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## MEMORANDUM

July 16, 2015

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of Commercial Division Rule 6 (22 NYCRR § 202.70(g)), relating to the use of bookmarks in electronically-submitted documents.

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The Commercial Division Advisory Council has recommended an amendment of Commercial Division Rule 6 requiring use of bookmarks in electronically-submitted memoranda of law, affidavits and affirmations listing document contents and facilitating easy navigation (Exh. A). A bookmark is an electronic functionality built into PDF documents that provides a listing of document contents and enables readers to navigate within documents and exhibits by clicking on the bookmark. According to the Advisory Council, bookmarking is an efficient and time-saving mechanism that helps judges, law clerks and litigants to review documents, prepare bench memoranda and decisions, and respond to pleadings and other documents. The Advisory Council's proposed amendment would read as follows:

**Rule 6. Form of Papers.** All papers submitted to the Commercial Division shall comply with CPLR 2101 and section 202.5(a). Papers shall be double-spaced and contain print no smaller than twelve-point, or 8½ x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than ten-point. Papers also shall comply with Part 130 of the Rules of the Chief Administrator. 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.

The Advisory Council also considered whether to recommend that use of "hyperlinks" in electronic documents be required and determined that such a recommendation would be premature.

Persons wishing to comment on this proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto: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 September 10, 2015.**

**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 the Use of Technology in the Commercial Division

RE: Advancing 21<sup>st</sup> Century Technology In the Commercial Division

DATE: June 15, 2015

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### Introduction

“Bookmarks” are

an electronic functionality built into a document that provides, adjacent to the body of the displayed document or otherwise readily accessible, a listing of the contents of the document and facilitates easy navigation by the reader within the document and exhibits thereto.

Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised March 17, 2014), Experimental Program, Statement of Procedures Governing Briefs and Certain Other Documents in Hyperlinked and Bookmarked Format in Electronically Filed Cases, Bookmarks and Hyperlinks Defined.

“Hyperlinks” are

an electronic functionality built into a memorandum of law, for instance, that permits the reader, by clicking on the name of a case, statute, etc. in a table of authorities or in the body of the brief to be immediately connected or “linked” to a copy of the authority, which automatically opens up for viewing. Material made accessible by hyperlinking does not constitute a part of the formal record. Hyperlinks merely provide efficiency and convenience in the accessing of cited material.

Id.

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.

### Recommendation on Bookmarking

Bookmarking is undoubtedly helpful to judges, clerks and litigants, and quite easy to learn and perform.

Accordingly, the Subcommittee recommends:

that Rule 6 of the Rules of the Commercial Division of the Supreme Court be amended to include the following sentence at the end of the current version of the Rule: "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."

### Recommendations on Hyperlinking

As noted above, hyperlinking can also be helpful to judges, clerks and litigants. However, it can be time-consuming and expensive for litigants, irrespective of whether the hyperlinks are created by a law firm or an outside vendor. 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.

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. How this works in practice is the subject of an experiment being conducted by the Subcommittee as described below.

With respect to docket entries, the Office of Court Administration is working on software that will enable litigants to more easily hyperlink to docket entries. This program will be modeled after the "Link Builder" program currently being used in the federal district courts. According to Jeffrey Carucci, the OCA Statewide Coordinator for Electronic Filing, the development of the Link Builder software can be completed by the end of 2015.

The Subcommittee notes that in March 2014, an experimental bookmarking/hyperlinking program was deployed in Commercial Division Parts 39 (Justice Scarpulla) and 48 (Justice Oing). According to Justice Scarpulla, no party has used hyperlinking in a single case in either her court or Justice Oing's court since the inception of the program. We believe Justice Bransten has also not had any use of this technology in her court.

The benefits of hyperlinking are obvious. The question for the Committee is whether those benefits outweigh, at this time, the concerns associated with hyperlinking. The Subcommittee's concerns are as follows:

- (1) Due to the cost associated with hyperlinking in affirmations/affidavits with numerous exhibits and briefs with numerous citations, it is not economically justified in many Commercial Division cases. (This conclusion seems to be supported by the lack of use of the technology in Commercial Division cases, as discussed immediately below.)
- (2) Even though parties in Justice Scarpulla's and Justice Oing's courts are "strongly encouraged" to bookmark and hyperlink—and it is actually required by the Justices' preliminary conference forms and orders—in practice no parties have included hyperlinks in their documents and none have sought leave to be excused from the requirement. This may be attributable to a lack of knowledge on the part of litigants and their counsel, or an unwillingness to perform hyperlinking in cases not worth at least tens of millions of dollars, or a combination of the two.
- (3) Currently, users may be separately charged each time they click on a hyperlink to a case on Westlaw or Lexis. +This requires further investigation.
- (4) If a new rule authorizing or encourage hyperlinking is adopted (or an existing rule is amended), the rule itself or the accompanying tutorial may become obsolete within months. Justice Scarpulla, Mitch Katz and Josh Blossveren are currently experimenting with a fictional e-filed case on NYSECF for the purpose of identifying potential problems and ways to improve the

hyperlinking process. In addition, as noted above, OCA is developing software that will more easily enable hyperlinking to docket entries.

The Subcommittee has considered recommending that Commercial Division justices be authorized to require hyperlinking in a case, after discussing the appropriateness of hyperlinking with the parties, given the particular circumstances of the case. However, given the concerns listed above, we believe such action would be premature.

The Subcommittee does recommend that:

With respect to hyperlinking, that the experiment discussed above be completed, the results be shared with the Advisory Council and that OCA be strongly encouraged to provide Mr. Carucci and staff with all support necessary for the completion of the Link Builder software by the end of 2015, along with whatever user guides are indicated by that process to accelerate adoption by the bar.

OCA be asked to develop an educational program that highlights the benefits of hyperlinks and bookmarks in cases that are document intensive, which is characteristic of cases pending before the Commercial Division. In addition, the Subcommittee recommends that the Commercial Division Justices discuss this technology in preliminary conferences and that the relevant committees of the Commercial and Federal Litigation Section of NYSBA be encouraged to develop programs and publications about the use and benefits of this technology.

#### Recommendations Regarding E-Filing for All Commercial Division Courts

On a related topic, the Subcommittee notes that not all of the Commercial Divisions are e-filing courts. The fact that any of the courts of the Commercial Division are not able to reap the benefits and efficiencies of electronic filing should be considered completely unacceptable by the Advisory Council. The Subcommittee is aware that legislation authorizing electronic filing in all districts is pending, but the legislation apparently provides an "out" under certain circumstances. The Subcommittee views this as an unacceptable impediment to efforts to advance the Commercial Division as the premier court in the world to adjudicate commercial cases.

Therefore, the Subcommittee recommends that:

The Advisory Council urges that e-filing be made mandatory in all Commercial Divisions.