order-In-Civil-Cases-Revised-February.pdf
	N.D. Cal.	Judge Claudia Wilken	Order for Pretrial Preparation: "The Court requests that the parties hyperlink each proposed finding of Fact to any supporting evidence."	https://www.cand.uscourts.gov/filelibrary/360/Order-for-Pretrial-Prep.pdf

Tenth Circuit	D. Utah	Federal District Court for the District of Utah	<p>District of Utah Civil Rule 7-5(a): "Encouraged and Permissible Hyperlinks. As a convenience for the court, practitioners are encouraged to utilize hyperlinks in a manner consistent with this rule. For purposes of this rule, a hyperlink is a reference within an electronically filed document that permits a user to click on the reference so as to be directed to other content. Standard legal citations must still be used so that those who desire to retrieve referenced material may do so without use of an electronic service. 1) Encouraged Hyperlinks. a) hyperlinks to other portions of the same document and to material elsewhere in the record, such as exhibits or deposition testimony, are encouraged. b) A hyperlink to a government site or to legal authority from recognized electronic research services, such as Westlaw, Lexis/Nexis, Google Scholar, Casemaker, Fastcase or Findlaw is encouraged"</p>	<p>https://www.utd.uscourts.gov/sites/utd/files/local%20rules%20-%20Civil%20.pdf</p>
Eleventh Circuit	M.D. Fla.	Judge Sheri Polster Chappell	<p>Preferences-Electronic Case Filing Requirements: "Judge Chappell strongly encourages counsel to insert hyperlinks in documents filed electronically. When filing a document containing hyperlinks, counsel must hyperlink to: other portions of the same document; other documents electronically filed with the court (or to any other federal court's e-filing system); and cited legal authority located on recognized electronic research services like Westlaw, Lexis Nexis, Findlaw, and official government websites"</p>	<p>https://www.flmd.uscourts.gov/judges/sheri-polster-chappell</p>
	M.D. Fla.	Judge William Jung	<p>Preferences-Motion Practice: "The court encourages counsel to consider inserting hyperlinks to cited legal authority located on recognized electronic research services like Westlaw, LexisNexis, Findlaw, and official government websites in documents file electronically."</p>	<p>https://www.flmd.uscourts.gov/judges/william-jung</p>